CIVIL APPEAL No. 38/34.

# IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Haj Said Ikweider, as *Mutawalli* of the *Wakf* Ikweider. APPELLANT.

v.

Zahra Yehia Ikweider. RESPONDENT.

*Arbitration — Land Court — Arb. Ord., L. C. Ord., sec. 5 — Steps in the proceedings — Powers of Supreme Court on appeal from Land Court.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 23rd January, 1934:—

HELD: 1. The Arbitration Ord. does not affect the powers of the Land Court to refer a dispute to arbitration.

2. This Power is also exercisable by the Supreme Court on appeal from a Land Court.

3. Such a reference constitutes a step in the proceedings.

4. All matters arising out of the arbitration are determinable by the Land Court, not by the District Court.

ANNOTATIONS:

1. The first appeal in this case (L. A. 56/27) is reported in 1, P. L. R. 341, 1, C. of J. 182.

2. On the powers of an appellate Court being co-extensive with those of the Court of first instance, *cf.* C. A. 155/35 (2, P. L. R. 398; 8, C. of J. 403), C. A. 162/37 (*post*), C. A. 140/41 (1941, S. C. J. 554), C. A. 114/42 (1942, S. C. J. 704) and CR. A. 132/42 (1942, S. C. J. 982).

## JUDGMENT.

We hold that the Arbitration Ordinance, 1926, did not affect the powers conferred by Section 5 of the Land Courts Ordinance, 1921, upon a Land Court to refer a dispute in any matter before it to arbitration; and to remit or set aside an award in any arbitration under

such reference; or to authenticate such award as a judgment of the Court.

Such a reference is to be regarded as a step in the proceedings in the Land Court.

It follows that any question arising with regard to an arbitration under such reference is to be determined by the Land Court.

We further hold that the powers conferred by Section 5 are exercisable by the Supreme Court sitting as a Court of Appeal for the hearing of an appeal from a Land Court; and that it was in exercise of such powers that this Court, by its judgment, dated the 16th January, 1929, in Land Appeal No. 56/27, between the parties to the present appeal, referred the dispute between the parties to that appeal to arbitration.

It follows that jurisdiction to hear and determine any question arising upon such reference is vested in this Court, and not in the District Court.

For these reasons, the appeal is dismissed.

Costs, including LP. 2.— advocate's fees, are to be paid by the Appellant out of the funds of the *Waqf* of which he is the *Mutawalli*.

Delivered this 23rd day of January, 1936.

*Senior Puisne Judge.*

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LAND APPEAL No. 35/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, A/S. P. J. and Khaldi, J.

IN THE APPEAL OF:—

1. Ghanimeh bin Salameh,
2. Ideh bint Mohammad Selim. APPELLANTS.

v.

1. Mad'an Abu Yehia,
2. 'Ayesh 'Awwad. RESPONDENTS.

*Possessory actions — Magistrates' Law, Art. 24, Proclamation of 1918, sec. 20 — Strict requirement for documentary evidence — Law applied by Court without argument of parties.*

In dismissing an appeal from the judgment of the Land Court of Jerusalem, (appellate capacity), dated 31.1.34:—

HELD : 1. The requirements of Art. 24 of the Magistrates' Law relating to documentary evidence should be strictly complied with. But see C.A. 13/43, 3 C.J., 158.
2. (*Obiter dictum*): The Court should not, except in connection with Court fees or jurisdiction, apply a law to which the parties have not adverted.

ANNOTATIONS :

1. For authorities on possessory actions under Art. 24 of the Magistrates' Law, see note 2 to C. A. 4/43 (1943, A. L. R. 306).

2. On the second point *cf.* C. A. 248/41 (1942, S. C. J. 155) and annotations.

FOR APPELLANTS: Muhtadi.

FOR RESPONDENTS: S. Shawa.

## JUDGMENT.

This is an appeal by way of leave, against the judgment of the Land Court, dated 31.1.34.

The point of law on which leave was granted, is whether Art. 24 of the Ottoman Magistrates' Law or Sec. 20 of the Proclamation, dated 1918, applies to the facts of this case.

There are several previous decisions of this Court to the effect that in cases of possession, the provisions of Art. 24 of the Ottoman Magistrates' Law requiring the production of a *'Sanad'* (document) must be strictly applied.

This is in substance what the Land Court, in its appellate capacity observed, and the appeal against its judgment must, therefore, be dismissed with costs and advocate's fees assessed at LP. 2.—.

It is to be noted in this connection, though the point does not arise before us, that the Land Court had applied Art. 24 of the Ottoman Magistrates' Law on its own initiative, without giving the parties opportunity of arguing the case on this basis.

Such procedure seems to be irregular, for though a Court may of itself raise such questions as pertain to Court Fees or jurisdiction, it is doubtful whether a Court is empowered to apply a law which the parties have not adverted to.

We are not called upon to decide this point for the determination of this case, but we desire to lay down the proper procedure for the future guidance of the Courts.

Delivered this 12th day of January, 1937.

*Acting Senior Puisne Judge.*

HIGH COURT No. 91/36.

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

BEFORE: Copland and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Tahe Salem 'Uthman. PETITIONER.

v.

1. The Chief Execution Officer, Jerusalem,
2. Same Nasser,
3. Muhammad Abdallah Ali El Musa, on behalf of the estate of Fadda Hassan Dahdoukah. RESPONDENTS.

*Prescription — Only available as a defence — Possessor ought not to be called upon to establish title.*

Application for an order to issue to the first Respondent, directing him to show cause why his order, dated the 23rd October, 1936, in Execution File No. 3158/34, should not be set aside; order made absolute:—

HELD: If the Applicant was in possession for the period of prescription he was entitled to a remedy and should not be called upon to establish his title in the competent Court: prescription being available as a defence and not to sustain a claim for ownership.

ANNOTATIONS:

1. Respondent No. 2 had obtained a judgment against the mother of Respondent No. 3 (since deceased), as well as the confirmation of a provisional attachment on certain shares in land registered in the name of Respondent No. 3's mother. Petitioner thereupon applied to Respondent No. 1 not to proceed with the sale of the said shares on the grounds that he, Petitioner, had acquired title to these shares by prescription. On the first Respondent giving him "15 days in order to enable him to procure an order of stay from the competent Court", the Petitioner applied to the High Court. See the further proceedings (*infra*).

2. Prescription only valid as a defence: See C. A. 228/37 (1938, 1 S. C. J. 99) and cases cited in note 2 thereto.

FOR PETITIONER: R. Haddad.

FOR RESPONDENTS: Nos. 1 & 3 — No appearance.
No. 2 — N. Nasr.

### O R D E R.

This is not a simple case. The difficulty arises from the fact that it has become an established principle of this Court, laid down in several judgments, that prescriptive possession, though it may con-

stitute a valid defence, is by itself insufficient to sustain a claim for ownership.

Thus, in granting the Applicant in this case a delay to enable him to refer to the competent Court, the Chief Execution Officer was in fact asking him to do something which he could not possibly do in the face of the above principle.

This order does not, of course, affect the question as to whether Applicant is or is not actually in possession, but if it appears in the result that he is, then he is entitled to a remedy.

The Court, therefore, makes the Order *Nisi* issued on the 8th day of October, 1936, absolute, and orders a stay in the execution proceedings pending further order, with costs and advocate's fees assessed at LP. 2.—.

Given this 12th day of November, 1936.

*British Puisne Judge.*

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HIGH COURT No. 91/36.

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

BEFORE: Copland and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Tahe Salem 'Uthman. PETITIONER.

v.

1. The Chief Execution Officer, Jerusalem,
2. Sami Nasser,
3. Muhammad Abdallah Ali el Mussa, on behalf of the estate of Faddah Hassan Dahdoukah. RESPONDENTS.

*Execution, Art. 6 Law of Execution — Interpretation of Order.*

In deciding an application by the Chief Execution Officer of Jerusalem for directions under Art. 6 of the Law of Execution:—

HELD : The previous order was to the effect that execution of the judgment, not of the order, should be stayed.

ANNOTATIONS:

1. See the previous order (*ante*).

2. On applications under Art. 6 of the Execution Law see H. C. 36/33 (4, C. of J. 1238) and H. C. 40/40 (1940, S. C. J. 157).

## ORDER.

The order of stay given by this Court really refers to the execution of the judgment, and not to the order of temporary stay granted by the Chief Execution Officer on 23rd October, 1935, for though the application was to set aside this latter order, the grievance actually was that the judgment should not be executed, and that the temporary stay was of no avail to the Petitioner (claimant of possession).

This Court referred to the previous decisions as laying down an established practice and it is of no consequence to the execution matter in question for the Court to lay down definitely whether it agrees with those decisions or not.

In saying that Petitioner is entitled to a remedy, this Court cannot necessarily have meant that he must act as Plaintiff. On the contrary, this Court stated in the order, that in view of past decisions, Petitioner could not successfully plead as Plaintiff.

It is not for this Court to lay down in advance the source of the "further Order" referred to, and it is sufficient to say now that it must be a competent authority.

With reference to the guarantee the question is exclusively for the Chief Execution Officer, because it is outside the ambit of this Court's Order and might be the subject of litigation.

Delivered this 19th day of February, 1937.

***British Puisne Judge.***

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LAND APPEAL No. 5/36.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, A/S. P. J. and Khayat, J.

IN THE APPEAL OF :—

Mamur Awqaf of the Northern District, Acre. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Title to land — Claim v. Government — Registration of land as miri, if admittedly wrong, cannot establish prescription — Tendency to decide cases hurriedly on preliminary points criticized.*

In allowing an appeal from the judgment of the Land Court of Nablus, dated the 31st December, 1935, and in ordering a new trial:—

HELD: The Appellant should have been allowed to prove that the Govern-

ment had admitted the registration of the land as *miri* to have been wrongly made.

ANNOTATIONS: "The latest *tapou* register is competent evidence as to the character (*i. e.* category) of the land in question and the strictest proof should be required before holding that on such a matter the subsisting entries are incorrect." — P. C. 56/38 (1940, S. C. J. 277). *Cf.* C. A. 206/40 (1941, S. C. J. 11).

FOR APPELLANT: Madi.

FOR RESPONDENT: Solicitor General — (Rose).

## JUDGMENT.

*Copland, A/S. P. J.*: I agree with the judgment that is about to be read by my brother Khayat, and would only add a few words.

There is a tendency in District and Land Courts to decide cases rather hurriedly on preliminary points. In this case now before us, in particular, the accuracy of the preliminary point of prescription was debatable seeing that the learned Judges in the Court below disagreed on it. It would have been much better, therefore, if the Court had heard the whole case and made their finding or findings of fact thereon, when of course it would have been quite possible that the plea of prescription would have been irrelevant. In any case, all the facts would have been before us, and we could then have given a final judgment and the case would have been finished, instead of the present result which is unavoidable.

I agree that there must be a new trial.

Costs to await final judgment.

Delivered this 28th day of January, 1937.

*Acting Senior Puisne Judge.*

*Khayat, J.*: I am of the opinion that mere registration of the land in dispute as *Miri* in the *Tabu* registers, is not by itself sufficient justification for dismissing the claim on the ground of prescription, if the Plaintiff is able to prove that the Defendant had admitted that this registration was in fact untrue.

The lower Court should have, therefore, examined the documents filed by the Plaintiff, and called upon him to prove same, in order to ascertain whether or not they amount to an admission by the Government that the lands in dispute are *waqf* of the "untrue" category, and having determined that point to see whether Plaintiff had neglected his rights for a period exceeding the period of prescription laid down for such cases.

I hold, therefore, that the judgment of the Lower Court should be

quashed and the case remitted to the Land Court to hear the action and give judgment accordingly.

Delivered this 14th day of January, 1937.

*Puisne Judge.*

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CIVIL APPEAL No. 167/33.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Corrie, S. P. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Daoud Yusef Ni'meh, on behalf of his father's estate. APPELLANT.

v.

Surayya bint Naser Assili, on behalf of her husband's estate. RESPONDENT.

*Bills of exchange — Consideration for promissory note — In discharge of legal obligation or as a gift — Ownership of land.*

In allowing an appeal from the judgment of the District Court of Haifa, dated the 8th July, 1933, and in remitting the case to the lower Court:—

HELD: If the note had been given not in discharge of a legal obligation, but in recognition of past services, it would not be supported by consideration.

ANNOTATIONS: On consideration in Palestine and in England *vide* Hooper, The Civil Law in Palestine and Trans-Jordan, Vol. 2, *pp.* 92 *seq.* As to bills and notes see now Bills of Exchange Ordinance, secs. 26(1) and 2(2).

JUDGMENT.

The District Court has found that the motive of the deceased Yusef Nimeh, in giving his son Hanna a promissory note for 150 Napoleons, was to compensate him for what he had done in supporting him and his (Yusef's) daughter Mariam: and that this constituted a consideration for the promissory note.

It is clear, however, that such a desire on the part of Yusef to compensate his son would not constitute consideration in law for the promissory note, unless such note was made in discharge of a legal

obligation upon Yusef towards his son. In the absence of any such obligation, there would be no consideration for the note, which would be made solely by way of gift.

The judgment of the District Court is, therefore, set aside, and the case is remitted for the Court to determine whether or not the promissory note was made in discharge of a legal obligation by Yusef to his son, and to give judgment accordingly.

The question of the ownership of lands clearly cannot be included in a judgment in an action upon a promissory note.

Costs will follow the event.

Delivered this 16th day of January, 1935.

*Senior Puisne Judge.*

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HIGH COURT No. 1/37.

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

BEFORE: Manning, S. P. J. and Frumkin, J.

IN THE APPLICATION OF :—

1. Rivka Zilberstein,
2. Joseph Zilberstein,
3. Sura Mizrahi (née Zilberstein). PETITIONERS.

v.

1. Constable in Charge of the Police Lock-up, Haifa,
2. Assistant Commissioner for Frontier Controls, Haifa. RESPONDENTS.

*Immigration — Habeas Corpus — Detention under secs. 5, 8(2) Immigration Ord. — Notice of detention "by order" — Manner of detention — "Temporary" detention — Fictitious marriage — Possession of a valid passport a condition of admission into Palestine — Requisites for a valid marriage under Jewish Law, C. A. 190/35 — Allowing passport to be used fraudulently.*

In refusing an application for a Writ of *Habeas Corpus*:—

HELD: 1. The notice of the High Commissioner was valid as a direction of detention. The omission to specify the manner of detention did not affect the validity of the confinement.

2. Having regard to the word "temporary" the Petitioners had not been unduly confined.

3. The marriage contracted in the lock-up was intended as an evasion of the Immigration law. It could not be used to seek the assistance of the Court.

4. (*Per* Frumkin, J.): The Immigration Officer was entitled to refuse the Petitioners admission on the ground that their passports were not valid.

REFERRED TO: C. A. 190/35 (*post*).

ANNOTATIONS:

1. Note that Art. 12(2) of the Palestinian Citizenship Order, as enacted in the Palestinian Citizenship (Am.) Order, 1939, states that mariage to a Palestinian does no longer confer Palestinian citizenship.

2. *Cf.* C. A. 13/43 (1943, A. L. R. 303) and cases therein cited.

FOR PETITIONERS: S. Shapiro & Argaman.

FOR RESPONDENTS: Solicitor General — (Rose).

## JUDGMENT.

*Manning, S. P. J.*: The three Petitioners are confined in the Police Lock-up at Haifa and the present proceedings came before us on rules *nisi*, directed to the person in charge of that lock-up to show cause why writs of *habeas corpus* should not be issued. The Solicitor General appeared to argue against the rules and from the affidavits filed it appeared that the Petitioners were and are still detained by virtue of Section 8(2) of the Immigration Ordinance, which reads as follows:—

> "8(2). Any person who is refused permission to enter Palestine may be temporarily detained in such manner and in such place as the High Commissioner may, by order, direct and, while so detained, shall be deemed to be in legal custody".

The relevant order of the High Commissioner is to be seen in Volume III of the Revised Laws at page 1767.

There can be no doubt that the three Petitioners are persons who have been refused permission to enter Palestine. They are, therefore, *prima facie*, detained in accordance with the Law, but Mr. Shapiro, who appeared on their behalf, has urged that their detention in the Haifa Lock-up is irregular because there is no valid order of the High Commissioner as to the place and manner of their detention. The order which I have referred to was, he says, a mere notice published in the *Gazette* of the 14th September, 1933, the words "by order" were not introduced into the Section until 1934 (by Ordinance No. 30 of 1934), and no order has been made since the amendment. He attacks the actual notice on the ground that it fails to set out the manner in which persons are to be detained.

These are ingenious arguments but they are much too technical in their nature to be of any avail to the Petitioners. The notice was a valid direction under the Section when it was made, the introduction of the words "by order" added nothing to the substance of the law except perhaps the necessity of publication in the *Gazette*. The amendment was not in any way a repeal of anything previously enacted, the old notice stood, and it is mere hair-splitting to suggest that it is not an order.

It is true that the order is silent as to the manner of detention, but this cannot affect the validity of the confinement. No doubt, the order ought to have made it clear that the detention should be a mere detention and not imprisonment of a penal nature, but there has been no suggestion that there has been anything irregular. The omission to specify the manner of detention does not invalidate the order.

Mr. Shapiro has further directed our attention to the word "temporarily" in the Section, and says the Petitioners have been unduly detained, they having arrived in Palestine on the 8th December, 1936. As to this it is clear that they were kept here at first to answer a criminal charge and after that to give them an opportunity of bringing these proceedings. In view of this explanation, the prolongation of the detention does not afford a ground for making the order absolute.

It is further urged that the Petitioner Sura Mizrahi, while in the Haifa Lock-up, contracted a valid marriage with a Palestinian citizen — she is, therefore, now a Palestinian citizen and cannot be detained under the Section. There is a certificate of marriage and an affidavit intended to show that a marriage took place. Affidavits have been put in by the other side to show that it was impossible that any marriage could have taken place. I do not intend to inquire whether a form of marriage took place or, if it did, whether it was a valid marriage. Sura Mizrahi was refused permission to enter Palestine and was consequently detained. If, as is alleged, she has contracted a marriage while in the Lock-up, she did so with no other object than to evade the Immigration Law. She cannot ask a Court to assist her in what amounts to a defiance of the Law. As far as this Court is concerned, she still remains a person who has been refused permission to enter Palestine, she has been lawfully detained, and she remains lawfully detained. If she is to obtain any relief on account of the Palestinian citizenship she says she acquired during her detention, she must seek it from the administration.

In my opinion the rule *nisi* should be discharged in all three cases.

Delivered this 29th day of January, 1937.

*Senior Puisne Judge.*

*Frumkin, J.*: One Moshe Silberstein, apparently a resident of Palestine for some time, has, in September, 1935, obtained an Immigration Certificate for his mother Rywka Zylbersztain, aged 60, her son Josef, aged 16, and daughter Sura, aged 17. This certificate entitled the three named persons to be admitted to Palestine and was valid until 10th December, 1936.

On the 8th of December, 1936, the three Petitioners arrived at Haifa under the said certificate and a Polish passport. The passport was considered by the Immigration Officer to be invalid and the Petitioners were detained and are still in custody under Section 8(2) of the Immigration Ordinance, 1933.

I propose to deal with each Petitioner separately and will begin with the second who holds himself out to be Josef Zylbersztain and pretends to be included in the said Immigration Certificate.

It is argued on his behalf, as well as on behalf of the other Petitioners, that an Immigration Certificate amounts to a permission to enter Palestine and, once such permission has been granted, the holder of such certificate cannot be refused entry into the country or detained under Section 8(2).

It is not necessary in this case to decide this point, as Section 5(1)(h) of the Immigration Ordinance makes it quite clear that an Immigration Certificate does not exempt its holder from being in possession also of a valid passport. I have seen the passport and had affidavits produced, and I am satisfied that the Immigration Officer was justified in considering that the passport, to say the least, is not a valid one. He could on this point alone refuse permission and the detention is, therefore, legal. On the other arguments of Counsel, I concur with the judgment of my learned brother Manning.

I realise the gravity of the effect of our finding in respect of the Petitioner as it will not only make his detention legal but will result in his being deported. I know what it means for a Jewish young man, who has probably striven for years to enter Palestine, to find himself, after having set foot on this soil, to be sent back to all the misery and persecution to which he was subjected in his old surroundings and who, in this case, will possibly also have to stand his trial for coming into conflict with the law of his country. Yet, I must say that I feel little sympathy with him. No aim can justify improper

means and one who seeks admission to the Holy Land must face the hardships and do so without resorting to fraudulent means.

What was said with regard to the second Petitioner applies with equal force also to the third Petitioner who called herself, on her arrival, Sura Zylbersztain and now Sura Mizrahi, and it is doubtful whether she is really entitled to any of these names. In addition to her attempt to enter the country under what is to all appearances a forged passport and hence under a certificate in which she was not included, she allowed herself to be involved in a marriage, which, whether valid or invalid in its form, is nothing but a disgraceful fiction of a marriage.

The effective part of the solemnisation of a marriage ceremony under Jewish Law is that the bridegroom puts a ring on the finger of the bride saying: "You are hereby sanctified to me under the Law of Moses and Israel". Under strict Religious Law the mere handing over of the ring or a coin to the bride followed by the said phrase is sufficient to establish a binding marriage between the parties; but in practice this is not the common form of marriage. It is only a part, truly, as I said, the effective part of the ceremony which is celebrated by a Religious minister in the presence of a congregation of at least ten males and is accompanied by a written deed of marriage called *"Ketuba"*.

In Civil Appeal No. 190/35, I already expressed my doubts whether in Palestine a marriage by sanctification in the presence of two witnesses is valid under Jewish Law and I cited a judgment of the Rabbinical Court of Appeal of Jerusalem in which such a marriage was held to be invalid.

In the present case it is alleged that one Eliahu David Mizrahi, a Palestinian citizen, visited the Haifa Lock-up on the 11th December, and, in the presence of two witnesses, put a ring on her finger citing the requisite phrase. It is on the strength of the evidence of Mizrahi and his two witnesses that the marriage was registered with the Rabbinical Office in Haifa and a marriage certificate issued.

The Solicitor General put in affidavits to prove that it was impossible for any person to visit the Petitioner in the Haifa Lock-up at the relevant date. The strength of these affidavits was somewhat shaken by the cross-examination of the Constable in charge of the Lock-up, as the evidence does not exclude the possibility that in the absence of the Constable and without his knowledge and by breaking Prison Regulations the three men could have found access to the corridor of the Lock-up for the few seconds required for the farce.

But even if we accept the Solicitor General's allegation, we, as a High Court of Justice, cannot annul the Certificate of Marriage on which will depend the acquisition by the Petitioner of Palestinian citizenship. I agree however with my brother Manning that whatever be the effect of the marriage, so far as this Court is concerned, she still remains a person who has been refused admission to Palestine, has been lawfully detained and remains lawfully detained.

Before passing to the last Petitioner, the first on the list, I want to take this opportunity to call the attention of the Rabbinical Authorities that it is most desirable to discourage, if not altogether to stop, the practice of giving legal effect to a form of marriage such as was presented to us in this case which, if not by its form, is certainly in its aim and result in violation of the sacred principles of the purity of Jewish family life.

To turn now to the first Petitioner, Rivka, she is the person in whose name the certificate was issued and if not for her lending her hand as well as her passport and certificate to the other two Petitioners, she could have now been living peacefully and undisturbed with her son. In law, however, her position is not different from that of the other Petitioners. She attempted to enter the country with a passport which was tampered with and is, therefore, invalid for all intents and purposes. In view, however, of the strong probability that she was merely a tool in the hands of others and in view of her age, I would like to recommend her for lenient treatment by the authorities.

I concur that the rule *nisi* be discharged in all three cases.

Delivered this 29th day of January, 1937.

*Puisne Judge.*

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CIVIL APPEAL No. 155/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, A/S. P. J. and Khayat, J.

IN THE APPEAL OF :—

George Hanna Mansour. APPELLANT.

v.

Andria Elias Hanna El-Kassis. RESPONDENT.

*Parties to action — Partner suing in personal or in representative capacity — Amendment of claim, when necessary — Attachment.*

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 29th July, 1935, and in remitting the case to the District Court for a fresh judgment:—

HELD: Appellant was entitled to sue on behalf of the firm and had purported to do so at the first hearing. There was no need to amend the claim.

ANNOTATIONS: Previous proceedings in this case are reported in 8, C. of J. 403.

FOR APPELLANT: Olshan.

FOR RESPONDENT: Cattan, Atallah.

## JUDGMENT.

The Appellant in this case sued before the District Court on two promissory notes. The action was originally entered in the name of George Hanna Mansour in person. During the first hearing, however, he sought to sue personally on behalf of the partnership "Mansour Hanna Mansour & Bros." The Court heard evidence as to the validity or otherwise of this representative capacity, but failed to make an interlocutory ruling thereon.

The Court proceeded with the hearing of the case, and when judgment was given, the Judges disagreed as to the permissibility or otherwise of the proposed amendment of the Statement of Claim and, as a result, Plaintiff's case was dismissed.

In doing so, the Lower Court erred, for having rejected the representative capacity of the Plaintiff, they should have asked him whether he would not proceed in his personal capacity.

Further, the Lower Court seems to have overlooked the fact that according to the deed of partnership produced any partner can sue on behalf of the firm — which renders the question of the amendment of the statement of claim immaterial.

For these reasons, the judgment of the District Court is quashed, and the case is remitted for a fresh hearing on the merits.

The attachment previously laid is to remain in force.

Costs to await final judgment.

Delivered this 27th day of January, 1937.

*Acting Senior Puisne Judge.*

CIVIL APPEAL No. 77/35.

# IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Khaldi and Frumkin, JJ.

IN THE APPEAL OF:—

Abdel Raouf Abu Laban. APPELLANT.

v.

Raoufeh Abdel Majid Malakha. RESPONDENT.

*Land Court — Claim for rent in respect of waqf — Denial of waqf — Category of land to be established first — Jurisdiction of District and Land Courts.*

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 17th January, 1935:—

HELD: Appellant claimed rent in respect of *waqf* and Respondent denied that the land was *waqf*. This involved a question of title which was not within the jurisdiction of the District Court.

ANNOTATIONS: The judgment of the District Court was as follows:—

"Action in this case was brought by Abdel Raouf Abou Laban in his capacity as *Mutawalli* of the *Wakf* of Rakieh Bint Haj Malskha against Raoufeh Bint el Sayed Abdel Majid Malskha, claiming the revenue of the *Waqf* held by Defendant and amounting to LP. 300.—.

The attorneys of both parties appeared at the hearing. The attorney for Defendant claimed that his client had been in possession of the property, whose revenue is being claimed, from ancient times and that it has been developed by her and buildings erected thereon.

On the other hand, the attorney for Plaintiff insisted that the said property is *Wakf* in accordance with a Title deed dated 096.

The Court differed in its opinion. The opinion of one us, Izzat, is as follows:—

*Opinion of Izzat, J.*

Whereas Defendant denies that the property is *Wakf* and claims, despite the official documents, that it is her own, therefore, it is incumbent on her to prove this before the proper Court after being allowed a certain time to do this. The finding will then be considered and Plaintiff will be called upon to prove that he used to be in possession of the said property and that Defendant holds it by wrongful appropriation, thereby establishing his right to claim the revenue thereof.

*Opinion of Dr. Shehade.*

Plaintiff has failed to prove that he is in actual possession of the

property in dispute to entitle him to claim the revenue thereof. I hold, therefore, that his claim should be dismissed. Whereas the Court has differed in its opinion, it is hereby decided to dismiss Plaintiff's action with costs and LP. 2 advocate's fees.

Judgment given in presence, subject to appeal, dated this 17.1.35."

FOR APPELLANT: R. Dajani.

FOR RESPONDENT: Mughannam.

## JUDGMENT.

The Appellant in this case, as *Mutawalli* of a *Wakf*, entered an action in the District Court claiming rent for certain property which he alleges to be *Wakf* land. The Defendant denies that the land is *Wakf*.

Hence, before deciding the claim for rent, it is necessary that the nature of the land be first determined. This is a question of title to land clearly not within the jurisdiction of a District Court.

For this reason the judgment of the Court as it appears is correct and must be confirmed.

The appeal is, therefore, dismissed with costs and LP. 2.— advocate's fees.

Delivered this 1st day of February, 1937.

*Chief Justice.*

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CRIMINAL APPEAL No. 187/36.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Copland and Khayat, JJ.

IN THE APPEAL OF:—

1. Abdul Rahman Ismail El Atrash,
2. Hammad Ismail el Atrash,
3. Abdul Fattah Yousef Abdul Fattah. APPELLANTS.

v.

The Attorney General. RESPONDENT.

*Criminal Procedure — Statement to police — Duty to cross-examine — Trial Upon Information Ord., secs.* 51, 47 — *Judgment to state grounds.*

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 9th November, 1936, whereby the appellants were convicted under

Article 174 of the Ottoman Penal Code and Sections 3 and 9 of the Criminal Law Amendment Ordinance (No. 2) of 1927, and sentenced to 10 years' imprisonment each; and in remitting the case with directions:—

HELD: 1. The point that witnesses made conflicting statements before the police and in Court could not be raised on appeal as there had been no cross examination in Court on that point.

2. The judgment contained no findings of fact and should be remitted.

FOR APPELLANTS: Abcarius.

## JUDGMENT.

The three Appellants were found guilty of murder and attempted murder on the 9th November, 1936, and have appealed to this Court. 2. Abcarius Bey, who argued the appeal on their behalf, urged that the prosecution witnesses had made statements to the Police which did not tally with their subsequent evidence before the Court. In the Court below there was no cross-examination on this point of the Police Sgt. who received the information, and we do not see how we can deal with this point now.

3. Abcarius Bey further urged that the Court below made no findings of fact in its judgment as required by Section 51 of Cap. 36 and that Section 47(1) and (2) of the same Ordinance had not been complied with. This is correct and we, therefore, order that the conviction and sentence be quashed and the case be remitted to the Court below for a new trial with directions to comply with sections 51 and 47(1) and (2) of Cap. 36.

Delivered this 2nd day of February, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 146/35.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J. and Frumkin, J.

IN THE APPEAL OF:—

Hamed el Kashash. APPELLANT.

v.

Erich Ney. RESPONDENT.

*Breach of contract — Undertaking to deliver orange boxes within a*

*specified time and at a specified place — Non-payment of small amount does not excuse failure to deliver.*

In dismissing an appeal from the judgment of the District Court of Jaffa, dated 26th May, 1935:—

HELD : The non-payment of a small amount due from the Respondent to the Appellant did not excuse the latter from delivering the orange boxes in accordance with the terms of the contract.

ANNOTATIONS: A trifling irregularity is not to be considered as a breach of contract — C. A. 194/42 (1942, S. C. J. 779) and note 1 thereto.

FOR RESPONDENT: Chakron.

FOR APPELLANT: Kanafani.

JUDGMENT.

The parties in this case entered into an agreement on the 28th December, 1933, under which the Appellant undertook to deliver to the Respondent, during the month of January, 1934, three thousand boxes of oranges. The goods had to be delivered free to the Bonded House of Jaffa or waggons at buyer's option. The Respondent was to pay the price against warehouse receipts. The Appellant further undertook to pay to Respondent 100 mils as damages for each box short of three thousand not delivered within the prescribed time.

The Appellant altogether delivered 1637 boxes, partly during the prescribed month and partly in February. We have not got any evidence as to actual dates of delivery, but it is admitted by the Appellant that at least 301 boxes were delivered in February.

There were a series of claims and counterclaims between the parties, one of them a claim by Respondent for the sum of LP. 136.300 mils damages for non-delivery of 1363 boxes. We are only concerned with this last claim.

The Appellant argues that he is not liable for damages because non-delivery on his part was due to the fact that the Respondent did not pay the price of some of the goods delivered.

As a matter of fact Appellant sued Respondent for money due on account of goods delivered. Respondent pleaded that he paid certain amount to others by authority of Appellant but failed to prove such authority to the satisfaction of the Court which, therefore, found as a fact that Respondent owes Appellant LP. 123.565 mils and deducted it from the sum claimed as damages. Out of this sum of LP. 123.565 mils if we deduct the price of 301 boxes not delivered until February which certainly was not due at the end of the period of agreement,

the maximum sum due by the end of January could not exceed the sum of some LP. 20.—.

I do not think that the non-payment of this comparatively small amount could seriously be alleged to be the proper cause for the non-delivery of the remaining cases. It clearly did not stop Appellant from delivering goods afterwards. The Appellant was to deliver the goods and the Respondent was to pay upon production of receipts from the warehouse. No evidence was forthcoming to prove that such receipts were produced and not honoured.

I, therefore, hold that the Appellant committed a breach, and the judgment of the District Court must, therefore, be confirmed and the appeal dismissed with costs to include LP. 3.— advocate's fee and travelling expenses.

Delivered this 10th day of February, 1937.

*Puisne Judge.*

I concur.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 205/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

1. Jacob Salomon,
2. Yehuda Aharon Russo. APPELLANTS.

v.

1. Fatmeh bint Muhd. Haj. Saleh Abu Layeh,
2. Safieh bint Ismail Mohareb,
3. Omar Khalil el-Amouri,
4. Ibrahim Haj Mahmud el-Ta'mari. RESPONDENTS.

*Contracts — Payment by one party to the other may be made to one of component members of party.*

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 20th November, 1935, and in remitting the case to the lower Court for rehearing:—

HELD: The condition in the contract which provided for payment to a party to the contract could be satisfied by paying to one of the component members of that party.

ANNOTATIONS: *Cf.* C. A. 197/42 (1942, S. C. J. 979) — payment to one of two *mutawallis* insufficient. See also annotations to that case.

FOR APPELLANTS: Olshan & Eisenberg.

FOR RESPONDENTS: F. Abdul Hadi.

## JUDGMENT.

This appeal arises out of an action for damages for breach of contract. The agreement provided that LP. 10 had to be paid by the Appellants to the two Respondents Fatmeh and Safiyeh. There was evidence before the Court below that this LP. 10.— had been received by Fatmeh. The Court, without determining whether the LP. 10.— had actually been paid, found that payment to Fatmeh alone did not comply with the condition and for this reason rejected the Appellants' claim for damages.

We think that this ruling of the Court below was incorrect. The clause in the agreement provided that second party (*i. e.* Appellants) should pay first party (Fatmeh and Safiyeh) LP. 10.—, and payment to either of the first party clearly fulfilled the obligation.

The Court below did not deal with the other issues that arose. We are, therefore, unable to determine the appeal and we order that the judgment of the Court below be set aside and that the case be remitted to them for re-hearing, to be dealt with according to law, and in particular that they deal with the issues as to whether the LP. 10.— was actually paid to Fatmeh and as to whether the payment of the LP. 10.— was an essential condition of the agreement.

Costs to abide the event.

Delivered this 10th day of February, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 170/35.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Shoshanna Levin. APPELLANT.

v.

Ibrahm Hassan El-Haj As'ad & 3 ors. RESPONDENTS.

*Stamping — Assignment of agreement to sell land — Stamping after execution — P/N should contain a promise to pay — Question of stamping raised after adjudication.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 9th July, 1935, and in remitting the case for rehearing:—

HELD: The assignment did not contain a provision to pay a sum of money and was not, therefore, a promissory note for the purpose of stamping.

ANNOTATIONS: It was held in C. D. C. Jm. 73/38 (P. P. 5.vii.40) that an assignment of debt was liable to stamp duty as an agreement.

FOR APPELLANT: A. Hamburger.

FOR RESPONDENTS: No. 2 — A. Salah.

JUDGMENT.

The Appellant was the assignee of an agreement for the sale of land made by the Respondents, and the Respondents having failed to transfer the land she sued them for return of part of purchase-price paid and for damages for breach. The Court below did not go into the merits. A point was raised as to the stamp necessary on the assignment. The Commissioners of Stamps decided this, and the assignment was duly stamped in accordance with this decision. After this the Court below was divided in opinion, Judge Izzat Nammar holding that the assignment was a promissory note and could not be legally stamped after execution. Judge Salim Shehadeh disagreed with this. The Court proceeded no further with the case and the action was dismissed.

Whatever the assignment was, it was not a promissory note; a promissory note must contain a provision to pay a sum of money.

The decision of Judge Izzat Nammar was not correct.

We, therefore, order that the judgment of the lower Court be set aside and the case be remitted to it for hearing.

Costs to abide the event.

Delivered this 28th day of January, 1937.

*Senior Puisne Judge.*

CIVIL APPEAL No. 58/34.

# IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Copland and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Henry Rock and 5 ors. — APPELLANTS.

v.

1. Joseph Klein,
2. Israel Shaffer. — RESPONDENTS.

*Mental capacity — Power of attorney given by insane person — Degree of mental incapacity is material.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 23rd January, 1934, and in remitting the case to the lower Court:—

HELD: The District Court should have determined the degree of mental incapacity of Z. Rock before deciding that the power of attorney given by him had been invalidated.

ANNOTATIONS: The judgment of the District Court is reported in 4, C. of J., at p. 1512; for other proceedings see C. A. 157/34 (7. C. of J. 123) and C. A. 284/40 (1941, S. C. J. 110).

FOR APPELLANTS: Eliash.

FOR RESPONDENTS: Horowitz.

## JUDGMENT.

This is an appeal from the District Court of Jaffa. In the course of the proceedings before that Court a question was raised as to the mental capacity of one of the Plaintiffs, *i. e.* Zaki Rock, and the advocate then appearing for the Plaintiffs stated "I have consulted my clients and they tell me Zaki Rock is insane".

So far as these proceedings are concerned, the District Court in its judgment held:—

> "that Zaki Rock if of unsound mind and has been in a mental home in Paris for some years. This in itself is sufficient to render null and void the Power of Attorney given by Zaki Rock, with the natural consequence that the whole series of Power of Attorneys issuing from this first Power of Attorney falls to the ground. The action is, therefore, improperly brought."

It is clear from the provisions of the *Mejelle* that in certain circumstances the authority of an agent may be determined by the principal becoming mad. Whether in any particular case the agency is

so determined depends upon the degree of mental incapacity, and, if it is so determined, the effect of that determination may depend upon the date when the principal became mad within the meaning of the provision.

These are both questions of fact, but it appears to us that in this case there was insufficient evidence before the District Court to enable it to come to the conclusion to which it came.

I feel it is most unfortunate that all matters of fact were not fully considered by the Court below and findings made upon them, but as this was not done this Court has no alternative but to remit the case to the District Court with a direction that it should go fully into the question of the state of mind of Zaki Rock at the material date in the light of such evidence as may be adduced before it.

The judgment of the District Court is, therefore, set aside and the case is remitted to the District Court.

Costs to abide final event.

Delivered this 4th day of March, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 78/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Yacob Niśsim Mizrahi. APPELLANT.

v.

1. Yacob Goral,
2. Moshe Goral,

as administrators of the estate of their father Isaac Goralishvili. RESPONDENTS.

*Damages — Breach of undertaking to vacate flat on Muharram — Alternative accommodation — Minor breach.*

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 12th June, 1936, and in remitting the case to the District Court:—

HELD: It was material to the claim for damages whether the flat had not been vacated on time or at all.

ANNOTATIONS: The proceedings terminated in C. A. 128/37 (*infra*).

FOR APPELLANT: Goitein.

FOR RESPONDENTS: Levitsky & Mizrahi.

## JUDGMENT.

This is an appeal against a judgment of the District Court of Jerusalem, dated the 12th June, 1936, whereby Appellant's claim for LP. 2,000.— damages, for alleged breach of contract, was dismissed.

The present Appellant, who was the Plaintiff before the District Court, contended that the Respondents had undertaken in Clause 8 of the agreement that their mother would vacate the premises, the subject matter of the agreement, by *Muharram* and that as she failed to vacate in time, they asked the Court to treat this as a breach and award the damages agreed upon.

It seems to us that before final judgment can be given, the Trial Court must come to a definite finding of fact as to when exactly Defendants' mother left the premises. This is essential because it is common knowledge in Palestine that sometimes it is a practical impossibility for tenants to vacate on the 1st day of *Muharram*, and a reasonable delay must, therefore, be allowed to enable them to find substitutory premises for their habitation.

But if, as alleged by Appellant, it appears in the result, that Respondents' mother was still in the house in June, 1936, when judgment was given by the District Court, then surely this constitutes a breach of the contract and Appellant would be entitled to claim the full amount of damages agreed upon.

For these reasons the appeal is allowed, the judgment of the District Court is set aside, and the case is remitted to that Court to hear evidence as to when the premises were actually vacated by Defendants' mother, and to give a fresh judgment in accordance with the above principles.

Costs to await the result of the second trial.

Delivered this 11th day of March, 1937.

*British Puisne Judge*

CIVIL APPEAL No. 128/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF :—

Jacob Nissim Mizrachi. APPELLANT.

v.

Jacob and Moshe Goral, administrators of the estate of the late Itzhak Goralishvili. RESPONDENTS.

*Damages for breach of contract — Reasonable delay in vacating house on Muharram.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated 31st of May, 1937:—

HELD : A delay of ten days in vacating the house after *Muharram* was not, in the circumstances of the case, unreasonable.

ANNOTATIONS: For the facts of this case see C. A. 78/36 (*ante*).

JUDGMENT.

The only point in this appeal is whether a delay of ten days in vacating a house after *Muharram* can be held to be reasonable period. What is reasonable is a question of fact, and must be determined in accordance with the circumstances of each case. In the circumstances of this case and particularly in view of the fact that the Respondent had been in occupation of the premises for forty years, we think that the ten days' delay is not unreasonable.

The appeal is, therefore, dismissed. The Appellant will have the costs of the first appeal, otherwise each side will pay their own costs. No advocate's fees.

Delivered this 29th day of July, 1937.

*British Puisne Judge.*

MISDEMEANOUR APPEAL No. 9/36.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Sharif Esh- Shanti. APPELLANT.

v.

The Attorney General. RESPONDENT.

*"Ramadan Case" — Charge of publicly breaking the fast — O. P. C. Art. 99, 3rd add., Irade-i-Saniye — Mandate, art. 15, P. O. in C., Arts. 17(1)(c), 46, 83 — Husseini v. Government of Palestine, Murra Case, Sobhuza v. Miller — "Ordinances" inconsistent with the Mandate — Discrimination, lawful excuse — Freedom of conscience.*

In dismissing an appeal from the judgment of the District Court of Nablus, dated the 16th December, 1935, whereby the judgment of the Magistrate of Tulkarm, acquitting the Appellant of a charge under the third Addendum to Article 99 of the Penal Code, was set aside and the case remitted for completion, but in varying the judgment of the District Court:—

HELD: 1. The *Irade* was not void for inconsistency with the Mandate as the Palestine Order-in-Council is not governed by the Mandate save so far as the latter is incorporated in the Order-in-Council.
2. The O. P. C. and the *Irade* were brought into force by Art. 46 of the P. O. in C.
3. The provisions of the laws under which the Appellant had been convicted did not discriminate among the inhabitants of Palestine; nor did they violate freedom of conscience.

FOLLOWED: H. C. 55/25 (1, P. L. R. 50, 4, C. of J. 1483); P. C. 98/25 (1, P. L. R. 71; 5, C. of J. 1818); Sobhuza II *v.* Miller, 1926, A. C. 518.

ANNOTATIONS:

1. The judgment of the Magistrate (CR. B. M. Tulkarm 1566/34) is reported in P. P. 16.x.35 and that of the District Court (M. A. D. C. Na. 109/35) in 8, C. of J. 651.

2. "An Order in Council can never be *ultra vires*" — H. C. 69/42 (1942, S. C. J. 575).

3. *Cf.* M. A. 18/28 (1, P. L. R. 283; 4, C. of J. 1317), wherein a by-law was found *ultra vires* as it discriminated between members of different religions.

### JUDGMENT.

The Appellant, Sharif Esh-Shanti, a Moslem, was charged before the Chief Magistrate at Tulkarm, under the 3rd *Addendum* to Article 99 of the Ottoman Penal Code and the *Irade-i-Saniye* of the 16th

*Ramadan*, 1329, with having publicly broken the Fast of *Ramadan*. He was acquitted by the Chief Magistrate on the ground that the *Irade-i-Saniye* was repugnant to Article 15 of the Mandate for Palestine and that, therefore, Article 46 of the Palestine Order-in-Council, 1922—23, was invalid so far as regards the *Irade*. The Attorney General appealed to the District Court of Nablus which quashed the Magistrate's decision, holding that the *Irade* in question had been validly brought into force by Article 46 of the Order-in-Council and that the Order-in-Council was not subject to or governed by the Mandate.

From that judgment the Appellant by special leave has appealed to this Court.

The two points on which leave to appeal was granted are as follows:—

1. Is the Palestine Order-in-Council 1922—3 subject to or governed by the terms of the Mandate for Palestine?

2. Has Article 46 of the Palestine Order-in-Council 1922—3 brought into force the provisions of Article 99 of the Ottoman Penal Code as amended by the Imperial *Irade* of 1329 *A. H.?*

The first point has already been before this Court in the case of Jamal Husseini *v.* Government of Palestine (P. L. R. 50). In his judgment, Corrie, J., at p. 51, says: "The terms of the Mandate are enforceable in the Courts only in so far as they are incorporated by the Palestine Order-in-Council 1922, or any amendment thereof": and further, he goes on to say: "In so far as the Mandate is not incorporated into the Law of Palestine by Order-in-Council, its provisions have only the force of treaty obligations, and cannot be enforced by the Courts". And in Jerusalem-Jaffa District Governor and another *v.* Murra and others (P. L. R. 71; 1926 A. C. p. 321) Lord Cave, L. C., who delivered the judgment of the Judicial Committee, discussing whether the Supreme Court was justified in going into the question of the validity of an Ordinance, said at p. 76 — "The Ordinance was made under the authority of the Order-in-Council of May 4, 1923, and if and in so far as it infringed the conditions of that Order-in-Council" (not, it is to be noted, the provision of the Mandate) "the local Court was entitled and indeed bound to treat it as void". The Judicial Committee held in effect that the Mandate could only be considered because the Order-in-Council stipulated that no Ordinance should be promulgated which was repugnant to, or inconsistent with, the provisions of the Mandate. And in Sobhuza

II *v.* Miller and others (1926) A. C. 518, the Judicial Committee have held that Orders-in-Council made under the Foreign Jurisdiction Act, 1920, are supreme and cannot be challenged even though they may go beyond the powers granted by the treaty under which the Crown assumed control of the territory.

Following these decisions, we think that the District Court was right in holding that the Palestine Order-in-Council, 1922—3, is not subject to or governed by the terms of the Mandate for Palestine, except in so far as the Order-in-Council has incorporated in itself the terms of the Mandate: and we, therefore, answer the first question in this appeal in the negative.

To take now the second point. Article 46 of the Order-in-Council says: "The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on November 1st, 1914.....": the remainder of the article is not material to the present case. Article 17(1)(c) of the Order-in-Council provides that no Ordinance shall be promulgated which shall be repugnant to or inconsistent with the provisions of the Mandate. Neither the Ottoman Penal Code nor the *Irade-i-Saniye* are Ordinances: neither were they promulgated by the High Commissioner. Both are part of the Ottoman Law in force on November 1st, 1914. If it had been intended to exclude any existing Ottoman legislation which was inconsistent with or repugnant to the provisions of the Mandate, it would have been very easy to have inserted a proviso to that effect in the Order-in-Council. This has not been done, and the Courts cannot imply such a proviso. We are, therefore, of opinion that Article 46 of the Order-in-Council has brought into force Article 99, third *Addendum,* of the Ottoman Penal Code and the Imperial *Irade of* 1329 *A. H.*

This really disposes of the two points on which leave to appeal was given, but a very large amount of argument has been devoted to showing that the *Irade* involves discrimination between the inhabitants of Palestine on the ground of religion, and also that it is inconsistent with Article 83 of the Order-in-Council, inasmuch as it impairs freedom of conscience. We do not think that there is any substance in any of these grounds. The *Irade* in its terms is perfectly general — it says that all persons who publicly break the fast, without lawful excuse and wilfully, shall be prosecuted under the 3rd *Addendum* to Article 99 of the Ottoman Penal Code. It applies to everybody without distinction. Many persons, of course, would have a lawful excuse, *i. e.* if they were Christians or Jews, that their reli-

gion did not compel them to observe the fast of *Ramadan*. Many Moslems would also have a lawful excuse, such as illness or absence from home. In these circumstances it cannot be said that there is any discrimination, and even if there were, since there is no exception with regard to Ottoman Legislation existent on November 1st, 1914, contained in the Order-in-Council, the *Irade-i-Saniye* was law in this country at the date of the prosecution of the Appellant, and must, therefore, be enforced.

Finally, as to the plea that the *Irade* violates freedom of conscience and is, therefore, invalid as being inconsistent with Article 83 of the Order-in-Council. This Article, so far as material, reads as follows:—

> "All persons in Palestine shall enjoy full liberty of conscience and the free exercise of their forms of worship subject only to the maintenance of public order and morals".

Many persons are apt to confuse freedom of conscience with freedom of action — they are by no means the same thing. Freedom of conscience must be exercised with due regard to the feelings of others and to the maintenance of public order. No one is entitled, in the name of freedom of conscience, to do an act which infringes either of these conditions. And in any case we fail to see that eating and smoking in public during certain hours have anything to do with freedom of conscience.

We are of opinion that the District Court came to a right decision on the law, and no exception whatever can be taken to their judgment, except in regard to one particular. The Appellant from the commencement of proceedings admitted all the facts, but pleaded that there was no offence in law. In these circumstances, we think that it is unnecessary to send the case back to the Magistrate with instructions to convict. It is high time that this criminal case, which began on the 12th July, 1935, should be brought to an end. The offence was actually committed on the 13th December, 1934.

We, therefore, find the Appellant guilty of the charge brought against him and order him to pay a fine of LP. 0.500 mils and costs: in default five days' imprisonment, with special treatment.

With this variation, the appeal is dismissed.

Delivered this 12th day of March, 1937.

*Senior Puisne Judge.*

LAND APPEAL No. 82/28.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Baker, Khaldi and Khayat, JJ.

IN THE APPEAL OF:—

Mrs. Said Kamel Pasha. APPELLANT.

v.

Government of Palestine. RESPONDENT.

*Crown action — Crown Actions Ord., sec. 2(4) — Fiat required on renewal of action — Judgment by default — "Fresh action".*

In dismissing an appeal from the judgment of the Land Court of Haifa, dated the 2nd July, 1928:—

HELD: A fresh action had been instituted after dismissal of the original action. The *fiat* of the High Commissioner should have been obtained again.

ANNOTATIONS: A contrary decision was given in C. A. 214/38 (1938, 2 S. C. J. 100). *Cf.* also C. A. 226/38 (1939, S. C. J. 337).

## JUDGMENT.

This is an appeal against the judgment of the Haifa Land Court, whereby the action of Appellant was dismissed on the grounds that the *fiat* of the High Commissioner had not been obtained in accordance with Art. 4, Section 2, of the Crown Actions Ordinance, 1926.

The Appellant pleaded that as the *fiat* of the High Commissioner had been obtained when the case was originally brought there was no necessity to again obtain it upon renewal of the case.

When the case was first brought the action on the 27th July, 1925, was struck out for want of prosecution.

And Appellant has now brought this present action by virtue of Sec. 1 of the Judgment by Default Rules which prescribes that a fresh action may be instituted under the circumstances therein prescribed.

In my opinion there can only be one interpretation to the expression fresh action and that is the interpretation given by the Land Court of Haifa in this case; and, as such, this present action must of necessity require the written consent of the High Commissioner.

Accordingly the judgment of the Land Court is confirmed and the appeal dismissed with costs.

Given this 18th day of March, 1929.

*Puisne Judge.*

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LAND APPEAL No. 43/36.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J. and Plunkett, J.

IN THE APPEAL OF:—

Mrs. Claire Calmy. APPELLANT.

v.

Mrs. Heraklia Politis. RESPONDENT.

*Title to land — Land bought before* 1918 *and not registered — Partition between registered co-owners — Manner of ascertaining position of land claimed — Powers of Land Courts, L. C. Ord., sec.* 3 *— Demarcation of boundaries — Appeals on question of law only, sec.* 4 *— Manner of Survey — Delivery of land, Mejelle, art.* 262 *— Prescription, Mejelle, art.* 1660, 1666, *opinion of commentators — Statement of claim not setting out boundaries, Mejelle, arts.* 1619, 1620, 1623 *— New map produced, other than referred to in statement of claim — Bona fide purchaser.*

*Interpretation of judgment on appeal — Judge retiring from the case after making up his mind on the issues from previous appeal — Two judges constituting a Court, Courts Ord., sec.* 3, *C. P. C. art.* 186.

In dismissing an appeal from the judgment of the Land Court of Jaffa, dated the 10th July, 1936:—

HELD: 1. Having satisfied itself that the Respondent owned part of the land registered in the name of the Appellant and the Government, the Land Court was right in determining the boundaries of the area.

2. Delivery was not essential to perfect title.

3. The period of limitation should be calculated in calendar years. It stopped on the institution of the action.

4. The Respondent had substantially complied with the requirements of art. 1623 of the *Mejelle.*

5. The Appellant was not a *bona fide* purchaser without notice.

ANNOTATIONS :

1. The ruling on the third point in this case was disapproved of by Manning, S. P. J. in C. A. 184/37 (*post*) wherein it was held that the period of prescription was to be reckoned in lunar years unless the action had been instituted after the 23rd August, 1933, *i. e.* the date of coming into force of the Land Law (Am.) Ordinance, 1933. C. A. 184/37 (*supra*) was followed in C. A. 23/39 (1939, S. C. J. 171); see also C. A. 119/42 (1942, S. C. J. 755).

2. On the effect of a purchaser of land not being *bona fide* see C. A. 215/38 (1938, 2 S. C. J. 177) — final judgment in C. A. 236/42 (1943, A. L. R. 509).

FOR APPELLANT: Moyal.

FOR RESPONDENT: Eliash.

## JUDGMENT.

*Manning, S. P. J.*: The facts giving rise to this appeal are as follows. In 1901 one Moyal and one Esteriades were joint owners of a piece of land in the vicinity of the town of Jaffa. In that year they sold a part of the land, 11,850 pics to one Franghia, and 12150 pics to the Greek Patriarch. They continued to be registered owners of the remaining part of the land until the death of Esteriades. He died without heirs and his undivided share passed to the Government of Palestine. After this Moyal sold his share to his son David, and the latter had the property registered in the name of his wife, now Claire Calmy, the Appellant in these proceedings.

Franghia had the portion he bought registered in his name and shortly afterwards left Palestine for Constantinople. In 1913, having heard that certain of his boundary marks had been obliterated, he returned to Jaffa and had fresh boundary marks placed at the four corners of his land. He then returned to Constantinople. In 1917 he sold the land to his daughter, now Mrs. Politis, the Respondent in the present proceedings.

The position in 1917 was, therefore, as follows. Of the original land owned by Moyal and Esteriades in 1901, the Greek Patriarch was the registered owner of one small part. The Respondent was the registered owner of another small part, and the rest was held in undivided ownership by the Appellant and the Government of Palestine. In 1925 the Government made an application for partition of this land between itself and the Appellant. The Government produced a map of the land (Exhibit No. 1 in these proceedings) and this map clearly showed a rectangular piece marked "the land of Franghia". This was obviously intended to represent the piece of land purchased by Franghia in 1901 and sold by him to the Respondent in 1917. Owing to some mistake this piece of land was included by the Court in the

land to be partitioned. The land was partitioned, part went to the Government and part to the Appellant. The result was that the land belonging to the Respondent fell into the share allotted either to the Government or to the Appellant, or part of it to one and part to another.

In 1926 the Respondent commenced an action for the recovery of her land in the Land Court of Jaffa. She made the Appellant and the Government of Palestine defendants. The Government adopted the role of a passive defendant; it took the attitude that if Respondent could prove her claim, it had no objection to handing over to her any part of the land ordered by the Court. The Appellant, on the other hand, offered a very strenuous opposition to the Respondent's claim.

The case dragged on until January, 1936, when judgment was delivered by the Land Court in favour of the Respondent. The Government accepted the decision of the Land Court, but the Appellant appealed. There was a very lengthy argument before a bench constituted of McDonnell, C. J., Baker and Frumkin, JJ. Judgment was delivered on May, 14th, 1936. The Court began its judgment in the following terms:—

> "After having read the Appellant's voluminous grounds of appeal and listened to her counsel's exposition thereof at great length, there is only one point in the whole case with which we think it is necessary to deal, and that is the matter relating to maps X and Y prepared by the Assistant Superintendent of Surveys of the Southern District."

The judgment ended as follows:—

> "We, therefore, set aside the judgment and remit the case to the Land Court to recall the surveyor in order that he may put in the maps in question and be examined and cross-examined if desired on the discrepancies in map X to which we have referred, the Court to give judgment accordingly. Costs to follow the event."

The Land Court carried out the order of this Court and then delivered a fresh judgment, adhering to its original decision in every respect. The Appellant again appealed, and the hearing of the appeal commenced on the 28th October, 1936, before a Court consisting of myself, Plunkett and Frumkin, JJ. Mr. Eliash for the Respondent, referring to the opening sentences of the judgment of this Court, said they meant that the Court had decided all points against the Appellant except one. It was quite clear to myself and my brother Plunkett that the Court had found it necessary to deal with one point only and that the other "voluminous grounds of appeal" remained undecided. My brother Frumkin, who had been a member of the previous Court, said that the previous Court had meant to decide all points but one. But the judgment did not contain a single reference to the

elaborate arguments of Appellant's advocate on the numerous other points in the case and we were left entirely in the dark as to what they had meant to decide. In these circumstances my brother Plunkett and I decided (my brother Frumkin dissenting) that there was nothing to be done except to have the whole appeal re-argued before us. When the argument had proceeded for a short time, my brother Frumkin intimated that, having already listened to the argument in the previous hearing, he had already made up his mind on the various issues. He asked to be relieved. The case was continued by consent before myself and my brother Plunkett. I may here remark that two judges constituted a proper Court under Section 3 of the Courts Ordinance, as amended by Ordinance No. 18 of 1935. The amendment came into force on the 16th April, 1935, and this appeal was commenced after that date. Article 186 of the Civil Procedure Code lays it down that the date of the commencement of an appeal is the date on which the application to appeal is presented and registered.

There was again a very lengthy argument before us. Mr. Moyal, for the Appellant, urged numerous reasons in support of his contention that the decision of the Land Court was wrong. I shall deal later with certain specific reasons but before doing so I wish to refer to a matter which goes to the root of the bulk of Mr. Moyal's contentions, namely the procedure adopted by the Land Court in deciding in favour of the Respondent's claim.

The Land Court found as a fact, and there was abundant evidence to support its finding, that the Respondent was owner of part of the land which had been partitioned between the Appellant and the Government in 1925. But it had considerable difficulty in determining the situation of the part of the land which belonged to the Respondent. The map produced by the Government at the partition proceedings in 1925 was found to be inaccurate. Another map (No. 5), which showed the Franghia land in the same position as map No. 1, was subject to the same defect. There was evidence that the scale was not exact, and that the map was merely a sketch. The same applies to the numerous other maps produced. From a perusal of any of them it was difficult to say with certainty where the Franghia land was actually situated with reference to the land partitioned in 1925.

The Land Court, being satisfied that the Respondent was the owner of a piece of land which had been comprised in the partitioned area, took the following course in order to determine its position. Various witnesses pointed out marks on the land which they said were at the south-east and south-west points of the land owned by Franghia. These

marks differed, but not to any great extent. The Court took the two points most favourable to the Appellant, and on the line joining then constructed a rectangle conforming in shape and area to the Franghia land shown on map 5, this being a map which had been produced by the Appellant. It declared this rectangular piece of land to be the property of the Respondent.

This method of procedure was much criticised by Mr. Moyal, but I think the Land Court was justified in its procedure. Land Courts were set up in Palestine by an Ordinance passed in 1921, now Cap 75 of the Laws of Palestine, Vol. II, p. 828. By section 3(d) a Land Court was empowered to decide disputes as to the ownership of land. By Section 3(b) it was empowered, where it accepted a claim to ownership as valid and undisputed, to demarcate the boundaries and direct registration in the Land Registry. By Section 3(c) it was empowered, where it accepted a claim as valid, and where only the boundaries were disputed, to give a decision as to the boundaries and to demarcate them in accordance with the decision.

In the Appellant's additional grounds of appeal, dated August 7th, 1936, her advocate said:—

> "There is no dispute that Mr. Franghia effected in Constantinople a transfer to the name of the Respondent of the land registered in his name on or about July 1333. But this *Kushan* is not sufficient by itself to show area, boundaries and position of the land."

Now, as I have said already, there was a definite finding of fact that this land registered in Franghia's name was part of the land partitioned between the Government and the Appellant in 1925. Section 4 of the Land Courts Ordinance provides that there is no appeal save on a question of law. The Land Court had, therefore, before it a clear admission that Franghia had transferred certain land to the Respondent, and it had its own finding of fact that this land was included in the area partitioned between the Government and the Appellant in 1925. Owing to inaccurate maps and the defective recollection of witnesses, the Court was unable to determine the exact situation of the land. It had, therefore, to piece together the various items of evidence, documentary and oral, and to demarcate the boundaries of the land to the best of its ability on the material before it.

There is a good deal to be said for the view that on the facts of this case the Respondent's claim to ownership was accepted by the Land Court as valid and undisputed, or that in the alternative her claim was accepted as valid, and undisputed except with regard to the boundaries, and that, therefore, the Court was justified in demarcating

the boundaries, in accordance with Section 3(b and c) of the Ordinance. But even if this were not so, I think the procedure adopted was the only one consonant with justice. It seems to me that this is what Land Courts were set up for. It must have been realised that after the Great War, followed by the British Occupation of Palestine, many cases would arise such as the present one, where there would be no dispute that a person was the owner of certain land, but owing to inaccurate *kushans* and maps, and discrepancies of witnesses as to boundaries, it would be difficult to say where were the actual boundaries of the land. Land Courts were set up to do substantial justice. Where such a Court finds that a person is indisputably the owner of land, but the situation of that land cannot be accurately determined, then it depends on the evidence whether a final decision can be given. If there is sufficient material to enable such a Court to carve out a piece of land in approximately the position indicated by the evidence, then I think its decision should not be interfered with unless it has caused injustice to some other person. In the present case the Land Court had, in my opinion, sufficient evidence before it to assign to the Respondent the portion of land it did. It could not say with certainty that this was the actual situation of the land sold by Franghia to the Respondent, but it got as near to its actual position as was possible, and carved out the correct shape and area. For this purpose it took two points favourable to the Appellant and used a map produced by the Appellant.

My decision that the judgment of the Land Court must not be interfered with on account of the procedure adopted disposes of most of the grounds of appeal urged by Mr. Moyal. A good deal of his argument was devoted to a criticism of the evidence of the Surveyor Davis and it was owing to such criticism at the first hearing of this appeal that this Court remitted the case to the Court below for further evidence to be taken from Davis in order to explain certain matters which seemed obscure. This further evidence was taken in the Court below, and it took it into consideration when delivering its fresh judgment. Mr. Moyal had an opportunity of cross-examining Davis and of bringing out the matters on which he relied for the purpose of discrediting this witness. He addressed the Court below at length on these matters. They all resolved themselves into questions as to the accuracy of certain rough notes made by the surveyor, from which notes he had prepared the plan as ordered by the Court. The surveyor was quite candid in admitting that the notes were rough and that a clerical error had been committed in one instance in transferring rough notes to the Field Book. But he was quite clear that his rough notes

were sufficient to make an exact survey and that his memory, together with the notes, was ample to give him complete information. The Court below was the best judge of the cogency of his evidence; it took into consideration the criticisms to which it was subjected by Mr. Moyal; and it decided that these criticisms did not debar it from accepting the evidence and basing its decisions upon it. I have perused the evidence and considered the criticisms and I am in agreement with the decision of the Court below.

I turn now to consider certain specific grounds of appeal urged by Mr. Moyal. The first of these was that there was no delivery of the land by Franghia to the Respondent in 1917. It has been seen that he does not dispute the transfer of the land to the Respondent in that year. On the question of delivery, he relied on certain articles in Chapter 5 of the *Mejelle*. The leading article, No. 262, is as follows (I am using Mr. Hooper's translation):—

> "Article 262. Taking delivery is not an essential condition of sale. After the conclusion of the contract, however, the purchaser must first deliver the price to the vendor, and the vendor is then bound to deliver the thing sold to the purchaser."

It is quite clear that taking delivery is not an essential condition of sale. The remaining words of the article merely indicate that on payment of the price the vendor is bound to deliver if he is asked to do so by the purchaser. The other articles of the Chapter relate entirely to what constitutes delivery. This ground of appeal fails.

The second ground is on the question of limitation. The Court below found as a fact that Franghia exercised his rights of possession over the land in 1913. There was evidence to support this finding and this Court should not interfere with it. The present action was commenced in 1926. Article 1660 of the *Mejelle* fixes the period of limitation at 15 years, so that the action seems to have commenced in time. But Mr. Moyal has put up an ingenious argument to defeat this conclusion. He says that the crucial date is not the date of the commencement of the action, but the date when the hearing before the Court begins. He further says that the period is to be reckoned in lunar, not in calendar years. The date on which this case first came on for hearing was the 6th December, 1927, and Mr. Moyal says, if this date be taken and if the period be calculated in lunar years, then the Respondent's claim is barred.

In support of his first proposition he relies on Article 1666 of the *Mejelle*. This is as follows:—

> "Article 1666. If any person brings an action in Court against any other person in respect to some particular matter once in a certain

> number of years, without the case being finally decided, and in this way fifteen years pass by, the hearing of the action is not barred. But any claim made out of Court does not cause the period of limitation to cease to run. Consequently, if any person makes a claim in respect to any particular matter elsewhere than in Court, and in this way the period of limitation elapses, the hearing of an action by the plaintiff is barred."

I do not see how this supports his contention. The intention of the article is to stress the point that the claim must be made before a Court, and that a claim otherwise made will not cause the period of limitation to cease to run. But the article does not suggest that the commencement of an action in Court is the date on which the actual hearing begins; the Code of Civil Procedure lays it down that an action commences when the claim is presented and registered. Mr. Moyal said that his view is supported by the Commentaries of jurists such as Ali Haider and Salim Baz. If this is so I must say that I do not agree with these jurists. With regard to lunar years Mr. Moyal has not produced any authority, and the practice of the Courts in this country since the Occupation has been to compute the period of limitation in calendar years. I think the Court below was right in rejecting the defence of limitation, and this ground of appeal also fails.

A third ground of appeal was that the Respondent did not set out the boundaries of the land claimed in her statement of claim. Mr. Moyal relies on Articles 1619, 1620, and 1623 of the *Mejelle*. These articles, especially Article 1623, support his contention that in an action for the recovery of land the boundaries must be set out. But this ground of appeal must be considered in the light of what I have already said as to the functions of Land Courts. The Respondent did, however, attach to her statement of claim a copy of the original *kushan* showing the registered title of Franghia, and she also produced a copy of the Map (Exhibit No. 1), showing an area marked out as the land of Franghia. I think she substantially complied with the requirements of the law, and this ground of appeal must also fail.

A fourth ground of appeal is connected with the production by the Respondent of the map above referred to. As I have already pointed out it was found during the hearing to have been inaccurately made and the Respondent produced another map later on which she said represented the locality more accurately. Mr. Moyal says she ought not to have been allowed to do this, she based her claim on map I, and she is estopped from relying on any other evidence. I do not see any force in this argument. Map I was simply a part of the Respondent's evidence; when it was found to be inaccurate, the Court had to make the best use of it it could. This it did in the light of all

the other evidence adduced. But it was not bound to reject the Respondent's claim merely because for some reason a surveyor had got his compass points wrong or his scale incorrect. It is necessary to repeat that the Land Court was satisfied that the Respondent's claim to land was a good one and that it found in the evidence sufficient material for it to say approximately where that land lay. When map I was found to be inaccurate the Respondent was not debarred from adducing other evidence to help her in proving the approximate situation of the land. This ground of appeal also fails.

A fifth ground of appeal is based on the doctrine of *bona fides*. The Appellant became in good faith the registered owner of certain land, she remained the registered owner for a number of years, she was a purchaser in good faith without any knowledge that part of the land belonged to anyone else. She should not, therefore, be disturbed. But the facts of this case are entirely against any plea of this nature. The Appellant never became the owner of the piece of land claimed by the Respondent. That land was registered in the name of Franghia since 1901 and in the name of Respondent since 1917. If the Appellant occupied any of this land before 1925 she was simply encroaching on the rights of another and could defend her right to occupy only on the ground of prescription. And at the time of the partition proceedings between herself and the Government in 1925, Map I was produced by the Government, showing clearly a rectangular piece of land marked "the land of Franghia". This was adequate notice to the Appellant of an adverse title to this piece of land, and when she allowed it to be included in the partitioned land, she did so at the risk of being ousted at a later date. This ground of appeal also fails.

There is a sixth ground of appeal on the question of costs, but I see no reason to interfere with the decision of the Court below as how the costs of the action should be borne.

I have read through my notes of Mr. Moyal's argument several times, and cannot find any grounds of appeal other than those I have already dealt with. There is a continual recurrence to the ground that the Court below had no legal evidence on which to base its decision. With this I disagree and in my opinion this appeal should be dismissed with costs. Having regard to the fact that there were two prolonged arguments before this Court these fees should include LP. 50.— advocate's fees.

Deliveerd this 19th day of March, 1937.

*Senior Puisne Judge.*

*Plunkett, J.*: I concur.

*Judge.*

CIVIL APPEAL No. 14/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Nasri Fi'ani. APPELLANT.

v.

Anis Medawar. RESPONDENT.

*Preliminary ruling — Ruling given by judge who is subsequently found not competent to sit — Action dismissed before conclusion of evidence.*

In allowing an appeal from the judgment of the District Court of Haifa, dated the 24th November, 1936, setting aside the judgment of the District Court and remitting the case:—

HELD: 1. As the preliminary ruling did not dispose of the action, it became merged in the final judgment.

2. The District Court should not have dismissed the action before concluding the hearing of evidence.

ANNOTATIONS:

1. The previous Supreme Court judgment referred to is C. A. 85/35 (8, C. of J. 571).

2. Later authorities for the proposition that a judgment which has been set aside or which has been declared void does not create *res judicata* are collated in note 3 to Misc. Appl. 32/43 (1943, A. L. R., at p. 604).

FOR APPELLANT: H. Hawa.

FOR RESPONDENT: F. Atalla.

### JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa, dated the 24th November, 1936.

It seems that in some earlier proceedings between the same parties and arising out of the same transaction the matter came before this Court. Unfortunately, owing to a technical mistake, this Court was forced to decide on the 9th April, 1936, that the proceedings then under appeal were bad in that one Judge was not properly authorised to sit as a Judge in the District Court.

It is now argued before us that a decision on a preliminary point which had been given in the course of these proceedings while the Judge in question was authorised to sit, binds the parties. We feel

some doubt as to that and unless the preliminary point decides the case the decision on the preliminary point must become merged in the final judgment when it is given, and in the case in question no final decision could be given.

At the second hearing by the District Court the appeal from which is now before us, the learned Judges disagreed: one took the view that there was some evidence, at any rate, of a partnership between the parties, the other learned Judge took the view that the Defendant was not a party as against the Plaintiff in this action. By that I take him to mean that the action was wrongly brought against the Defendant in that he was not liable upon the claim. In the result, the action was dismissed, as the Judges disagreed.

We are of opinion that the Court below was wrong in dismissing the action at the stage at which the action was dismissed, and we think that the Court below should have considered further evidence before giving its decision.

The judgment of the Court below is, therefore, set aside and the case remitted to the District Court to go further into the merits.

Costs will follow the event.

Advocate's fees LP. 3.—.

Delivered this 20th day of March, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 59/36.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Isaac Ginio. APPELLANT.

v.

A. D. Saporta. RESPONDENT.

*Tendering the oath — Procedure — Case sent back to administer the oath to a party — Whether further evidence may be heard.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 19th May, 1936:—

HELD: As the case had been remitted to the Magistrate to administer the oath, he should not have heard additional evidence.

ANNOTATIONS: C. A. 76/38 (1938, 1 S. C. J. 266) and C. A. 138/38 (1938, 2 S. C. J. 65) are to the same effect.

FOR APPELLANT: Eliash.

FOR RESPONDENT: Zeev.

## JUDGMENT.

This is an appeal from the judgment of the District Court of Jerusalem, dated the 19th May, 1936, which comes before us by special leave and it is the last step in long protracted litigation between the parties which started with a judgment by a Magistrate in February, 1931.

When the case came before the District Court for the first time, it came before that Court on the 21st day of January, 1932; the Appellant having reserved his right to tender to the Respondent the oath until after the appeal.

The District Court sent the case back to the Magistrate to administer the oath in question and to give a fresh decision, that is, as we understand it, a decision based upon the results of administering the oath.

It went back to the Magistrate and the Magistrate exceeded the direction given in that judgment and, instead of administering the oath and doing nothing more, he entertained certain evidence.

It went again to the District Court on appeal and that Court set aside the judgment because the Magistrate exceeded his jurisdiction and sent it back again to the Magistrate to give judgment in accordance with the direction of the District Court given on 21st January, 1932.

It went back to the same Magistrate again and the Magistrate did comply with the first direction of the District Court, that is, limited himself to administering the oath. The case came a third time before the District Court on appeal and the Court confirmed this judgment of the Magistrate on the 29th June, 1934.

Now the case comes before this Court, as I said before, by leave.

The point argued before us really being whether or not, in the circumstances, the Magistrate was limited to tendering the oath, or whether the position was such that he could hear evidence and deal with the case on the basis of such evidence.

In our view, the true position was that on the first occasion when the case was before the Magistrate and it was brought before the District Court on appeal, the only outstanding question was the

question of the Magistrate administering the oath, and the District Court having sent it back to him with instructions to comply with that only outstanding question, in other words, to administer the oath, he could only administer the oath and do nothing more.

It follows that this appeal fails and it is dismissed with costs and advocates fees at LP. 2.—.

Delivered this 12th day of April, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 200/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Moshe Dahan. APPELLANT.

v.

Muhammad Khalil Lafi & 24 ors. RESPONDENTS.

*Contracts — Signature by unauthorised agent on behalf of persons constituting a party — Ineffective ratification — C. A. 176/34 — Failure to defend action.*

In dismissing an appeal from the judgment of the District Court of Jerusalem dated the 29th October, 1935:—

HELD: 1. (Following C. A. 176/34). The agreement was not binding, not having been signed by all the persons constituting one party.
2. The ratification was ineffective, as it had not been notified to all parties, and had been effected after the cause of action had arisen.
3. Judgment could not issue against the persons who had not defended the action.

FOLLOWED: C. A. 176/34 (7, C. of J. 161).

ANNOTATIONS: On the indivisible effect of evidence as against all parties see also C. A. 224/43 (1944, A. L. R. 76).

FOR APPELLANT: Kehaty.

FOR RESPONDENTS: Haddad.

JUDGMENT.

The Appellant lodged this action against the Respondents claiming from them damages owing to their commission of a breach of the

terms of the agreement under which they undertook to transfer to him a certain land in accordance with the terms agreed upon in that agreement.

The legal point that was raised before the District Court and was the basic ground for dismissing the action is that the said agreement was not signed personally by Halimeh bint Suleiman who is one of several persons who constitute one party to the agreement, but that it was signed by Ismail, one of her two agents, who was not authorised to sign alone without associating with him the second agent, Yusef.

At a subsequent hearing to that at which this legal point was raised, counsel for Appellant submitted two exhibits, M. D. 1 and M. D. 2, stating that these two exhibits were a ratification of the agreement, one of them from Halimeh herself and the other from the second agent, Yusef, but the District Court did not consider these two ratifications for the reasons stated in its judgment and dismissed the action. Plaintiff appealed against this judgment which is the subject of this appeal.

This Court of Appeal has ruled in several cases, one of which is Civil Appeal No. 176/34, that every agreement that is not signed by all the members of the parties to that agreement cannot be considered as a valid agreement binding to the obligations consequent upon a breach of its terms.

The agreement which is the subject matter of this action does not bear the signature of Halimeh, nor that of one of her two agents, Yusef. The other agent, Ismail, is not entitled to represent and sign for Halimeh except in association and jointly with the other agent. We, accordingly, hold that the two documents of ratification, M. D. 1 and M. D. 2, both of which are undated and which were submitted by counsel for Appellant during the hearing of the action at the District Court, do not make the Respondents liable for the damages agreed upon:—

(1) because the Appellant claims from the Respondents damages for non-performance of the terms of the agreement within the period prescribed for the performance thereof. It was not proved to the District Court that the ratification had taken place before the stipulated period had expired to enable them to argue that at that time the agreement became binding and the Respondents became responsible for its due performance;

(2) because there was no evidence before the District Court to show that the Respondents were notified, before the expiry of the period stipulated for the performance of the terms of the agreement

on which Halimeh's signature was lacking, of the ratification of the agreement either by Halimeh herself or by her second agent, Yusef, so as to allow it to be stated that the Respondents had committed a breach of the terms thereof, by their non-compliance with its terms within the stipulated period, while knowing at that time that they were bound by a valid agreement and responsible for the due performance of its terms.

We do not agree with the contention of counsel for Appellant that the District Court erred in not giving judgment for damages against those Respondents who did not appear before it and who made no objection to the agreement as to the absence of Halimeh's signature, because an agreement which cannot be considered as evidence against those of the Respondents who were present at the hearing of the action, cannot also be considered as evidence against those who did not appear merely because they did not appear at the hearing.

We, accordingly, hold that the judgment of the District Court is in accordance with the law, and the appeal must, therefore, be dismissed with costs against Appellant.

Delivered this 22nd day of April, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 74/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Abdul Fattah Younis el Khawalidi. APPELLANT.

v.

Hassan Abdul Qader el Sayyed. RESPONDENT.

*Appeals — Points not taken in notice of appeal cannot be argued on appeal.*

*Alternative defences, how they should be taken — C. A. 58/27 — Point not argued in the lower Court, C. A. 160/35.*

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 16th day of April, 1936:—

HELD: 1. The point that the Appellant had no capacity to contract could not be argued on appeal as it had not been taken in the notice of appeal.

2. Alternative defences may be raised but this should be done with great care.

3. The point of damages and penalty could not be argued on appeal, although taken in the grounds of appeal, as it had not been argued in the lower Court.

FOLLOWED: C. A. 160/35 (9, C. of J. 864).

DISTINGUISHED: C. A. 58/27 (1, P. L. R. 203; 4, C. of J. 1552).

ANNOTATIONS: The ruling on the third point has been reiterated in C. A. 250/37 (1938, 1 S. C. J. 75); *cf.* also C. A. 85/40 (1940, S. C. J. 474). See, on the other hand, C. A. 80/43 (1943, A. L. R. 222).

FOR APPELLANT: Cattan.

FOR RESPONDENT: Moghannam.

## JUDGMENT.

Mr. Cattan, who argued this appeal at considerable length and ability, raised four grounds of appeal.

The first point was that the Court should have heard witnesses to prove the allegations of the present Appellant, who was the Defendant in the Court below. We hold, however, that in the circumstances the District Court was justified in refusing to hear the evidence.

The second point taken was that Appellant had no capacity to contract. As the Appellant did not mention this ground in his lengthy statement of appeal, this point cannot be argued at this stage.

His third point was regarding alternative defences. The present Appellant had two defences in the Court below, first that there is fraud, and alternatively that he refused to sign the contract as the purchase price was wrongly stated. We agree with Mr. Cattan that alternative pleas may be taken, but the person taking alternative pleas must be very careful in doing so, as such a course is very dangerous. The case quoted by Mr. Cattan, Civil Appeal No. 58 of 1927, cannot apply in the present case.

Mr. Cattan's fourth point was as regards the question of penalty and damages. This point was never raised and discussed in the lower Court, and although it is one of the grounds stated in the statement of appeal, it cannot be argued now before us. The same question has already been decided by this Court in Civil Appeal No. 160 of 1935.

The appeal should be dismissed with costs to include LP. 5 advocates' fees.

Delivered this 15th day of April, 1937.

*British Puisne Judge.*

CIVIL APPEAL No. 79/36.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Archimandrite Makarious. APPELLANT.

v.

Issa Cattan. RESPONDENT.

*Currency — Conversion — Excessive interest — Burden of proof — Rate of exchange prevailing at date of payment — 1918 Rules — Attachment.*

*Stamping — Promissory notes made before enactment of Stamp Duty Ord. admissible in evidence though not stamped.*

In allowing, as to part thereof, an appeal from the judgment of the District Court of Jerusalem, dated the 16th June, 1936, and in amending the judgment of the lower Court:—

HELD: 1. Unstamped promissory notes made before the enactment of the Stamp Duty Ordinance are admissible in evidence.

2. The Rules made in 1918 for the conversion of currency were temporary Rules. The ordinary rule is that sums payable in foreign currency in Palestine should be paid at the rate of exchange prevailing on the date of payment.

ANNOTATIONS: The ruling on the second point has been overruled in P. C. A. 1/42 (1943, A. L. R. 408).

FOR APPELLANT: Nasr.

FOR RESPONDENT: Cattan.

### JUDGMENT.

In this case the Respondent sued the Appellant on four promissory notes which amounted to 578 French gold pounds and 48 Egyptian pounds.

The Appellant's first objection to the judgment of the District Court in favour of the Respondent was that two of the promissory notes were not properly stamped. These promissory notes were made before the present Stamp Ordinance came into force and consequently they were admissible in evidence and could be sued on by the Respondent. That ground of appeal fails.

The next ground of appeal was that the Court below converted

Russian Roubles into French gold pounds without any evidence before it of the rate of exchange. In doing that the Court below was dealing with the Appellant's plea that excessive interest had been charged. The burden of proving the excessive interest was on the Appellant and the Court below was doing all it could, in the absence of any evidence from him, to see how much excessive interest had been charged, and the Appellant has no reason to complain of the rate of exchange which was adopted. With regard to excessive interest, there is one point which seems to have escaped the attention of the Court below, and that is, on the promissory note for 210 French gold pounds, they allowed interest for seven years, whereas it was clear from the evidence that only fifty of these pounds were lent in 1913. It is not quite clear when the remaining 160 pounds were lent, and we think the fairest thing to do is to regard the whole of these 160 pounds as having been lent in 1918; that makes the difference in the calculation of the total amount due by the Appellant to the Respondent. The calculation of the Court below made that amount 342 French gold pounds. Calculating according to what I have just said, the amount comes to 270 French gold pounds, that is seven years' interest on 50 pounds and two years' interest on 160 pounds. That makes the total amount due 442 French gold pounds and 48 Egyptian pounds.

With regard to the objection by Nasri Eff. Nasr that the order made by the Court as to the rate of exchange is wrong, we are against him on that point. The Rules to which he referred made in 1918 were mere temporary Rules to guide the inhabitants as to the rates of exchange on which debts at that date might be liquidated, but there is no reason to depart from the ordinary rule which always prevails in these matters, that is, sums payable in foreign currency in Palestine have to be paid at the rate of exchange prevailing on the date of payment.

With regard to the attachment, we made it clear this morning already that if the Commission on the Finances of the Orthodox Patriarchate had wished to take any objections to the provisional attachment, the law provided a means of doing so. As they did not appear, we do not propose to consider further the objections which have been argued by Nasri Eff. Nasr.

This disposes of the grounds of appeal which have been urged, and the result will be that the judgment of the Court below is varied by making it a judgment for the Plaintiff for 442 French gold pounds, plus 48 Egyptian pounds, less 70 Egyptian pounds. These amounts

to be converted in the local currency at the rate of exchange prevailing on the date of payment.

The attachment is confirmed and each party will pay its own costs of this appeal.

Delivered this 19th day of April, 1937.

*Senior Puisne Judge.*

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LAND APPEAL No. 17/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Ahmad Jibril Gheith & 5 ors. — APPELLANTS.

v.

Hadya Salah Saleh & 8 ors. — RESPONDENTS.

*Land Settlement — Village masha' — Prescription — Salameh v. Ismail — Village customs.*

In dismissing an appeal from the judgment of the Land Court of Jaffa, dated the 13th January, 1936:—

HELD: The ordinary laws of prescription applied as no custom apportioning the land yearly among the male inhabitants had been proved.

DISTINGUISHED: L. A. 121/26 (1, P. L. R. 234; 4, C. of J. 1271).

ANNOTATIONS: For authorities on *masha'a* lands see C. A. 99/43 (1943, A. L. R. 239) and annotations.

FOR APPELLANTS: Goitein.

FOR RESPONDENTS: Moyal.

JUDGMENT.

We need not trouble you, Mr. Moyal.

The Appellants claimed before a Settlement Officer a right to three and a half *suhums* out of 72 *suhums*, of the *masha'a* land in Bashit village. The Settlement Officer rejected their claim because the Respondents had been in possession since 1902. His decision was upheld by the Land Court.

In arguing the appeal before us, Mr. Goitein relied on the authority of Salameh & others *v.* Ismail, Law Reports of Palestine, 1920—33,

p. 234. That case referred to lands in the village of Beit Lid, which were registered in the names of twenty persons, who held it in trust for the villagers, and where the custom was to apportion each year the lands of the village among the adult male inhabitants. In the present case there was no such custom, the land was cultivated by the registered owners according to the number of shares held by them. Consequently, the ordinary law of prescription applies and the argument of the Appellant on this point fails.

The Appellants were unable to put forward any legal excuse which would defeat the defence of prescription.

No other ground of appeal was argued before us and we order that the appeal be dismissed.

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

Delivered this 29th day of April, 1937.

*Senior Puisne Judge.*

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LAND APPEAL No. 50/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Fayez Odeh Elias. APPELLANT.

v.

Bishara Odeh Elias. RESPONDENT.

*Title to land — Rectification of register — Land Court may hear oral evidence against a document, L. C. Ord., sec.* 8; *C. P. C. arts.* 80, 82 — *Fraudulent breach of trust, P. O. in C., Art.* 46.

In allowing an appeal from the judgment of the Land Court of Jerusalem, dated the 5th October, 1936, setting aside the judgment of the Land Court and remitting the case:—

HELD: The Land Court should not have refused to hear oral evidence against a registered title; generally on the ground that the limitations set out in art. 80 of the C. P. C. do not apply to Land Courts and particularly in this case where fraud was alleged and where the parties were brothers (C. P. C. art. 82).

ANNOTATIONS: The law as to the admissibility of oral evidence against entries in the Land Registry is fully set out in C. A. 2/38 (1938, 1 S. C. J. 165); *cf.*

also C. A. 130/38 (1938, 2 S. C. J. 3), P. C. 56/38 (1940, S. C. J. 277), C. A. 217/41 (1941, S. C. J. 609), C. A. 137/42 (1942, S. C. J. 713), C. A. 120/42 (1942, S. C. J. 899) and C. A. 179/42 (1942, S. C. J. 926).

FOR APPELLANT: Elia.

RESPONDENT: In person.

## JUDGMENT.

In this case the Appellant sought the rectification of a document, namely a certificate of registration in the Land Registry. He alleged that he and his brother, the Respondent, had jointly purchased land and had contributed jointly to building a house thereon, that they had agreed that they should jointly own the house and land, Appellant as to one-third, Respondent as to two-thirds. The Respondent, however, he said, registered the house in his (the Respondent's) name solely and refused to acknowledge that the Appellant owned any part of the house and land. The Respondent being registered as owner, the Appellant has no title unless he succeeds in his claim for rectification.

The Land Court heard the evidence of the parties but refused to hear the evidence of witnesses whom the Appellant wished to call in support of his claim. The Land Court apparently relied on Article 80 of the Ottoman Code of Civil Procedure and considered it was precluded from hearing the evidence of witnesses to contradict the effect of a document. It held that there was "no fraud against this *kushan*" and that no admissions had been proved, and dismissed the Appellant's case.

We think that the Land Court was wrong in considering itself bound by Article 80 of the Ottoman Code of Civil Procedure. Section 8 of the Land Courts Ordinance provides that a Land Court is not bound by the rules of evidence contained in that Code.

Further, and on broader grounds, we think that the Land Court should have heard the witnesses whom the Appellant desired to call. If the Appellant's story is true, he has an equitable right to one-third of the house and land, and the Respondent is a trustee as to that one-third. If the Respondent, by registering the land in his own name, intended to deprive the Appellant of his right, he was committing a fraudulent breach of trust. If there is no provision in the Ottoman Law by which a written document can be contradicted on the ground of fraud, then Article 46 of the Palestine Order-in-Council has to be resorted to and English Law may be applied. There can be no doubt that under that law the Appellant was entitled to call witnesses as to

the circumstances under which the land was bought and the house erected.

Lastly, even if the rules of evidence contained in the Ottoman Code of Civil Procedure are resorted to, it seems that the effect of Article 82 is to lay down that Article 80 does not apply when the parties are brothers, as they are in this case.

We are of opinion that the Land Court erred in refusing to allow the Appellant to prove his claim by the oral evidence of witnesses, and we order that the judgment appealed against be set aside and the case remitted to the Land Court with directions to hear the evidence of any witnesses whom the Appellant may desire to call in support of his claim and the evidence of any witnesses the Respondent may desire to call in reply and to decide the case in accordance with law.

Costs of this appeal will abide the event.

Delivered this 30th day of April, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 68/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland and Frumkin, JJ.

IN THE APPEAL OF:—

Noach Lipmann. APPLICANT.

v.

Joseph Kirjovsky. RESPONDENT.

*Appeals — Judgment in Appellant's favour — C. P. C., Art. 111 — Damages.*

In refusing an application for leave to appeal from the judgment of the District Court of Jaffa, sitting at Tel-Aviv, dated the 10th February, 1937:—

HELD : The arbitrators had awarded against the Appellant a smaller amount than claimed. This was in his favour and the Appellant could, therefore, not appeal.

ANNOTATIONS: *Cf.* C. A. 116/38 (1938, 1 S. C. J. 325) and cases cited in annotations thereto.

FOR APPLICANT: Silberg.

FOR RESPONDENT: Brevdo.

## JUDGMENT.

This is an application for leave to appeal to the Supreme Court from the judgment of the District Court of Jaffa, sitting at Tel-Aviv, dated 10th February, 1937, whereby the arbitrators' award dated 19th July, 1936, was confirmed and Appellant's opposition dismissed.

The two important grounds on which the application is based are:—

1. That the two arbitrators have given their award without any common consultation with the third arbitrator.
2. The award gives the Applicant as damages an amount smaller than that stipulated in the agreement, which is contrary to the provisions of Article 111 of the Civil Procedure Code.

As to the first point, which is a question of fact, the Court below heard evidence and came to the conclusion that the dissenting arbitrator resigned after all the proceedings were over and the majority award was decided.

The application on this point, therefore, fails.

With regard to the second point, as to whether the arbitrators are bound by Article 111 of the Civil Procedure Code, it does not arise in the present case, and we make no decision upon it. The Arbitrators gave an award less than the amount claimed for which the Applicant might have been liable. This is in Applicant's favour and it is obvious that he cannot appeal on a question such as this.

For these grounds, the application for leave to appeal is refused with costs and LP. 3.— advocate's fees.

Delivered this 14th day of May, 1937.

*British Puisne Judge.*

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LAND APPEAL No. 14/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Ahmad Issa Abu Hamdeh & 8 ors. APPELLANTS.

v.

1. Eliazar Yosef Elyashar,
2. Hay R. Elyashar. RESPONDENTS.

*Awlawieh — L. S. Officer has no jurisdiction to entertain priority*

*actions — Priority rights discussed — Function of Court — L. S. Ord., sec.* 10(1).

In dismissing an appeal from the judgment of the Land Court of Jaffa, dated the 19th February, 1936:—

HELD: 1. The right of *awlawieh* is optional and cannot be registered. It may be exercised at any time within the special period of limitation and the person to whom the right is adjudged by Court may withdraw from taking the land.

2. In *awlawieh* actions there is no dispute as to ownership or possession but only as to the estimation of *badal el misl* and as to whether the claimant is entitled to the right. Such actions, consequently, are not within the jurisdiction of the Land Settlement Officer.

ANNOTATIONS: On the statutory jurisdiction of the L. S. O. see C. A. 133 & 136/41 (1942, S. C. J. 122) and note 4.

FOR APPELLANTS: Nasr.

FOR RESPONDENTS: Eliash.

## JUDGMENT.

*Khayat, J.*: This is an appeal from the judgment of the Land Court of Jaffa, dated 19th February, 1936.

In this case, the question has arisen as to whether the Settlement Officer has jurisdiction to hear actions in regard to rights of priority (*Haq el Awlawieh*). The Settlement Officer held that such actions are not within his jurisdiction and the Land Court, in an appeal which was lodged therein against this decision, upheld the Settlement Officer's view.

I am of opinion that:—

(1) The right of priority is an optional right and individuals cannot be forced to make use of it, and, therefore, such right cannot be registered;

(2) The said optional right is limited to a period and can be claimed at any time during that period which is prescribed by law, and the individuals cannot be forced to make use of it at a certain date to be fixed by the Judge; and

(3) Even though a judgment is given in favour of claimant of the right of priority and the *Badal el Misl* having been fixed, he can, at any time, withdraw from taking the land and cannot be forced to accept it.

Section 10(1) of the Land Settlement Ordinance also shows the powers of the Settlement Officer and restricts them to deciding any dispute arising out of claims to ownership or possession of land. In

actions for priority there is no dispute as to ownership or possession, and the dispute is as to the estimation of *Badal el Misl* and ascertaining as to whether the person claiming the right of priority is the proper person in accordance with the law or not.

For these reasons, I hold that, the appeal must be dismissed with costs and advocate's fees LP. 3.—.

Delivered this 19th day of May, 1937.

*Puisne Judge.*

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CIVIL APPEAL No. 96/35.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: McDonnell, C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

The Reo Company of Palestine. — APPELLANTS.

v.

The Commercial Insurance Company of Ireland. — RESPONDENTS.

*Insurance — Arbitration clause — Action to be filed within 3 months from rejection of claim — Jureidini's case, Scott v. Avery, Woodall v. Pearl Assur. Co., Elliott v. Royal Exchange Assur. Co., Wilford & Otter-Barrey Fire Insurance — Repudiation of contract as a whole and repudiation by virtue of provision in the contract.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 21st January, 1935, and in remitting the case to the lower Court for completion:—

HELD: 1. (Following Scott v. Avery). Repudiation of the claim was made in virtue of a clause in the policy and not for extraneous reasons. The arbitration clause in the policy, therefore, applied.

2. There being no difference as to amount it was not necessary to go to arbitration. The limitation of 3 months began to operate from the date on which the amount had been agreed between the parties.

FOLLOWED: Scott v. Avery, 1856, 5 H. L. C. 811.

REFERRED TO: Woodall v. Pearl Insurance Co., 1919, 1 K. B. D., p. 604; Elliott v. Royal Exchange Assurance Co., 1867, L. R. 2 Ex., p. 245.

DISTINGUISHED: Jureidini v. National British and Irish Millers Insurance Co. Ltd., 1915, A. C., p. 499.

ANNOTATIONS: *Cf.* C. A. 71 & 72/39 (1939, S. C. J. 352) where an unsuccessful attempt was made to attack the validity of the same clause 13 in an insurance policy.

FOR APPELLANT: Bar Shira.

FOR RESPONDENT: Seligman & Wittkowski.

## JUDGMENT.

This is an action upon a policy for the insurance of a motor car issued by the Respondents to the Appellants.

The following conditions are endorsed upon the policy:—

> "XII. If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this policy; or, if the loss or damage be occasioned by the wilful act, or with the connivance of the insured; or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 18th condition of this policy) within three months after the Arbitrator or Arbitrators or Umpire shall have made their award, all benefit under this policy shall be forfeited".
>
> "XVIII. If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an Arbitrator ..... And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such Arbitrator, Arbitrators or Umpire of the amount of the loss or damage if disputed shall be first obtained".

The Insurance Co., the Respondents, denied liability on the ground that the Appellants failed to institute legal proceedings within three months from the date of the rejection of their claim by the Insurance Company as required by Clause XIII of the conditions endorsed upon the policy.

The following is the relevant part of the judgment of the District Court:—

> "The only point I want to discuss is the matter of time mentioned in Article 13 of the Policy, which states that the case should be raised within three months from the date of the refusal of the Company for payment..
>
> This point depends on the explanation of Article 13 and 18 of the Policy, and, notwithstanding the presence of some doubt, the Court is of opinion that the defence of the defendant is right.
>
> It is clearly shown in the letter of the Defendants dated 4.7.1934 that they absolutely deny their responsibility in accordance with

> this Policy and refuse to pay, and for that I find no need for arbitration for the estimation of the amount of damage.
>
> The only doubt that ensued is from the last clause of Article 18 of the Policy for the presence of the two words (if disputed), but the reality is that no dispute did ensue with regard to the amount of damage and loss; therefore, the condition found in the last clause of Article 18 cannot be applied, and is ineffective. Since we decided this point and we can give our judgment according to it, I find no reason for discussing the other points raised before us".

We have had cited to us Jureidini *v.* National British and Irish Millers Insurance Company Ltd. (1915) A. C. p. 499.

The Fire Insurance policy sued upon in that case contained conditions in exactly the same terms as Clauses XIII and XVIII of the conditions endorsed upon the policy in the case before us.

In Jureidini's case the Insurance Company repudiated the claim *in toto* upon the ground of arson and fraud and it was held, distinguishing Scott *v.* Avery (1856) 5 H. L. C. 811, that repudiation of the claim on a ground going to the root of the contract precluded the Company from pleading the arbitration clause as a bar to an action to enforce the claim. As was said in his judgment in that case by Viscount Haldane, L. C.:—

> "No doubt it is true that the policy contains an arbitration clause with a very stringent addition to it, to the effect that the going to arbitration is a condition precedent to the right to sue; and if that had been all, — if the action had been brought upon a policy containing such a clause and no more had happened, — then, on principle and on authority, the claim could not have been maintained without fulfilling the condition precedent; because by the law of this country you can make most contracts which you desire, and, among others, a contract that you will not come under liability under a contract unless that liability is defined in a particular way, it may be by an arbitrator.
>
> Scott *v.* Avery is a decision of this House to the effect that that is the law. But in Scott *v.* Avery the action was brought upon a contract containing such a clause, and to the declaration a plea was put in raising this term of the contract: that the action could not be maintained because the plaintiff had contracted that he should have no cause of action unless there had been a previous arbitration. On that the plea was demurred to, and this House, after consulting the judges, who differed very much in opinion, ultimately decided that the demurrer was not a good demurrer, that the plea was a good one, and that the action could not be maintained. That was in effect a decision upon the demurrer. But the present case, as I have already pointed out, is different; there has been in the proceedings throughout a repudiation on the part of the respondents of their liability based upon charges of fraud and arson, the effect of

which, if they are right, is that all benefit under the policy is forfeited. But one of the benefits is the right to go to arbitration under this contract, and to establish your claim in a way which may, to some people, seem preferable to proceeding in the Courts; and accordingly that is one of the things which the appellants have, according to the respondents, forfeited with every other benefit under the contract.

Now, my lords, speaking for myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced".

Bankes, L. J., In Woodall *v.* Pearl Assurance Co. (1919) 1 K. B. D. at p. 604 said:—

"It is necessary to draw a clear and sharp distinction between two separate classes of cases. One class is where the insurance company is repudiating a contract in the sense that they are disputing the existence of any binding contract at all. Jureidini's Case falls within that class. The other is where the Company is repudiating liability under the contract, but is accepting the existence of the contract as a binding contract. Stebbing *v.* Liverpool and London and Globe Insurance Co. (1917) 2 K. B. at p. 433 is an instance of the latter class".

On page 605 the learned Judge goes on:—

"How then is the case affected by the decisions in Jureidini's case and in Stebbing's Case. In the former case, which is a good illustration of the first of the two classes I have mentioned, clause 12 of the policy provided that if, among other things, the claim were in any respect fraudulent, or if any false declaration were made or used in support thereof, all benefit under the policy should be forfeited. The arbitration clause provided for arbitration in case any difference arose as to the amount of any loss or damage, and it was confined to the ascertainment of the amount of loss or damage, if any such difference arose. The insurance company alleged that the claim was fraudulent, that all benefit under the policy had been forfeited, and that there was consequently no existing binding contract between the parties; and they pleaded that it was a condition precedent to any right of action on the policy that an award of the amount of loss or damage if disputed should be first obtained. That was the question which the House of Lords had to decide. The opinions of the Law Lords do not, I think, proceed upon quite the same grounds, but all the learned Lords made it clear that the decision proceeded upon the ground that the dispute between the parties did not come within the arbitration clause at all, and that the insurance company took up the position that they repudiated the contract in the fullest sense, and that the policy had been forfeited. I do not think that it is necessary to refer in detail to the passages in the opinions of Lord Haldane, L. C., Lord Dunedin, and Lord Atkinson for this purpose. Stebbing's Case is a good example of the second class of

> cases to which I have referred, and the language of Lord Reading, C. J., makes this clear. He said: "But the phrase 'avoiding the policy' is loosely used in reference to the circumstances of this case. In truth the Company is relying upon a term of the policy which prevents the claimant recovering". And later on: "In the present case the Company are claiming the benefit of a clause in the contract when they say that the parties have agreed that the statements in question are material and that they induced the contract. If they succeed in escaping liability that is by reason of one of the clauses in the policy".

The report in Scott *v.* Avery is not available in this country but the effect of it as stated by Bramwell, B. in Elliott *v.* Royal Exchange Assurance Co. (1867, L. R. 2 Ex. at p. 245) is cited in a footnote on page 314 of the 3rd Edition of Wilford & Otter-Barrey's Fire Insurance dated 1932 as follows:—

> "If two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third person has so assessed the sum. For to say the contrary would be to give to the party a different measure or rate of compensation from that for which he has bargained".

Now, in the case before us there is no question of a repudiation by the Insurance Company of the contract as a whole by reason of something arising outside and existing independently of the contract, to use the words of Duke, L. J., at p. 611 of Woodall *v.* Pearl Assurance Co., and what the Insurance Company say is that they deny liability by virtue of the provision in the policy by which actions must be entered within a certain time, which they allege has elapsed. The case is governed, therefore, not by Jureidini's case but by the decision in Scott *v.* Avery.

The following facts must now be taken into account.

The Company on the 17th June, in Ex. 3, repudiated liability pursuant to condition XIII; it repeated this on the 4th July in Ex. 4, upon which the District Court relied.

The proper course then was, under the authorities which we have cited, to go to arbitration. This the Appellants evidently proposed in their letter of the 29th July referred to in the letter of the Company's advocate of the 30th August.

It is untrue to say, as did this letter, that "under the date 6th May, 1934, your clients (*i. e.* the insured) and my clients (*i. e.* the insurers)

agreed upon the sum of LP. 378", but the letter prefaces this by saying "I have to inform you that there is no dispute whatsoever between your clients and my clients in regard to the amount". This must be taken to be an acceptance of the offer of the 6th May and brings the matter in consequence out of the scope of condition XVIII, inasmuch as from that date there was no difference as to the amount of any loss or damage. This letter, therefore, must be taken in lieu of an award and its date must be taken to be the date of the commencement of the three months within which the action must be commenced.

The statement of claim was filed on the 21st October, 1934, the action was, therefore, commenced within the time prescribed in Clause XIII of the conditions in the policy. The judgment of the District Court must, therefore, be set aside and the case remitted for completion accordingly.

Delivered this 20th day of May, 1936.

*Chief Justice.*

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CRIMINAL APPEAL No. 174/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

1. Yusef Shehadeh Bannour,
2. Diab Abdul Khaleq Saydan,
3. Yusef Hussein Saydan. APPELLANTS.

v.

1. Mariam, widow of Yusef Abdullah,
2. Heirs of Halimeh el-Sha'er. RESPONDENTS.

*Compensation in lieu of diyet — No notice of claim required — Civil and Religious Courts Jurisdiction Ord., sec. 6 — Religious denomination of parties immaterial — Finding of Criminal Court.*

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 24th September, 1936, whereby the Appellants were ordered jointly and severally to pay the sum of LP. 300 to the civil claimants:—

HELD: 1. It is not necessary to serve notice of a claim for compensation in lieu of *diyet*.

2. Sec. 6(2) of the ordinance applies to non-Moslems as well.

ANNOTATIONS: On compensation in lieu of *diyet see* C. A. 39/41 (1941, S. C. J. 155) and cases therein cited; *cf.* also cases cited in note 1 thereto.

FOR APPELLANTS: Moghannam.

FOR RESPONDENTS: H. S. Dajani.

JUDGMENT.

In this case the Appellants, having been convicted by the District Court of Jaffa of wilful murder, were ordered to pay compensation in lieu of *diyet*.

Mr. Moghannam has appealed to this Court on their behalf against this order and his first ground of appeal is that he was not served in the Court below with any notice of the application to claim *diyet*. As regards this we do not think any notice was necessary. The terms of Section 6(2) of the Civil and Religious Courts Jurisdiction Ordinance are quite clear, the sub-section speaks of compensation in lieu of *diyet* and gives a Criminal Court power to award such compensation at the request of a person entitled to *diyet*.

Mr. Moghannam had another ground of appeal, *viz.* that Section 6(2) refers to non-Moslems only and that the parties here concerned are Moslems. We do not agree. Section 6(2) is an additional provision to Section 6(1), which refers to Moslems only, and confers a jurisdiction on a Criminal Court, no matter to what denomination the parties may belong.

A third ground of appeal was that the Appellants did not themselves commit the homicide, but were only aiding and abetting. The answer to this is that they were found guilty of wilful murder.

The appeal is dismissed with costs to inclule LP. 3.— advocate's fees.

Delivered this 29th day of May, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 139/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Salim Cotran. APPELLANT.

v.

1. Raja Rayes,
2. Administrators of the Estate of the late Iskander Kassab. RESPONDENTS.

*Partnership — Claim against dissolved partnership or against partners — Prescription.*

In allowing an appeal from the judgment of the District Court of Haifa, dated the 23rd day of April, 1935, setting aside the judgment of the District Court and ordering a new trial:—

HELD: The District Court should have ascertained whether any former partner of the defunct partnership had received moneys on behalf of the Appellant, in which case the Appellant would have a cause of action.

## JUDGMENT.

1. On November 23rd, 1934, the Appellant brought an action for an account against the Respondents in the District Court of Haifa. A firm entitled "Rayes and Kassab" had been carrying on business in Haifa and the Appellant alleged in his statement of claim that extensive business transactions began between himself and the said firm in the year 1912. In particular he alleged that just before the outbreak of the Great War he delivered considerable quantities of goods to the firm for shipment and sale abroad, but that the price of these goods did not reach the members of the firm until sometime after the Armistice in 1918.

2. The District Court found as a fact that the firm of Rayes and Kassab was dissolved on the 24th December, 1915, by the death of Salim Bey Rayes, a member of the firm. It also made a finding that the Appellant had admitted in paragraph 4 of his statement of claim that the sums claimed from the firm were owing since 1912, and that the claim was consequently barred by limitation. This finding was due to a mis-reading of paragraph 4 — that paragraph only alleged that the business transactions between Appellant and the firm commenced in 1912.

3. The essence of the Appellant's claim was that on a certain date after the Armistice (the Court found this to be either 1923 or 1924) certain persons who had been members of the firm received the price of the goods which the Appellant had delivered to the firm in 1914 for shipment and sale abroad. The Appellant's contention was, therefore, that the moneys had been received in 1923 or 1924 and these were the dates on which the moneys became due, and that no question of limitation could arise, the period of limitation being fifteen years. The Court did not deal with this aspect of the matter — all it said was this:—

> "The Court cannot find legal grounds for hearing the action against defendants in their capacity as partners to Rayes and Kassab firm because the partnership was dissolved and annulled on the death of one of the members Salim Bey Rayes in 1915. If a member of this dissolved partnership received part of the value of the plaintiff's goods in 1923—1924, then he can institute against him a separate action".

4. In the earlier part of its judgment the Court held that the action had been instituted against the firm of Rayes and Kassab. This helps to explain the error into which it fell in the passage which I have just quoted. In the statement of claim the defendants were described as follows:—

> "1. Raja Bey Rayes, in his capacity as partner of the late firm 'Rayes and Kassab' and as heir of the estate of his late father Selim Bey Rayes, member of the said partnership, and
> 2. Messrs. Fuad Saba, Muhammad Ali Bey el Tamimi and Hanna Asfour, administrators of the estate of the late Iskander Kassab, member of the late firm 'Rayes and Kassab'."

5. It is quite clear that the Appellant did what the District Court said he ought to have done. He did not sue the firm, he chose to sue three persons who had been members of the firm. One of these had been a partner and was alive. The two others were dead and the personal representative of their estates were sued in their stead.

6. There were thus three persons who had been partners concerned, *viz.* Raja Bey Rayes, who was alive at the time of the action, and Salim Bey Rayes and Iskander Kassab, who were both dead. The issues before the District Court were simple, to determine whether any of these persons had received money on behalf of the Appellant and at what dates, at what dates the period of limitation began to run, and whether Raja Bey Rayes and the representatives of the other persons were bound to account. From what has been said it is clear that the District Court failed to appreciate the nature of the action and the issues involved. There is no finding as to whether any of the persons concerned received any moneys on behalf of the Appellant and this Court cannot, therefore, make any order for an account. In my opinion the judgment of the District Court should be set aside and there should be an order for a new trial. The costs of this appeal, to include LP. 5.— advocate's fees, should abide the event.

Delivered this 18th day of June, 1937.

*Senior Puisne Judge.*

I concur.

*Puisne Judge.*

I concur.

*Puisne Judge.*

CIVIL APPEAL No. 2/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Corrie, S. P. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

A. S. Elberg. APPELLANT.

v.

Bank Bnei Brak Ltd. RESPONDENT.

*Arbitration — Objection to confirmation of award — Mistake of calculation in award — In re Hall and Hinds, Phillips v. Evans, Russell — Evidence heard in absence of parties — Walker v. Frobisher.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 22nd March, 1934, in setting aside the judgment of the lower Court and substituting a fresh judgment:—

HELD: 1. The mistake in the amount did not appear on the face of the award and the award would not be set aside on that ground.

2. The fact that the arbitrator had heard evidence in the absence of the parties was fatal to the validity of the award.

FOLLOWED: Phillips *v.* Evans, 1843, 13 L. J. Ex. 80; Walker *v.* Frobisher, 1801, 6 Ves. 70.

NOT FOLLOWED: Hall and Hinds, *in re*, 1841, 10 L. J. C. P. 210.

ANNOTATIONS:

1. For an example of an award being bad on the face of it see C. A. 228/41 (1941, S. C. J. 570).

2. On the second point *cf.* C. A. 235/43 (1943, A. L. R. 814) and note 2.

FOR APPELLANT: H. Margalith.

FOR RESPONDENT: Sasson.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jaffa, dated the 22nd March, 1934, dismissing an opposition by the present Appellant, A. S. Elberg, to the confirmation of an award given in arbitration proceedings between him and the present Respondent, Bank Bnei Brak Ltd.

The first ground put forward by the Appellant is that the arbitrator has made a mistake with regard to a sum of 345 dollars due to the Appellant, as shown by the Respondents' books, and has credited the Appellant with a sum of 300 dollars only.

The Appellant relies upon the judgment *in re* Hall and Hinds (1841) 10 L. J. C. P. 210, cited in Russell on Arbitration, 12th Edition, page

404. In that case, the arbitrators instead of adding two sums together, subtracted one from the other and directed payment only of the difference. Upon an affidavit of these facts by two out of three arbitrators, the award was set aside. That judgment, however, was not followed in the more recent case of Phillips *v.* Evans (1843) 13 L. J. Ex. 80, cited in Russell on Arbitration, pages 404—405. In that case, the arbitrator omitted by mistake a sum admitted to be due to the Plaintiff, the result being that he awarded in favour of the Defendant instead of the Plaintiff. It appeared on affidavit that, on the error being pointed out, the arbitrator admitted it and requested the Defendant to allow him to reconsider the award, which the Defendant refused. The error did not appear on the face of the award, nor did the arbitrator make any affidavit. The Court refused to set aside the award.

In accordance with this judgment, we hold that the Appellant is not entitled to have the award set aside upon this ground.

The second ground of appeal is that the arbitrator heard evidence in the absence of the Appellant.

With regard to this the Court has made the following finding:—

> "We consider that the important point is that the arbitrator heard witnesses in the absence of the parties. It appeared to us after hearing the evidence that he actually did that. The evidence of the witness whom he heard was a legal evidence and has its effect inasmuch as the arbitrator heard a person's statement after he had closed the proceedings on the 24th July, and had merely commenced preparing the form of the judgment. He further stated clearly that he issued his award after having heard all the evidence and he relied on the books of the bank: and that what he heard after the 24th July was of no effect. He moreover asserted that after the 24th July he looked up the books again to enable him to draft the judgment in the proper form".

Upon this, the District Court dismissed the Appellant's opposition.

It is clear, however, that it is misconduct on the part of an arbitrator to take evidence in the absence of a party upon which a Court may set an award aside.

In Walker *v.* Frobisher (1801) 6 Ves. 70, where some witnesses attended before the arbitrator to give evidence on behalf of the Defendant and the arbitrator, notwithstanding that the parties had agreed to produce no more evidence, received the testimony of these witnesses, the parties and solicitors on both sides being present, the award was set aside on the ground that the evidence had been improperly admitted although the arbitrator swore that the evidence thus received had no effect on his award. Lord Elson, L. C., being of opinion that no Court

should permit an arbitrator to decide so delicate a matter as whether a witness, examined in the absence of one of the parties, had an influence on him or not.

In accordance with the rule so laid down, we hold that the judgment of the District Court must be set aside and judgment entered allowing Appellant's opposition and setting aside the arbitrator's award.

Costs here and below will be paid by the Respondent.

Delivered this 25th day of March, 1936.

*Senior Puisne Judge.*

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CIVIL LEAVE APPLICATION No. 6/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Frumkin and Khayat, JJ.

IN THE APPLICATION OF:—

Noach Havkin. APPLICANT.

v.

Bank Ashrai Cooperative Society, Ltd. RESPONDENT.

*Arbitration — Submission to be unambiguous — Method of reference provided in case parties agree to submit — District Court refusing to appoint arbitrators.*

In dismissing an application for leave to appeal from the judgment of the District Court of Jaffa, dated the 15th April, 1936:—

HELD: The clause in the Society's rules did not constitute an agreement to submit.

ANNOTATIONS: *Cf.* H. C. 96/42 (1942, S. C. J. 618) and cases cited in note 2 thereto.

FOR APPLICANT: Hamburger.

FOR RESPONDENT: Karwassarsky.

JUDGMENT.

This is an application for leave to appeal to this Court from the judgment of the District Court of Jaffa, dated the 15th April, 1936, in proceedings arising out of a clause in the rules of a society which has reference to arbitration.

The clause in question provides:—

"All disputes between a member of the Society or past member of not more than six months prior to the disputes, or any one having claims through such member or such person and between the Society or its officials will be tried in a competent Court in place of domicile of the Society or before Arbitrators as follows:—

(1) Both parties choose three arbitrators.

(2) Arbitration costs to be borne by the Litigant Party.

(3) Copy of the award to be served by the Arbitrators on the Society".

A dispute having arisen, an application was made by one party to the dispute to arbitrate under the above clause, but the other party refused to submit to arbitration.

An application was made to the District Court under the Arbitration Ordinance for the appointment of arbitrators, and the District Court refused the application. The question now arises whether the District Court was right in so doing.

The clause in question is not well drafted, and it seems to us that its true intention is that a dispute may be decided by the Court, in which case the Court is to be the Court of the domicile of the Society, or it may be decided by arbitration, in which case provision is made for the form of arbitration.

Before the arbitration link of the clause becomes operative, it is necessary for both parties to the dispute to agree to submit to arbitration, but having so agreed that link dealing with the method of arbitration becomes operative. In this particular case, the Respondent Society refused to submit to arbitration, and we think the District Court was right in the view that it took.

The application is, therefore, dismissed with costs and LP. 3.— advocate's fees.

Delivered this 25th day of March, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 113/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

1. Shmuel Gertner,
2. Zipora Gertner. APPELLANTS.

v.

Menachem Hochman. RESPONDENT.

*Arbitration — Whether award is conditional — Award remitted to arbitrators by appellate court — Land described in award of partition to be accurately defined.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 10th September, 1934, and in remitting the award to the arbitrators with directions:—

HELD: 1. The provision for payment of compensation after valuation of the plots did not make the award conditional.
2. The land partitioned should be defined.

ANNOTATIONS:

1. The following is the text of the award:—

"At our sitting on the 27th *Tevet a. c.*, before us the Rabbinate for the Jaffa and Tel-Aviv District, there appeared Mr. Menachem Hochman as Plaintiff, and Mr. Shmuel Gertner and his wife Zipora as Defendants, in a matter concerning the division of a plot of land which they purchased jointly from Mr. Silberstein. Both parties have undertaken in writing to comply with the award to be issued by us: and after hearing arguments and evidence, we have decided:—

A. The lot between them, made with the consent of both parties, stands valid, and the parties succeed to the shares fallen to them by the lot. Mr. Shmuel Gertner and his wife, the half to the East, bounding on the land of Salonica Jews: and Mr. Hochman the Western half.

B. If, subsequent to the grant of the *Kushans*, it shall appear that the share of Mr. Gertner is worth more, he shall pay to Mr. Hochman the sum of LP. 15 in respect of the excess: and Mr. Gertner has already deposited this sum.

Given under our hand at Tel-Aviv, this 30th day of *Shevat*, 5693.

*The RABBINATE for the Jaffa and Tel-Aviv District.*"

2. The judgment of the District Court was as follows:—

"Whereas the subject matter of the dispute is a land, and whereas the land was referred to in the judgment in a vague way, and inasmuch as the judgment is subject to a contestable condition, therefore, the judgment is not subject to execution in its present form, and we decide to dismiss the case.

Costs and Court fees should be paid by the Plaintiff with LP. 1 advocate's fees.

Judgment delivered in presence, this 17th day of September, 1934."

JUDGMENT.

The appeal is allowed.

The case is remitted to the arbitrator to define the land, which is the subject matter of the award, accurately.

We hold that the award is not conditional.

Respondent to pay costs and LP. 3.— advocate's fees.

Delivered this 18th day of February, 1937.

*British Puisne Judge.*

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CIVIL APPEAL (LEAVE APPLICATION) No. 5/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: McDonnell, C. J., Frumkin and Khayat, JJ.

IN THE APPLICATION OF:—

Hayim Alexander Kachko. APPLICANT.

v.

Aharon Levin. RESPONDENT.

*Arbitration — Award set aside and remitted to umpire — Interpretation of judgment — Leave to appeal under sec.* 15(3) *— Party cannot appeal decision made in his favour — Result of misconduct: setting aside or remitting award, Halsbury, p.* 676, *secs.* 12, 13.

In dismissing an application for leave to appeal from the judgment of the District Court of Jaffa, dated the 16th November, 1936, in Civil Case No. 343/36:—

HELD: 1. The English rule that where there has been misconduct the Court may either set aside or remit the award applies under secs. 12 and 13.

2. The District Court had set aside the award. The decision was consequently in the Applicant's favour and he could not appeal it.

ANNOTATIONS:

1. This case was followed in C. A. 21/38 (1938, 1 S. C. J. 144); see also C. A. 245/43 (1943, A. L. R. 814).

2. On the second point *cf.* C. A. 68/37 (*ante*, p. 57) and annotations.

FOR APPLICANT: P. Goldberg.

FOR RESPONDENT: Livay.

## JUDGMENT.

An application was made to the District Court, sitting at Tel-Aviv under the Arbitration Ordinance to confirm an award made in an arbitration.

The Court refused to confirm the award and found misconduct on the part of the arbitrators. They, therefore, set aside the award and went on to hold "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."

From that judgment the present Applicant, who was the Defendant in the proceedings before the District Court, asks to appeal to this Court by leave under Section 15(3) of the Arbitration Ordinance.

It is clear according to English Law where misconduct in the technical sense has been found against an arbitrator or an umpire, the Court may either set aside the award or remit it (see Halsbury's Laws of England, Hailsham Edition, Vol. I, p. 676): and it would seem that the same powers may be exercised by the Court under Sections 12 and 13 of the Ordinance.

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. The present Applicant, therefore, applies for leave to appeal against a judgment in his own favour and his application is refused. Advocate's fees LP. 3.—.

Delivered this 12th day of February, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 121/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Copland and Frumkin, JJ.

IN THE APPEAL OF:—

Abraham Haim Yadgaroff. APPELLANT.

v.

1. Abraham Haim Khojainoff,
2. Farha Khojainoff,
3. Hanna Khojainoff. RESPONDENTS.

*Arbitration — Partition — Agreement to abide by decision of persons named — Proceedings then brought in Court — Partition is a matter of a judicial nature — Submission and award.*

In dismissing an appeal from the judgment of the District Court of Jaffa, sitting at Tel Aviv, dated the 10th May, 1937:—

HELD: There had been a submission and an award relating to partition. Partition could, therefore, not be sought in the Court.

ANNOTATIONS: For another instance of an award *re* partition of land see C. A. 113/35 (*ante*, p. 72).

JUDGMENT.

The parties who were joint owners of an orange grove, decided to have a partition. They entered into an agreement by which certain named persons were to decide the four portions into which the grove should be divided and they agreed to abide by the decision of these persons. The grove was divided and the parties, including the Appellant, are satisfied with their share. In spite of this, the Appellant took partition proceedings in a Magistrate's Court. That Court held that, in the circumstances, such proceedings could not be brought, and its decision was upheld by the Land Court.

We think the Land Court was right. The agreement referred differences for decision to certain persons, and partition is certainly a matter of a judicial nature. There was, therefore, a submission, followed by an award, and the Appellant cannot now take proceedings for partition in Court.

The appeal is dismissed with costs, to include LP. 5.— advocate's fees.

Delivered this 22nd day of July, 1937.

*Senior Puisne Judge.*

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LAND APPEAL No. 33/34.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFRE: Corrie, A/C. J., Khaldi and Frumkin, JJ.

IN THE APPEAL OF:—

1. Abdullah Ibrahim El Wahsh,
2. Ahmad Ibrahim El Wahsh. APPELLANTS.

v.

Khalil Musa. RESPONDENT.

*Arbitration — Third party opposition to a judgment — Award by special referee under Sec. 5(1) Land Courts Ord. — Arbitration Ord. sec. 14, C. P. C. 161.*

In allowing an appeal from the judgment of the Land Court of Jerusalem, dated the 7th February, 1934, setting aside the judgment of the Land Court and in remitting the case for completion:—

HELD: The third party opposition was based on the earlier judgment, not on the judgment confirming the award. The case would be returned for completion.

## JUDGMENT.

This is an appeal against a judgment of the Land Court given on the 7th February, 1934, upon a third party opposition to a judgment of the Court delivered on the 7th September, 1931, based upon an award made by a referee upon a reference under Sec. 5(1) of the Land Courts Ordinance, 1921.

The Land Court has declared the award cancelled on the ground of misconduct of the arbitrator in that his award interfered with the rights of the Respondent.

It was, however, not the award but the earlier judgment of the Land Court, in respect of which the third party opposition was made: and it is, therefore, for the Land Court to consider the objection made to its earlier judgment and to make such order thereon as to the Court may seem just.

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

Costs will follow the event.

Delivered this 27th day of June, 1935.

*Acting Chief Justice.*

The Respondent, Khalil Musa, has lodged a third party opposition under Article 161 of the Civil Procedure Code against a judgment of the Land Court, dated 7th September, 1931, whereby an award made by a referee upon a reference by the Court under Section 5(1) of the Land Courts Ordinance, 1921, was authenticated under that Sub-section.

Now an opposition under Article 161 of the Civil Procedure Code is a totally distinct proceeding from an opposition to the enforcement, under Section 14 of the Arbitration Ordinance, 1926, of an award made upon a submission to arbitration by the parties to a dispute.

The subject of the opposition under Article 161 is not the award but the judgment based thereon; and such judgment is clearly open

to attack by way of opposition in the same manner and upon the same conditions as any other judgment of the Land Court declaring title to land.

It follows that the Land Court has jurisdiction to hear the Respondent's opposition.

Delivered this 27th day of June, 1935.

*Puisne Judge.*

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CIVIL APPEAL No. 99/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, A/C. J. and Frumkin, J.

IN THE APPEAL OF:—

David Payess. APPELLANT.

v.

Simha Hodorov & 3 ors. RESPONDENTS.

*Arbitration — Irrevocable power of attorney given to execute the award — Objections to the award not precluded by the power of attorney*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 10th February, 1935, and in remitting the case to the District Court for trial:—

HELD: The Appellant was not precluded, by having given an irrevocable power of attorney to execute the award, from contesting the validity of that award.

ANNOTATIONS: *Cf.* C. A. 154/42 (1942, S. C. J. 951) — waiver of misconduct.

FOR APPELLANT: P. Joseph.

FOR RESPONDENTS: Siev.

JUDGMENT.

In this case the District Court decided that as the Appellant had given an irrevocable power of attorney to have an award executed he was precluded from having the award set aside on grounds which included misconduct of the arbitrators, errors of law and illegality of the transaction out of which the submission arose.

We do not agree. The Appellant is entitled to apply to set aside

the award, even though he may seem to have agreed to it. If his contentions are correct, the award may be set aside.

The case must be remitted to the District Court for Appellant to argue on the objections set out by him — the Court will then decide on the validity of the award, having heard, of course, the arguments of the Respondents in reply.

The judgment of the lower Court is set aside.

Costs to follow the event.

Delivered this 24th day of December, 1936.

*Acting Chief Justice.*

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CIVIL APPEAL No. 149/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Shlomo Kronhauz. APPELLANT.

v.

Baruch Heiman. RESPONDENT.

*Arbitration — Sec. 6(1)(c), additional arbitrator may be appointed.*

In allowing an appeal from the judgment of the District Court of Haifa, dated the 30th May, 1937, in quashing the judgment of the lower Court and in remitting the case with directions:—

HELD: The District Court was empowered, under Sec. 6(1)(c), to appoint an additional arbitrator.

ANNOTATIONS: The judgment of the District Court was as follows:—

"The Court finds that the two parties have agreed to appoint two arbitrators *vide* per arbitration deed and that they had authorized same to appoint a third arbitrator if they deem that fit. Whereas it has been found unnecessary by one of the arbitrators to appoint a third arbitrator at the present time, and whereas the appointment of a third by one of arbitrators is outside his authority and jurisdiction, and as the Court is only entitled to appoint a third arbitrator if same is deemed fit by both arbitrators the Court orders the Plaintiff's case to be dismissed in its present condition with costs, for he failed to convince the Court that there are judgments from the English Courts which justify the acceptance of his case,

bearing in mind that he had ample time within which to produce all his legal documents.

Judgment given on the 30th day of May, 1937."

FOR APPELLANT: Tovbin.

RESPONDENT: In person.

## JUDGMENT.

It appears to us that this is an application to the District Court within the meaning of Section 6(1)(c) of the Arbitration Ordinance. The District Court took the view, apparently, that that provision did not apply and refused to appoint an additional arbitrator. In our view, the District Court was wrong in so doing.

The judgment of the District Court will, therefore, be quashed and the case remitted to it to comply with that provision, with costs of this appeal and LP. 3 advocate's fees.

Delivered this 28th day of September, 1937.

*Chief Justice.*

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## CIVIL LEAVE APPLICATION No. 9/33.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Khayat, JJ.

IN THE APPLICATION OF:—

The Kfar Ganim Cooperative Society Ltd. — APPELLANTS.

v.

1. Isaac Dubitzy,
2. Jacob Feirstein. — RESPONDENTS.

*Arbitration — Appointment of arbitrator by District Court — Conduct of parties — Appointment not contested.*

In dismissing an application for leave to appeal from the judgment of the District Court of Jaffa, dated the 10th July, 1933:—

HELD: Appellant did not contest the right of the Court to appoint an arbitrator. Leave to appeal would not be granted.

JUDGMENT.

In the proceedings in the District Court the Appellant never contested the right of the Court to appoint an arbitrator: he only discussed the question who should be so appointed.

Under these circumstances we see no ground for allowing an appeal against the refusal of the District Court to grant leave to appeal.

The appeal is dismissed with costs, including LP. 2.500 mils advocate's fees and expenses.

Delivered this 29th day of March, 1934.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 15/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland and Khaldi, JJ.

IN THE APPEAL OF:—

Shehadeh Isleman. APPELLANT.

v.

Michael Bornescu. RESPONDENT.

*Arbitration — Appeals — Judgment in arbitration given on review — Leave to appeal required.*

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 8th November, 1936:—

HELD: The proceedings were an arbitration matter (even though decided on review) and the judgment was, therefore, not appealable without leave.

ANNOTATIONS: This decision has been followed in C. A. 111/39 (1939, S. C. J. 509).

FOR APPELLANT: Shapiro.

FOR RESPONDENT: Tovbin.

JUDGMENT.

The original application was for the enforcement of an award under the Arbitration Ordinance.

The application was refused for certain reasons which do not affect the point in issue.

An application to review its former judgment was then submitted to the District Court of Haifa. The Court, however, saw no reason to alter its previous judgment.

The appeal before us is against this judgment of the District Court.

This is a matter under the Arbitration Ordinance and in order to be able to appeal to the Supreme Court it is necessary first to obtain leave to appeal either from the District Court or from the Court of Appeal. It is admitted that no such leave has been asked for, much less given.

It has been argued before us with considerable ability by Mr. Shapiro that this being an appeal against a judgment given on review, it is not an appeal in a matter under the Arbitration Ordinance.

We do not agree with this argument.

The whole matter was an application under the Arbitration Ordinance. Supposing the District Court allowed the application for review and accepted the application for the enforcement of the award, an appeal to this Court against such a decision would have to be by leave under the Arbitration Ordinance.

We hold, therefore, that leave to appeal should have been obtained by Appellant, and in consequence of his having failed to do so there is no appeal before us. The appeal is, therefore, dismissed on this preliminary objection. The Appellant must pay the costs and LP. 4.— advocate's fees.

Delivered this 25th day of May, 1937.

*British Puisne Judge.*

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CIVIL LEAVE APPLICATION No. 12/34.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Corrie, A/C. J. (S. P. J.), Frumkin and Khayat, JJ.

IN THE APPLICATION OF :—

Maurice Goldenthal. APPLICANT.

v.

Antoine F. Albina. RESPONDENT.

*Arbitration — Application for leave to appeal under sec. 15(2) — Supreme Court has no jurisdiction if no previous refusal by the District Court.*

In dismissing an application for leave to appeal from the judgment of the District Court of Jerusalem, dated the 1st November, 1934:—

HELD: As the District Court had given no order refusing leave to appeal, the Supreme Court had no jurisdiction to entertain such an application.

ANNOTATIONS:

1. C. A. 239/41 (1941, S. C. J. 557) is to the same effect.

2. For further proceedings in this case see C. A. 13/37 (*post*, p. 86) and P. C. L. A. 13/37 (*post*, p. 88).

## ORDER.

A formal order of the District Court refusing leave to appeal is to be filed in duplicate by the Applicant on or before the 26th December, 1934.

The sale in execution of the judgment in favour of the Respondent is to be stayed pending further hearing of this application.

Delivered this 19th day of December, 1934.

*Acting Chief Justice.*

## JUDGMENT.

As no order of the District Court has been given refusing leave to appeal this Court has no jurisdiction to hear an application for leave to appeal under Sec. 15(2) of the Arbitration Ordinance, 1926.

The application is, therefore, dismissed and the order of this Court, dated 19th December, 1934, staying execution pending the further hearing of this application, is discharged, with costs: including LP. 3 advocate's fees.

Delivered this 8th day of February, 1935.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 17/35.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Corrie, A/C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Said Awad Khoury. — APPELLANT.

v.

Ni'meh Awad Khoury. — RESPONDENT.

*Arbitration — Allegations of misconduct made before and after remittal of award to arbitrators — Invalidity of judgment.*

In allowing an appeal from the judgment of the District Court of Nablus, dated the 30th January, 1934, in setting aside the judgment of the District Court and remitting the case with directions:—

HELD : No allegations of misconduct before the remittal of the award could be entertained by the District Court. Misconduct after the remittal could be established and the District Court should have heard evidence on that question.

FOR APPELLANT: Asfour.

FOR RESPONDENT: F. Atalla.

JUDGMENT.

So far as this appeal rests upon allegations against the arbitrators of misconduct prior to the judgment given by the District Court on the 16th November, 1932, we hold that the appeal must fail.

It was open to the present Appellant to prove, in the proceedings to enforce the award which led up to that judgment, the misconduct which he now alleges; and the District Court's judgment whereby it remitted the award to the same arbitrators for further consideration implies the finding that no such misconduct was proved to the Court as would disqualify the arbitrators from proceeding in the arbitration.

That judgment is not subject to appeal and it was binding upon the District Court in the subsequent proceedings upon the Appellant's application to have two of the arbitrators removed.

With regard to misconduct alleged to have been committed since the judgment of the 16th November, 1932, the District Court must hear evidence and give judgment: and the judgment of the District Court given on the 30th January, 1934, is, therefore, set aside and the case remitted.

Costs will follow tbe event.

Delivered this 3rd day of July, 1935.

*Acting Chief Justice.*

CIVIL APPEAL No. 126/34.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: McDonnell, C. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Salim Cotran. APPELLANT.

v.

Wadia 'Ead & 3 ors. RESPONDENTS.

*Arbitration — Leave to appeal from judgment confirming award — Time for filing — Sec. 15(1), C. P. C. 22, C. A. 109/32, C. A. 182/33 — Computation of time.*

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 5th May, 1934:—

HELD: The appeal would have to be dismissed as it had been filed more than 30 days after delivery of the judgment, allowance being made for the period pending grant of leave to appeal.

REFERRED TO: C. A. 109/32; C. A. 182/33 (not reported).

ANNOTATIONS: The procedure is now governed by the C. P. R., 1938; *cf.* C. A. 239/41 (1941, S. C. J. 557).

FOR APPELLANT: F. Atalla.

FOR RESPONDENT: Catafago.

JUDGMENT.

In this case the judgment confirming the arbitration award was dated 5th May, 1934. An application for leave to appeal was filed on the 26th May: such leave was granted by the District Court on the 30th May and was served on the Applicant on the 31st May, that is five days after the filing of the application.

The petition for appeal was then filed on the 3rd June and the grounds of appeal on the 14th June.

The provisions of Sec. 15(1) of the Arbitration Ordinance, 1926, import the rules of procedure prescribed for civil actions, *i. e.* Art. 22 of the *addendum* to the Civil Procedure Code, which prescribes thirty days as the period for lodging appeals.

Now, in this case the period from the 5th May to the 14th June is forty days and if from this period, on the analogy of the decision in C. A. 109/32, followed in Mulki *v.* Mulki, C. A. 182/33, we deduct the five days from May 26th to May 31st, between the Applicant's

filing of his application for leave and the grant to him of such leave, we are left with a resulting period of 35 days.

This being in excess of the thirty days allowed results in the appeal being out of time and it is, therefore, dismissed with costs to include LP. 6.— advocate's fee.

Delivered this 24th day of March, 1936.

*Chief Justice.*

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CIVIL APPEAL No. 13/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Maurice Goldenthal Morrison of Maadi, Egypt. APPELLANT.

v.

Antoine F. Albina. RESPONDENT.

*Arbitration — Lack of evidence to support award is not error patent — Judgment of District Court not setting out reply to all arguments.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 1st November, 1934:—

HELD: 1. It was not necessary for the District Court to deal in detail with every argument raised.

2. The absence of evidence to support an award does not constitute a defect patent on the face of the award.

ANNOTATIONS: As to when an award is "bad on the face of it" see Russell on Arbitration, 13th ed., *pp.* 190 *seq.*; *cf.* C. A. 228/41 (1941, S. C. J. 570).

2. See P. C. L. A. (C. A. 13/37) at p. 88, *post.*

FOR APPELLANT: Smoira.

FOR RESPONDENT: Kehaty.

JUDGMENT.

By an agreement, dated the 15th November, 1928, Appellant (a property owner) and Respondent (a Real Estate Agent) agreed to act in partnership from that date until the end of 1929 in all transactions pertaining to immovable property.

A dispute arose between the parties to the agreement which was referred to an arbitrator.

The Respondent submitted an application for the confirmation of the award, and the Appellant opposed such confirmation and asked

that it should be set aside. The District Court, however, after hearing the advocates of both parties, stated in its judgment that it did not see any legal ground which would prevent the confirmation of the award nor any ground which would necessitate the setting aside of that award. It thereupon confirmed the award.

Application for leave to appeal having been granted, the Appellant now requests this Court to set aside the judgment of the District Court referred to above and dated 1st November, 1934, on the following grounds:—

(1) That the judgment appealed against did not contain any reasons.

(2) That the arbitrator misconducted himself in adjudicating upon matters beyond the limits of the submission, and that accordingly his award should not be enforced and/or should be set aside.

(3) That the arbitrator misconducted himself in stating a case before the District Court of Jerusalem in an improper manner, and in proceeding to give his award, though the questions raised in the case stated were never validly decided by the said Court.

(4) That the arbitrator had no evidence before him on which he could award to the Respondent the amount he did.

With regard to the first ground, we are of opinion that the judgment of the District Court deals quite sufficiently with the arguments advanced by the parties. If the lower Court finds it unnecessary in its judgment to deal with every point raised, it will be a mere waste of time to require it to do so and in our opinion it will serve no useful purpose.

As to the second point, we believe that the arbitrator's award is an excellent one. We went through it carefully and cannot see how he has gone beyond the limits of the submission.

We do not see anything in the third point at all: and the allegation that there was no evidence to support the arbitrator's findings is not an error on the face of the award.

No defects appear to be on the face of the award, and the District Coure before confirming the award heard both parties to the dispute.

We cannot see any merits whatsoever in the appeal.

The appeal must, therefore, be dismissed with costs and LP. 5.— advocate's fees.

Delivered this 3rd day of June, 1937.

*British Puisne Judge.*

P. C. L. A. CIVIL APPEAL No. 13/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J. and Greene, J.

IN THE APPLICATION OF :—

Maurice Goldenthal Morrison. APPLICANT.

v.

Antoine F. Albina. RESPONDENT.

*Arbitration — Application for leave to appeal to Privy Council from judgment confirming award — Computation of value of award — No question of great general or public importance conferring jurisdiction on the Court — Quaere whether fees form part of matter in dispute — Matters not taken in first instance.*

In refusing an application for conditional leave to appeal to His Majesty in Council from the judgment of the Supreme Court sitting as a Court of Appeal, dated the 3rd June, 1937, in Civil Appeal No. 13/37:—

HELD: The costs of the award could not be included among the matters in dispute, to entitle the Applicant to appeal, as the question of excessive costs had not been raised in the grounds of appeal.

ANNOTATIONS: See the previous proceedings, C. L. A. 12/34 (*ante*, p. 82) and C. A. 13/37 (*ante*, p. 86).

FOR APPLICANT: Smoira.

FOR RESPONDENT: Eliash.

### ORDER.

1. In a dispute between one Morrison and one Albina a chartered accountant named Young was appointed arbitrator. He gave his award on March 12th, 1934. There were two matters in dispute between the parties. The first concerned a share in the profits in connection with the sub-letting of a house in Jerusalem. The second was a claim by Morrison for the value of certain shares in a limited company. On the first matter the arbitrator made an award of LP. 488.750 mils in favour of Albina. On the second matter he ordered Albina to assign to Morrison 225 shares in a limited company or their nominal value of LP. 225.—. The award was confirmed by the District Court of Jerusalem, whose decision was affirmed by this Court on appeal. Morrison now seeks conditional leave to appeal to the Judicial Committee of the Privy Council, and Mr. Eliash, the advocate for Albina, objects on the ground that the matter in dispute is not of the value of LP. 500.— or upwards.

2. Dr. Smoira, on behalf of Morrison, says that the arbitrator ordered Morrison to pay to Albina the costs of the arbitration amounting to LP. 27.500 mils and also to pay the arbitrator's fees and expenses amounting to LP. 95.680 mils, and that the addition of those amounts to the sum of LP. 488.750 mils brings the matter in dispute to over LP. 500.—. He does not say that the matter is one of great general or public importance conferring on this Court a discretion to grant leave to appeal irrespective of the amount involved.

3. When asking for leave to appeal from the District Court to this Court Morrison gave as a ground that the fees charged by the arbitrator were excessive. After leave was granted, however, he did not embody this ground in his written grounds of appeal, nor did he argue it before this Court. He cannot be heard now to say that these fees form part of the matter in dispute. As regards costs generally, it has not been urged that the arbitrator made an unfair or erroneous exercise of his discretion. This being so the costs are not included in the matter in dispute and cannot be added to the amount of LP. 488.750 mils in order to make the amount involved LP. 500.— or upwards.

4. Furthermore, from the affidavit filed it is clear that Morrison does not dispute the award to him of 225 shares, on the ground that more shares should have been awarded and that the value of what should have been awarded would amount to LP. 500.— or upwards. The affidavit shows that the only matter in dispute between the parties is the correctness of the arbitrator's award in ordering Morrison to pay LP. 488.750 mils. For the above reasons I am in agreement with Mr. Eliash and am of opinion that leave to appeal cannot be granted. Albina will have the costs of this application to include LP. 5.— advocate's fees.

Delivered this 3rd day of December, 1937.

*Senior Puisne Judge.*

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HIGH COURT No. 33/37.

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

BEFORE: Trusted, C. J. and Copland, J.

IN THE APPLICATION OF :—

Reuben Sheinzwit. — PETITIONER.

v.

Inspector General of Police. — RESPONDENT.

*Criminal procedure — Access to statement of witnesses in police file — No discovery in criminal cases — Inherent right of the Crown to object to the production of a document — CR. A. 162/28, CR. A. 7/33, P. C. 79/35 — When statements should be put in evidence — Certified copies may be delivered — Exhibits to be used by experts should be available to defence — General remarks on law of evidence.*

In allowing an application for an Order to issue to the Respondent, directing him to show cause why the Petitioner and/or his advocates should not have access to the statements of the witnesses made to the Police at such times and places as they may reasonably demand, and in making the order absolute:—

HELD: 1. The defence should be given access, before the trial, to previous statements made by witnesses whose names appear on the back of the information.

2. These statements should not be put in evidence before re-examination.

3. The defence should have access to exhibits upon which the prosecution expert may give evidence.

REFERRED TO: CR. A. 162/28 (1, P. L. R. 348; 2, C. of J. 603); CR. A. 7/33 (P. P. 14.iii.33); Mahadeo *v.* The King, 1936, 2 All E. L. R. 813.

ANNOTATIONS: The latest authority on the subject is H. C. 14/43 (1943, A. L. R. 64) where earlier authorities are reviewed.

FOR PETITIONER: Abcarius.

FOR RESPONDENT: Solicitor General — (Rose).

## O R D E R.

This is a return to a rule *nisi* and our decision involves several important points of evidence and practice.

No comprehensive evidence ordinance has yet been passed by the legislature and as a result the Courts have been guided by some requirements of the Ottoman Law, the Evidence Ordinance, now Cap. 54, and certain English rules and principles.

Where it has been sought to cross-examine a witness as to a previous statement made by him in writing the principles laid down in the English Criminal Procedure Act 1865 (28 and 29 Vic. c. 18) relating to such cross-examinations, have in effect been applied by the Courts and this would seem to be a convenient practice.

The question with which we are concerned is, what steps may properly be taken by a defendant in a criminal matter, to obtain copies of, or access to, previous written statements by prospective adverse witnesses.

It is contended by Abcarius Bey in support of the rule that in criminal cases where a witness has appeared before a magistrate, the

practice of the Courts and justice require that the accused person should have access to any statement in writing made by a witness whose name appears on the back of the information. He does not contend, and we do not think he could do so, that an accused person has any right of access to the police file.

The Solicitor General argues that what is sought is in effect discovery, and that as a general rule there is no discovery in criminal cases; that there is an inherent right in the Crown, exercisable by the Chief Secretary, to object to the production of documents on the grounds of public interest, but this principle, which so far as I know is not disputed, does not directly arise as the Chief Secretary has put forward no objection either generally or to the particular documents — if any — to which this rule applies; and, no doubt following the principles of the English Act to which I have referred, he says the proper time to deal with the matter is at the trial.

Our attention is directed to Criminal Appeal No. 162 of 1928, Palestine Law Reports, page 348. The substance of that decision is as follows:—

> "If, however, a complainant or a witness for the prosecution has made a statement to the Police which is inconsistent with his deposition or evidence, or which goes to support the case for the defence, it would clearly be a denial of justice that the existence or nature of such statement should be withheld from the defence. They are entitled, if they so desire, to have such statement put in evidence and to use it as a ground for cross-examination of the person by whom it was made.
>
> It follows that an opportunity must be given to the defence to peruse such statements before the trial, if they so desire, for the purpose of deciding whether they wish to have the statements put in evidence."

This decision has been followed and in one instance, Criminal Appeal No. 7/33, where the Court held that the defence must be allowed to peruse statements to the police before the trial, enlarged.

The only English decision to which our attention has been called which would seem to be directly in point is a recent one of the Privy Council in an appeal from Fiji, Mahadeo *v.* The King (Privy Council Appeal No. 79 of 1935) which, for all material purposes, fell to be decided according to the English common law. It appears that a witness, Sukraj, had made earlier statements and that the defence asked for their production, and in the Privy Council their Lordships held:—

> "In the result the statements of Sukraj were not produced but they were available on the hearing of this appeal before their Lordships. The refusal of these documents is the subject of the first comment

> which their Lordships feel bound to make upon the conduct of this trial. There is no question but that they ought to have been produced, and their Lordships can find no impropriety in the letter asking for their production. It is true that upon cross-examination without the statements Sukraj admitted that he had at first put forward a story of suicide. But it is obvious that counsel defending the Appellant was entitled to the benefit of whatever points he could make out of a comparison of the two documents *in extenso* with the oral evidence given and an examination of the circumstances under which the statements of the witnesses changed their purport."

It is not clear if the defence applied for the production to them of these statements before the trial or for their production at the trial. From an earlier passage in their judgment where their Lordships state: "These statements were not admitted at the trial in circumstances to which it will be necessary to refer later," it would seem that their Lordships' criticism was chiefly directed against their non-production at the trial.

Primarily a court of trial must decide the matter on the evidence adduced before it but clearly it is open to the defence to seek to show, by cross-examination, that some or all of a witness's evidence should not be accepted, and for this purpose a previous statement by the witness may be of use.

We are of opinion, therefore, that the Defence are entitled to have access to previous statements in writing by witnesses whose names appear on the back of an information, and having regard to the difficulties caused by the conditions in this country, particularly the need for translation, we think that the balance of convenience decrees that such access should be given before, rather than at, the trial.

We do not agree with so much of the judgment in Criminal Appeal No. 162/1928 which lays down that the defence are entitled to decide whether they wish to have the statements put in evidence.

If they are used for cross-examination they can clearly be used in re-examination, and they become one of the matters to be considered by the Court under Section 12 of the Evidence Ordinance. It would not in our opinion be right that they should be put in evidence until the witness concerned has had an opportunity of explaining or otherwise dealing with them.

In so far as the judgment in Criminal Appeal No. 7/33 may be taken to apply to statements made by persons whose names are not upon the information we do not agree with it.

When application is made for access to statements we see no objection to the accused person or his advocate being furnished with a

certified copy thereof, the originals being available for the Court of Trial should they be required.

A further and somewhat different point was raised by Abcarius Bey that the accused is entitled to access to reports furnished to the police by expert witnesses, in this case a hand-writing expert, and in his affidavit he says — "The petitioner must be given an opportunity of showing the said Report, before the trial, to independent experts for if he be unable so to do the presentation of his defence will be seriously prejudiced."

In argument Abcarius Bey stated that the evidence given by this witness at the preliminary hearing before the Magistrate was not sufficient to enable him to prepare his defence on that part of the case. We have seen the deposition and it seems to us clearly to indicate the matters upon which the expert based his opinion.

The accused or his advocate or expert is entitled, under proper safeguards, to have access to the exhibits upon which the prosecution's expert based his opinion, and the expert for the defence can then form his opinion, and with that assistance the defence will be able to cross-examine if they wish.

Abcarius Bey stated that he had tried to get a copy of the expert's report in this case from the expert himself and that he had been asked LP. 20 for it. As this is an *ex parte* statement we make no comments upon it. The police will, no doubt, enquire if one of their witnesses was prepared to sell a copy of his report — if he made one — to the defence for this large, or any, sum.

The rule will, therefore, be made absolute with regard to statements in writing, if any, in the possession of the police, made by persons whose names appear upon the information, in the case of the Attorney-General *v.* Reuben Sheinzwit, subject to the police being at liberty to furnish certified copies of such statements if they wish instead of giving access thereto.

Given this 2nd day of July, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 31/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Moshe Jacob Rabikoff. APPELLANT.

v.

Estate of Moshe Golenberg, through Mrs. Zipora Golenberg, heir to the estate and trustee by order of the Rabbinical Court. RESPONDENT.

*Sale of land — Claim for the return of purchase price, C. A. 87/30, 89/30, 50/26, 147/26 — Sale and agreement to sell, L. T. Ord., sec. 11 — Procedure.*

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 13th September, 1936:—

HELD: Subject to the terms of an agreement, the purchaser can always ask for the return of money paid by him, before transfer of the land at the Land Registry. The vendor may sue for damages.

REFERRED TO: C. A. 50/26 (1, P. L. R. 131; 1, C. of J. 29); C. A. 147/26 (1, P. L. R. 116; 1, C. of J. 378); C. A. 87/30 (5, C. of J. 1789); C. A. 89/30 (1, P. L. R. 574; 2, C. of J. 421).

ANNOTATIONS: The decision in this case seems no longer to be good law: It has been held in C. A. 261/40 (1941, S. C. J. 36) that whether or not a claim for refund of purchase price succeeds depends primarily on the terms, if any, of the contract; see also C. A. 80/43 (1943, A. L. R. 222) and note 1. For earlier authorities *vide* C. A. 253/37 (1938, 1 S. C. J. 66) and annotations, and C. A. 217/38 (1938, 2 S. C. J. 221).

FOR APPELLANT: Fleischer.

FOR RESPONDENT: Silberg.

## JUDGMENT.

Plaintiff (Respondent) raised an action against the Defendant (Appellant) in the Magistrate's Court of Tel-Aviv for the return to him of a sum of LP. 100 which he paid to the latter in order to transfer to him a piece of land in Affuleh.

The Magistrate's Court accepted Plaintiff's claim and entered judgment in his favour for the sum claimed with legal interest as from 9.7.1936.

The District Court upheld the Magistrate's judgment.

On the application of Appellant, the President of the District Court granted leave to appeal to the Supreme Court on the following so-called points of law:—

1. Whether the Respondent was entitled to claim back the purchase price paid in respect of an agreement for sale of a plot in face of the judgments Supreme Court sitting as a Court of Appeal C. A. 87/30, 89/30, 50/26, 147/26.
2. Wheher the sale of a plot by a person, not being the owner or possessor of it, is to be regarded as a transaction in the meaning

of Art. 11 of the Land Transfer Ordinance, 1920, or as an agreement for sale.

3. Whether the refusal to give the Appellant possibility to prove that the parties lodged with the Land Registry Office the Application for Transfer, No. 26/36 in order to show that there was an agreement for sale and not a transaction, was contrary to the form and principles of the Law of Civil Procedure.

We are surprised that leave to appeal should have been granted on these so-called points of law. Only one point is really involved and that has been settled law for a very long time. More care should be taken in framing points of law for submission to this Court.

It is perfectly clear that, subject to the terms of an agreement, the purchaser of immovable property may always bring an action for the return of the money paid by him before the registration is effected in the Land Registry. Section 11 of the Land Transfer Ordinance is quite clear on this point, though, of course, the vendor may be at liberty to bring an action for damages.

This is a sufficient answer to the first point for which leave to appeal has been granted. The other two points, if they be points of law, do not, therefore, arise.

The appeal is, therefore, dismissed with costs and LP. 4.— advocate's fees.

Delivered this 1st day of June, 1937.

*British Puisne Judge.*

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CIVIL APPEAL No. 25/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Abraham Rindzunsky. APPELLANT.

v.

Noach Havkin. RESPONDENT.

*Hearing — Advocate to be heard before order made.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 8th day of May, 1936, setting aside the judgment of the District Court and remitting the case for a fresh hearing:—

HELD : The District Court should have allowed the Appellant's advocate to conclude his argument before remitting the case to the arbitrators.

FOR APPELLANT: Harari.

FOR RESPONDENT: Livay.

JUDGMENT.

In this case the Appellant sought before a District Court to have an award set aside. The District Court, without hearing the whole argument of Appellant's advocate, ordered the case to be remitted to the arbitrators. We are of opinion that the District Court should not have made any order affecting the rights of the Appellant without hearing the argument of his advocate in full. The order of the District Court must, therefore, be set aside and the matter remitted to it for a fresh hearing.

Costs will follow the event.

Delivered this 1st day of June, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 183/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Khalil Malass & Co. APPELLANTS.

v.

Valor Societe de Vente d'Aciers Lorrains, Paris. RESPONDENTS.

*Arbitration — Stay under sec. 5 — Appointment of arbitrator by Court — Court may appoint arbitrator or umpire under sec. 6 only in certain circumstances.*

In allowing an appeal from the judgment of the District Court of Haifa, dated the 23rd June, 1935, and in setting aside the order of appointment made by the lower Court:—

HELD : The Court had no jurisdiction to appoint an arbitrator before the procedure contemplated by sec. 6 had been complied with.

FOR APPELLANTS: Ben-Israel.

FOR RESPONDENTS: Weinshall.

JUDGMENT.

In this case the District Court stayed proceedings under Section 5 of the Arbitration Ordinance, 1926. It there and then asked the parties to appoint their arbitrators, and as there was no agreement, the Court itself appointed an arbitrator.

The appointment of an arbitrator or an umpire is in the first instance a matter for the parties themselves. If they fail to agree, then the procedure laid down in Section 6 of the Arbitration Ordinance has to be followed, *i. e.* notice to be served by one party on the other, then an interval of at least fifteen days and then an application to the Court to appoint an arbitrator or umpire. This procedure was not followed in this case, and the Court had no jurisdiction to make an order at the stage when it did so.

The appeal will be allowed with costs (to include LP. 3.— advocate's fee).

The order relative to stay of proceedings will stand, and so much of the order as relates to the appointment of an arbitrator is set aside.

Delivered this 4th day of November, 1936.

*Senior Puisne Judge.*

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LAND APPEAL No. 71/34.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Hayim Margalith-Kalvarisky. APPELLANT.

v.

Joseph Elyashar. RESPONDENT.

*Powers of attorney — Delegation, how and when effected — C. A. 111/32.*

In overruling a preliminary objection in an appeal from the judgment of the Land Court of Haifa, dated the 7th July, 1935:—

HELD: The delegation, by power of attorney, was ineffective as it had been made before the advocate delegating the power had been appointed. The delegation by letter was valid.

FOLLOWED: C. A. 111/32 (not reported).

ANNOTATIONS: *Cf.* C. A. 22/42 (1942, S. C. J. 259).

FOR APPELLANT: B. Joseph.

FOR RESPONDENT: Mizrahi.

JUDGMENT.

A preliminary objection was raised in this Court by Mr. Mizrahi, the counsel for Respondent, to the effect that the notice of appeal which is dated the 15th August, 1934, was signed by Mr. Friedenberg who is not entitled by law to sign it, and he asked the Court to hold that no appeal lies before them in this case.

In reply to the said objection, Dr. Joseph, the counsel for Appellant, stated that Mr. Friedenberg was authorised by him to sign the said notice of appeal by virtue of a power of attorney and by a letter.

The power of attorney given to Mr. Friedenberg is dated the 19th April, 1928. In accordance, therefore, with the judgment of this Court in Hamudah *v.* Yorkshire Insurance Co., Civil Appeal 111/32, it could not confer upon Mr. Friedenberg power to act in a case in respect of which Mr. Joseph himself received no power of attorney until the 21st April, 1934.

As to the letter which is dated the 29th of June, 1934, we find that it does authorise Mr. Friedenberg to sign the notice of appeal, because it confirmed the said power of attorney and rendered it operative up to its date, and it was given when Dr. Joseph was attorney in this case, and prior to the date on which Mr. Friedenberg had signed the notice of appeal.

By virtue of this letter Dr. Joseph has renewed the power of attorney given by him to Mr. Friedenberg at the time when he was representing the Plaintiff.

The objection is, therefore, overruled.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 196/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Copland and Frumkin, JJ.

IN THE APPEAL OF:—

Henry Cattan. APPELLANT.

v.

Jamileh Y. Laama. RESPONDENT.

*Advocates — Agreement under sec. 21 of Advocates Ord. — Ecclesiastical Court — Case stated on a point of law.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, (appellate capacity), dated the 7th November, 1935:—

HELD : The agreement being concerned with litigation in an Ecclesiastical Court did not fall under sec. 21 of the Advocates Ordinance, Cap. 2 (Sec. 22 of the Advocates Ordinance, 1938).

ANNOTATIONS :

1. The previous proceedings were as follows:—

1. Judgment of the Magistrate:—

"I am of opinion that the letters produced today do not establish the allegation of Defendant's attorney that the bringing of the action by the attorney Jiryes Zughbi was subject to the issue of a special permit by the Defendant.

Defendant's attorney admits that the previous attorney Jiryes Zughbi was holding a general power of attorney from the Defendant wherein she authorizes him to brief others for bringing the action in respect of the estate of the late Ya'coub A'ma.

By virtue of this power of attorney Jiryes Zughbi entered into an agreement with Plaintiff Henry Eff. Cattan on the 28th of May, 1934, whereby he authorized the latter to represent his client in the case brought before the Ecclesiastical Court for the confirmation of the will of the late Ya'coub A'ma for LP. 90 as Advocate's fees payable on demand.

After this authorization and on 1/11/34 Plaintiff and the attorney Jiryes Zughbi were informed that they had been dismissed from the power of attorney by Defendant Jamileh. The said agreement was not denied in Court, and I am unable to find any law which prevents its execution. This Court had previously decided the dismissal of all objections brought in respect of it by the attorney of defence.

Wherefore, I decide the liability of the Defendant Jamileh for the payment of the sum agreed upon, namely, LP. 90.— with costs."

2. District Court Judgment:—

"Having been filed within the prescribed period, the appeal is allowed in form.

It appears that the Appellant alleges that the Respondent did not perform such duties as to justify the said fee being awarded, and that it is excessive.

As it was for the Magistrate to go into that point and arrive at a decision thereon and as he failed so to do, the judgment is, therefore, set aside and the case remitted to the Magistrate to comply and give judgment accordingly".

3. Order granting leave to appeal:—

"Leave to appeal to the Supreme Court, sitting as a Court of Appeal is hereby granted on the following point of law:—

"Whether or not an agreement made between an advocate and client for fees in respect of proceedings before a Latin Ecclesiastical Court is subject, with reference to the amount of fees, to reduction or control under Sec. 19 of the Advocates Ordinance, 1922, on the ground of it being excessive, or whether such an agreement is

outside the operation of the Advocates Ordinance in view of the definition of Civil Court in the said Ordinance as excluding Religious Courts and of the other provisions of the said Ordinance".

2. For authorities on advocates' remuneration see C. A. 83/42 (1942, S. C. J. 485) and annotations.

FOR APPELLANT: Abcarius.

FOR RESPONDENT: Amon.

## JUDGMENT.

On the point of law submitted, we decide that the agreement in this case, being concerned with litigation in an Ecclesiastical Court, is not an agreement within the meaning of Sec. 21 of the Advocates Ordinance.

In spite of this ruling, the Order of the District Court must stand as there may be other grounds for contesting the payment of the full LP. 90.— agreed on.

Costs to abide the event.

Delivered this 4th day of February, 1937.

*Senior Puisne Judge.*

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## PRIVY COUNCIL LEAVE APPLICATION No. 5/36.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Khaldi and Khayat, JJ.

IN THE APPLICATION OF :—

Sheikh Abdul Hafeez & 3 ors. APPLICANTS.

v.

Ahmad Ibn Mahmud Snobar. RESPONDENT.

*Leave to appeal to Privy Council — Construction of power of attorney, "up to the last degree of trial" — Certification of signature in joint and several power, Advocates Ord. sec. 20 — Delay in making objection to power of attorney — Name of party altered in pleadings — Failure to object in time — C. P. C. 16, 186 — Judgment over LP. 500, quaere whether leave required.*

In allowing an application for leave to appeal to the Privy Council from the judgment of the Supreme Court, sitting as a Court of Appeal, dated the 7th April, 1936, in Civil Appeal No. 78/35:—

HELD: 1. The power of attorney was "to the last degree of trial" and therefore, included authority to apply for leave to appeal to the Privy Council.

2. As the advocates were appointed jointly and severally, any of them could certify the client's signature.

3. No objection had been made to the alteration of the names of the parties, it was too late to raise it now.

4. *Quaere* whether leave was required where the amount of the judgment exceeded LP. 500.—.

ANNOTATIONS:

1. On the interpretation of powers of attorney to advocates *cf.* C. A. 129/41 (1941, S. C. J. 308) and annotations.

2. On the last point *vide* P. C. L. A. — C. A. 169/35 (8, C. of J. 690).

3. The proceedings terminated with the grant of a certificate of non prosecution; see 1938, 2 S. C. J. 97.

FOR APPELLANT: Abdul Hadi.

FOR RESPONDENT: A. L. Saleh.

## JUDGMENT.

This is an application for leave to appeal to the Privy Council against a judgment of this Court delivered on the 7th April, 1936.

The application was made on the 7th May, 1936, but by reason of the disturbed state of the country it did not come before this Court until 26th January, 1937, when it was adjourned in order that the power of attorney might be produced.

It is admitted by the advocates representing the Applicants and the Respondent that the sum involved is LP. 2000.—.

The advocate for the Respondent objects to the granting of leave to appeal on three grounds:—

First, that the power of attorney held by Awni Bey Abdul Hadi, who appears for the Applicants, is defective in that it does not extend to authorise him to apply for leave to appeal to the Privy Council, and that it was improperly drawn. The power of attorney ran as follows:—

> "We have appointed advocates Awni Bey Abdul Hadi and Ibrahim Eff. Nijem jointly and severally to appear on our behalf and defend us in the civil case brought against us by Ahmad Mahmud Snobar, for the sum of LP. 2,050, before the District Court of Jaffa under No. 242/33, up to the last degree of trial; and we authorise them to delegate this power to others and to raise a counter-claim, to serve and be served upon and to issue notifications and generally in everything emanating or resulting from the case".

In our opinion the words "up to the last degree of trial" are wide

enough to cover an appeal to the Privy Council, and as Awni Bey and Ibrahim Eff. Nijem are appointed jointly and severally, we are of opinion that it is properly certified within the meaning of Section 20 of the Advocates Ordinance (Drayton, Cap. 2). Throughout these proceedings, which started some four years ago, Awni Bey has acted under the power of attorney and no objection has been made thereto.

The second point of objection is that the application is made by four persons, the fourth of whom is described as Muhammad Haj Hassan Zuhd. These proceedings started in the District Court of Jaffa and came on appeal to this Court. When they were originally started this party was described as Ahmad Haj Hassan Zuhd, his proper name. The matter then came on appeal to this Court still in this party's proper name and was returned by this Court to the Jaffa District Court.

It again came on appeal to this Court, and so far as we are able to discover owing to a clerical error the name Muhammad was substituted for Ahmad. No objection appears to have been taken to this, and the proceedings on the second appeal to this Court were conducted in the name of Muhammad and in consequence the present application was made in that name.

We are satisfied that this was a mistake which the present Respondent took no steps to put right and we are of opinion that this is no ground for refusing the appeal.

The third ground of objection is somewhat similar to the second in that the first of the four Applicants is described as Sheikh Abdul Hafeez whereas he should have been described as Sheikh Abdul Hafeez Ibn Haj Hassan Al-Zuhd (namely the son of Haj Hassan Al-Zuhd) and that consequently his full name and description have not been given as is required by Articles 16 and 186 of the Civil Procedure Code.

It seems that in the earlier stages of these proceedings his full description was given and in the Notice of Appeal, in the last appeal to this Court, it was included but for some reason or other it does not appear in the judgment in that appeal.

We do not consider that this is an adequate ground for refusing leave to appeal.

If this case proceeds to the Privy Council it will be open to the Respondent to take all or any of these points, should they be so advised.

As this is a final judgment and the amount involved exceeds LP. 500.—, it is not altogether clear if any leave to appeal is required under Section 3 of the Palestine (Appeal to Privy Council) Order-in-

Council, but if such appeal is required we give leave subject to the Applicants producing within six weeks the sum of LP. 300 or a bank guarantee to that amount as security for the due prosecution of the appeal and complying with such other formalities as to the preparation of the record and otherwise as is prescribed.

Delivered this 15th day of February, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 145/34.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Corrie, S. P. J., Baker and Khayat, JJ.

IN THE APPEAL OF :—

L'Union des Fabriques De La Boheme Pour La Vente Du Verre a Vitre. APPELLANT.

v.

Haim Ya'ish. RESPONDENT.

*Admissions — Admission made in Court by advocate duly authorised — Oath to opposite party that admission is false, Mejelle, art.* 1589 — *Oath or proof of payment on account, Mejelle, Art.* 1818.

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 13th May, 1934, and in remitting the case to the lower Court with directions:—

HELD: 1. The admission made in Court by Appellant's advocate was binding and the Appellant should have been given an opportunity to administer an oath to the Respondent that the admission was false.

2. Failing evidence of repayment, the Respondent could establish it by administering an oath to the Appellant that the payment had not been made.

ANNOTATIONS: On the binding effect of an admission by party's advocate *cf.* C. A. 97/43 (1943, A. L. R. 249).

FOR APPELLANT: H. Margalith.

FOR RESPONDENT: N. Levy.

JUDGMENT.

We hold that the admission made in Court by the Appellant's advocate that the Appellant had received 5000 francs on account of the

debt due from the Respondent was an admission which the advocate had authority to make.

This admission is binding upon the Appellant unless the Respondent fails to take an oath in accordance with Article 1589 of the *Mejelle*, that such admission is not false.

We hold, therefore, that the District Court should have asked the Appellant whether he desired to have such oath tendered to the Respondent or not.

With regard to the Respondent's allegation that he had paid to the Appellant a further sum of 2000 francs, making a total payment in respect of the debt of 7000 francs, the Respondent should have been called upon to furnish particulars of the alleged payment: and in default of other evidence, the Respondent should have been asked whether he desired to have an oath administered to the Appellant, in accordance with Article 1818 of the *Mejelle*, denying the truth of such particulars.

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

Costs will follow the event.

Delivered this 1st day of November, 1935.

*Senior Puisne Judge.*

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LAND APPEAL No. 39/34.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Baker, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Fahmi Husseini. APPELLANT.

v.

Fouad Dajani. RESPONDENT.

*Admission — Undertaking by advocate not to execute judgment — Judgment becomes unenforceable.*

Appeal from the judgment of the Land Court of Jaffa, dated the 16th April, 1934, withdrawn:—

HELD: The Respondent's advocate made a statement in Court that he would

not attempt to execute the judgment: the judgment, therefore, became unenforceable.

FOR APPELLANT: M. Levy.

FOR RESPONDENT: Z. El-Din.

JUDGMENT.

In view of the statement made in this Court by Respondent's advocate that he will make no attempt to execute it, the judgment of 16th April, 1934, becomes unenforceable and, therefore, cannot be executed.

Consequently the Appellant withdraws his appeal.

Delivered this 26th day of November, 1935.

*Puisne Judge.*

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CRIMINAL APPEAL No. 62/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Frumkin, JJ.

IN THE APPEAL OF:—

Mustafa Said el Awartani. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Corroboration — Witness identifying accused and another identifying voice — Court assisting unrepresented accused.*

In dismissing an appeal from the judgment of the District Court of Nablus, dated the 26th May, 1937, whereby Appellant was convicted under Section 295(a) of the Criminal Code Ordinance, 1936, and sentenced to two years' imprisonment with hard labour:—

HELD: The requirements of the Evidence Ord. were sufficiently complied with by one witness who had recognised the accused, and another who had recognised his voice.

ANNOTATIONS: On the effect of the accused being unrepresented see CR. A. 34/40 (1940, S. C. J. 143) and cases cited in annotations; for later authorities *vide* CR. A. 42/40 (1940, S. C. J. 160), CR. A. 33/41 (1941, S. C. J. 153), CR. A. 91/42 (1942, S. C. J. 376) and CR. A. 118/42 (1942, S. C. J. 472). See also CR. A. 106/37 (*post*).

APPELLANT: In person.

FOR RESPONDENT: Government Advocate.

JUDGMENT.

The prisoner is not represented by an advocate.

The only point which can be raised in this Court on his behalf, and it is hardly a point which he himself would appreciate, is whether or not the evidence of one witness who saw and recognised him at the time of committing the offence, and that of another witness who was unable to see him but recognised his voice and was able at a subsequent voice test to recognise his voice, is sufficient to satisfy the requirements of the Evidence Ordinance.

This is a question of degree, and we are of opinion that the prisoner could, upon that evidence, be convicted. The sentence of two years' imprisonment upon the facts appears to be a proper one.

The appeal will, therefore, be dismissed.

Delivered this 30th day of June, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 206/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Khaldi and Khayat, JJ.

IN THE APPEAL OF:—

Mustafa Haj Said Mana'. APPELLANT.

v.

Israel Shafir. RESPONDENT.

*Arbitration — Action referred to arbitration by Court, with consent of parties — Appointment of umpire upon failure of arbitrators to concur — Allegation of misconduct — Umpire acting on evidence before the Court — Consent of parties — Refund of fees for renewal of appeal.*

In dismissing an appeal from the judgment of the District Court of Jaffa, dated 1.5.1934:—

HELD: The parties had agreed to the umpire acting on the evidence heard by the District Court. The award would not, therefore, be set aside on that ground.

ANNOTATIONS: *Cf.* C. A. 132/43 (1943, A. L. R. 790) — agreement to obtain referee's answer by telephone.

FOR APPELLANT: Sh. Dajani.

FOR RESPONDENT: A. Levin.

## JUDGMENT.

This appeal arises out of a dispute between the Appellant and the Respondent with regard to certain work. The Respondent took action in the District Court of Jaffa. The District Court heard a large amount of evidence as to the state of the account between the parties and also had before it the report of a Committee of Inspection. At that stage the matter was, by consent, referred to arbitration and as the arbitrators did not agree the matter fell to be decided by the umpire who had been agreed to by the parties.

The umpire made his award and the Respondent sought to have it confirmed in the District Court. The Appellant opposed the confirmation, and the Court allowed him to call evidence to show that there had been misconduct by the arbitrator. He failed to prove that there had been any misconduct and the award was confirmed by the District Court.

On appeal to this Court the Appellant has urged two grounds:—

First that the arbitrator had not dealt with his counter-claim. It is quite clear that the arbitrator did deal with the counter-claim of the Appellant and rejected it for reasons given by him.

The second point is that the umpire instead of calling witnesses, dealt with the dispute on the evidence which had been given before the District Court. We are satisfied that the parties agreed to the umpire taking this course, and this ground of appeal must also fail.

The appeal is, therefore, dismissed with costs to include LP. 5 advocate's fees.

We order the refund to the Appellant of the fees which he paid in order to renew this appeal.

Delivered this 4th day of November, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 174/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Khayat, JJ.

IN THE APPEAL OF:—

Hanna Naser Abyad. — APPELLANT.

v.

Yola Shehab. — RESPONDENT.

*Admissions — Admission made by advocate — Responsibility of advocates — Art. 1647 Mejelle, admission before C. E. O. — Matter must be before the Court — Phipson, Urquhart v. Butterfield.*

In dismissing an appeal from the judgment of the District Court of Haifa, sitting in its appellate capacity, dated the 29th April, 1937, confirming the judgment of the Chief Magistrate of Haifa, dated the 5th March, 1937:—

HELD: An admission by an advocate binds the client but it must be in connection with a matter properly before the Court.

FOLLOWED: Urquhart v. Butterfield, 37 Ch. D. 357.

ANNOTATIONS: *Cf.* C. A. 145/34 (*ante*, p. 103).

FOR APPELLANT: No appearance.

FOR RESPONDENT: Levin.

## JUDGMENT.

This is an appeal from the judgment of the District Court of Haifa, dated 29.4.37, confirming the judgment of the Chief Magistrate of Haifa, dated 8.3.37.

This appeal was originally fixed for hearing on the 8th of October, 1937, but owing to the illness of Mr. Elias Koussa, Counsel for Appellant, the hearing was adjourned for today. Counsel for Appellant absented himself today also, without giving any reasons, and as it was shown that he was properly served we decided to hear the Respondent's reply to the points raised by Mr. Koussa in his statement of appeal.

From the facts of this case it would appear that it originally started with foreclosure proceedings on a mortgage deed before the Chief Execution Officer. Interest was payable on that deed and it fell into arrear. The proceedings were in the early stages of the dispute brought under section 14 of the Land Transfer Ordinance which provides that application for the sale of immovable property in satisfaction of a mortgage may be made to the President of the District Court.

It appears that in the course of these proceedings the then advocate of the present Respondent made an admission as to the amount of the interest in arrear, which admission he later found to have been wrongly made by mistake.

I should be loath to say anything which might lead to any lessening of responsibility on the part of advocates. It seems to me that advocates acting for clients have not always that sense of responsibility which they should possess, and I hope that it will be appreciated that

advocates are in a particular position and have a particular responsibility towards their clients and the Courts.

A separate action was brought later, in the Chief Magistrate's Court, to recover the interest in arrear, independently of the foreclosure proceedings, and in this action the question arose as to whether or not the admission as to the amount of interest due, to which I have referred, prevented the Plaintiff from recovering the full amount claimed. The Chief Magistrate held that it did not on the ground that it was made owing to a genuine mistake.

The question then went on appeal to the District Court of Haifa, which supported the judgment of the Chief Magistrate on a somewhat different ground. It took the view that the President of the District Court sitting as a Chief Execution Officer did not constitute a Court and that an admission made before him might be shown to have been wrongly made as it was not made in accordance with Article 1647 of the *Mejelle*.

It seems to me that if one takes the *Mejelle*, or if one applies the principles of English law it must be clear that an admission to be binding must be made in a matter which is properly before the tribunal. There is no doubt, under English law, that counsel may make an admission which binds the client, and according to Phipson such admissions are in civil cases conclusive, if made for the purpose of dispensing with proof in the trial but are otherwise merely *prima facie* evidence against a client (see Urquhart *v.* Butterfield, 37 Ch. D. 357). In the case before us the admission was not made in regard to any issue before the tribunal, as the President of the District Court was purported to exercise his powers with regard to foreclosure of a mortgaged property and not as to the amount of the interest as to which the admission was made; and although the line may be a very narrow one, I think that an admission so made is not conclusive and can be withdrawn, and that it is not such a binding admission as to prevent the full amount being recovered.

The appeal must, therefore, be dismissed with costs and LP. 5.— advocate's fees.

We are very much obliged to Mr. Levin, who appeared on behalf of the Respondent, for his very interesting arguments on the points raised in this case.

Delivered this 28th day of October, 1937.

*Chief Justice.*

CIVIL APPEAL No. 4/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Greene and Khaldi, JJ.

IN THE APPEAL OF:—

Ishhadeh Yousef el-Budeiri, in his capacity as guardian of the minor children of the late Aref el-Budeiri and in his capacity as the attorney of the mother of the late Aref el-Budeiri, Zakiyeh Dabbagh. APPELLANT.

v.

Fareedeh bint Jiryes Sliman Abu Dayeh of Beit Jala. RESPONDENT.

*Succession — Succession Ord., secs.* 6(1), 21, 24; *P. O. in C., arts.* 38, 46, 52, 57 — *Jurisdiction of Courts — Authority of P. O. in C. — Murra case — Provisions in Ord. ultra vires the P. O. in C. — Interpretation — Effect of P. (A.) O. in C.,* 1923, *Art.* 4.

In allowing an appeal from the judgment of the District Court of Jerusalem, dated 22nd December, 1936:—

HELD: As regards Moslems, sec. 24(2) of the Succession Ord. is *ultra vires* the Palestine Order in Council, for inconsistency.

FOLLOWED: P. C. A. 98/25 (1, P. L. R. 71; C. of J. 1818).

ANNOTATIONS: For other instances of Ordinances being found to be *ultra vires* the Palestine Order-in-Council see H. C. 15/38 (1938, 1 S. C. J. 193) and C. A. 279/42 (1943, A. L. R. 88).

FOR APPELLANT: Kamal.

FOR RESPONDENT: Moghannam.

JUDGMENT.

This appeal raises an interesting point, and one not free from difficulty, which has hitherto not come before this Court.

The Respondent, Fareedeh Jiryes Sliman Abu Dayeh, a member of the Protestant faith, was married to one Aref-el-Budeiri, a Moslem, in the German Evangelical Protestant Church on 7th July, 1916. Her husband died intestate on or about 8th December, 1935, leaving him surviving the following, namely:—

1. His widow — the present Respondent.
2. His mother.

and two major sons and two minor sons.

On the 3rd of April, 1936, his widow applied to the District Court, Jerusalem, for an order declaring the succession to her deceased husband. In the meantime, on 11th January, 1936, the *Sharia* Court of Jerusalem had issued a notice stating that it had been represented to them that the above persons were the only heirs of the late Aref el-Budeiri, and stating that any objection should be made to that Court within 15 days.

On the 10th May, 1936, the *Sharia* Court issued a certificate of succession confining the inheritance to the mother and children of the deceased, and disinheriting the widow stating that they did so "because of the difference in religion by virtue of the *Sharia* Law of Inheritance".

On the 16th May, 1936, the present Appellant, as guardian to the minor children of the deceased and as attorney for the mother, filed a notice of opposition, in the District Court of Jerusalem, to the Respondent's application alleging that an order of succession had already been issued in the only competent Court, the *Sharia* Court, and that the District Court had no jurisdiction in cases of personal status of Moslems.

The application duly came on for trial before the District Court which decided that under Section 24 of the Succession Ordinance 1923 it had jurisdiction to reopen questions of succession where heirs had been deprived of their share on account of their nationality or religious belief, and accordingly they made an order giving the Respondent the share to which she would have been entitled if she had been a Moslem and not a Christian. The guardian has now appealed to this Court.

It may be convenient here to set out the various sections of the law to which reference has been made in the course of the argument before us.

The Succession Ordinance (Cap. 135 — Revised Edition of the Laws) lays down the following:—

Sec. 6(1) The Moslem Religious Courts shall have exclusive jurisdiction as to all matters relating to succession upon death to the estate of a Moslem, whether under a will or otherwise.

Sec. 21 Every court having jurisdiction in matters of succession shall, in all cases, determine the rights of succession to *miri* land in accordance with the provisions of the Ottoman Law and such provisions shall be applied notwithstanding any disposition made, or power of attorney given, by the deceased intended to take effect after death, whether by way of will or otherwise.

Sec. 24(1) No person shall be deemed to be under a legal incapacity to take any share in a succession to property in Palestine or to take under a will by reason only of his nationality or religious belief.

(2) Where, under the law then applicable in Palestine, any person has

been excluded from a share in the succession to a person who has died possessed of property in Palestine, since the 31st December, 1918, by reason only of his nationality or religious belief, the person so excluded or his heirs may apply to the District Court, which, upon such application and upon consideration of all the circumstances, may make such order as it thinks fit, reopening the succession and granting to the applicant such share in the succession as may, in the circumstances, appear equitable:

... ... ... ... ... ... ... ... ... ... ...

The following are the relevant articles in the Palestine Order-in-Council 1922 as amended:—

Article 38. The Civil Courts hereinafter described shall subject to the provisions of this part of the order exercise jurisdiction in all matters and over all persons in Palestine.

Article 46. The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on 1st November, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders in Council, Ordinances and Regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted;

... ... ... ... ... ... ... ... ... ... ...

Article 52. Moslem Religious Courts shall have exclusive jurisdiction in matters of personal status of Moslems in accordance with the provisions of the Law of Procedure of the Moslem Religious Courts of the 25th October, 1333, *A. H.*, as amended by any Ordinance or Rules. .....

Article 57. Subject to the provisions of any Ordinance or Order establishing a Supreme Council for Moslem Religious Affairs, the constitution and jurisdiction of Religious Courts established at the date of this Order may be varied by Ordinance or Order of the High Commissioner.

The terms of Article 52 of the Order-in-Council are very definite — they give to the Moslem Religious Courts exclusive jurisdiction in matters of personal status of Moslems, and I do not think that the words "as amended by any Ordinance or Rules" affect this exclusive jurisdiction. They can refer only, from their context, to amendments of the Laws of Procedure of Moslem Religious Courts; and Section 6(1) of the Succession Ordinance, following Article 52 of the Order-in-Council, gives exclusive jurisdiction in all matters relating to succession upon death of the estate of a Moslem to the Moslem Religious Courts. It is apparent, therefore, that there is a conflict between Section 24(2) of the Succession Ordinance, on the one hand, and Section 6(1) of the Succession Ordinance and Article 52 of the Order-in-Council on the other. It is true that an Ordinance must be read as a whole, and if there were no other considerations, I would be prepared to hold that Section 24(2) imposed a qualification in certain cases on the otherwise exclusive jurisdiction of Moslem Religious Courts

in relation to the succession to the estates of deceased Moslems. But an Ordinance must be in conformity with the provisions of the Order-in-Council, under which it is made, for the legislative authority in this country derives its power from the Order-in-Council.

If authority be needed for this proposition, it may be found in the often quoted case of Jerusalem—Jaffa District Governor and another *v.* Murra and others (P. L. R. I. p. 71), where Viscount Cave, L. C., in delivering the judgment of the Judicial Committee of the Privy Council, said at p. 76 "The Ordinance was made under the authority of the Order-in-Council of May 4, 1923, and if and in so far as it infringed the conditions of that Order-in-Council, the local Court was entitled and indeed bound to treat it as void." Section 24(2) of the Succession Ordinance clearly infringes the provisions of Article 52 of the Order-in-Council and must, therefore, be treated as void in so far as it purports to deal with questions of succession to the estates of Moslems.

I do not think that Article 38 of the Order-in-Council is of any help to the Respondent. An Order-in-Council, just as an Ordinance, must be read and construed as a whole, and on a parity of reasoning with that which I have used in discussing certain sections of the Succession Ordinance, I must hold that, even if Article 38 has the meaning which the Respondent contends that it has, yet it is qualified by Article 52.

Similarly Article 46 does not assist her argument since it merely details the laws which the civil courts shall apply, and does not affect the jurisdiction as laid down in Article 38 and 52.

But Mr. Moghannam, with his customary skill and lucidity, has strongly urged that Article 57 of the Order-in-Council has validated Section 24(2) of the Succession Ordinance. I have listened with close attention to this Argument, but I think that it fails.

I do not think that the Order-in-Council can be varied by one sub-section in an Ordinance of 27 sections which deals with many other matters, and which makes no reference to the Order-in-Council. I think that any Ordinance or Order which purports to vary the Order-in-Council must do so specifically and not merely by implication.

There is, finally, one further point which must be dealt with, and that is the effect, if any, of Article 4 of the Palestine (Amendment) Order-in-Council, 1923. This reads as follows:—

> "4. The Proclamations, Ordinances, Orders, Rules of Court, and other legislative acts which have been issued or done by the High Commissioner or by any Department of the Government of Palestine on

> or after the 1st September, 1922, shall be deemed to be and always to have been valid and of full effect and all acts done thereunder and all prohibitions contained therein shall be deemed to be valid."

This provision came into force on the 29th May, 1923, that is after the date of promulgation of the Succession Ordinance, 1923, which was the 8th March, 1923. This amending Order-in-Council, therefore, validated the Succession Ordinance. The question that arises is, has it also the effect of validating any inconsistencies between the Succession Ordinance and the principal Order-in-Council of 1922. On the whole, I do not think that it has such an effect. There can be but little doubt that the intention of the legislator was to validate the enactment of the various Ordinances and other measures which had been issued between the 1st of September, 1922, and the 29th of May, 1923, regarding the regularity of which enactment doubts had arisen, but the main principles and limitations in the principal Order-in-Council remained unaffected.

To hold that this amendment validated any conflicts between the principal Order-in-Council and any Ordinance would lead to the curious and paradoxical result that between the 1st September, 1922, and the 29th May, 1923, the High Commissioner would have had unlimited power to enact any legislation disregarding any of the limitations laid down in the principal Order, whereas after the 29th May, 1923, these limitations would have come into force again. I cannot adopt this view unless no other construction were possible. I think that the effect of Article 4 is to validate the enactment of Ordinances only and it does not render valid Section 24(2) of the Succession Ordinance in so far as that subsection purports to deal with questions of succession to the estates of deceased Moslems.

In the result: I think that this appeal should be allowed and the judgment of the District Court set aside and judgment entered for the Appellant.

No costs.

Delivered this 24th day of May, 1937.

*British Puisne Judge.*

CIVIL APPEAL No. 135/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Frumkin, JJ.

IN THE APPEAL OF:—

Moshe Schwarz. APPELLANT.

v.

Egged Cooperative Society Limited. RESPONDENT.

*Arbitration — Offences submitted to arbitration — O. P. C. 236, no public rights involved and no charge — Adjournments — Submission in general terms — Arbitrators not to be bound by law.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 20th May, 1937:—

HELD: 1. The offence submitted to arbitration did not involve public rights. It required a complaint which had not been made. The submission had, therefore, been validly made.

2. A submission authorising the arbitrators not to be bound by law is not in itself bad, if the arbitrators do not commit misconduct.

ANNOTATIONS: See, on the first point, Halsbury, Vol. 1, *p.* 628, last paragraph of *No.* 1075.

FOR APPELLANT: Marein.

FOR RESPONDENT: Iszajewicz.

### JUDGMENT.

This is an appeal which comes to us by leave of the District Court from the decision of the District Court of Jerusalem, refusing to set aside an award and ordering its confirmation. Several grounds have been urged why this award should be set aside.

The first was that the arbitrators, in effect, as I understand it, found one of the parties to the award guilty of embezzlement. It is said that that transaction involved what was in effect a criminal offence, in that embezzlement took place, and that the principles applicable are those applicable in English law. It is admitted that the appropriate section of the Ottoman Penal Code is Article 236 which is, as was pointed out in argument, an article which depends upon the action of the person aggrieved. The Egged Cooperative Society who were themselves aggrieved, took no steps to that effect and, therefore, there

was no criminal charge that could be brought at that time and no "public rights" were involved.

It is argued in the second place that some injustice was caused to the Appellant in that no adjournment was granted to him upon his application. It was for him to find out whether the proceedings were adjourned, and as he had received no reply from the arbitrators to his application, it was incumbent upon him to attend or send some representative, and as he did not do so we do not think he can complain.

A further point is taken, that the general terms of the submission to arbitration are illegal in that there are some wide provisions as to the powers of the arbitrators. Where power is given to arbitrators not to be bound by the law, that in itself may be a wide provision, but the effect of it must be considered in each particular case, and unless it can be shown that the arbitrators misconducted themselves I do not think the award should be set aside.

The appeal will, therefore, be dismissed with costs and LP. 5 advocate's fees.

Delivered this 21st day of September, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 142/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J. and Greene, J.

IN THE APPEAL OF :—

David Moyal. APPELLANT.

v.

Elhanan Karwassarsky as Curator for the properties and chattels of Sheikh Tewfiq el Dajani, interdicted. RESPONDENT.

*Champerty — Contract encouraging litigation — Champerty defined — Advocate may give services in lieu of purchase price — Advocates Ord., Sec. 22 — Damages for breach of contract — Abandonment, C. A. 67/36, Halsbury Vol. 7 — Insufficient findings of fact.*

In allowing an appeal from the judgment of the District Court of Jaffa,

dated the 20th June, 1937, in setting aside the judgment of the District Court and remitting the case for completion:—

HELD: 1. The agreement between the parties was not champertious. Champerty is a bargain between a party to a suit and a stranger (the champertor) to divide the proceeds of the litigation, whereupon the champertor is to carry on the suit at his own expenses.

2. There was nothing in law preventing the Appellant giving his services as an advocate in consideration of the purchase price.

3. The principle of abandonment is that there may be a lapse of time allowed by both sides so long as to raise the inference that both parties thought that each of them had treated the business as at an end. There were insufficient findings to indicate whether that had been the case between the parties.

REFERRED TO: C. A. 67/36 (7, C. of J. 186).

ANNOTATIONS: See, on champerty, Halsbury, Vol. 1, *pp.* 72—3, *No.* 89. *Cf.* also C. A. D. C. T. A. 91/40 (Tel-Aviv Judgments, 1940, p. 106).

FOR APPELLANT: Goitein.

RESPONDENT: In person.

## JUDGMENT.

This is an appeal from a judgment of the District Court, Jaffa, dismissing a claim by the Plaintiff in an action for damages for breach of a contract but ordering the return of certain moneys paid by him under the contract.

The main ground of the decision of the District Court appears to be in para. 3 of its judgment, which is as follows:—

> "The contracting parties did not fix a period for the carrying out of the contract for the transfer of the vineyard into the Plaintiff's name; but they left it up to the completion of the litigation regarding the said vineyard. It could be said that the disputes have not so far, in fact, commenced although 13 years passed, even if it commenced it may not be completed in years. Such a contract cannot be looked at as a valid one since its execution. This makes us consider it as one of the contracts which are known to the English law as 'champerty contracts' which encourages and increases litigation".

Assuming that the principles of the English doctrine of champerty apply in Palestine, I think it is necessary to look a little more closely into that doctrine, and this particular contract. Champerty may be defined as a bargain between a Plaintiff or Defendant in a suit and a third person, *campum partire,* to divide between them the land or other matter sued for in the event of the litigant being successful in the suit, whereupon the champertor is to carry on the party's suit or

action at his own expense; or it is the purchasing the right of action or suit of another person.

Under the contract in this case the Defendant sold to the Plaintiff certain land at the price of LP. 20.— per *dunum*.

It appeared from the contract that the vendor (Defendant in the Court below and here Respondent) was not in a position to give a clear title, and clauses 3 and 9 of the contract provide as follows:—

> "3. The second party undertakes to introduce all the necessary cases against Messrs. Salim George Haddad and his partners Shakib el Haj to cancel the said deed of sale and to reduce the usurious interest which was added to the deed of sale. The second party undertakes also to institute all the necessary actions against the neighbours who have trespassed on the said vineyard or any part thereof in his capacity as an advocate but without charging any advocate's fees and to pay from his own money all the necessary expenses and fees for all the actions with the permission and authorisation of the first party. Provided only that the second party shall have the right to deduct such expenditure from the balance of the purchase price and provided only that he (the second party) obtains the permission and authorisation of the first party to make such expenditure.
>
> 9. The purchaser has the right to make the said transfer in his name or in the name of any person he wants or appoints."

It should be noted that the purchaser (Plaintiff below and Appellant here) was at all material times and is an advocate.

The purchaser also agreed to advance certain other moneys on account of the vendor which were to be deducted from the purchase price. It is clear that the expenses and fees were to be paid by the vendor out of the purchase price. The only criticism that can be made is that the vendor was giving his services as an advocate, presumably, although there is no finding as to this — in consideration of the agreed price. There would appear to be nothing repugnant to the general principles of the Palestinian Law in this (although not directly in point *cf.* the Advocates Ordinance, Cap. 2, sec. 22).

Taking the agreement as a whole we do not think it is champertious.

The District Court also in paragraphs 4 and 5 of its judgment, found as follows:—

> "4. Add to that the Plaintiff himself did not take actual steps as he undertook to do in the contract as far as the actions which he should have instituted against the persons who claim the ownership of the vineyard and against those who have trespassed over the boundaries of the said vineyard.
>
> "5. His sleeping over his rights namely not taking any steps for such a long period without any excuse. From this it could be inferred that he left the contract; and for this reason he cannot

claim damages provided for as was decided by the Supreme Court in Civil Appeal No. 67 of 1936. All these reasons made us dismiss his action for the liquidated damages, namely the LP. 10,000".

To some extent these amount to findings of fact but it is clear that the judgment of the Court below turned primarily upon the question of champerty. It is clear also from the argument in this Court that the parties do not agree as to the facts. With regret we have to come to the conclusion that the case must go back to the District Court to find fully the facts and to draw such inference as may be necessary therefrom as to performance, variation or rescission.

In particular, with reference to para. 6 of the judgment we would point out that the principle underlying the decision in Civil Appeal No. 67/36 may be stated as follows: — there may be a lapse of time allowed by both sides so long as to raise the inference that both parties thought that each of them had treated the business as at an end. This principle is discussed in Halsbury (2nd Edition) Vol. VII, pp. 186 and 203. Each case must be considered in the light of its own facts.

The judgment of the District Court is, therefore, set aside with costs and the case remitted for completion. Advocate's fees LP. 5.

We make no finding as to the points raised in the cross-appeal.

At the close of the hearing the Respondents undertook to take no action for 21 days in order that the Appellant could make any application he desired to the District Court.

Delivered this 3rd day of November, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 171/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Greene, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Benjamin Mashieff of Haifa. APPELLANT.

v.

Fritz Sonnenfeld. RESPONDENT.

*Arbitration — Action on an award — Applicability of English law when not in conflict with Palestine law — Russell, pp.* 269 & 273 — *"Written submission" incorporated in the record — Res judicata: proceedings in Court after award — Opportunity to argue the case.*

In dismissing an appeal from the judgment of the District Court of Haifa, dated 30.6.37 on appeal from the judgment of the Haifa Chief Magistrate, dated 9.4.37:—

HELD: 1. An agreement to submit, incorporated in the record of the Court, constitutes a "written submission".

2. An action on an award may be brought in Palestine.

3. The proceedings in the District Court after the delivery of the award did not constitute *res judicata*.

ANNOTATIONS: See C. A. D. C. T. A. 169/39 (Tel-Aviv Judgments, 1940, p. 22) and C. A. D. C. T. A. 114/40 (*ibid.*, p. 165) for other cases of actions on an award.

FOR APPELLANT: Levitzky.

FOR RESPONDENT: Marein.

## JUDGMENT.

This is an appeal from the judgment of the District Court of Haifa, sitting in its appellate capacity. Leave to appeal was given by the presiding judge on the following point of law:—

> "Whether or not the remedy of an action brought upon an award is governed in Palestine by the principles of English Law and practice in regard thereto and if so to what extent particularly in regard to the defences that may be raised to such action brought upon an award."

We are of the opinion that the principles of English law and practice apply to cases brought in Palestine upon an award to the extent that it does not come into conflict with the Palestine law.

Mr. Levitzky, on behalf of the Appellant, argued several points before us. He first argued that there was no "written submission" within the meaning of the Ordinance. There is no dispute between the parties that they submitted to arbitration in Court and that was recorded in the Court's record. In our opinion this amounted to a "written submission" within the meaning of the Ordinance.

The second point is that a party cannot bring an action upon an award, but should avail himself of the remedy open to him under the Ordinance in applying for the confirmation of the award. The remedy of bringing an action upon the award is open in England, see in this regard Russell on Arbitration, 11th Edition, pages 269 and 273 and there is no provision in Palestine to the contrary.

Mr. Levitzky then argued that the matter was *res judicata* and that the Chief Magistrate should have dismissed the action. In this regard we wish to state that the proceedings taken before the District Court after the award was made, do not constitute a *res judicata*.

Mr. Levitzky argued further that the learned Chief Magistrate did not give him an opportunity of arguing certain points on the merits. A perusal of the record shows that Mr. Levitzky did in fact mention certain points on the merits and he cannot now successfully argue that he was not given an opportunity of arguing his defences before the Court of trial.

The appeal will be dismissed with costs to include LP. 5 advocate's fees.

Delivered this 9th day of November, 1937.

*British Puisne Judge.*

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CIVIL APPEAL No. 164/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Khayat, JJ.

IN THE APPLICATION OF :—

The Labour Council of Tel-Aviv and Jaffa. APPLICANTS.

v.

David Illgovsky. RESPONDENT.

*Arbitration — Sec. 15(3) construed — Leave to appeal may be granted when the judgment of the District Court is given in appellate capacity — Construction of statutes, reenactment of Section in Revised Edition — "Decision" and "Order".*

In allowing an application for leave to appeal from the judgment of the District Court Jaffa, sitting at Tel-Aviv, in its appellate capacity, dated 27th July, 1937, refusing to grant leave to appeal from its judgment, dated the 31st May, 1937, setting aside the judgment of the Chief Magistrate:—

HELD : 1. From the history of sec. 15(3), as reenacted in the Revised Edition, it was clear that the provision for leave to appeal applied to judgments of the District Court in first instance or in appellate capacity.

2. There was no distinction between the words "decision" and "order" appearing in the section.

ANNOTATIONS:

1. This case has been followed in C. A. 111/39 (1939, S. C. J. 509) and in C. A. 234/41 (1941, S. C. J. 545).

2. The appeal itself is reported *infra*.

FOR APPLICANTS: Krongold.

FOR RESPONDENT: Pevsner.

## JUDGMENT.

*Trusted, C. J.*: This is an application for leave to appeal to this Court from a decision of the District Court of Jaffa, sitting at Tel-Aviv, which involves the interpretation of rather an interesting provision under the Arbitration Ordinance. The particular Section concerned is Section 15(3) which lays down as follows:—

> "An appeal shall lie from an order of a Magistrate's Court to the District Court of the District in which the Magistrate's Court is situated, and the decision of the District Court shall be final: no appeal shall lie from the order of a District Court, except by leave of the Court or of the Court of Appeal."

In this case the decision was given originally by a magistrate; there was an appeal to the District Court which reversed the Magistrate's decision; an application was then made to the District Court for leave to appeal to this Court and the District Court held:—

> "We hold that there is no power in this Court to give leave to appeal. Our decision is final under Section 15(3). The application for leave to appeal is dismissed."

Now it seems to me that in the ordinary meaning of the words the provisions of the sub-section either mean the decision of the District Court on an appeal from a Magistrate is literally final, and the latter part applies to an order made by the District Court under sub-section 2, or it is final unless and until leave to appeal is granted (*cf.* Section 6, Magistrates' Courts Jurisdiction Ordinance, 1935).

It is clear from the marginal note of the Revised Edition of the Statutes that this sub-section (Sub-section 3) came into existence in its present form by an amendment of the original ordinance. When there is an ambiguity of this sort, the Court may look back to the original ordinance and its amendments to ascertain the intention of the legislature. In the original provision in the 1926 Ordinance, which there appears as Section 15(2), we find the words "no appeal shall lie except by leave of the Court, or by leave of the Court of Appeal". In 1928, when the Ordinance was amended in order to extend its provisions to Magistrates' Courts, these particular words were transposed from their original place and put at the end of the new sub-section which applies to Magistrates' Courts, and the words — "from the order of a district court" were inserted between the word "lie" and the word "except." In my view the effect of this change was to make these words "no appeal shall lie from the order of a district court, except by leave of the court or of the Court of Appeal" applicable both to Sub-section (2) and Sub-section (3).

It is argued that a distinction can be drawn between these two sub-

sections, in that in Sub-section (2) there is no mention of the word "decision", whereas in Sub-section (3) the word "decision" occurs and in the last part of that sub-section the word "order" occurs. In my view, for this purpose, there is no distinction between the words "decision" and "order", and this argument, therefore, does not alter the view I have expressed.

In my opinion, leave to appeal to this Court should be granted, and as my brother Greene agrees with me, it will be granted.

Delivered this 6th day of October, 1937.

*Chief Justice.*

*Greene, J.*: I have had the advantage of discussing this point with His Honour the learned Chief Justice, and of going back to the history of this sub-section, and I agree with His Honour's decision.

*British Puisne Judge.*

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CIVIL APPEAL No. 164/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Khayat, JJ.

IN THE APPEAL OF:—

The Labour Council of Tel-Aviv & Jaffa. APPELLANTS.

v.

David Illgovsky. RESPONDENT.

*Arbitration — Borer Shelishi Makhriyah, whether umpire or third arbitrator with casting vote — Hebrew text of sec. 6(1)(c) — Winteringham v. Robertson.*

In allowing an appeal from the judgment of the District Court of Jaffa, sitting at Tel-Aviv, in its appellate capacity, dated 31.5.37, setting aside the judgment of the Chief Magistrate; in setting aside the judgment of the District Court and restoring the judgment of the Magistrates Court:—

HELD: Whatever the true meaning of the words *"borer shelishi makhriya"* the intention in the present case had been to appoint an umpire, not a third arbitrator.

REFERRED TO: Winteringham v. Robertson, 1858, 27 L. J. Ex. 301.

ANNOTATIONS: See the order granting leave to appeal (*supra*).

FOR APPELLANTS: Krongold.

FOR RESPONDENT: Pevsner.

## JUDGMENT.

This is an appeal which comes to this Court from the District Court, sitting at Tel-Aviv reversing the decision of the Chief Magistrate which confirms, with a variation, an award in an arbitration.

The submission to arbitration ended with the words:—

> "We also undertake in the same form to abide by the decisions of the arbitration also in case the said two arbitrators will join to themselves a third arbitrator with a casting vote (*Borer Shelishi Makhriyah*) if they will fail to reach an agreement between themselves."

That was made on the 26th of June of last year. It appears that the arbitrators who were appointed did not reach an agreement as to the award and they added to the submission, *inter alia,* the words "therefore, we hereby appoint, according to this deed of submission Dr. N. Feinberg as *Borer Makhriyah* (Umpire)."

The arbitration was entered upon and the dispute was inquired into upon the basis of a tribunal consisting of an umpire and two arbitrators until eventually the umpire gave the decision of the tribunal. Neither of the two arbitrators, in any way, objected to those proceedings. It is perfectly clear that the arbitrators and presumably the parties were satisfied with the way this arbitration was conducted.

Later the unsuccessful party took objection to the proceedings basing his main objection on the interpretation of the Hebrew words *"Borer Shelishi Makhriyah"* and also upon the words "also in case the said two arbitrators will join to themselves a third arbitrator with a casting vote."

The learned Chief Magistrate held that the third person appointed by the arbitrators was appointed to act as an umpire. The District Court differed from that view, and referring to the Hebrew words quoted in the submission, namely *"Borer Shelishi Makhriyah"* said "we are satisfied that this means a third arbitrator with casting vote". It goes on to say "This Court has decided in a previous case that the expression *'Borer Makhriyah'* means an Umpire".

It is difficult for us to decide definitely from the documents submitted to us by the parties in proof of their conflicting arguments as to the meaning of the words occurring in the submission. If we, however, look at Section 6(1)(c) of the Arbitration Ordinance and compare it with the Hebrew translation of that section, we find that the words used in the Hebrew version of this section for the English word "Umpire" are the same as used in the submission, the only difficulty being caused by the introduction into the latter of the Hebrew word

*"Shelishi"* which means third and the consequent suggestion that it means a third arbitrator.

The District Court unfortunately did not give us any enlightenments as to the matters which weighed with them in coming to the conclusion to which they have come and in our opinion the true effect of the submission was that if the two arbitrators failed to agree a third person was to be appointed to act as an umpire, and this view appears also to have been in the mind of the arbitrators and the parties until the umpire gave his award.

It is perhaps interesting to note in an English case — Winteringham *v.* Robertson (1858), 27 L. J. Ex. 301, where the words, in a reference to two arbitrators, with power to them if they should not agree to appoint a third person, were "to be umpire in or to concur and join with them in considering and determining all or any of the matters referred," which are not dissimilar to the words in the submission in this case as translated by the District Court, the Court held that the third person was an umpire and not a third arbitrator.

The judgment of the District Court is, therefore, set aside and that of the learned Magistrate restored with costs to include LP. 5.— advocate's fees.

Delivered this 16th day of November, 1937.

*Chief Justice.*

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CRIMINAL APPEAL No. 121/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Copland and Khayat, JJ.

IN THE APPEAL OF:—

1. Albert Floyd of Jerusalem,
2. Moshe Shapiro of Jerusalem. APPELLANTS.

v.

The Attorney General. RESPONDENT.

*Promulgation of Bye laws — Whether publication of prior draft necessary — P. O. in C. Art. 17(1) — "Ordinance", Interpretation Ord. does not apply to P. O. in C. — M. A. 18/28.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated 30.9.37:—

HELD: There was no necessity to publish a draft of the bye laws before their enactment.

OVERRULED: *Dictum* of Frumkin, J., in M. A. 18/28 (1, P. L. R. 283; 4, C. of J. 1314).

ANNOTATIONS:

1. *Cf.* H. C. 46/38 (1938, 1 S. C. J. 423) as to Emergency Regulations.

2. On the meaning of the word "ordinance" generally see CR. A. 89/38 (1939, S. C. J. 10) and annotations, CR. A. 40/43 (1943, A. L. R. 324) and C. A. 257/43 (*ibid.*, p. 802).

FOR APPELLANTS: Geichman.

FOR RESPONDENT: Junior Government Advocate — (Salant).

## JUDGMENT.

In this case the Appellants were charged in the Magistrate's Court of Jerusalem, with contravening certain sections of the Jerusalem (Advertisements) By-Laws, 1937.

Before the learned Magistrate an objection was taken that these By-Laws had not been published as a draft for a period of one month before the enactment thereof. The learned Magistrate agreed to this objection and dismissed the charge.

On appeal to the District Court of Jerusalem, that Court reversed the decision of the learned Magistrate and remitted the case to him for trial.

The Appellants have appealed to this Court and the only question before us is whether these By-Laws should have been published as a draft for one month before their enactment.

Mr. Geichman for the Appellants relies on Article 17(1)(d) of the Palestine Order-in-Council as substituted by the Amending Order-in-Council of 1923. The relevant part of that article is "No Ordinance shall be promulgated unless a draft of the same shall first have been made public for one calendar month at the least before the enactment thereof".

The question is what does the word "Ordinance" mean in that part of the article, and the answer to that can be found when referring to Article 17(1)(a) which provides that "The High Commissioner shall have full power and authority to promulgate such Ordinances as may be necessary for the peace, order and good government of Palestine..."; and Article 17(1)(b) enacts that "No Ordinance shall be promulgated by the High Commissioner until he has consulted the Advisory Coun-

cil..." From these two paragraphs of Article 17, it is quite clear that an Ordinance means a law promulgated by the High Commissioner after he has consulted the Advisory Council, and the word "Ordinance" cannot refer to any statutory legislation made either by the High Commissioner himself or by any body or person to whom powers have been delegated to make any Rules or Regulations.

Reference has been made to the Interpretation Ordinance and to the definition of Ordinance contained therein. The Interpretation Ordinance has no reference to the Order-in-Council.

Mr. Geichman further relied on a decision of this Court in Misd. Appeal No. 18 of 1928, Attorney General *v.* Abraham Altshuler, reported on page 283 of the Law Reports of Palestine 1920—1933. In that case Frumkin, J., was reported to have said "I concur in the judgment of my learned brethren in that "Ordinance" in Art. 17(1)(a) and (c) of the Palestine Order-in-Council is meant to include all sorts of enactments made by subordinate legislature as well as Ordinances proper."

The leading judgment in that case was given by McDonnell, C. J., and no such explicit statement is to be found in his judgment. The other member of the Court, Corrie, J., concurred with the Chief Justice, and, therefore, we do not quite understand the judgment of Frumkin, J., when he said that he concurs with the judgment of the others to the effect I have stated. If anything to the effect stated by Frumkin, J., is to be found in the judgment of the Chief Justice, then we think it is much too broadly stated, and we think that the proposition as laid down by Frumkin, J., must be over-ruled.

Finally we are all of the opinion that the word "Ordinance" in Article 17(1)(d) of the Palestine Order-in-Council as substituted means an ordinance promulgated by the High Commissioner after consulting the Advisory Council and does not include any rules, regulations or by-laws, made under the provisions of an Ordinance.

There is no provision in the law of Palestine that any rules, regulations or by-laws should be made public for a month before their enactment and, therefore, we are in agreement with the judgment of the District Court. That judgment must be affirmed and this appeal must be dismissed. No costs.

Delivered this 17th day of November, 1937.

*Senior Puisne Judge.*

CIVIL APPEAL No. 52/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

1. Ali Kharbutly,
2. Khader Kharbutly,
on behalf of their father's estate. APPELLANTS.

v.

Ismail Atrak & 2 ors. RESPONDENTS.

*Partnership — Claim by partner against others before winding up — Lindley, Partnership Ord. sec. 2(2) — Failure to apply for confirmation of award.*

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 13th January, 1937:—

HELD: 1. The Appellants could not apply to Court against their partners before winding up of the partnership.

2. The Appellants should have applied for the confirmation of the award.

FOR APPELLANTS: R. Said.

FOR RESPONDENTS: Eliash.

## JUDGMENT.

On 14th July, 1929, Appellants and their father formed a partnership agreement with the Respondents for the purpose of trading in vegetables and fruits for a period of five years.

At the end of the season of 1930 the partnership sustained losses. The Respondents were called upon to pay their share in the losses which they refused to do. The matter was referred to the arbitrators agreed upon in the Deed of Partnership and they gave their award on the 14th June, 1931.

The Appellants have not applied for the confirmation of the arbitrators' award, neither have they submitted an application for the winding-up of the Partnership. Instead, they chose to raise an action in the District Court of Haifa, claiming from Respondents a certain sum which they alleged to be Respondents' share in the losses.

The District Court dismissed the action on the ground that no claim

could be made by one partner against another partner before a liquidation has taken place, reserving to the Appellants and the third party the right to institute it again after a winding-up of the partnership has taken place.

As the partnership was formed for a period of five years, it has to be presumed still to exist until the end of the five years unless a winding-up order has been issued by the competent Court.

The District Court was, therefore, correct in its judgment. It is the established English practice as evidenced in Lindley on Partnerships, p. 568 *et seq.* that a Court will not interfere with a partnership except for the purpose of its dissolution. The Court never deals with individual items of disputes in a partnership. It is provided in Section 2(2) of the Palestine Ordinance that it has to be interpreted by reference to the Law of England relating to partnerships, and the English rules of equity and common law applicable to partnership shall apply in Palestine, save as far as they are inconsistent with the express provisions of the Ordinance.

This English practice does not seem to be inconsistent with the express provisions of our Ordinance and hence this English rule must be considered applicable in Palestine.

With regard to the second point raised before us, that is, that there was an arbitration award, we hold that as the Appellants have not submitted an application to the District Court for the confirmation of the award, the District Court could have equally dismissed the action on this ground also.

The appeal must, therefore, be dismissed with costs and LP. 5.— advocate's fees.

Delivered this 8th day of June, 1937.

*British Puisne Judge.*

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CIVIL APPEAL No. 39/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF:—

Jacob Lubitz. APPELLANT.

v.

The General Insurance Office Ltd. RESPONDENTS.

*Insurance — Lloyds Underwriters — Cover note and policy — Agent or insurer — Broker not liable except for breach of warranty.*

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 9th December, 1936:—

HELD: 1. The Respondents, as brokers, were not liable on the policy. The underwriters who signed the policy should have been sued.
2. The document relied upon was a cover note, not a policy.

FOR APPELLANT: Bar-Shira.

FOR RESPONDENTS: Seligman.

## JUDGMENT.

*Copland, J.*: In this case the Appellant sued the Respondents in the District Court asking for the enforcement of an arbitration award.

The District Court dismissed the application on the ground that the Respondents were not the proper parties to the application.

The Appellant had effected a Workmen's Compensation Assurance Policy through the Respondents with Lloyds Underwriters London, and the point in this appeal is whether the Respondents are the agents here of Lloyds in this country, so that they can be sued here on behalf of Lloyds or as being personally liable under the Policy.

There seems to be a certain amount of misconception as to the exact nature and function of Lloyds Underwriters. They are not a company nor a partnership — they are an institution, composed of individuals, who in their personal capacity take up shares in risks submitted to them, but each individual is separately responsible only for his share of the risk, and assumes no liability for any other individual underwriter's share. These individuals sometimes form groups, and these groups accept risks offered to them by brokers, each individual in the group taking his particular share of the risk.

The Respondents act in this country as agents for a firm of brokers in England, who place business with Lloyds. On the 11th April, 1935, they issued to the Appellant a document, referred to in these proceedings as Exhibit 1. A large amount of argument before us has been devoted to the question whether Ex. 1 is a cover note or a policy.

I have no doubt that it is a cover note. It is addressed to the Appellant and is in these words:—

> "We hereby certify that we have on your behalf effected the following insurance with Lloyds London covering you for the sum of Palestine Pounds six hundred (LP. 600) from 11th April, 1935, to 11th

April, 1936 (noon) against risks of Workmen's Compensation Ordinance, 1927."

It is clear from the wording that the Respondents acted as agents for the Appellant.

Attached to this cover note is a sheet headed "Conditions". It has been strenuously argued by Mr. Bar-Shira for the Appellant that from these conditions the Respondents became permanent agents for Lloyds in all particulars, and that they held themselves out as such agents. But, as remarked by Mr. Seligman, most of the conditions in which the name of the Respondents occurs are routine matters, such as the giving of notices or sending of communications to be given or made under the Policy; notices of accidents, commencing of litigations, furnishing of information, renewal of premiums, and so on. In any case where the question of liability under the Policy arises, or the making of any admission or settlement, the sole authority rests with Lloyds Underwriters, and information must be given to Lloyds Underwriters to enable the latter to resist or settle any claim made under the Policy — see especially conditions 3, 7 and 8.

Further, it has been stated to us, and not contradicted, that the Respondents have contracts with brokers in London and that they hold a cover note from the brokers covering them. It seems to me that the most that can be made of the situation is that the Respondents are agents for the brokers and that it is the latter who place the risks with Lloyds Underwriters. This cannot make the Respondents agents for Lloyds in the sense contended for by the Appellant.

And finally, I think that it is quite clear that a broker is under no liability since he is not an insurer unless for damages for any breach of warranty by him. And if this is so for a broker, then it is equally so for an agent of the broker. And Mr. Seligman pointed out that liability cannot be created by letters stating that liability was denied.

For these reasons I think that the District Court was right and the persons to be sued under the Policy are the Underwriters who signed it. The Policy was actually issued on 12th August, 1935.

It has been pointed that if this is so, then an insured person may find it very difficult, if not impossible, to sue underwriters in this country, since their number on any particular Policy may run into hundreds — in this case actually there were sixty. But an insured has still the right to sue in England, and is in no worse position than he was, before Lloyds' Policies issued to persons in this country were amended by the deletion of the clause confining any disputes arising under the policies to the jurisdiction of the English Courts.

I think that this appeal fails and should be dismissed with costs and LP. 5.— advocate's fees.

Delivered this 30th day of June, 1937.

*British Puisne Judge.*

*Greene, J.*: I concur.

*British Puisne Judge.*

*Frumkin, J.*: The Appellants sued the Respondent Company under the policy or cover note whatever it may be in order to make it personally liable under it. In this the Appellant could not succeed.

Giving the special conditions attached to the document the best possible construction in favour of the Appellant, the most it could be said is that by the very wide powers given to the Respondent Company, the Appellant might have been misled in considering those powers to include Respondent's authority to represent the Lloyds Underwriters in an action brought against them, but the Appellant did not sue the Respondent Company as agents but as principals. No undue hardship will be caused to the Appellant in suing the Lloyds Underwriters since this particular group of Underwriters accepted the jurisdiction of the Palestine Courts and are represented by Counsel in this country.

For this reason, I agree that the judgment of the District Court be confirmed and the appeal dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 30th day of June, 1937.

*Puisne Judge.*

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CIVIL APPEAL No. 85/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Khadra Muhammad Abdul Aziz & 5 ors. APPELLANTS.

v.

Jubran Fouad Sa'ad, on behalf of his late father's Fuad Sa'ad's estate. RESPONDENT.

*Title to land — Claim against bona fide registered owner — Oral evidence of possession, L. A. 34/28, claim based on inheritance.*

In dismissing an appeal from the judgment of the Land Court of Nablus, sitting at Nazareth, dated the 17th April, 1937:—

HELD: After a considerable lapse of time and after two transfers in the Land Registry to *bona fide* purchasers, the Appellants could not set up their ownership by oral evidence of possession.

DISTINGUISHED: L. A. 34/28 (1, P. L. R. 301; 4, C. of J. 1216).

ANNOTATIONS: Where land is *unregistered*, oral evidence of possession is admissible in order to establish a claim for ownership: — C. A. 42/40 (1940, S. C. J. 97) and cases therein cited; see also annotations to that case in 1940, S. C. J., at p. 98.

FOR APPELLANTS: Atallah & Zuhbi.

FOR RESPONDENT: Asfour.

## JUDGMENT.

The present Appellants brought an action in the Land Court of Nablus, claiming that they inherited certain plots of land from their ancestor Muhammad Abdul Aziz, who was the registered owner of these lands. They further alleged that in 1922 one of the heirs of Muhammad Abdul Aziz fraudulently obtained a registration of these lands into his name to the exclusion of the other heirs. They further alleged that notwithstanding the fact that 14 plots of these lands were sold and transferred in the Land Registry twice, they have been and still are in possession. They asked that the Court below should hear evidence regarding their possession and order the registration of these 14 plots in their names.

2. The lower Court refused to allow oral evidence to be tendered against a registered title and dismissed their action.

3. Mr. Hanna Atalla, who appeared for the Appellants, relied on a passage in the judgment of this Court in Land Appeal No. 34 of 1928. This passage reads as follows:—

> "..... The Appellants' case is based not merely on possession, but upon title by inheritance, which is one of the three grounds of ownership; and in the absence of anything to the contrary, such a claim, if established, would prevail against a claim based solely upon registration .....".

4. I entirely agree, if I may say so, with all respect, with this passage, but in the present case there was something very much to the contrary. There were at least two transfers effected in respect of the lands in dispute and the present Respondents bought in good faith. For these reasons, Appellants cannot, after such a long period, come to

Court and ask it to set aside the registration of the Respondents.

5. The appeal must be dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 16th day of June, 1937.

*British Puisne Judge.*

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CIVIL APPEAL No. 43/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Manning, S. P. J. and Frumkin, J.

IN THE APPEAL OF:—

Haim Rakover. APPELLANT.

v.

"Switzerland" ("La Suisse") General Insurance Co. Ltd. RESPONDENT.

*Insurance — Acceleration of appeal to complete proceedings within period stipulated in policy — Proof that loss occurred independently of stated causes — Construction of policy — Proving a negative, Mejelle* 1699 *— Hooley Hill Rubber and Chemical Co. v. Royal Insurance — Quantum of proof — Court will not hear evidence without an application to that effect.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 11th March, 1937:—

HELD: 1. The proof required by the policy referred to the claim and not to the notice of claim.

2. Notwithstanding the provisions of the *Mejelle*, a contract may provide that one party should prove a negative.

FOLLOWED: Hooley Hill Rubber & Chemical Co. *v.* Royal Insurance Co., 1920, 1 K. B. 257, at pp. 272—3.

ANNOTATIONS:

1. The following are the terms of clauses 6 and 11 of the policy:—

"6. La presente police ne garantit pas non plus les pertes ou dommages qui resultent, directement ou indirectement, ou qui sont la consequence des evenements ci-apres enumeres:—

a) Tremblement de terre, feu souterrain, tempete, cyclone, typhon, ouragan, eruption volcanique ou tout autre phenomene meteorologique.

b) Invasion, actes quelconques d'un ennemi, hostilites ou mesures de guerre (peu importe qu'elles aient precede ou suivi la declaration

de guerre) sedition, troubles politiques, soulevement, revolte, dictature militare ou pouvoir usurpe, infliction de la loi martiale ou proclamation de l'etat de siege pour un lieu ou un territoire quelconques, ainsi que n'importe quels evenements ou faits dont la proclamation ou le maintien de la loi martiale ou de l'etat de siege seraient la consequence ou la cause.

c) Mesures prises par les autorites en general, notamment celles qui seraient en connexion avec les evenements ou causes designes sous les lettres a et b, ou bien toutes autres mesures prises dans l'interet sanitaire, national ou municipal.

Si l'assure demande selon cette police une indemnite pour perte ou dommage par suite d'un incendie, il est tenu a la sommation de la Compagnie dans la quinzaine suivant la reception de l'avis du sinistre, de lui fournir la preuve satisfaisante et indubitable que la perte ou le dommage a eu lieu independamment des evenements cites, et que, ni directement ni indirectement, ils n'etaient en rapport avec ces evenements ou consequences, ni occasionnes par eux ou par un crime incendiaire en connexion avec eux. Faute d'une telle preuve satisfaisante, la Compagnie ne sera obligee a payer aucune indemnite ni en totalite ni partiellement."

"11. Aussitot que se declare un sinistre occasionnant des pertes ou dommages aux objets garantis par la presente police, l'assure sera tenu d'en donner immediatement avis a la Compagnie, et de lui fournir, au plus tard dans les quinze jours du sinistre ou dans tout autre delai que la Compagnie lui aurait specialement accorde par ecrit, les pieces suivantes, dument signees par lui, savoir:—

a) Un etat des objets existants lors du sinistre et leur valeur.

b) Un etat des pertes ou dommages occasionnes par le sinistre, indiquant d'une facon aussi detaillee et exacte que possible les divers objets detruits ou avaries, et le montant des dommages qui s'y rapportent, en egard a la valeur des dits objets au moment du sinistre, sans y comprendre aucun benefice.

c) Un etat detaille de toutes les autres assurances qui pourraient exister sur ces memes objets.

L'assure sera egalement tenu en tout temps d'obtenir, produire et communiquer a ses frais a la Compagnie tous details, plans, devis, livres, quittances, factures, duplicates ou copies de factures, documents, pieces justificatives et renseignements quelconques que la Compagnie, soit directement, soit par ses representants, est equitablement en droit d'exiger de lui, ayant trait a la reclamation, a l'origine et a la cause de l'incendie et aux circonstances dans lequelles les pertes ou dommages ont eu lieu, ou touchant la question de la responsabilite de la Compagnie ou le montant de l'indemnite due par elle. En meme temps, l'assure sera tenu d'affirmer l'exactitude de sa reclamation et de tous les points qui y sont enonces, par une declaration faite, soit sous serment, soit dans toute autre forme legale.

Faute par lui de se conformer aux dispositions du present article, l'assure n'aura droit a aucune indemnite en vertu de la presente police."

2. On interpretation of the Abnormal Conditions Clause see P. C. A. 34/39

(1940, S. C. J. 432) and note 2 for earlier authorities rendered mostly obsolete by the decision of the Board; *cf.* C. A. 200/40 (1940, S. C. J. 464).

FOR APPELLANT: Eliash.

FOR RESPONDENT: Abcarius & Aboulafia.

## JUDGMENT.

This is an appeal from a decision of the District Court, Jerusalem, given on the 11th of March last.

Owing to the terms of an insurance policy upon which the proceedings were based, the hearing of this appeal has been accelerated upon the application of the Appellant.

The Plaintiff claimed the sum of LP. 3000.— under a policy of insurance against fire effected with the Defendant Company.

In his statement of claim the Plaintiff pleaded that a fire occurred on the night of the 25-26 of April, 1936, at his warehouse, and destroyed his property. He further pleaded that he had carried out whatever was incumbent on him under the policy, as shown by certain documents which were attached to the statement of claim.

The Defendant put in no defence.

The proceedings before the District Court consisted of argument only upon the policy and the correspondence.

Abcarius Bey, on behalf of the Defendants, relied upon clause 11 and clause 6 of the policy.

Clause 11 is a long clause dealing, *inter alia*, with the proof which the company is entitled to demand as to the value of the goods damaged, in respect of which a claim is made. One of the sub-clauses provides that the insurer will at any time be equally bound to obtain, produce and communicate at his expense, to the company all particulars, plans, specifications, *etc.*, which the company is entitled to ask of him, and goes on to state, that at the same time the insured will be bound to affirm the truth of his claim and of all the points therein set out, by a declaration either on oath or in any other legal form.

It was argued by Abcarius Bey that this latter provision applied to the original notice of claim which admittedly was not supported by oath or declaration. The District Court, however, did not agree with that contention.

Clause 6 of the policy provides that the policy does not cover loss or damage which arises directly or indirectly or which is the consequence of a number of excepted causes, for example, earthquakes or meteorological phenomena, invasion, riots, political trouble *etc.*, and goes on to provide that in the event of a claim for indemnity for loss

or damage following a fire being made under the policy, the company may require the insured to furnish satisfactory and indubitable proof, that the loss or damage had taken place independently of such causes and further provides that upon failure of such satisfactory proof the company will not be obliged to pay any indemnity.

It is clear from the letter of the Defendant's advocate, dated the 8th of May, 1936, that the company requested the insured to furnish the necessary proof in accordance with this clause.

In reply to that letter, the only documents furnished which could be regarded in any way as proof, were copies of letters which had been obtained from the Police, one dated 27th of May, 1936, and signed by Mr. Burns, in which he states that at present there is no evidence to show whether this fire was accidental or due to some criminal act; and another signed by Mr. Rice, dated 4th of July, 1936, in which he says that no evidence of arson was discovered in connection with the fire in question.

Abcarius Bey argued that these letters did not comply with the requirements of the clause, and on this point, in its judgment, the District Court held: "in fact, Plaintiff made no real effort to submit satisfactory proof," and in the result decided that the action was premature and should be dismissed with costs. Against that judgment, the Plaintiff now appeals.

To deal firstly with clause 11 of the policy, which was interpreted by the District Court in favour of the Plaintiff. Abcarius Bey argues that although there is no cross appeal by him he is entitled to question the decision of the District Court on this point. Whether he is technically entitled to do so or not, I am of opinion that the view of the District Court was right and that upon the true construction of the clause the obligation upon the insured was to verify on oath or by other declaration the details of his claim which he might be called upon to produce under clause 11 and not the notice of his claim which he had to give in the first instance.

As to the interpretation of clause 6 of the policy, Dr. Eliash argues that, owing to the provisions of Article 1699 of the *Mejelle* which provides that the object of evidence is to prove a right, negative evidence is inadmissble, and that consequently a provision in a contract which may, in certain circumstances, call upon the party to prove a negative, *e. g.* that there was not an earthquake, is illegal and consequently void. With that contention I do not agree. Whatever may be the true effect of the article of the *Mejelle* it is a provision as to evidence, and I can see no reason why a party to a contract should be barred by it from

undertaking, if he is so minded, in certain circumstances to prove a negative.

It is further argued by Dr. Eliash that the true effect of clause 6 is, that it is for the company to set up the exception and then for the insured to show that the loss occurred irrespective of the exception, and he relied on a reference to a decision of the courts in South Africa. We have no report of the case in question and I did not know what were the precise terms of the policy discussed in that case.

It seems to me that the meaning of the clause is clear, *i. e.* the policy does not extend to loss by fire resulting directly or indirectly from certain stipulated perils and that the company, if they so desire, may call upon the insured to show that the loss for which he claims arose independently of such excepted perils. I can see no reason why the parties should not enter into such an agreement if they wish, and I am strengthened in that view by a passage in the judgment of Scrutton, L. J., in Hooley Hill Rubber and Chemical Company and Royal Insurance (1920, I, K. B. p. 257) at the bottom of page 272 and top of page 273 as follows:—

> "Thirdly, explosion followed by fire; as to that the memorandum says that the policy does not cover loss caused by the fire unless it be proved that the fire was not caused directly or indirectly by the explosion, or was not the result thereof. The effect of this is that, where damage is done by an explosion and fire following it, the assured cannot recover unless he can prove that the fire was not caused by the explosion. This case is specifically dealt with by the last part of the memorandum."

What is satisfactory and indubitable proof must depend upon the facts of each case, and I take indubitable to mean without reasonable doubt in a business sense. When the insured person is called upon, under the terms of the clause, to furnish proof and does so, and such proof is rejected by the company, it may become a question for the Court to decide whether, in the circumstances, the proof furnished was satisfactory within the meaning of the clause, and was such proof as the company acting reasonably should have accepted.

In this case the Plaintiffs pleaded in their statement of claim, as I mentioned above, that they had done what was incumbent on them under the policy as shown in the documents attached. I have referred to the documents in question, and the view expressed by the District Court thereupon. I take that view to mean that in the opinion of the Court the proof tendered by the Plaintiff was insufficient to satisfy the requirements of the clause. I think the Court was certainly entitled to come to that conclusion upon the documents produced, and I am of opinion that this appeal should be dismissed.

Dr. Eliash, before this Court, raised a further point, that if the District Court was of opinion that the proof tendered was insufficient it should itself have heard evidence upon the matter. I find no record of any such submission in the proceedings of the Court below nor do I find any application by Dr. Eliash to be allowed to call such evidence. I do not think, therefore, that this point is open to him and consequently I express no opinion upon it.

The appeal is dismissed with costs, advocate's fee LP. 5.—.

Delivered this 14th day of April, 1937.

*Chief Justice.*

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CRIMINAL APPEAL No. 65/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Frumkin, JJ.

IN THE APPEAL OF :—

Zaki Hamza Zeid. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Autrefois convict — Charges under* 8A *Emergency Regulations and Sec.* 26(2)(*b*) *Firearms Ord., same facts — One charge struck out — Case remitted for rehearing — Sentence under remaining charge not quashed — C. C. O. sec.* 21.

In allowing an appeal from the judgment of the District Court of Haifa, dated the 15th April, 1937, whereby Appellant was convicted under Emergency Regulation 8A as amended by the Emergency Regulation 3(b) (i) and sentenced to five years' imprisonment, and in quashing the conviction:—

HELD : At the time of the second trial sec. 21 of the C. C. O. applied and the Appellant could not be convicted twice for the same offence under two different laws.

ANNOTATIONS :

1. The judgment in the previous case which is set out in full *infra* was given in CR. A. 138/36 by Manning, A. C/J., Copland and Khayat, JJ.

2. On Sec. 21 of the C. C. O. see the cases cited in note 4 to CR. A. 100/43 (1943, A. L. R. 648) and CR. A. 144/43 (*ibid.*, p. 780).

FOR APPELLANT: H. Atalla.

FOR RESPONDENT: Junior Government Advocate — (Kantrovitch).

## JUDGMENT.

This is an unusual case which has been brought about by an unusual combination of circumstances.

It seems that the Accused was originally charged before the District Court of Haifa for two offences: (1) of being in possession of explosives without authority contrary to Section 8A of the Emergency (Amendment) Regulations, (No. 5) of 1936, and (2) of being in possession of ammunition without a licence contrary to Section 26(2)(b) of the Firearms Ordinances, 1922—36.

When the matter first came before the District Court, Haifa, for reasons into which it is unnecessary to go, that Court struck out the charge under Section 8A of the Emergency Regulations and convicted the Accused of the charge under the Firearms Ordinance, and imposed a short term of imprisonment and a fine.

The matter came before this Court differently constituted on appeal by the Attorney General, (the date is important), on the 23rd December last; the judgment of this Court was as follows:—

> "In this case the Respondent was charged with an offence under Section 8A of the Emergency Regulations. The Court below, without taking any plea or hearing any evidence, struck out the charge. This was irregular.
>
> The case, as regards the charge, must be remitted to the Court below to be tried in accordance with law.
>
> Delivered this 23rd day of December, 1936."

The case then went back to the District Court and came before that Court on 6.2.37, and it is clear that the learned President appreciated that he was in a difficulty, as in his judgment he says:—

> "I, therefore, hold I am to treat the order of the Supreme Court as a direction for retrial setting aside on grounds of irregularity the whole of the proceedings which took place before this Court at the original trial. It necessarily follows that the Accused's original plea of guilt and the sentence passed in regard thereto are to be set aside; I don't think I can pay any regard to the fact (unfortunate as it may — or might be) that the Accused has served a term of 3 months' imprisonment as a result of his plea of guilt. If he is finally acquitted, this will be a matter for the consideration of other authorities."

It is quite clear that the judgment of this Court did not quash the conviction under the Firearms Ordinance and that conviction, therefore, stood.

There can be no doubt that the facts upon which both charges were based were the same, as the Assistant Government Advocate, at the second hearing by the District Court, stated: "Yes, there were two charges but same facts constituted these charges."

Whatever may have been the law at the time when the judgment of this Court was given, to the date of which I have expressly called attention, there is no doubt that the law applicable after the 1st day of January, 1937, when the Criminal Code Ordinance came into force, is to be found in Section 21 of that Ordinance.

Therefore, we have the position that the Accused has already been convicted of an offence on certain facts. Upon those same facts, he was again put on his trial and convicted, which was contrary to the provisions of Section 21 of the Criminal Code Ordinance which by then had been brought into force.

This appeal must, therefore, be allowed, and the conviction quashed.

Delivered this 30th day of June, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 80/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Frumkin, JJ.

IN THE APPEAL OF:—

Ali Hassan Abdallah Lahham. APPELLANT.

v.

Mohammad Abdul Hadi Hamd & 2 ors. RESPONDENTS.

*Evidence — Claim for ownership by prescription — Oral evidence of possession.*

In dismissing an appeal from the judgment of the Land Court of Jaffa, dated the 17th April, 1937:—

HELD: The Land Court was right in refusing to hear oral evidence of possession.

ANNOTATIONS: *Cf.* C. A. 85/37 (ante, p. 132) and annotations.

FOR APPELLANT: Shawa.

FOR RESPONDENT: Kanafawi.

### J U D G M E N T.

This is an appeal from the judgment of the Land Court of Jaffa. By a majority judgment that Court dismissed the action following the practice that the Court could not hear oral evidence of the fact of

possession by a Plaintiff in support of a claim of ownership by prescription. With that judgment we cannot interfere.

It is now said by the advocate for the Appellant that Land Settlement is about to come to the village in which the land in question is situated, and we express no opinion as to the Appellant's rights before the Land Settlement Officer.

The appeal will, therefore, be dismissed with costs and LP. 3.— advocate's fees.

Delivered this 17th day of June, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 147/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, A/S. P. J. and Khaldi, J.

IN THE APPEAL OF:—

Shlomo Slutzky & an. APPELLANTS.

v.

Mohammed Kamel, son of Haj Hassan Deeb & 2 ors. RESPONDENTS.

*Evidence — Admissibility of oral evidence to show manner in which contract is being carried out — Points covered by previous appeal cannot be heard — C. A. 186/33.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated 12.6.35 and in remitting the case with directions:—

HELD : Oral evidence is admissible to prove the manner in which the contract had been implemented.

ANNOTATIONS: The present position as to the admissibility of oral evidence may be gauged from the decisions in, and the annotations to, C. A. 168/41 (1941, S. C. J. 642), C. A. 94/43 (1943, A. L. R. 152) and C. A. 247/43 (1943, A. L. R. 689).

FOR APPELLANTS: Turteldove.

FOR RESPONDENTS: R. Anabtawi.

JUDGMENT.

The present appeal is before this Court for the second time (*vide* C. A. 186/33). On the previous occasion this Court remitted the case

because parol evidence had been wrongly admitted to vary the terms of a written contract. This Court added, however, that the lower Court could hear any evidence that was legally admissible. The District Court seems to have interpreted the said judgment narrowly for when the case came up for a rehearing it disallowed any evidence whatsoever.

The pleadings of both parties show, however, that there are points in issue in respect of which parol evidence may be admitted without in any way varying the contents of the written agreement.

To start with Appellants had been prepared to adduce oral evidence to prove Respondents' consent to the replacement of the pump, but as this point was before the Court when the previous judgment was given it must be deemed to have been covered by the said judgment and cannot, therefore, be reopened.

But the Appellants have raised a second point, namely that there was not a sufficient supply of water in the well to exhaust the pumping powers of the installation, and this Court is of the opinion that this is a relevant point on which the lower Court should have allowed oral evidence to be tendered.

The appeal is, therefore, allowed and the case is remitted to the District Court to hear evidence as to whether at the time the motor was installed by the Appellants, the supply of water in the well was or was not in excess of the powers of the combined pumping installation.

Costs to follow the event.

Delivered this 5th day of January, 1937.

*Acting Senior Puisne Judge.*

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CIVIL APPEAL No. 12/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Greene and Khayat, JJ.

IN THE APPEAL OF:—

David Bader and Moshe Lubetkin, administrators of the estate of the late David Brodetsky. APPELLANTS.

v.

Riunione Adriatica di Sicurta. RESPONDENT.

*Administrators — Rabbinical Courts — Succession Ord., sec. 8; P. O. in C. 53(i)(ii), consent to jurisdiction — Insurance, construction of policy.*

In dismissing an appeal from the judgment of the District Court of Jaffa, sitting at Tel-Aviv, dated the 25th November, 1936:—

HELD: The appointment of the Appellants as administrators did not show that all the heirs of the deceased had consented to the jurisdiction of the Rabbinical Court which had made the appointment. The Appellants could consequently not act as administrators.

ANNOTATIONS:

1. As to the power of a Religious Court to appoint administrators see C. A. 52/35 (9, C. of J. 740), overruling C. A. 55/32 (1, C. of J. 52).

2. Although consent to the jurisdiction of a Religious Court must be clear and unambiguous, it may, in proper cases, be inferred from the conduct of the parties: H. C. 79/40 (1940, S. C. J. 354), followed in H. C. 12/42 (1942, S. C. J. 254).

FOR APPELLANTS: Smoira.

FOR RESPONDENT: Gorodissky.

## JUDGMENT.

An insurance in the sum of LP. 500 against accidents and diseases was effected by the late David Brodetsky, a foreigner, with the Defendants, the Riunione Adriatica di Sicurta. The deceased paid the full premium for a year and received the cover note which contained a clause that it is subject to the terms and conditions of the Policy.

Clause 3 of the Policy provides that it does not insure against ..... any accident of whatever nature occurring while the ensured shall be engaged in fighting, duelling, mountaineering, playing polo or football, *motor-cycling*, racing, *etc.*

The death of the ensured was the result of severe injuries which he sustained while riding a motor-cycle.

After his death, the Rabbinical Court, on application, appointed the Appellants as Administrators of his estate.

The Administrators on behalf of the estate commenced proceedings in the District Court of Jaffa, sitting at Tel-Aviv, claiming the value of the Insurance Policy.

The District Court held that Section 8 of the Succession Ordinance does not empower a Religious Court to appoint an administrator, and that in consequence the Appellants must fail in their case as they had no authority to sue as such.

Although the District Court dismissed the claim on this point, it very judiciously dealt in full with the other points raised before it

which makes it possible for us to appreciate all the facts of the case and saves the case being remitted to the lower Court for further findings.

After giving consideration to all the facts of the case and to the arguments of Counsel for the Appellant before us, we come to the conclusion that even if we assume that the Rabbinical Courts had jurisdiction to appoint an administrator, they cannot do so unless all parties to the action consent to their jurisdiction as provided in Article 53(ii) of the Palestine Order-in-Council.

The certificate appointing the administrators does not contain a statement that the heirs of the deceased have consented to the jurisdiction, and in the absence of such a clear statement in the certificate we cannot assume that the parties consented to the jurisdiction of the Rabbinical Courts. In order to hold that a Religious Court of any one of the specified Religious Communities had jurisdiction to deal with any matter of personal status, other than those specified in Article 53(1) of the Palestine Order-in-Council, it is invariably necessary that certificates issued by such Courts should contain an explicit statement to the effect that all parties have consented to the jurisdiction. Otherwise, no one can tell, in a case such as this, whether administrators have been properly appointed or not.

But the appeal fails on the second ground also. The cover-note states that it is issued subject to the terms and conditions of the Policy and the Policy expressly excepts the risk of motor-cycling. In his proposal form which forms the basis of an insurance contract the deceased stated in answer to a question that he did not use a motor-cycle. When killed, he was motor-cycling and, therefore, he was not covered by the Policy at the time of his death.

For these reasons the appeal must be dismissed with costs and LP. 4 advocate's fees, to be paid personally by the Appellants.

Delivered this 24th day of May, 1937.

***British Puisne Judge.***

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CIVIL APPEAL No. 30/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khaldi and Khayat, JJ.

IN THE APPEAL OF:—

Hassan Sidki Dajani. APPELLANT.

v.

Hashem Abu Khadra. RESPONDENT.

*Contract — Variation of mode of performance by unilateral act — Refund of purchase price — Interest.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 28th January, 1937:—

HELD : The Appellant could not succeed in damages as he had failed to notify the Respondent as to the time and place of delivery. He could, however, claim back the money paid to the Respondent.

APPELLANT : In person.

FOR RESPONDENT : Cattan.

## JUDGMENT.

This is an appeal from the judgment of the District Court of Jerusalem, dated the 28th January, 1937, where the Appellant (as Plaintiff) claimed from the Respondent the sum of LP. 144.860 mils together with LP. 500 damages for breach of contract.

The contract entered into between the parties is quite a clear document. The Respondent undertook to deliver 700 boxes of oranges to the order of the Appellant free from all charges on board the ship to be named by Appellant by a registered letter to be addressed by him to the Respondent.

The Appellant did not name a ship, neither did he fix a day for the delivery of the oranges, but instead addressed a registered letter to Respondent requiring him to deliver the oranges in accordance with instructions that he will receive from Abdel Raouf Bitar. In the same letter the Appellant further requested the Respondent that in the event of his receiving no communication from Abdel Raouf, he should inform him immediately.

Copy of this letter was sent to Abdel Raouf under cover of a personal letter in which the Appellant asked the former to appoint and inform the Respondent of the date and the ship for shipping the oranges, but clearly this letter cannot affect the Respondent.

Abdel Raouf Bitar did not communicate with the Respondent and the oranges were not delivered as requested.

The District Court refused Appellant's claim for damages on the ground that he failed to prove a breach of contract as no clear shipping instructions appeared to have been given by him to Respondent, but that he was entitled for the sum of LP. 144.860 mils, which the Respondent admitted to have received, with interest thereon as from date of action and half costs.

The question really is — was the Respondent under an obligation to carry out the instructions contained in Appellant's letter. In our

opinion he was not compelled to do so, and on the true construction of the agreement we consider that it was the duty of Abdel Raouf Bitar, as agent of Appellant, to communicate with the Respondent and give him instructions as to the ship and day appointed by him for the purpose.

This he did not do. There was, therefore, no breach of contract on the part of the Respondent.

The appeal must be dismissed and the judgment of the District Court confirmed with costs and LP. 3 advocate's fees.

Delivered this 26th day of May, 1937.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 37/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Khayat, JJ.

IN THE APPEAL OF:—

Saber Abdallah Abu Rizk & an. APPELLANTS.

v.

Attorney General. RESPONDENT.

*Corroboration — Evidence which amounts to corroboration.*

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 24th March, 1937, whereby Appellants were convicted under Sections 288(1) and 23(a) and (b) of the Criminal Code Ordinance, 1936, and sentenced to seven years' imprisonment each:—

HELD: Evidence that a house has been searched can constitute corroboration of the evidence of the principal witness that the house has been searched and a sum of money lost.

ANNOTATIONS: On the sufficiency or otherwise of corroborative evidence see CR. A. 122/43 (1943, A. L. R. 770) and notes. *Cf.* CR. A. 18/44 (1944, A. L. R. 158).

FOR APPELLANT: Moghannam.

FOR RESPONDENT: F. Ghussein.

JUDGMENT.

We are of opinion that there is sufficient evidence to justify this conviction.

The fact that the main witness said that the house was searched and that he lost a certain sum of money and that other witnesses said that the house was searched, is sufficient to satisfy the rule that an accused person cannot be convicted upon the evidence of a single witness unless it is corroborated.

We think that the Court was justified in coming to the conclusion to which it did and we see no reason to interfere with the sentence. The appeal is, therefore, dismissed.

Delivered this 1st day of May, 1937.

*Chief Justice.*

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HIGH COURT No. 112/36.

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

BEFORE: Copland, A/S. P. J. and Frumkin, J.

IN THE APPLICATION OF :—

Karl Schneider & an. — PETITIONERS.

v.

1. Chief Execution Officer, Nazareth,
2. Shafik Kaawar. — RESPONDENTS.

***Public policy — Interest reipublicae ut sit finis litium — Judgment impugned in separate applications on different grounds — H. C. 23/36.***

In dismissing an application for an order to issue to 1st Respondent, directing him to show cause why his order, dated 11.12.36, should not be set aside:—

HELD: Public policy does not allow of litigation by instalments: The Petitioner should have raised the point of jurisdiction in the earlier High Court proceedings.

REFERRED TO: H. C. 23/36 (not reported).

ANNOTATIONS: On successive applications to the High Court see H. C. 1/41 (1941, S. C. J. 8), H. C. 7/42 (1942, S. C. J. 51, at p. 63) and H. C. 78/42 (1942, S. C. J. 529).

FOR PETITIONERS: J. Levy.

RESPONDENT: *Ex parte.*

### ORDER.

The Petitioners in this application are asking for an Order *nisi* to issue against Respondents, calling upon them to show cause why the

Chief Execution Officer of Nazareth should not stay the execution of a judgment in favour of the second Respondent.

The said judgment is now attacked on the grounds that having been delivered by a Magistrate prior to the enactment of the new Magistrates' Courts Jurisdiction Ordinance, and being in respect of a sum exceeding LP. 100, it was outside the Magistrate's jurisdiction and hence unenforceable on that account.

It must be remembered, however, that on a previous occasion, in High Court No. 23/36, a similar attempt to impugn the same judgment was made on the ground that being a compromise and not having been signed by both parties, it was not executory.

Now, public policy does not allow of such continuous litigation by instalments. The present point could just as well have been raised when the matter came up before this Court on the former occasion. The Petitioners have failed to show any cause for the delay, and the present application, as far as we can see, is nothing but a means whereby to delay the execution of a valid judgment.

For the above reasons, the rule is refused.

Delivered this 4th day of January, 1937.

*Acting Senior Puisne Judge.*

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CIVIL APPEAL No. 16/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Khaldi and Khayat, JJ.

IN THE APPEAL OF:—

Mabmoud Saleh Hassan & 3 ors. — APPELLANTS.

v.

Khadra Shilbayeh & 3 ors. — RESPONDENTS.

*Land Settlement — Village musha — Order for compensation in lieu of land under L. S. O., sec.* 60.

In dismissing an appeal from the judgment of the Land Court of Jaffa, dated the 12th October, 1933, and delivered on 14th January, 1937:—

HELD: The L. S. O. had been justified in the exercise of his discretion to grant the Appellants compensation in lieu of lands.

FOR APPELLANTS: Kanafani.

FOR RESPONDENTS: No. 1—3: Assal.

No. 4: In person.

## JUDGMENT.

This is an unfortunate case which has been going on for a very long time. It concerns a small parcel of land in a *Musha'* village.

It seems that in the result the Settlement Officer, exercising his powers under Section 60 of the Land (Settlement of Title) Ordinance, directed that certain compensation should be paid, owing to certain of the owners not being able to obtain their full share.

The matter came before the Land Court and that Court dealt with the matter in their judgment in which they say:—

> "The whole dispute concerns certain shares in a village partition scheme. The average of one share was about 44 m. *dunams*, but in actual practice it varied considerably, and it must be noted that the Respondents' share is only about 34 *dunams*. The Appellants contend that they should have the land itself and not the compensation in lieu which was awarded them by the Settlement Officer; as long as there is no appeal to disturb the whole partition, the partition must stand and in the circumstances we are not prepared to interfere with his order which seems to us to be an eminently fair one. We, therefore, confirm it. The compensation is to be payable in such a manner and in such proportion as the Settlement Officer shall direct."

It appears to us that the Land Court was right in the decision which it gave, that justice was being done in accordance with the provisions of the law, and that the compensation shall be assessed by the Settlement Officer.

The appeal will, therefore, be dismissed with costs and LP. 3.— advocate's fees.

Delivered this 26th day of May, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 32/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Thurayya Najib el Haj, on behalf of the heirs of her late father. APPELLANT.

v.

Nassib El-Haj. RESPONDENT.

*"Disposition" — Admission that immovable property transferred in 1903 was transferred by way of security — Evidence.*

In dismissing an appeal from the judgment of the Land Court of Jaffa, dated the 14th January, 1937:—

HELD: The written admission, made in 1929, that the property transferred in 1903 had been transferred by way of security only did not constitute a "disposition".

ANNOTATIONS: See C. A. 70/38 (1938, 1 S. C. J 281) and last paragraph of annotations thereto.

FOR APPELLANT: Zein Ed-Din.

FOR RESPONDENT: Cattan.

JUDGMENT.

The Appellant in this appeal from the Land Court of Jaffa has urged that he Court below erred in relying on certain documents. The first of them was a deed of 1929, containing an admission by the Appellant that the land in dispute had been transferred in 1903 by way of security only. Appellant's advocate urged that the deed of 1929 was in fact a disposition of land made outside the Land Registry and was consequently null and void.

We do not agree. We hold that the deed of 1929 was not a dispositon of land.

The second document was the *kushan* of the Respondent and we fail to see why the Court below should have refused to rely on this.

The appeal is dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 31st day of May, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 86/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Frumkin, JJ.

IN THE APPEAL OF:—

As'ad Ewayed. APPELLANT.

v.

Raouf Ka'war. RESPONDENT.

*Contracts — Allegation of fraud — Findings of fact — Penalty and*

*liquidated damages, O. P. C. 111 — Onus of proof — "Samaria" District Court.*

In dismissing an appeal from the judgment of the District Court of Nablus, (Samaria), dated the 17th April, 1937:—

HELD: The question of damages and penalty under O. P. C. 111 would have to be fully argued before changing the practice of allowing the amount fixed in the contract as damages.

ANNOTATIONS: The distinction between liquidated damages and penalties has been introduced into Palestine law by the decision in C. A. 191/37 (*post*) as a result of the judgment of the Judicial Committee in P. C. 1/35 (2, P. L. R. 390; 7, C. of J. 331); C. A. 191/37 (*supra*) was later confirmed on appeal in P. C. 30/39 (1941, S. C. J. 279), but already in C. A. 126/38 (1938, 1 S. C. J. 428) the Court held that the said distinction was part of the law of the country.

FOR APPELLANT: Saunders.

FOR RESPONDENT: Asfour.

## JUDGMENT.

This is an appeal which is brought from what is described in the notice and grounds of appeal as the District Court, Samaria. There is no District Court of Samaria and it would be convenient that Courts should be correctly described.

The case turns on a contract, in the simplest form, for the sale of a house.

The Appellant, the Defendant in the Court below, failed to comply with his contract and under the terms thereof he was sued for a sum of money provided for in the contract and described as damages.

The Appellant sought to show that he entered into the contract owing to misinterpretation and fraud, but, as was pointed out in the course of these proceedings, the position was clear from the very nature of the document itself. It provided in the simplest terms that he was to sell a house, not a part of a house, and the document was witnessed, and it is very hard to think that there should have been any doubt in the minds of the parties or the witnesses as to what the agreement really was. It is said that the Appellant did not really know what he was doing owing to his inadequate knowledge in Arabic, that it was not sufficiently explained to him or it was wrongly explained to him. This argument is answered completely by the view which the District Court took:—

> "There is no plea that the contract was falsely read, that Defendant was falsely misled, or that the written contract does not set out what Defendant may have understood to be the terms agreed upon."

and the Court clearly came to the conclusion that the Defendant, the

present Appellant, was not misled by the Plaintiff. This disposes of the main question and we see no reason to interfere with the decision of the District Court.

It is also argued that the sum involved is a penalty and not damages and is, therefore, irrecoverable. As I said in a recent case, the Courts here have for a long time construed Article 111 of the Civil Procedure Code which provides:—

> "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."

as permitting recovery under a claim such as this, and before that series of judgments could be reversed it would be necessary for the question to be fully argued and considered.

Even if this question is open to argument, so far as this particular case is concerned, the District Court took the view that the Defendant (Appellant) had not discharged the onus of showing that the sum in question was a penalty.

The appeal will be dismissed with costs and LP. 5 advocate's fees.

Delivered this 16th day of June, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 18/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khaldi and Khayat, JJ.

IN THE APPEAL OF:—

Shlomo Mizrahi & an. APPELLANTS.

v.

Muhammad Abdel Halim El-Jabali. RESPONDENT.

*Sale of land — Refund of deposit — Money had and received — No evidence of payment — Cause of action.*

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

HELD: The Appellants could not succeed in an action for money had and received as there was no evidence of payment. They could not succeed on the promissory note as they had to sue the maker thereof.

FOR APPELLANTS: Horovitz.

FOR RESPONDENT: Abdul Hadi & Abcarius.

## JUDGMENT.

This is an appeal from the judgment of the District Court of Haifa, dated the 14th January, 1937, which rejected an action brought by Appellants against Respondent for breach of contract claiming LP. 1,000 as money paid and received and LP. 30,000 as liquidated damages.

The District Court arrived at their decision after hearing a considerable amount of evidence all of which can be found in the record of the proceedings. After considering the lengthy pleadings of the Appellant, we came to the conclusion that the lower Court was quite correct in its judgment and we agree *in toto* with its arguments.

The only question about which we need say a few words is the LP. 1,000 alleged to have been paid by the Appellants to the Respondent. The District Court while dismissing the action, reserved to the Appellants the right to any claim which they may have against the Respondent in regard to the promissory note for the LP. 1,000.

There is no proof that the LP. 1,000 was actually paid in cash, and the Respondent emphatically denied that he ever received this sum in respect of this transaction.

The promissory note is signed by the Respondent and his son and this is confirmed by the *addendum* to the contract which is in the following terms:—

> "The second party (*i. e.* the Appellants) may pay by this *sanad* (*i. e.* bill) given by the firm of Muhammad Abdul Halim & Son, which he has in his possession, in lieu of LP. 1,000 cash which is incumbent on him to pay at the signature of these presents by his guarantors."

The LP. 1,000 becomes due only when the guarantors to be produced by the Respondent affix their signatures to the contract. This admittedly was never done.

If the Appellants are suing for the LP. 1,000 as money paid and received under the contract, their claim must fail as there is no proof of this sum having been actually paid in cash.

If the Appellants are suing for the LP. 1,000 on a promissory note signed by the firm of Muhammad Abdul Halim & Son, then they must bring a separate action against the makers of the bill.

This being so, the appeal, which has no merits, must be dismissed with costs and LP. 5.— advocate's fees.

Delivered this 26th day of May, 1937.

*British Puisne Judge.*

CIVIL APPEAL No. 50/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Fadil Abbas El-Fahoum & an. APPELLANTS.

v.

Riziq Mahmud Muhammad Khalaf & 2 ors. RESPONDENTS.

*Land Court — Jurisdiction to confirm award — L. C. Ord., Sec. 6(2); 1926 Judgment by Default Rules — Provision regarding confirmation of award within six months — Court Fees Rules, r. 13 — In case of conflict between rules, those of later date prevail — "Shall", Stroud's Judicial Dictionary, Re Thurlow, Mayer v. Harding — L. A. 58/28 — Previous authority insufficiently argued.*

In allowing an appeal from the judgment of the Land Court of Nablus, dated the 9th March, 1937, setting aside the judgment of the Land Court and remitting the case for a new trial:—

HELD: 1. The authentication of the award, where the reference was made by the Land Court, was within the jurisdiction of that Court.

2. The Court Fees Rules, later in date than the Judgment by Default Rules, contemplate (rule 13) the renewal of an action, such as the present action, which has been struck out.

3. Although not authenticated within six months, the award had not lapsed, the Appellants having applied in time.

APPLIED: *Re* Thurlow, 1895, 1 Q. B. 729; Mayer *v.* Harding, L. R. 2 Q. B. 410.

NOT FOLLOWED: L. A. 58/28 (not reported).

ANNOTATIONS:

1. Sec. 6(1) of the Land Courts Ordinance has since been amended; see Land Courts (Am.) Ord., No. 46 of 1939, sec. 3.

2. On the interpretation of the word "shall" see also C. A. 224/41 (1942, S. C. J. 77).

3. For other instances where the Supreme Court disregarded precedents on the gound that the case had not been fully argued, see second paragraph of note 1 to C. A. 233/43 (1943, A. L. R., at p. 735).

FOR APPELLANTS: O. Saleh, Cattan.

FOR RESPONDENTS: Bustani.

## JUDGMENT.

This is an appeal from a judgment of the Land Court of Nablus, dismissing the Appellants' claim to confirm an arbitration award, on the grounds, first, because the authentication of the award was not made within six months of the publication of the award as required by Section 6(2) Land Courts Ordinance (Cap. 75, Laws of Palestine), and, secondly, because by Rule 2 of the Judgment by Default (District and Land Courts) Rules, 1926, the right to renew a case, after it has been struck out, has been abolished.

The facts of the case are as follows :—

On 1st October, 1933, the Appellants filed their claim in the Land Court asking for the Respondents to be prohibited from trespassing on their land. After various hearings, both parties to the action, on 17th June, 1935, asked that the matter might be referred to arbitration to an arbitrator named by them, and it would seem that the Court thereupon referred the matter to the named arbitrator, since on 8th January, 1936, the Court ordered the "case to be struck out with liberty to parties generally to apply when award has been published." On 9th March, 1936, the award was issued, and on 12th March, 1936, three days after that issue, the Appellants applied for confirmation of the award. The case was set down for hearing on 8th April, 1936, but on the parties not appearing, the case was struck out a second time. On 9th April, 1936, the case was renewed by the Appellants and was fixed for hearing on 28th April, 1936. On that day, however, owing to the disturbances which had broken out in Palestine, no President District Court and, therefore, no Court was available, and the case was adjourned, the parties being so informed. It was not until 9th March, 1937, that the case was again set down to be dismissed for the reasons I have stated above.

The relevant provisions of the Land Courts Ordinance are:—

> "6. (1). A Land Court may, with the consent of the parties, refer to arbitration any dispute arising before it in any matter under this Ordinance.
>
> (2) Subject to the powers set out in subsections (3) and (4) as to remitting or setting aside the award, a Land Court shall, within six months of its issue, authenticate the award, and the award, when so authenticated, shall have the effect of a judgment of a Court and shall be executory."

On this appeal, Mr. Cattan, for the Appellants, in addition to submitting that the two conclusions as to the law made by the Land Court were wrong, has argued that the confirmation of this award lies within the sole jurisdiction of the District Court under the Arbitration Or-

dinance. To this I do not agree. The reference to arbitration was made by the Land Court under Section 6(1) of the Land Courts Ordinance, and by Section 6(2) the Land Court has full power to authenticate such an award when it has been issued.

As to the finding by the Land Court that there is no right now to renew an action which has been struck out, I think that the Land Court was wrong. Rule 2 of the Judgments by Default Rules gives a right to enter a fresh action when a case has been struck out for non-appearance, but Rule 13 of the Court Fees Rules 1935, undoubtedly contemplates the renewal of an action which has been similarly struck out. Both sets of Rules are of equal legal validity as against each other, and I do not think that they are contradictory when read together. And in any case the Court Fees Rules are of later date and should prevail in the event of inconsistency with any previous Rule.

I come now to the most important point in this appeal: namely, if the Court does not authenticate an award within six months of its publication, does the award lapse and become incapable of authentication?

The answer to this question depends partly on the meaning to be assigned to the word "shall."

The law on this point is summarised in Stroud's Judicial Dictionary, Second Edition, page 1851, in these terms:—

> "Whenever a statute declares that a thing 'shall' be done, the natural and proper meaning is that a peremptory mandate is enjoined. But where the thing has reference to the time or formality of completing any Public act, not being a step in a litigation, or accusation, ..... the enactment will generally be regarded as merely directory, unless there be words making the thing void if not done in accordance with the prescribed requirements."

A very large number of cases are cited in Stroud. None of them seems to throw much light on the present case, except *Re* Thurlow (1895, 1 Q. B. 729) where it was held that the words "shall adjudge" in Section 20(1), Bankruptcy Act 1883, did not deprive the Court of the power to adjourn given by Section 105(2). And in Mayer *v.* Harding (L. R. 2 Q. B. 410) it was held that where a party had done all that he could in order to comply with a statute he should not be penalised because the condition in the statute was, in the circumstances of the case, impossible of performance owing to the Court Offices being closed. Meller, J., said: "As regards the conduct of the parties themselves, it (*i. e.* lodging in due time a case) is a condition precedent. I think it cannot be considered strictly a condition precedent where it

is impossible of performance in consequence of the offices of the Court being closed. Here all that was possible was done, and I think that is sufficient."

Applying the principles in these cases to the present problem, it seems to me that the Appellants have done all that they could possibly do. They had applied for confirmation of the award within three days of its issue — different considerations might well have applied if they had waited until the last week of the six months, thereby rendering it impossible for the Court to adjudicate within the prescribed limit. I do not see what else the Appellants could have done, for I know of no method in this country to compel a Court to adjudicate or to sit: and Section 6(2) does not contain any words which could be construed as rendering the award void if not confirmed within the prescribed limit.

The point, however, has previously come before this Court. In L. A. 58/28 this Court confirmed a judgment of the Land Court of Jerusalem of 19.5.28. The Land Court had held by a majority, stating that they did so with regret and reluctance, that the word "shall" in Section 6(2) was peremptory, and that, therefore, an award which was not authenticated within six months of its issue must be considered as null and void. The Supreme Court merely dismissed the appeal without assigning any reasons. It would not appear that the attention of either Court was drawn to the cases which I have cited: nor to the fact that the word "shall" may, in certain circumstances, be directory and not peremptory. This argument was never considered.

In these circumstances, I consider myself free to express my own opinion, untrammelled by the previous ruling. It seems to me, that where a party has done everything in his power, and with exceptional diligence, to get a decision of a Court, that it would be a negation of natural justice if he were denied his rights, owing solely to a failure on the part of the Court to decide his application within a prescribed limit of time. I think that the word "shall" in Section 6(2) is directory only, that is that authentication should be given, if possible, within six months, but that a failure to do so by the Court does not render the award null and void.

For these reasons, I think that this appeal should be allowed, the judgment of the Land Court set aside and the case remitted for re-trial.

Delivered this 8th day of June, 1937.

*British Puisne Judge.*

CRIMINAL APPEAL No. 52/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Greene and Khaldi, JJ.

IN THE APPEAL OF :—

Ahmad Abed Abu Radi. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Emergency Regulations — Defence Order in Council, Art. 10 — Regulations preserved.*

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 17th April, 1937, whereby the Appellant was convicted under Regulation 8A(i) of the Emergency Regulations, 1936, and sentenced to five years' imprisonment:—

HELD: The Emergency Regulations were preserved by Art. 10 of the Palestine (Defence) O. in C.

FOR APPELLANT: Abulafia.

FOR RESPONDENT: Assal.

JUDGMENT.

Article 10 of the Palestine (Defence) Order-in-Council, 1937, clearly preserves the Emergency Regulations.

The appeal is dismissed and the conviction and sentence are affirmed.

Delivered this 29th day of May, 1937.

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CIVIL APPEAL No. 119/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Greene, Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Elazar Elyashar. APPELLANT.

v.

Kamel Khalil el-'Ubeid & 5 ors. RESPONDENTS.

*Estoppel — Statement of account constituting estoppel as regards area only.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 30th September, 1936, and delivered on the 9th October, 1936 and in remitting the case to the lower Court:—

HELD: The District Court had failed to consider the question of breach of contract. The written statement of account constituted an estoppel only as regards the area transferred.

FOR APPELLANT: Olshan.

FOR RESPONDENTS: A. Salah.

JUDGMENT.

It was alleged by the Appellant in the Court below that the statutory tenants on the land have acquired their right from the Respondents, or some of them, after the agreement of sale and after the promulgation of the Cultivators Ordinance, and if it were so the Respondents have committed a breach under the agreement and are liable to pay damages.

It was also alleged that after the entry of the land in the name of Appellant before the Settlement Officer, two counter-claims have been entered, this fact also constituting a breach by Respondents.

The Court below did not determine these two points.

The statement of accounts signed by Appellant on the 8th of March, although forming an estoppel as regards the area transferred, does not cover further claims. Nor does the question of double damages arise, because the Respondents have clearly undertaken to renounce any objection to the land even after registration.

The judgment must, therefore, be set aside and the case remitted to the Court below to deal with and determine the two allegations above mentioned and give a fresh judgment accordingly.

Costs to follow the event.

Delivered this 19th day of May, 1937

*British Puisne Judge.*

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HIGH COURT No. 27/37.

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

BEFORE: Manning, S. P. J. and Frumkin, J.

IN THE APPLICATION OF :—

The "Jaf-Ora" Jaffa Orange Products Co-operative Society Ltd. PETITIONERS.

v.

The Palestine Fruit Products Company "Assis" Ltd. with Receiver and Manager. RESPONDENTS.

The Registrar of Trade Marks. THIRD PARTY.

*Trade Marks — Opposition to registration — Opposer's prior user — Effect of registration abroad — Word common to the trade — "Jaf-Ora".*

In allowing an opposition to the Registration of Trade Mark No. 3746 advertised in Supplement No. 3 to the Palestine *Gazette* No. 647 of the 19th November, 1936:—

HELD: 1. The use of the word by the Petitioners was sufficiently long to enable them to oppose its registration.

2. The use of the word was calculated to deceive.

3. The word had practically become common to the trade.

4. The registration of the word in foreign countries did not affect the proceedings in Palestine.

ANNOTATIONS: For Palestinian authorities on trade marks see H. C. 36/42 (1942, S. C. J. 335) and note 2; *cf.* also H. C. 47/43 (1943, A. L. R. 404).

FOR PETITIONERS: Harari.

FOR RESPONDENTS: I. Levin.

## JUDGMENT.

*Manning, S. P. J.*: On June 4th, 1935, the Respondents, who are manufacturers of citrus products, applied for the registration of a trade mark. For some reason there was considerable delay in advertising the mark in the *Gazette*, and it was not until November 19th, 1936, that the advertisement appeared. The greater part of the mark consists of two oranges at the edge of a branch, one above the other, under the right-hand orange is the word "Assis" in green letters: underneath this sign in large white letters on a blue background is the word "Jaf-Ora", and at the foot are the words "Made in Palestine."

2. The Petitioners filed a notice of opposition to the registration. The dispute has arisen with respect to the use of the word "Jaf-Ora". The relevant facts are as follows: On August 5th, 1932, a Co-operative Society was formed under the name of the "Jaffa Orange Products Co-operative Society Ltd.", hereinafter called the Society. In the same year it began to use the word "Jaf-Ora" as a trade mark, though unregistered, and has continued to use it to the present day. It was also in possession of a special recipe for the manufacture of an orangeade known to the trade as "Jaf-Ora" and in 1933 it entered into an agreement with the Respondents, under which it handed over to them this

recipe, on condition that the Respondents purchased all the raw materials required for the manufacture of the orangeade from the Society and marketed it under the name "Jaf-Ora".

3. This agreement came to an end in 1934. In 1935 the Society together with an English company applied for the registration in England of the trade mark "Jaf-Ora". On January 9th, 1936, a new co-operative society (the Petitioners) was formed, it took over the business of the Society and purchased its good-will. It had the same name as the Society except that the name "Jaf-Ora" appeared in front. On January, 29th, 1936, the name "Jaf-Ora" was registered in England as the joint trade mark of the Society and an English Company.

4. The Respondents have been using the trade mark which they wish to have registered since 1930. It has been registered in India, Poland and Egypt since 1935. In spite of these facts I think the opposition of the Petitioners should succeed. The use of the word "Jaf-Ora" in the Respondents' mark is open to objection. The Society, and their successors, the Petitioners, have been lawfully using it since 1932. In the 1933 agreement to which I have referred, the Respondents recognised the Society's right to the use of the word "Jaf-Ora". Its use by the Society is not so recent as to prevent the Petitioners from successfully opposing the registration of a trade mark in which the word is a prominent feature.

The use of the word is calculated to deceive. There is a further objection to its use; from the facts which I have set out it seems that the name has practically become common to the trade to denote an orangeade made from Jaffa oranges.

5. The registration of the name "Jaf-Ora" as a trade mark by the Society, and the registration of the trade mark of the Respondents in other countries cannot affect the situation. The registration of the Respondents' mark in Palestine has been opposed and for the reasons stated I think the opposition succeeds.

6. The opposition is accepted. The Petitioners will have the costs of the opposition to include an advocates' fee of LP. 10.

7. It seems that there would be no opposition to the Respondents' trade mark if the word "Jaf-Ora" was omitted, but in that case I think the mark should be advertised in the prescribed manner.

Delivered this 16th day of July, 1937.

*Senior Puisne Judge.*

*Frumkin, J.*: I concur.

*Puisne Judge.*

HIGH COURT No. 94/36.

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

BEFORE: Manning, S. P. J. and Copland, J.

IN THE APPLICATION OF :—

Joseph Weinberg. PETITIONER.

v.

Dr. H. Khaldi, in his capacity as Mayor of the Municipal Corporation of Jerusalem. RESPONDENT.

*High Court practice — Ex parte orders — Persons affected should be cited.*

In discharging an order issued to the Respondent, directing him to show cause why he should not abstain from treating certain persons as Councillors of the Council of the Municipal Corporation of Jerusalem and from summoning them as Councillors to the meetings of the said Council and from allowing them to vote at the meetings of the said Council:—

HELD: The rule would be discharged as Councillors, whose position would be affected by the order, had not been represented at the hearing.

ANNOTATIONS: *Cf.* H. C. 92/41 (1941, S. C. J. 483).

FOR PETITIONER: Levitsky.

FOR RESPONDENT: Cattan.

### ORDER.

If the Court were to make any Order in this case, it would amount to a decision that certain Councillors of the Jerusalem Municipal Corporation have become disqualified to sit by reason of certain omissions. These Councillors have not been represented at the hearing, and in accordance with well-recognized principles of law, no order affecting their position in any way ought to be made.

For this reason, we order the Rule to be discharged and we do not think it necessary to deal with any of the other issues that have been raised.

Petitioner to pay Respondent his costs to include LP. 6.— advocate's fees.

Given this third day of February, 1937.

*Senior Puisne Judge.*

CIVIL APPEAL No. 77/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Trusted, C. J., Copland and Frumkin, JJ.

IN THE APPEAL OF:—

Yehuda Blum. APPELLANT.

v.

Estate of Alfred M. Sursok & an. RESPONDENTS.

*Landlord and tenant — Frustration, C. A. 43/33 — Period from which rent ceases to be payable — Mejelle.*

In allowing an appeal from the judgment of the District Court of Jaffa, (appellate capacity), dated the 25th March, 1937, setting aside the judgment of the District Court and restoring the judgment of the Magistrate:—

HELD : The Appellant was entitled to stop payment of rent as from the date when the interference first arose.

FOLLOWED: C. A. 43/33 (8, C. of J. 543).

ANNOTATIONS: The latest Palestinian authority on frustration of a contract of lease is C. A. 61/43 (1943, A. L. R. 145); the development of the law in England on this point is fully set out in the annotations thereto.

FOR APPELLANT: Wilner.

FOR RESPONDENTS: No appearance.

### JUDGMENT.

This appeal arises out of a contract of lease of certain premises in Jaffa.

Owing to the conditions which prevailed in Jaffa last year during the term of the lease it became practically impossible for the Appellant to use the premises.

It was decided by this Court in Civil Appeal 43/33 in which the facts would appear to have been similar to those in this case, that in such circumstances the provisions of the *Mejelle* apply and the tenant is relieved of his obligations to pay rent.

The Magistrate held in this case that the tenant (Appellant) was relieved of his obligation to pay as from the commencement of the interference. The District Court held that he was relieved only from the date when he cancelled the lease.

Against the decision of the District Court the Appellant appeals.

The Respondent has not appeared and has made no application to

cross-appeal from the main finding, *i. e.* that the lease was terminated.

While expressing no opinion as to this main point, we are of opinion that if the facts were such as to make the provisions of the *Mejelle* applicable, the tenant was entitled to treat the contract as terminated from the date when the interference first arose, and the appeal is allowed and the judgment of the District Court set aside and that of the Magistrate restored, with costs, advocate's fees LP. 4.—.

Delivered this 15th day of June, 1937.

*Chief Justice.*

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CRIMINAL APPEAL No. 27/37.

CRIMINAL APPEAL No. 28/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Manning, S. P. J. and Khayat, J.

IN THE APPEAL OF:—

Abraham Litvak & an. APPELLANTS.

v.

The Attorney General. RESPONDENT.

*Remittal by Magistrate to District Court — M. C. J. O.*, 1935, *sec.* 3(2) *— Magistrate may remit after opening of case by prosecution — O. P. C.* 203 *— Sentence.*

In dismissing an appeal from the judgment of the District Court of Jaffa, sitting at Tel-Aviv, dated 9th January, 1937, whereby the first Appellant was sentenced to twelve months' imprisonment, and the second Appellant to three months' imprisonment:—

HELD: A British Magistrate may remit a case to the District Court after the prosecution has opened the case.

ANNOTATIONS:

1. *Cf.* CR. A. 34/43 (1943, A. L. R. 384).

2. As a consequence of his conviction in this case the first Appellant was later struck off the Roll of medical practitioners and his application for a new licence was refused and such refusal upheld in H. C. 79/42 (1942, S. C. J. 548).

FOR APPELLANTS: Abcarius.

FOR RESPONDENT: Government Advocate — (Alami).

JUDGMENT.

This is an appeal from the judgment of the District Court of Jaffa, sitting at Tel-Aviv, dated the 9th January, 1937, by two accused persons, Dr. Abraham Litvak and Hirsh Feldman, who were convicted by that Court under Article 203 of the Ottoman Penal Code.

The District Court in trying this case was exercising its summary jurisdiction and it refused leave to appeal to this Court. Application was made to me as Chief Justice and I granted leave to appeal.

The case was originally brought before the Chief Magistrate, Tel-Aviv, and the Chief Magistrate, acting under Section 3(2) of the Magistrates' Courts Jurisdiction Ordinance, 1935, remitted it to the District Court, taking the view that the facts were so serious to warrant its remission to the District Court.

The first ground of appeal before us was that the Magistrate was wrong in so doing, in that the prosecution had opened the case, and it is urged on behalf of these Accused that when any step has been taken, other than taking the plea from the accused, the Magistrate no longer has power to remit, and that he can only exercise his power under that subsection before the proceedings have started.

With that view we do not agree. In our view the Magistrate was right and empowered to remit the case to the District Court and that Court was properly seized with this case.

The second ground of appeal is that Article 203 is not altogether clear in its terms and did not extend to an offence such as was alleged in this case. We are of opinion that the case was properly brought under that Article of the Ottoman Penal Code.

It is further argued on behalf of these Appellants that upon the facts the District Court should not have convicted them. We are concerned only with the facts in so far as they are referred to in argument before us and it is not for us, at this stage, to comment on them — it is sufficient for us to say that, taking the evidence as a whole, we are of opinion that the District Court was justified in the view which it took. The appeal, therefore, fails.

We feel that, although this case is a very serious one, in the circumstances, the sentence of one year's imprisonment imposed upon Accused No. 1 might be reduced to imprisonment for a term of six months.

Delivered this 19th day of March, 1937.

*Chief Justice.*

CIVIL APPEAL No. 60/36.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Copland and Khaldi, JJ.

IN THE APPEAL OF:—

Yassin Yousef Keitawi. APPELLANT.

v.

Moshe Motzman. RESPONDENT.

*Contract — Mutual promises — Consideration.*

In allowing an appeal from a judgment of the District Court of Haifa, dated the 4th of May, 1936, and in remitting the case to the lower Court for a new trial:—

HELD: The contract consisted of mutual promises and each promise constituted the consideration for the other promise.

ANNOTATIONS: *Cf.* C. A. 167/33 (*ante*, p. 12) and note.

FOR APPELLANT: Asfour.

RESPONDENT: In person.

### JUDGMENT.

This appeal arises out of an agreement made between the parties on the 8th December, 1934. The Appellant undertook to sell certain land to the Respondent, and the Respondent undertook to pay the purchase price of the land. A preliminary point was taken in the Court below that there was no consideration mentioned in the contract. On this point the learned judges of the District Court disagreed and in consequence the action of the Appellant was dismissed.

The contract consists of mutual promises, each promise being the consideration for the other promise. We think, therefore, that the judgment of Judge Izzat Nammar was wrong and that the judgment of Judge Sherwell was correct.

The judgment of the District Court must be set aside and the action remitted for a new trial. The Appellant will have costs of this appeal to include LP. 5 advocate's fees.

We wish to suggest that in cases in the District Courts where the Court is composed of two judges and these judges differ on some preliminary point, it would save a great deal of time and expense if they

proceeded to deal with the other issues in the case and give a final judgment on all the facts.

Delivered this 6th day of December, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 22/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF:—

Haj Muhammad Ahmad Abu Laban. APPELLANT.

v.

Hamid Abu Laban & 2 ors. RESPONDENTS.

*Contract of sale of land — Damages — Damages clause ceases to be operative after land is transferred — No evidence to justify finding of fact — Costs and expenses — Taxation.*

In allowing an appeal, as to part thereof, from a judgment of the District Court of Haifa, dated the 18th January, 1937:—

HELD: 1. There had been no evidence before the lower Court to justify a finding that Appellant was not ready to transfer the land.

2. Appellant could not obtain both the land and damages and, as he had already obtained the land, he could only claim the costs and expenses incurred by him to obtain the land, such costs to be taxed by the Chief Registrar.

ANNOTATIONS: See C. A. 105/37 ( *post*, p. 173) and note.

FOR APPELLANT: Eliash.

FOR RESPONDENTS: Abcarius.

JUDGMENT.

The Appellant would undoubtedly have been entitled to damages if it were not for the fact that since this action was commenced the Appellant has now managed to obtain the land.

All the evidence in the Court below went to show that the Appellant was in a position to transfer the Fijjeh land as well as the other lands on 30.6.33 and I am at a loss to understand the finding of the District Court to the effect that he was not ready.

But we do not think that he can take the land and at the same time obtain liquidated damages for LP. 5,000 since the clause awarding damages is no longer operative.

The Appellant, however, has undoubtedly suffered loss through the action of the Respondents.

In the circumstances we think that the Appellant is entitled to all legal costs and expenses incurred by him in obtaining the land. To this extent, therefore, the appeal must be allowed and the judgment of the District Court varied by allowing the Appellant the legal costs and expenses as stated above, in the event of dispute to be taxed by the Chief Registrar.

We understand that there is an appeal pending with regard to the land obtained.

Should this appeal be determined against the present Appellant, he will be at the liberty to apply again to this Court for a fresh order.

The Appellant will get all his costs both here and below to include LP. 10.— advocate's fees.

Delivered this 6th day of July, 1937.

*British Puisne Judge.*

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CIVIL APPEAL No. 97/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Abdul Fattah El-Haj Daoud el-Jayyousi. APPELLANT.

v.

The General Manager of the Palestine Railways. RESPONDENT.

*Crown actions — Limitation — Railways Ord., sec. 42(4), Crown Actions Ord., sec. 4 — Date of commencement of action.*

In allowing an appeal from the judgment of the District Court of Nablus, dated the 1st November, 1936, and setting aside the judgment of the District Court and ordering a new trial:—

HELD : The commencement of the action was the date on which the petition asking for the High Commissioner's *fiat* was filed in Court.

ANNOTATIONS:

1. The proceedings culminated in C. A. 242/38 (1939, S. C. J. 5).

2. Other railway cases: C. A. 221/37 (1938, 1 S. C. J. 57), C. A. 200/38 (1938, 2 S. C. J. 146) and C. A. 59 & 60/40 (1940, S. C. J. 130).

FOR APPELLANT: Hazou.

FOR RESPONDENT: Junior Government Advocate — (Ghussein).

## JUDGMENT.

The Appellant desired to sue the General Manager of the Railways for damage to his crops by fire. The cause of action arose on the 10th June, 1935. Section 42(4) of the Railways Ordinance — (Laws of Palestine, Vol. II, page 1289) — which was the relevant Law at the time, provided that actions must be commenced within six months of the cause of action. Section 4 of the Crown Actions Ordinance (which applies to such proceedings) provides that an action is commenced by the filing of a petition in Court. This clearly means the filing of a petition to the High Commissioner for his consent.

In the present case, this petition was filed on November 26th, 1935, in the District Court, Nablus. This date must, therefore, be taken as the commencement of the action; and it was within the prescribed period of six months.

The District Court erred in holding that the suit was barred by limitation.

We, therefore, order that the judgment of the District Court be set aside and the case be remitted to it for a new trial.

Costs to abide the event.

Delivered this 29th day of June, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 46/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—.

Haj Abdul Kader Muhammad Abdul Kader. APPELLANT.

v.

Mustafa Muhammad Abdul Kader. RESPONDENT.

*Land Settlement — Contesting a judgment of L. S. O. in the Land Court — Oath.*

In dismissing an appeal from the judgment of the Land Court of Jaffa, dated the 9th February, 1937:—

HELD: Judgments of Settlement Officers cannot be contested save in the presence of strong grounds, such as fraud.

ANNOTATIONS: *Cf.* C. A. 85/42 (1942, S. C. J. 743) and cases cited in note 3 thereto.

FOR APPELLANT: Haddad.

RESPONDENT: In person.

## JUDGMENT.

The Appellant, who is the brother of the Respondent, raised an action in the Land Court of Jaffa alleging that a part of his land was included in that of his brother's by the Land Settlement Officer; and requested the Court to issue to the Respondent an order to refrain from interfering with the small part situated at the South-Eastern corner of the land, the area of which does not exceed 250 metres and which was registered in the name of the Respondent by way of mistake. He further asked the Court to order the correction of the registers accordingly.

The Land Court dismissed the action on the ground that judgments of Settlement Officers cannot be contested save in the presence of strong grounds as to fraud, *etc.* Also on the ground that Respondent, at the instance of the Appellant, has taken the oath that partition was carried out and the part in claim was included in his share with the knowledge and approval of the Appellant.

The only point against the judgment of the Land Court that was raised by the Appellant was that it did not hear the evidence of his witnesses, and that it contented itself with the oath that was served upon the Respondent.

From the record of the proceedings in the Land Court it appears that the Court below after hearing the evidence of both parties addressed the oath to the Respondent on the application of the Appellant. This is confirmed by the Court in its judgment.

There is no merit in the appeal which must be dismissed with costs.

Delivered this 7th day of June, 1937.

***British Puisne Judge.***

LAND APPEAL No. 51/36.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Mariam Anton Bkhit. APPELLANT.

v.

Francis Zacharia. RESPONDENT.

*Unregistered partition — Partition effected in* 1888 *— Boundaries to be set out by the Court.*

In allowing as to part an appeal from the judgment of the Land Court of Jerusalem, dated the 5th October, 1936, and in remitting the case to the Land Court for a definition of the boundaries of the land:—

HELD: 1. The consent partition, effected in 1888, would be maintained.
2. The Land Court should set out the boundaries of the land.

ANNOTATIONS: A partition of long standing will not be interfered with: C. A. 19/43 (1943, A. L. R. 27) and case therein followed.

## JUDGMENT.

This is an appeal from the judgment of the Land Court of Jerusalem, dated the 5th October, 1936, ordering the Defendant (Appellant) not to interfere with Plaintiff's enjoyment of his share in the land, the subject matter of the dispute.

The Plaintiff (Respondent) claimed that Appellant started to interfere in his enjoyment of a piece of land which he inherited from his father and which has been in his possession, without interference, for the last twenty years.

The Appellant claimed that the land was *musha'* and that she has a share therein.

The Respondent alleged that, although this land had been a *musha'*, a partition took place in the year 1888, and in support thereof produced a partition document and several witnesses who gave evidence that a partition took place.

An Inspection Committee was appointed to ascertain whether the land in dispute is the same as set out in the document of partition and to verify the boundaries and to find whether there are any boundary marks.

Basing itself on the deed of partition, on the inspection report and on the evidence of witnesses, the Court said in its judgment as follows:—

> "Court believes that there was a partition of these lands and that Plaintiff is entitled to his share, boundaries according to the inspection report."

After carefully considering the evidence that was before the lower Court, we hold that there was sufficient evidence before the Land Court to support their finding that the property had been partitioned.

We, however, consider that the appeal must be allowed since the judgment cannot be executed as the inspection report does not define the boundaries.

The judgment of the Land Court is, therefore, set aside and the case remitted to it to define the boundaries between the Appellant's and Respondent's plots.

Costs to await final judgment.

Delivered this 29th day of April, 1937.

*British Puisne Judge.*

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CIVIL APPEAL No. 105/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Khayat, JJ.

IN THE APPEAL OF :—

Rashid Ahmed Abu Laban & 2 ors. APPELLANTS.

v.

Mohammad Ahmed Abu Laban. RESPONDENT.

*Partnership — Land ordered by L. S. O. to be registered in name of partnership — Prior waiver by partner of his rights in the firm — Effect on ownership of the Land — Effect of High Court judgment — Position on dissolution of the firm.*

In dismissing an appeal from the judgment of the Land Court of Jaffa, dated the 11th May, 1937:—

HELD: The result of previous litigation in the High Court made it clear that the Respondent was entitled to a share in the land on dissolution of the firm.

REFERRED TO: H. C. 26/31 and H. C. 45/33 (not reported).

ANNOTATIONS: For other proceedings in "this continuous litigation" between the parties see C. A. 156/38 (1938, 2 S. C. J. 13) and note.

FOR APPELLANTS: Abcarius.

FOR RESPONDENT: Eliash.

## JUDGMENT.

There have been prolonged disputes between the parties to this appeal who are brothers.

In these proceedings the Plaintiffs in the Land Court (Appellants before us) ask that the registration of certain land — *i. e.* Block 6195, Parcel 132 — be changed by the omission of the name of the Defendant (Respondent); in other words, that the land should be registered in the names of the three Plaintiffs only instead of the names of the three Plaintiffs and the Defendant, as it is at present.

It is not disputed that at one time the parties to this appeal were partners under the name of Ahmad Hasan Abu Laban & Sons.

In 1930 the land was subject to settlement. The present Respondent argued that he was entitled to be registered as the owner of a fourth share of the land; but the Settlement Officer decided on 12.8.30 as follows:—

> "I decide that one half of parcel 4 of Block 27 of Khairiyeh village shall be recorded in the Schedule of Rights in the name of the firm Ahmad Hassan Laban and Sons as at present constituted."

And in awarding costs expressed the view that the Respondent's claim was frivolous.

The Respondent appealed to the Land Court presumably on the ground that the registration in the name of the partnership did not give him any interest in the land by virtue of a document dated 20th September, 1927, and endorsed 23rd October, 1929, to which I will refer later, but his appeal was out of time — he appealed to this Court but withdrew his appeal.

It seems that a notice was published in the *Gazette* of 1st February, 1930, whereby it was notified that the Respondent had resigned from the partnership.

He thereupon applied to the High Court in H. C. No. 26/31 for "an order to issue to the first two Respondents to show cause why they should not be directed to cause a notice to be published in the Official *Gazette* cancelling the notice which appeared in the Official *Gazette* of 1.2.1930 whereby it was notified that Petitioner had resigned from the partnership Ahmad Hasan Abu Laban and Fils".

The proceedings before the High Court turned upon the effect of

the document to which I have referred, dated 20th September, 1927, and the Court held on 25th June, 1931:—

> "We are of opinion that this document cannot be construed as a declaration required by Art. 5 in conjunction with Art. 2 of the Registration of Partnerships Ordinance, 1919, and that the Registrar of Partnerships was wrong in acting upon it."

and the rule was made absolute.

The effect of this would seem to be that on the date of that judgment the Respondent was held to be a partner.

In 1934 it seems that the Appellants applied to the Land Registrar of Jaffa informing him that the partnership had been dissolved and asking for the property to be registered in their names — instead of that of the partnership. He demurred, as the registration of the partnership still showed four names (*i. e.* the Appellants and the Respondent).

The Appellants then came to the High Court asking in 45/34 for:—

> "An order to issue to the first Respondent (*i. e.* the Director of Land Registration), directing him to show cause why the orchard situated in the Khairiyeh village now registered in the name of the firm Ahmad Hasan Abu Laban & Sons (under Parcel 132, Block 27 of 1934), should not be registered by way of *Musha'a* into the names of the three Petitioners; and further, why his instructions for the registration of the aforesaid orchard into the names of the Petitioners and the second Respondent (*i. e.* Muhammad Ahmad Abu Laban, the present Respondent) should not be cancelled."

and on 24th October, 1935, the Court discharged the rule.

It seems quite clear that on 24th October, 1935, it had been decided as between these parties that the land was rightly registered as to a one-fourth share in the name of the Respondent. We can discern nothing to vary the position thus created, and it appears to us that the matter is concluded by this judgment. Advocate's fees LP. 5.—.

The appeal will be dismissed with costs.

Delivered this 25th day of October, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 99/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Sa'adia Yitzhaki & an. — APPELLANTS.

v.

Shimon Yacob Shimon & an. — RESPONDENTS.

*Charitable trusts — Evidence — Court may decide not to hear additional witnesses — Estoppel, admission.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 17th July, 1936:—

HELD: 1. The lower Court had been justified in refusing to hear further evidence, the nature of which was known, which did not further Appellants' claim.

2. The admission of the mortgagor was not binding on the mortgagee.

ANNOTATIONS: Previous proceedings in this case: H. C. 60/35 (8, C. of J. 456).

FOR APPELLANTS: Levanon.

FOR RESPONDENTS: No. 2 — Abulafia.

## JUDGMENT.

This is an appeal from the judgment of the District Court of Jerusalem, dated 17th July, 1936, where it was sought to except from the foreclosure and sale of a mortgaged building certain rooms alleged to be used for a charitable trust.

The District Court heard a certain amount of evidence advanced for the purpose of proving the charitable trust, but the evidence was completely useless and it gave judgment against the Plaintiffs (Appellants).

The Appellant has taken two points:—

1. That the Court did not hear sufficient evidence;
2. That the first Respondent admitted the existence of the trust.

With regard to the first point, the lower Court pointed out in its judgment that even if the further evidence, the nature of which was known, were heard, there would still be no evidence before the Court that would lead it to decide that there was a charitable trust. We entirely agree and it is unnecessary that any further witnesses should be heard.

With regard to the second point: the first Respondent is the mortgagor who by admitting the claim prejudices the rights of the second Respondent (the mortgagee) but loses nothing himself. No weight can, therefore, be given to his admission.

The Court was, therefore, perfectly right in dismissing the claim.

The appeal is dismissed with costs and LP. 5.— advocate's fees.

Delivered this 10th day of May, 1937.

*British Puisne Judge.*

CIVIL APPEAL No. 199/35.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Samuel Sachs. APPELLANT.

v.

Karim George & an. RESPONDENTS.

*Contracts — Construction — "Neighbours" to sign map; whether Government is a neighbour — "Tashliq" — Intention of contract read as a whole — Recovery of purchase price.*

In allowing an appeal from the judgment of the District Court of Haifa, dated 15th October, 1935, and in amending the judgment of the Court below:—

HELD: Although Government was technically a neighbour and all neighbours were required, under the terms of the contract, to sign the map, the intention of the contract read as a whole could not be to include the Government as a neighbour for the purpose of signing the map. The Appellant had, therefore, not committed a breach of the contract, in failing to obtain Government's signature on the map.

FOR APPELLANT: Olshan.

FOR RESPONDENTS: Bustani.

## JUDGMENT.

*Manning, S. P. J.*: The facts giving rise to this appeal are as follows. There was an agreement between the Appellant and the Respondents by which the Respondents agreed to transfer certain land to the Appellant. This land was bounded as follows:—

North: Mustafa Bin Yousef,
South: Mahmoud Abas,
East: A road,
West: Tashliq.

The word *"Tashliq"* means rocky land, *i. e.* waste land, not occupied by any person as owner. It is conceded by both sides that the nominal owner of such land is the Government of Palestine, and Mr. Olshan for the Appellant referred us to Cap. 79 of the Laws of Palestine, Vol. 2, p. 852, which amends the Ottoman Land Code by making it an offence to break up or cultivate such land without the consent of the Director of Lands.

One of the conditions of the agreement was that the Appellant undertook to pay to the Respondents LP. 400.— on the production of the map of the purchased land signed by all the neighbours, and the Respondents undertook to produce the said map with all the said signatures within 14 days from the date of the agreement.

The Respondents produced a map signed by the neighbours on the north and the south. It was not signed by any representative of the Government. The Appellant refused to pay the LP. 400.—. Each side then alleged a breach of the agreement; the Appellant, because a map signed by all the neighbours had not been produced; the Respondent, because the LP. 400.— had not been paid. The Appellant sued the Respondents for damages in the District Court of Haifa, and the Respondents put in a counterclaim for damages.

The District Court was constituted of the President, Sherwell, J., and Aziz Bey Daoudi, J. After hearing the arguments of counsel and a number of witnesses they differed as to the interpretation of the word "neighbours" in the agreement. The President held that it included the Government, Judge Daoudi held otherwise. The result was that both claim and counterclaim were dismissed.

The Appellant has appealed against the dismissal of his claim. The Respondents have not appealed against the dismissal of the counterclaim. The argument before us was entirely directed to the question whether the word "neighbours" in the condition I have referred to included the Government or not.

There was evidence in the Court below that the Government is prepared to sign a map as a neighbour, if one of the boundaries is given as *Tashliq*. But I think that the proper method of approach in this case is to look at the agreement as a whole and ascertain from it the intention of the parties, *i. e.* did they intend that the word "neighbours" should include the Government as the owner of the land described as *"Tashliq."*

The first point to be noticed in the agreement is that the registered area of the land was eight *dunams*. The Respondents, however, declared that the real area was 49 *dunams* and 14 square metres, and one of the conditions was that the area was to be not less than 30 *dunams*. The boundaries of the land on the north, east and south were known; the land could expand in one direction only, *i. e.* to the west, where the neighbouring land was described *"Tashliq"*. It is clear, therefore, that the boundary on the west was indefinite, and that the owner on that side could not be expected to sign until it was definitely fixed. These circumstances were well known to both parties.

One of the first things to be done was, therefore, the correction of the area of the land. The Respondents undertook to do this, and paragraph 11 of the agreement ran as follows:—

> "11. Period of performing the transaction: The vendors undertake to effect and to complete the correction of area and boundaries and all other formalities in respect of the transfer of the purchased land to the purchaser or to his nominee as stated in para 1 above within 6 months as from the date of signature of this agreement and in the event that any difficulties will arise on the account of the Government authorities this period shall be prolonged for further two months only."

The Respondents were given a period of six to eight months to correct the area. It was anticipated that there might be difficulties with the Government, and there can be no doubt that some of this anticipation was due to the indefinite nature of the boundary on the west. Paragraph 3 of the agreement made it necessary for the Respondents to receive the confirmation and approval of the Government for the correction of area and boundaries and to have a map of the land prepared by a licensed surveyor.

Now by paragraph 7 of the agreement the vendors were bound to produce "the map of purchased land signed by all the neighbours" within 14 days from the date of the signature of the agreement. It is clear that this map is not the map to be prepared by a licensed surveyor. Paragraphs 3 and 4 of the agreement show that the map to be prepared by a licensed surveyor was to be the map of the corrected area, and the Respondents had a much longer period than 14 days in which to carry out the correction of area. The map to be produced within 14 days was the map as it stood at the date of the agreement, that is, a map incorrect as to area and with an indefinite boundary on the west. That boundary had to be fixed before any person could sign as neighbour. The person who might eventually sign as neighbour on that boundary was the Government of Palestine, but before the boundary was fixed that Government had to approve of the correction of area. It could not have been contemplated by the parties that the Government would sign as a neighbour until the area was corrected and the boundary known.

To sum up, the Respondents agreed to transfer certain land to the Appellant. There was a map of that land, showing a road as a well-defined boundary on the east. The boundary lines on the north and south ran east and west. On the west was waste land. The area was uncertain. It had to be corrected and the Government had to approve that correction. Once the Government had approved that correction there was no necessity for the Government to sign as a neighbour. The

Government could not sign as a neighbour until the area had been corrected. A period of 6 to 8 months was allowed for the correction of the area. From all this it can be readily concluded that it was not the intention of the parties that the map to be produced within 14 days should be signed by the Government as a neighbour.

I think that the judgment of Judge Daoudi was right and that this appeal should be dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 17th day of March, 1937.

*Senior Puisne Judge.*

*Frumkin, J.*: This case depends upon the construction of clause 7(b) of the agreement entered into between the parties to this appeal. The point being as to whether the Government was also to be regarded as one of the neighbours under that clause to sign the map. Technically speaking, the Government, which has control over the *"Tashliq"* land forming one of the boundaries of the land, is a neighbour and at first sight it appeared to me that the clause under construction meant what it said, namely that the signature of the Government should also have been obtained within the period prescribed in that clause. But after a more thorough examination of the contract as a whole I am satisfied that it must have been clear to the parties that it would be impossible to obtain the signature of the Government within such a short period as by its signature the correction of area would already have been disposed of. The correction of the area requires more time and longer periods have in fact been provided for that purpose in the agreement. I, therefore, hold that the Appellant cannot succeed on his claim for damages and the appeal on this point is dismissed.

He can only succeed in his claim for the sum actually paid by him. The appeal on that point is allowed and there will be a judgment against the Respondents for LP. 200 plus legal interest from the date of action.

Delivered this 17th day of March, 1937.

*Puisne Judge.*

*Khayat, J.*: The point to be decided in this appeal is what is the correct construction of the word "neighbours" which is referred to in paragraph 7(b) of the contract of sale, as one of the boundaries of the land in respect of which this contract was made is *"Tashliq"*, that is rocky, and by law is owned by Government.

It was argued on behalf of the Appellant, who was the Plaintiff in the Court below, that the word "neighbours" in the contract included the Government's representatitve.

The Respondent, who was the Defendant in the Court below, argued that it did not include the Government, for the following reasons:—

a) that the Government is not one of the neighbours as it does not own a plot of land which is registered and has boundaries and which is known as "State Domains". There was a plot of land which could not be used for cultivation purposes. The mere fact that this is Government land, does not make the Government a neighbour.

b) Paragraph 11 of the contract provided that the period for the correction of area and obtaining Government's consent is six or eight months, while the period given for obtaining the signatures on the map is 14 days. In case Government signed the map, it will not be necessary to carry out the correction of area and there would be no necessity for this clause.

I am of the opinion that the parties did not intend that Government should be included in the word "Neighbours" in paragraph 7. They intended that it should include owners and persons who are in possession. Further paragraph 3 provides for two transactions and provided for obtaining the consent of the neighbours first and then provided for obtaining a separate consent of the Government and a separate period was provided for in paragraph 11.

I, therefore, hold that judgment should be entered in favour of the Appellant for the return of the sum of LP. 200 paid by him on account of the purchase price, and that his claim for damages be dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 17th day of March, 1937.

*Puisne Judge.*

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CIVIL APPEAL No. 73/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Khamis Daoud Barghal. APPELLANT.

v.

Hassan Abdul Rahman Barghal, in his capacity as Mutawalli of Barghal Waqf. RESPONDENT.

*Appeal — Adjournments — Evidence of time of lodging appeal.*

In dismissing an appeal from a judgment of the Land Court of Jaffa, dated the 9th March, 1937:—

HELD: The appeal must be dismissed as Appellant had failed to satisfy the Court that he had filed the appeal in time.

FOR APPELLANT: Rashid.

FOR RESPONDENT: Nashashibi.

JUDGMENT.

This appeal has been adjourned four times for various reasons at the request of the Appellant — on one of these occasions, when the Court was presided over by me, the Appellant was asked to produce documents to prove whether or not the appeal was lodged in time. The only document he now produces is a receipt from the District Court, Jaffa, which would appear to have reference to an application made to that Court, for the exemption from fees. That has no relation to an application which is alleged by counsel for Appellant to have been submitted to the Chief Registrar for exemption from Court fees in this Court which cannot be traced in the case file — the Appellant has not satisfied us that the appeal was lodged in time.

The appeal will, therefore, be dismissed with costs and advocate's fees at LP. 3.

Delivered this 20th day of September, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 42/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Philip Mattar & 2 ors. — APPELLANTS.

v.

Zahdi Khoury widow of the late Badih Mattar. — RESPONDENT.

*Maintenance — Moslem Sharia Law applicable in the Greek Catholic Melkite Community — Proof of Sharia law — Moslem Family Law Art. 401 — Child only entitled to maintenance — Amount of maintenance.*

In allowing an appeal from the judgment of the District Court of Haifa, dated the 13th May, 1937, and in amending the judgment of the District Court:—

HELD: 1. There was evidence that the Moslem *Sharia* Law applied in matters of personal status to members of the Greek Catholic *Melkite* Community.

2. The President of the Ecclesiastical Court was the most competent witness to give evidence on the law applicable.

3. According to Moslem Family Law the minor (though not the mother) was entitled to maintenance from the Appellants, as the nearest relatives.

ANNOTATIONS: Authorities on the amount of maintenance awardable are collated in annotations to C. A. 135/43 (1943, A. L. R. 213).

FOR APPELLANTS: H. Atallah.

FOR RESPONDENT: Sahyoun.

## JUDGMENT.

Badih Mattar, brother of Appellants, died leaving Respondent and a child six years old.

Respondent claimed in the District Court of Haifa maintenance for herself and her child from her brothers-in-law, and the District Court gave judgment in her favour for the sum of LP. 7.500 per month.

The principal grounds of appeal put before us by Appellant's Counsel are:—

(a) That the parties being Palestinians and members of the Greek Catholic *Melkite* Community, one of the communities specified in the Order-in-Council, the law that should be applicable to them is the law of that Religious Community, and not the *Sharia* Law.

(b) That if the *Sharia* Law is to be applied to this case, it must be proved by a competent witness and by reference to specific provisions.

(c) That if any liability exists on the Appellants for maintenance, it must be limited to the child and should not be extended to the mother.

(d) That the amount allotted by the District Court for maintenance is excessive having regard to the means and responsibilities of the Appellants.

With regard to the first ground, both parties admitted in the Court below that the law applicable to members of their community in matters of personal status is the Moslem *Sharia* Law. This fact was testified by the President of the Ecclesiastical Court of the Greek Catholic

Community who, when giving evidence before the District Court, stated *verbatim*: "We apply Moslem *Sharia* Law".

As to the second ground, we are of opinion that the President of an Ecclesiastical Court is the most competent witness to prove a law which he applies in the Court of his community and he has definitely stated in his evidence that Article 401 of the Moslem Family Law provides maintenance of minors by nearest relatives.

We agree with the third point raised by Appellants that the order for maintenance should be in respect of the child only, and the mother should not be entitled to such a claim.

We also agree that the amount allotted by the District Court is, in our opinion, rather too much, and we order that the following amounts should be paid by the respective Appellants for the maintenance of the child only:—

| | |
|---|---|
| First Appellant to pay ... ... | LP. 2.750 per month |
| Second Appellant to pay ... ... | LP. 0.750 per month |
| Third Appellant to pay ... ... | LP. 1.500 per month |
| | LP. 5.000 per month |

The appeal is, therefore, allowed and the judgment of the lower Court should be amended accordingly.

In the circumstances, we do not allow costs to either side.

Delivered this 3rd day of June, 1937.

*British Puisne Judge.*

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CIVIL APPEAL No. 162/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J. and Frumkin, J.

IN THE APPEAL OF:—

Rivka Maisnik & 2 ors. APPELLANTS.

v.

Asher Kaplan. RESPONDENT.

*Supreme Court — Caution may be entered at the Land Registry on order of Supreme Court when appeal pending — L. S. Ord., sec. 49(1).*

In allowing an application for an order to issue to the Land Registrar of Tel-Aviv under Section 49 of the Land (Settlement of Title) Ordinance to record in

the Land Registry Registers of Tel-Aviv a caution with regard to the disposition of the land in dispute registered in the Land Registry of Tel-Aviv under Block No. 6128, Parcel No. 190 at Ramat Gan, pending the decision of the appeal in this case:—

HELD: The Supreme Court could direct a caution to be entered, under sec. 49(1) of the Land Settlement Ord. as an appeal was pending.

ANNOTATIONS: *Cf.* C. A. 38/34 (*ante*, p. 5) and note 2 thereto.

FOR APPELLANTS: Gratch.

FOR RESPONDENT: Dunkelblum.

## ORDER.

This is an application for a caution under Section 49(1) of the Land (Settlement of Title) Ordinance. It is quite clear that it can be ordered by this Court, in that an appeal is pending in this Court. All applications under this Section must be considered upon their merits, but it seems to us that this application is properly made and accordingly a caution may issue.

The application will, therefore, be granted, the caution will take the form that "an appeal is pending in the Supreme Court affecting this land". The case will be assumably heard on the date for which it is listed.

Costs of this application, including advocate's fees, will abide the event of the appeal. Advocate's fees for this application should then be applied for and fixed.

Given this 28th day of September, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 36/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Jacob Battat. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Immigration bond — Forfeiture upon conditions not being complied*

*with — Traveller subsequently married and acquiring Palestine nationality — Construction of bond — Intention of parties — Evasion of immigration laws by marriage even though genuine — Notarial notice, O. P. C. Art. 106.*

In dismissing, by majority, an appeal from the judgment of the District Court of Jerusalem, dated 16.2.37;—

HELD: 1. The tenor of the bond was that the traveller should leave Palestine within a stated period. Whether that period was overstayed legally or not did not affect the form of the bond.

2. The traveller's acquisition of Palestine nationality by marriage was an evasion of the Immigration laws, albeit the marriage was not fictitious.

3. There was no need to serve a notarial notice on the Appellant, as he was under no duty to do any act; nor on the traveller, as she was not sued.

REFERRED TO: H. C. 1/37 (*ante*, p. 13).

ANNOTATIONS: The judgment in this case was distinguished in C. A. 22/39 (1939, S. C. J. 131) and in C. A. 257/42 (1943, A. L. R. 5).

FOR APPELLANT: Olshan, Levy, Mizrahi.

FOR RESPONDENT: Junior Government Advocate — (Salant).

## JUDGMENT.

*Copland, J.*: The facts of this case are very simple. On 26th January, 1936, a Miss Rachel Sobel was granted permission to enter into and remain in Palestine as a traveller for a period of one month, after the Appellant had paid into the Treasury of Palestine the sum of LP. 100 as a guarantee that the lady would not overstay the prescribed period. The Appellant signed a bond to this effect.

On the 14th of February, 1936, Miss Sobel married a Palestinian citizen, and her name was entered by the Immigration Department on her husband's passport. The lady did not leave Palestine before the expiration of the one month allowed her, or at all. The Appellant asked for the refund of the LP. 100 deposited by him on the ground that Miss Sobel was entitled, being now of Palestinian nationality, to remain in Palestine, but the Migration Department has refused the refund saying that the deposit has become forfeited. The Appellant thereupon brought an action in the District Court against the Attorney General asking for the return of his money.

During the trial it was stated by the Junior Government Advocate that Miss Sobel had originally applied to enter Palestine as a capitalist, but since the Immigration authorities were not satisfied that the sum of LP. 1000 had in fact been placed at her disposal, she was allowed to enter as a traveller for one month.

The District Court dismissed the Appellant's action, holding that the terms of the bond were perfectly clear and unambiguous, that since the condition that Miss Sobel should leave the country on or before the 26th February, 1936, had not been fulfilled, the guarantor had forfeited his deposit. The Appellant has now appealed to this Court.

I must admit that in the course of the excellent arguments addressed to us by both sides, my opinion has varied, but upon consideration I think that the judgment of the District Court was right. The bond definitely states "that if the said Rachel Sobel leaves Palestine on or before the 26th day of February, 1936, then the above written bond shall be void, otherwise it shall be and remain in full force and the sum of one hundred Palestine pounds deposited ... shall be forfeited." The bond does not state that if she should remain in the country illegally longer than one month, then the deposit shall be forfeited. It would have been very easy to have said this in the bond if this had been the intention of the parties. A Court cannot rewrite the terms of a bond. I do not think that the recital that the lady had applied for and had been granted permission to enter Palestine as a traveller can nullify the condition, the clear and unqualified condition, that she must leave within one month of entry.

And there is this further consideration that the lady's marriage constitutes an evasion of the Immigration laws. I do not say that this marriage is fictitious; I am assuming that it is a genuine marriage, but whether genuine or fictitious the result is the same — the Immigration laws have been evaded. She was given permission to remain in Palestine for one month only — she has broken the condition upon which alone she was allowed to enter the country.

There is one final argument with which I must deal and that is that a notarial notice should have been served on the Appellant according to Article 106 of the Civil Procedure Code before the deposit could be retained. I do not think that this is so. The Appellant was not under any obligation to perform any act, and no notarial notice, therefore, was necessary; and since the bond was not executed by Miss Sobel, no notarial notice could be necessary in her case as the LP. 100 are not being claimed from her.

For these reasons I think that this appeal fails, and should be dismissed with costs and LP. 5.— advocate's fees.

Delivered this 11th day of June, 1937.

*British Puisne Judge.*

*Khayat, J.*: I agree.

*Puisne Judge.*

*Frumkin, J.*: The Appellant in this case entered into a bond for LP. 100 to be forfeited to the Government of Palestine in case a certain Rachel Sobel, who was permitted to enter the country as a traveller, will not leave Palestine before the 20th February, 1936.

2. Before the expiration of that date the said Rachel Sobel who will hereinafter be referred to as the Immigrant, became a Palestinian citizen by marriage and as such was allowed to remain in the country. The Appellant then claimed the refund of the money and failed. Hence this appeal.

3. The main argument on behalf of the Appellant is that it was the intention of the parties concerned that the Immigrant shall not remain in Palestine as a traveller, but if she otherwise obtains permission to remain in the country the bond would be void.

4. This is a matter of interpretation, and we are bound by the general rules of construction of instruments that the intention of the parties is to be ascertained from the terms of the instrument itself and no parol evidence is admissible, although in the case of a bond the conditions are to be interpreted strongly in favour of the obligor.

5. The Appellant relies on the description of the Immigrant as a "traveller" both in the heading of the bond and in the recital of the conditions of the bond. This description alone would not carry us any further.

6. The Junior Government Advocate however volunteered information which threw much light on the intention of the parties at the time the bond was executed. In his defence in the Court below the Junior Government Advocate stated:—

> "While on ship the lady held a certificate for a capitalist entry. LP. 1000 held for her by her father. She failed to satisfy the Palestine authorities that the LP. 1000 was at her disposal and instead of refusing her entry to Palestine as they could, gave her the opportunity to prove her statement that this LP. 1000 at her disposal is true. For this she was given a period of one month within which to prove the fact and for this purpose this bond was entered into by the lady."

7. It follows without saying, that had the Immigrant succeeded to prove her certificate for a capitalist entry, she would be allowed to remain in the country and the Director of Immigration would not, in that case, enforce the bond. The position at present is that instead of remaining in the country in one lawful way she remains in another way which is also lawful. To my mind it makes no difference, since it is clear that the main object of obtaining the bond was to secure

that the Immigrant should not illegally remain in the country as a traveller. The Immigrant did not remain in the country illegally and the object of the Immigration Department was secured.

8. Some allusion was made by the Junior Government Advocate to High Court No. 1/37 in which this Court refused to grant a remedy to an Immigrant girl who, while in the Lock-up at Haifa, tried to evade the law by entering into a form of marriage which I considered to be of a fictitious nature. There was no evidence in the present case as to the form of marriage, nor was it alleged that it was a fictitious one in order to evade the law. It will be too far fetching to presume that any marriage contracted by an Immigrant girl was so done in evasion of the law.

9. I hold, therefore, that the Appellant must succeed, the judgment of the District Court set aside and judgment entered for Appellant.

*Puisne Judge.*

Appeal is dismissed by a majority.

*British Puisne Judge.*

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CIVIL APPEAL No. 11/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Husni Jaber Nijem & an. — APPELLANTS.

v.

Ali Hassan Ismail & 3 ors. — RESPONDENTS.

*Hearing the parties — Judicial proceedings.*

In allowing an appeal from the judgment of the Land Court of Jaffa, in its appellate capacity, dated the 9th May, 1935, and in remitting the cases to the Land Settlement Officer for rehearing:—

HELD: It was not clear from the record that the Land Settlement Officer had dealt with the dispute in a judicial manner.

ANNOTATIONS: The proceedings terminated in C. A. 197/41 (1941, S. C. J. 458).

JUDGMENT.

This is an appeal from the Land Court of Jaffa, confirming the decisions of a Settlement Officer in three consolidated appeals.

One ground of appeal in the Land Court was that the Settlement Officer had arrived at his decision without hearing the parties. The Land Court did not deal with this point in its judgment.

From the record before us it is not clear that the Settlement Officer dealt with the dispute in a judicial manner. We, therefore, order that the decisions of the Settlement Officer in all three cases be set aside and that the judgment of the Land Court be set aside and the three cases be remitted to the Settlement Officer to be dealt with according to law.

Costs to abide the event.

Delivered this 28th day of July, 1937.

*Senior Puisne Judge.*

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CRIMINAL APPEAL No. 35/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Copland and Khayat, JJ.

IN THE APPEAL OF:—

Wakim Yousef Abu Amsha. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Death sentence — Murder contrary to sec. 214 C. C. O. — Motive, evidence — Verdict signed by all Judges; one Judge signing sentence of death, C. C. O. sec. 215 — Extra-judicial confessions — Evidence Ord., sec. 9 — Premeditation, C. C. O. 216 — Inferences drawn by Trial Court — Absence of provocation.*

In dismissing an appeal from the judgment of the Court of Criminal Assize, sitting at Jerusalem, dated the 23rd March, 1937, whereby Appellant was convicted under Section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death:—

HELD: 1. The only sentence which may be pronounced when the accused is found guilty of murder is a sentence of death. There is, therefore,

no miscarriage of justice if, the verdict being signed by all Judges, only one Judge signs the sentence.

2. A statement to the police, voluntarily confirmed by the accused, is admissible in evidence.

ANNOTATIONS:

1. On confessions *cf.* CR. A. 155/42 (1942, S. C. J. 689).

2. On inference of premeditation *vide* CR. A. 9/44 (1944, A. L. R. 90) and note 2 thereto.

FOR APPELLANT: G. Salah.

FOR RESPONDENT: Ghussein.

## JUDGMENT.

The Appellant was convicted of murder with premeditation contrary to Section 214 of the Criminal Code Ordinance, 1936, by the Court of Criminal Assize, sitting in Jerusalem and was sentenced to death.

The facts are simple. The murdered man was engaged to marry the Prisoner's sister and on the 18th January, 1937, the Prisoner and the murdered man, after some conversation with reference to the engagement, set off together to the home of the Prisoner's father. The Prisoner was carrying a rifle, and it is not suggested that he was doing so legitimately. On the way Prisoner shot the deceased — three shots being fired — from behind and caused his death. There were signs that an attempt had been made to hide the body and when enquiries were made as to the deceased's whereabouts the Prisoner gave evasive answers.

There is no evidence of any motive for this shooting. It was stated in evidence by the girl who was engaged to the deceased man that she went with him to Bethlehem in order to be photographed, but no photograph was taken, and a witness (Anton Elias) stated, "a fiancée should not, according to custom, go about alone with her fiancé" from which it may have been intended to suggest that the visit had angered the Prisoner, but the suggestion was not developed, and the girl stated that she did not know if her brother heard of the visit and that her brother did not question her about it. Both she and the witness Anton stated that the Prisoner and the deceased were dear friends.

The evidence against the Prisoner is based to some extent upon a statement which he made to the police on 2.2.37. In that statement he admits that he was carrying a rifle and that he actually shot the deceased but says he did so accidentally and then ran away and concealed the rifle. He only admits to firing one shot. His story is corroborated by the finding of the rifle with one empty cartridge in the breach and

six live rounds in the magazine, in a spot which he pointed out to a police officer, and by technical evidence that the three empty cartridge cases, found at the scene of the crime, were fired from that same rifle.

It is clear from the medical evidence that the deceased was shot at short range from behind and that three shots were fired.

The defence was that the killing was accidental, but the Court of Assize, having regard particularly to the fact that three shots were fired, found that the killing was deliberate.

Before this Court it was argued by George Eff. Salah on behalf of the Prisoner, firstly, that the sentence of death was only signed by the President of the Court of Assize. This is true, but all the judges signed the verdict finding the Prisoner guilty, and by Section 215 of the Criminal Code Ordinance, one sentence only can be pronounced when a man is found guilty of murder, and we are satisfied that the omission causes no miscarriage of justice.

It was also argued before us that the Prisoner's statement was a confession and it was inadmissible in that Section 9 of the Evidence Ordinance, which deals with the admissibility of confessions, had not been complied with.

The circumstances in which the statement of 2.2.37 were made are set out in the statement itself and are stated in the evidence of Ibrahim Jarjoura, the Police Inspector. The proceedings record that no objection was taken to the statement, and the Prisoner, in a statement from the dock said: "The statement I made to the Police is the same as I make today. That's all." That presumably had reference to the statement which had been put in evidence. It is true that in cross-examination the Police Inspector said that the Prisoner had made an earlier statement in which he denied any knowledge of the crime, but the Prisoner in his statement from the dock did not deny having committed the crime and we do not think, therefore, he can have been referring to that earlier statement. We are of opinion that the statement was admissible.

The third ground of appeal was that the requirements of Section 216 of the Criminal Code Ordinance were not satisfied.

By Section 214 of the Criminal Code Ordinance, to constitute the offence of murder death must be caused, *inter alia*, with premeditation, and Section 216 sets out the three ingredients of premeditation, and the onus is upon the prosecution to show that they are present.

For the purposes of this case there must be a resolution to kill; the killing must be "in cold blood without immediate provocation in cir-

cumstances in which he was able to think and realise the result of his actions;" and there must be some preparation by the accused person of himself or of the instrument used.

The Assize Court drew the inference from the number of rounds fired and the carrying of the rifle that the accused had resolved to kill the deceased. We think that it was entitled to do so.

The Assize Court found, "There is not the slightest ground to infer that there was any provocation" (then follows a discussion as to whether the incident of the girl going with the deceased to Bethlehem could be immediate provocation, which it clearly could not be), and the Court goes on to state: "We are entitled to infer from the circumstances that the Accused, at the time of the shooting, was able to think, and to realise the result of his action."

The form of the first of these statements may be open to some criticism. The question is, was there evidence from which an inference could be properly drawn that the Prisoner killed the deceased in cold blood, *etc.*, which is substantially the form in which the second statement of the Court was framed.

We are of opinion that from the evidence — including the evidence that the deceased was shot from behind, of which the Assize Court makes no express mention — that that Court was justified in drawing the conclusion that Section 216(b) had been satisfied.

The Court found that the carrying of the rifle was the necessary preparation, which we think it was entitled to do.

In the result, we are of opinion that there was evidence before the Court of Assize upon which it could come to the conclusions to which it did, and this appeal is dismissed.

Delivered this 15th day of May, 1937.

*Chief Justice.*

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HIGH COURT No. 5/37.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :—

Joseph Elyashar. PETITIONER.

v.

1. The President District Court, Jerusalem,

2. The Chief Execution Officer, Jerusalem,
3. Moshe Oxhorn. RESPONDENTS.

*Construction of mortgage conditions — Date from which interest becomes payable — "After maturity": Maturity may be accelerated by default clause — Payment of mortgage by instalments may not be ordered, H. C. 50/32.*

In making absolute, as to part, an Order issued to the first and second Respondents to show cause why the Order, dated the 22nd January, 1937, in Execution File No. 2604/36, should not be set aside:—

HELD: 1. The date of maturity of a debt is the date on which it becomes due, even if that date comes into operation by an acceleration default clause.

2. By ordering the deduction from the mortgage of amounts paid on account into a bank, the C. E. O. was ordering payment of a mortgage by instalments — which he had no power to do.

FOLLOWED: H. C. 50/32 (1, P. L. R. 764; 4, C. of J. 1525).

ANNOTATIONS: On the C. E. O.'s powers to allow payment by instalments see H. C. 96/40 (1940, S. C. J. 429).

FOR PETITIONER: Olshan & Mizrahi.

FOR RESPONDENTS: Nos. 1 & 2 — Absent — served.
No. 3 — Levy.

## ORDER.

The first point in this case is the date from which interest runs. In the main body of the mortgage deed it is quite clearly stated that "the borrower hereby agrees to pay to the said lender or order the sum on the 1st day of January, 1938, plus interest at the rate of 7% payable monthly as from the 1st April, 1936". And in the special conditions, there appears the following:—

> "Manner of payment — monthly instalments of LP. 100 plus interest at the rate of 7% commencing from 1st April, 1936."

Whilst the special conditions may be somewhat ambiguous, we think that there can be no doubt with regard to the main recital in the deed and we hold that interest at 7% is payable as from 1st April, 1936, only.

On this point, therefore, we rule against the Petitioner.

The second point is the meaning to be attached to the phrase "after maturity". The Chief Execution Officer held that interest at 9%, which is payable in case the borrower fails to pay the interest and fails to pay the debt after maturity, could not be charged until after 1st

January, 1938, which is the date on which the mortgage sum is expressed to be due. In this, we think, he is wrong. The date of maturity of a debt is the date on which the debt becomes due. By the operation of the usual default clause, this debt became due in whole on the 2nd July, 1936. Interest at 9% is, therefore, payable as and from this latter date.

The third point is as follows. At various times the Respondent has paid into an account in the Anglo Palestine Bank to the name of the Petitioner various sums, amounting, it is said, to some LP. 800.—. The Chief Execution Officer ordered that this sum should be deducted from the LP. 1900 due under the mortgage. We think that this Order is not correct, for this Court has already held that a Chief Execution Officer has no power to order payment of a mortgage debt by instalments: and it follows that a mortgagee cannot be compelled against his will to accept payment of such a debt by instalments. See Yola Shehab *v.* Chief Execution Officer, Haifa, and another, H. C. 50/32 (P. L. R. 764).

The Petitioner is, in our opinion, entitled to the full sum of LP. 1900.— together with interest at 9% as from 2nd July, 1936.

The rule *nisi* is, therefore, made absolute as regards the second and third points, and discharged as to the remainder.

The Respondent must pay the costs and LP. 3.— advocate's fees.

Delivered this 12th day of March, 1937.

*British Puisne Judge.*

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CIVIL APPEAL No. 69/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Fahmi Husseini, Mayor of Gaza on behalf of the Municipal Council of Gaza. APPELLANT.

v.

Ismail Abu Lutfi. RESPONDENT.

*Illegal contract — Farming out taxation illegally imposed — Party not assisted in profiting from illegal transaction — Ottoman Municipal Tax Law, 1329, arts. 25, 40 & passim, O. P. C., Art. 64: Quaere whether farming out rates is legal — Municipal Fees Law, art. 11.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 15th March, 1937:—

HELD: (Khaldi, J., *dissentiente*): — The Municipality had shown no authority for the imposition of the tax. It could, therefore, not seek the assistance of the Court in deriving the benefit of farming out such tax.

ANNOTATIONS: It has been held in C. A. 45/38 (1938, 1 S. C. J. 248) that since the enactment of the Municipal Corporations Ordinance, 1934, municipalities are no longer entitled to conclude farming out agreements.

FOR APPELLANT: Abcarius.

FOR RESPONDENT: Shehadeh.

## JUDGMENT.

*Copland, J.*: I have had the advantage of reading the judgment just delivered by my brother Majed Bey, and I agree with the conclusions arrived at by him.

When once it is realised that these rates, which the Municipal Corporation has levied and which the Respondent has been collecting, were illegally imposed, since the Appellants had no power to levy them, it seems to me that it follows that the Appellants cannot claim money paid in respect of a contract giving power to the Respondent to collect such illegal rates, since the law will not help anyone to collect the profits or proceeds of illegality. And since it is impossible to say what proportion of the contract prices were paid by the Respondent for the right to collect illegal rates, the whole contract must be held to be void and incapable of enforcement. As the District Court remarked, at the end of their judgment, the Appellants may bring any claim they choose against the Respondent to recover money collected by him — I would add "legally" collected by him — on their behalf.

I would further say that I entertain very considerable doubt, though I am not prepared to dissent on this point, as to the right or power of a Municipal Corporation to farm out taxes or rates. I cannot find any legal enactment authorising them to do so, though it seems that such a power has been deemed to exist from the provisions of the Ottoman Municipal Tax Law 1329, and in particular Art. 40 thereof.

With these observations, I agree that the Plaintiffs' case fails, and this appeal should be dismissed with the consequences indicated by my brother Majed Bey.

Delivered this 30th day of June, 1937.

*British Puisne Judge.*

*Abdul Hadi, J.*: This is an appeal from the judgment of the District

Court of Jaffa, dated 15th March, 1937, in the case raised by the Municipality of Gaza against the Defendant, claiming from him the sum of LP. 948.720 mils as the balance still owing by him out of the original sum of LP. 3490 under the following undertakings:—

A. Ground rent from fruit and vegetable sellers and auction fees in the town of Gaza for 15 months beginning as from 1.1.32 to 31.3.33.

B. Sale of animal fees for the same period.

C. Ground rent from fruit and vegetable sellers and auction fees for a period of 12 months beginning from 1.4.33 to 31.3.34.

The Plaintiffs produced in the District Court, in support of their claim, three contracts signed by the Respondent: the first of these contracts dated 28.12.31, the second dated 29.12.31, and the third dated 1.4.33.

After hearing the case the District Court dismissed the claim for the reasons mentioned in its judgment which is the subject matter of this appeal.

After hearing the pleadings of Counsel for Appellants and Counsel for the Respondent, I am of the opinion that the three farming out contracts, regarding the power of the Municipality to delegate the collection of taxes to other persons by way of farming out, were valid, as such contracts are of the kind of agreements mentioned in Art. 64 of the Code of Civil Procedure and I can see nothing therein to conflict with the provisions of that Article.

With regard, however, to the second point mentioned by the Defendant, which was one of the grounds for the dismissal of the claim, and that is that the three contracts are void, because, as the Counsel for Respondent states, they contain certain fees which the Municipality (the Plaintiff) itself has no right to levy, I am of opinion that the contracts do contain certain fees which the Municipality has no right to levy as the Respondent states, such as, for example, the fees for the sale of animals, even those sold in any place within the Municipal boundary, which expression, namely, "in any place within the Municipal boundary", is wider than what could be implied by the first paragraph of Art. 11 of the Law regarding Municipal Fees referrred to by Counsel for the Appellant and which prescribes fees on the sale of animals only in the places mentioned in that paragraph.

With regard to the second paragraph of Art. 11, however, I believe that its terms apply only to sales and purchases other than animal sales

mentioned specifically in paragraph 1. Under this category there comes also the fee levied upon every one who contravenes the terms of the contract — the amount of which has been fixed at four times the original fee. No authority has been quoted to us giving the Municipality power to collect such a fee.

If the Municipality has no right itself to collect such fees, it has no right to claim from the Respondent the value of the fees in question which he also has no right to collect, for, should we consider that the Respondent has undertaken to pay the whole of the value of the contract in consideration of all the fees mentioned therein (including fees on animals wherever they be sold and four times the usual fee to be paid by the one who contravenes the contract); and should we also consider that the Respondent has no right to collect those fees as it is likewise not for the Municipality to do so: it will be a part of the farming out contract, which the Respondent undertook to collect, the amount of which cannot be specified and is, therefore, without the legal consideration.

For these reasons, the appeal must be dismissed.

*Puisne Judge.*

*Khaldi, J.*: I am of the opinion that the contract was accepted by the Respondent *in toto*, and although some of its terms cannot be executed, the Respondent has not proved that damage was caused to him by the non-execution of these terms. Moreover, he has not proved that he tried to enforce it on the individuals concerned and that he has thereafter failed. In any event he had the choice of either to rescind the contract, or, when damage occurs, to apply for a reduction in the value of the farming out. On the contrary, by paying some of the instalments which fell due, he must be assumed to have accepted the contract with all its defects. I, therefore, hold that the Respondent should be held liable under the contract.

As to the legality of some of the terms of the contract, besides what has been provided for in the laws as to the validity of the transactions and taxes which were collected by the Municipality in accordance with the custom as set out in Art. 25 of the Municipal Law, this objection is for the tax-payer to make and there is no necessity to discuss it in relation to the present contract as it was not proved that there was difficulty or damage in its actual execution.

The judgment of the lower Court should, therefore, be set aside and the case remitted to them to give judgment on the merits of the case.

Costs to follow the event.

*Puisne Judge.*

In the result, by a majority, the appeal is dismissed with costs and LP. 4.— advocate's fees.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 106/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Manning, S. P. J. and Khayat, J.

IN THE APPEAL OF:—

Mohammad Salem Salman. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Young offenders — Prosecution completed before the enactment of the Ordinance — Accused not represented by counsel; guardian or parent not present — Accused not prejudiced — Sentence based on ordinance before enactment — Amendment of judgment on appeal, T. U. I. Ord., sec. 72(1)(b).*

In partly allowing an appeal from the judgment of the Court of Criminal Assize, sitting at Hebron, dated the 13th September, 1937, whereby Appellant was convicted under Sections 214(b) and 215 of the Criminal Code Ordinance, 1936, and sentenced to detention during the pleasure of His Excellency the High Commissioner, under Section 13 of the Juvenile Offenders Ordinance, 1937, and in varying the judgment of the Court below:—

HELD: 1. Where an accused person is not represented it is the duty of the Court to watch over his interests. The Appellant had not been prejudiced by appearing alone.

2. The judgment would be amended by varying the sentence imposed on the basis of the new Ordinance (not yet in force) to a sentence under the old Ordinance (not yet repealed).

ANNOTATIONS: On the effect of the accused being unrepresented see CR. A. 62/37 (*ante*, p. 105) and annotations.

FOR APPELLANT: Assal.

FOR RESPONDENT: Ghussein.

JUDGMENT.

This is an appeal from a conviction by the Court of Criminal Assize, sitting at Hebron; the first ground of appeal being that the Accused

was not represented by counsel and that his parent or guardian was not present. We do not think that these matters constitute any ground for appeal. It is quite true that the spirit of the Juvenile Offenders Ordinance, which is not yet in force, required that the parent or guardian of the Accused should be present; it is not a matter of law that a person cannot be convicted in the absence of his parent or guardian. Where an accused person is not represented it is the duty of the Court to watch over his interests but it is not suggested to us that anything went wrong in the conduct of this case or that the Accused was in any way prejudiced.

It is also pointed out that the sentence purports to be based on the Juvenile Offenders Ordinance, 1937, which, as I have said, is not yet in force, which fact does not appear to have been brought to the notice of the Court.

It is quite clear from the Criminal Procedure (Trial Upon Information) Ordinance, Section 72, sub-Section (1) (b), that this Court may amend the judgment of the Court of Criminal Assize or the District Court either as to the description of the offence proved or the article or section of the law applicable and may increase or reduce the punishment, and, in general, give such judgment as in its opinion ought to have been given by the Court below on the information and evidence before it. The Juvenile Offenders Ordinance repeals the Young Offenders Ordinance, but as the former is not yet in force the latter is not yet repealed, and Section 8 of the latter provides as follows:—

> "(1) When a person who, being a boy, has not completed his sixteenth year, or, being a girl has not completed her eighteenth year, is found guilty of any offence other than a contravention, the Court may, instead of passing the sentence prescribed by law, sentence the offender to detention for a period of not less than one year."

The facts of this case bring it within the purview of that Section, the Accused not having completed his sixteenth year, and, instead of imposing the ordinary penalty, by virtue of the provisions contained therein and of the provision of the Trial Upon Information Ordinance to which I have referred, we vary the sentence to one of detention for a period of five years.

Delivered this 2nd day of October, 1937.

*Chief Justice.*

CIVIL APPEAL No. 79/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Abdul Rahim Rashid Danaf El Ansari. APPELLANT.

v.

Abdul Qader Ahmad Es-Siksik. RESPONDENT.

*Evidence — Court refusing to act upon uncontradicted verbal and written evidence.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 20th April, 1937, in quashing the judgment of the District Court and entering judgment for the Appellant:—

HELD : The Appellant relied on a written admission which had not been contradicted by any document, or rebutted by evidence. The Court was bound to accept that evidence.

ANNOTATIONS: See C. A. 147/35 (*ante*, p. 142) and annotations.

FOR APPELLANT: Kamal.

FOR RESPONDENT: Henigman.

### JUDGMENT.

This appeal must be allowed.

The District Court dismissed the Appellant's case on the ground that they did not believe the evidence of the Appellant, nor the evidence of the person who appeared in the lower Court as second Defendant. That would have been a perfectly sound reason provided that that was the only evidence before the District Court. Unfortunately, it was not. There was the actual document in which the second Defendant, who was the agent of the Respondent, admitted that he received the LP. 600. That being so, that document being in existence, it is difficult to find out how the Court below came to the conclusion to which it did.

I admit that many cases of fraud and collusion would be extremely difficult to prove, but in view of this document, not rebutted by any admission on the part of the Appellant or of the second Defendant, not contradicted by any documentary evidence, the District Court had no option but to give judgment in favour of the Appellant.

The appeal must be allowed, the judgment of the District Court

quashed, and judgment entered for the Appellant for LP. 600.— with costs and LP. 3.— advocate's fees.

The provisional attachment granted by this Court on 25th May, 1937, is confirmed.

Delivered this 21st day of June, 1937.

*British Puisne Judge.*

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CIVIL APPEAL No. 83/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Copland and Frumkin, JJ.

IN THE APPEAL OF :—

Zvi Nachtigal & an. APPELLANTS.

v.

Ishaq Ibrahim Totah
in his personal capacity and as heir representing all the heirs of Ibrahim Salameh Totah, deceased. RESPONDENT.

*Repayment of loan — Breach of contract — Liability of heirs on ancestor's contract — Account.*

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 23rd April, 1937, and in amending the judgment of the lower Court:—

HELD: 1. There had been no breach of the contract on which Respondent could be held liable.

2. Respondent was liable for the return of the loan advanced to his father.

ANNOTATIONS: On the contractual liability of heirs *cf.* C. A. 80/43 (1943, A. L. R. 222) and note 3.

FOR APPELLANTS: Goitein.

FOR RESPONDENT: Moghannam.

### JUDGMENT.

*Manning, S. P. J.*: The Appellants sued the Respondent in the District Court of Jerusalem for money lent and damages for breach of contract. There had been an agreement between them and the Respondent's father for the joint leasing of certain land for the cultivation of bananas and cereals. The money necessary for the under-

taking was advanced by the Appellants; the Respondent's father did not put up any money, but it was provided in clause 2 of the agreement that a third of the money advanced should be regarded as a loan to him, and in clause 21 he was given a period of five years in which to repay the loan. The actual sum advanced by the Appellants was LP. 1950.

The date of the agreement was the 23rd November, 1934. The Respondent's father died on the 12th October, 1935, without having repaid any part of the loan. The Plaintiffs sued for the whole of the LP. 1950, advanced, though it is quite clear from the agreement that only one third of it was to be regarded as a loan to the Respondent's father. The District Court did not deal in its judgment with this part of the Appellant's claim. The Respondent was sued in his personal capacity and as heir representing all the heirs of his deceased father. In his personal capacity he is not liable for any money lent to his father, but as personal representative of the deceased he is liable to the extent of such assets of the deceased as have come or may come into his possession. I think the District Court erred in failing to give judgment for the Appellants on this part of the claim.

As regards the remaining two-thirds of the LP. 1950, which had been advanced to the Respondent's father in order to lease the land required for the undertaking, the Appellants did not sue for an account. Both here and below their advocate strongly repudiated the necessity of suing for an account. It is, therefore, unnecessary to consider whether the Respondent was bound to account for this part of the money advanced.

With regard to the breach of contract the Appellants alleged breaches of clause 18 and 23 of the agreement. Clause 18 required the Respondent's father on the demand of the Appellants, to register in their names two-thirds of the land leased. There was no suggestion in the Court below that any such demand had ever been made to the Respondent's father — it is clear, therefore, that he had not committed a breach of clause 18. The Appellants fell back on the submission that the Respondent, after the death of his father, was bound to carry out the provisions of clause 18. I am in complete agreement with the Court below on this point, namely, that the Respondent had no obligations under the contract, and could not be sued for damages for any act or omission of his.

Clause 23 of the agreement required the Respondent's father, as a security for the money advanced, to register certain orchards in the name of the Appellants. Clause 30, however, must be read in

conjunction with clause 23, and this clause allowed the Respondent's father to substitute for the orchards other security acceptable to the Appellants. In the event of any dispute as to the alternative security, an advocate named Mizrahi was to be called in to settle the matter. The Respondent's father did substitute an alternative security. The Appellants must have accepted it as satisfactory, as Mr. Mizrahi was never called upon to settle anything. The Court below was right in holding that there had been no breach with respect to clause 23.

In a reply to the defence submitted by the Respondent, the Appellants alleged further breaches of the agreement, but they did not press this part of their case in the Court below and it is, therefore, unnecessary to consider it.

One ground of the Respondent's defence was that the agreement was an agreement of partnership between the Appellants and Respondent's father. This point was not pressed in the Court below and it need not be considered.

The Court below was right in rejecting the Appellant's claim for damages for breach of contract, but erred in respect of the money lent. In my opinion, therefore, its judgment should be set aside and there should be substituted for it a judgment as follows:—

That the Plaintiffs do recover as against the Defendant as heir representing all the heirs of Ibrahim Salameh Totah, deceased, the amount of six hundred and fifty pounds and costs in proportion to the sum hereby adjudged, such sum of money and costs to be capable of execution against the property, movable or immovable, of the said Ibrahim Salameh Totah, deceased.

Delivered this 9th day of July, 1937.

*Senior Puisne Judge.*

*Copland, J.*: The facts of this case are as follows:—

On the 23rd November, 1934, the Appellants and one Ibrahim Salameh Totah, the father of the Respondent, entered into an agreement whereby Ibrahim Totah was to lease certain *Jiftlik* lands in Jericho, which were to be planted with bananas for the benefit of the Appellants and Ibrahim Totah.

By Clause 2 of the agreement, a total sum not exceeding LP. 2000.— was to be invested in the venture, the Appellants supplying the share of capital of Ibrahim Totah as a loan to him.

By Clause 5 and 6 Ibrahim Totah undertook to acquire the necessary land on behalf of the venture — the Appellants, by clause 3,

advancing the necessary instalments of capital as required for this purpose. By other clauses, Ibrahim Totah undertook to cultivate the land in a proper manner and to exercise personal supervision over the work.

By clause 17 the lands were to be registered in the name of Ibrahim Totah, but it was stated that the property, in spite of the registration, belonged to all the parties in accordance with their stated shares.

By clause 18, Ibrahim Totah undertook to register 2/3 of the lands in the names of the Appellants within one month after being called upon to do so.

By clause 31, Ibrahim Totah had to repay his share of the capital, which had been advanced to him by the Appellants, within five years of the date of the agreement.

Clause 23, on which the greater part of the dispute has hinged, reads as follows:—

> "As a security for the orchard and everything attached thereto which is registered in the name of the first party, the first party is hereby bound, immediately upon the beginning of the investment of monies upon the part of the second and third party to register in the name of the second and third party in the offices of the Government all his shares in the orchard with water attaching thereto on the date of the signature of this agreement, belonging to him in Jericho and known as:—
>
> 1. An orchard in partnership with Zaarur in Jericho of an area of 32 *dunams* with the right of water for 11 hours a week together with an additional 2 *fasels* and 2) an orchard in partnership with Hanna Khalaf in Jericho and of an area of 38.680 *dunams* together with a right of water of seven hours a week that is to say 3½ watches and the share of these orchards of the first party will be registered in an official way in the name of the second and third party but in fact this will be merely as a security for the capital invested by the second and third party and the registration of the joint orchard in this contract is only with the first party.
>
> The arrangement of the manner of securing the orchard will be carried out by decision, which will bind the parties in the form of arbitration."

By clause 30, Ibrahim Totah, if he wished to sell these Jericho orchards mentioned in clause 23, had the right to do so, provided he furnished other security to the satisfaction of the Appellants. If agreement on this could not be reached then the dispute was to be referred to advocate Mizrahi for settlement.

Ibrahim Totah died on the 12th October, 1935, and on the 23rd February, 1936, the Appellants served a Notary Public notice on the

Respondent calling upon him and the heirs of the deceased Ibrahim Totah to carry out the terms of the agreement of 23rd November, 1934, and warning them that on failure to do so, they would be liable to pay the sum of LP. 10,000.— liquidated damages as provided in clause 32 of the agreement.

The heirs did not comply and an action was thereupon brought in the District Court claiming the sum of LP. 1950.—, money advanced, and LP. 10,000.— liquidated damages. The District Court on the 23rd April, 1937, dismissed the claim, holding (1) that the action was misconceived inasmuch as the agreement of 23rd November, 1934, was a partnership agreement and that, therefore, the Appellants' proper course was an action for an account and dissolution; (2) that the Appellants had not proved the breach alleged in the statement of claim and that they could not amend their claim by adding allegations of other breaches and (3) that the sum claimed as damages was a penalty and not liquidated damages. Hence this appeal.

The questions which arise for decision on this appeal are:—

(1) Was the agreement of 23rd November, 1934, a partnership agreement or not.

(2) If it was a partnership, then was it dissolved by the death of Ibrahim Totah or not.

(3) Was the Appellants' proper course to bring an action for an account.

(4) Were the Appellants entitled to damages for any breach committed by the deceased in his lifetime or by his heirs after his death.

(5) Were the heirs liable to pay damages.

(6) Were the Appellants entitled to allege at the trial breaches of the agreement other than those set out in their statement of claim.

To deal with the sixth point first, the Appellants originally alleged breaches of clauses 18 and 23 of the agreement. After the trial had begun and the Respondent's statement of defence had been put in, they filed a written rejoinder alleging further breaches of clauses 12 and 24. The District Court refused to allow these to get to trial, I think rightly, since they raised new rights of action and were not merely an amendment of pleadings and so could not be allowed in this action.

As to the first point, whether this agreement constituted a partnership or not, from reading the agreement, I do not think that there can be much doubt that it did. In the preamble, and in a large number of the

clauses, occur the words "partnership" and "partners", and the general tenor of the document points to the fact that the parties desired to form a partnership to lease land and cultivate bananas. It is true that it contains matters which are not normal in a partnership agreement, such as the clause for damages, but I do not think that this can alter the character of the agreement, which carries all the marks of a partnership.

It has been argued that the test of a partnership is the carrying on of the business, not the agreement to carry on. But the carrying on had begun, and I do not think that it can be seriously argued that a partnership does not come into operation until all the constructional or cultivation preparatory works have been completed and the venture is in a position to earn profits. That a commencement in the partnership operations had been made is clear from the statement of claim, in para. 3 of which the Appellants state that the deceased had in fact taken a lease of the land required, and the same statement occurs in their notarial notice. The Appellants cannot now deny this. In my opinion the partnership had come into being when the lands were acquired by the deceased in accordance with his undertaking in the agreement, and the fact that the interest acquired had not yet been registered in his name is immaterial in this regard.

It has been further argued that this cannot be a partnership owing to certain provisions of the Partnership Ordinance (Cap. 103). But Sec. 6(2) merely says that registration of a partnership formed by cultivators for any common purpose in connection with the cultivation of land shall not be deemed to be a partnership for the purpose of carrying on a trade, profession, or industry, and, therefore, under Sec. 6(1) it need not be registered unless the partners so wish. Sec. 11(1) prohibits the registration of any partnership formed for the acquisition and development of land generally unless under a certificate from the High Commissioner. But neither of these provisions prevents a partnership for cultivation of lands being formed.

Section 69(3) says that the Ordinance shall not apply to a partnership not formed for carrying on a trade, profession or industry, unless it is registered. But the partnership still exists and is not illegal. The effect of Sec. 69(3) is that, in determining the next point for decision, namely whether the partnership were dissolved by the death of Ibrahim Totah, the statutory provisions of Sec. 39(1) cannot be relied on.

Here it seems clear that the obligations undertaken by the deceased were almost entirely of a personal nature, see clauses 6, 7, 9 and 10 of the agreement. The other partners were entitled to his *personal* know-

ledge and work, and his was a personal responsibility, which could not be undertaken by his heirs. It seems to me, therefore, that the partnership would of necessity be terminated by his death, unless anything to the contrary can be found in the agreement, and I cannot find, in the agreement of 23rd November, 1934, any such provision to the contrary.

Clause 11 clearly does not help the Appellants. This clause stipulates that the partnership will pay a monthly salary to the deceased and his son Issa for their services during the term of the "partnership". This cannot make the heirs responsible for carrying out all the terms of the agreement. Clause 16 which fixes the term of the "partnership" at ten years equally cannot have the effect of making the heirs liable, since to do so, the parties must contract for themselves and their heirs in order to bind the latter. Clauses 17 and 22 contain certain conditions binding the heirs of Ibrahim Totah, but the reason for that is obvious, as the District Court remarks. Since the partnership property was to be registered in the name of Ibrahim Totah, the Appellants had to be safeguarded in the event of his premature death, before their respective shares in that property had been registered in their names so that Totah's heirs could not claim the property as a part of his estate. In my opinion, there was no agreement to the contrary, and the partnership was dissolved as from the date of the death of Ibrahim Totah.

When once it is established that the agreement between the parties was a partnership and that property had been acquired with the funds of the partnership, the only remedy open to the Appellants would be an action for an account. It is not true to say that the LP. 1950 paid by the Appellants to the deceased were given to him as a loan. This sum constituted the capital of the partnership supplied by the Appellants on their behalf and on behalf of the deceased. This was paid to the deceased to expend in acquiring land on behalf of the partnership in accordance with clauses 2, 3, 5, 6, and 7 of the agreement. He was, therefore, the purchasing agent of the partnership — not merely of the Appellants. Only his share in the capital was advanced by the Appellants to him as a loan to be repaid within five years — see clause 21 of the agreement. The partnership having been dissolved by the death of Ibrahim Totah, the one third of LP. 1950, advanced to him, has now become payable and the District Court were wrong in not giving judgment for that sum. With regard to the remaining two-thirds, bearing in mind that the deceased had expended money of the partnership in acquiring property for the partnership, it is impossible to determine the true position between the parties unless an action for an

account be brought, and I think that the District Court were right in holding that this present action was misconceived.

To turn now to the question of damages. Since, in my view, the partnership was dissolved by the death of Ibrahim Totah, his heirs are not bound to carry out the terms of the partnership agreement and, therefore, are not liable in damages for any act or omission on their part, since they were under no obligation towards the Appellants.

Their liability, if any, to pay damages can only, possibly, arise if the deceased committed a breach of the agreement in his lifetime.

The breaches alleged against the deceased are first, under clause 18 of the agreement that he failed to transfer to the Appellants the stipulated shares in the partnership property acquired by him within 30 days after being called upon to do so by them, and secondly under clause 23 that he failed to provide the agreed security for the sums of money, being the partnership capital, given to him by the Appellants to be expended by him in acquiring land for the partnership. With respect to the alleged breach under clause 18, there is no evidence, and, in fact, no allegation in the statement of claim, nor in the arguments before this Court, that the deceased was ever asked to transfer and failed to do so. There is, therefore, no breach of the agreement under clause 18.

As to clause 23, under this clause the deceased had to give security for the capital sums entrusted to him by registering certain orchards, specified in the agreement, in the names of the Appellants, but by clause 30, he had the right to substitute other security acceptable to the Appellants. If the security proposed by him were not accepted by the Appellants, than the matter had to be referred to the Arbitration of an advocate, Mr. S. Mizrachi. The District Court found as a fact that in respect of the first payments of capital, amounting to LP. 1200, the deceased furnished alternative security which was accepted by the first Appellant, and that the second Appellant never objected nor asked for arbitration, as he was entitled to do under the agreement. I see no reason to differ from this finding which is supported by the evidence and the logical conclusions to be drawn therefrom. In my opinion the District Court were justified in holding that the mortgages for LP. 1200 were accepted by the Appellants in lieu of the security provided for in clause 23, so far as regards the capital advancement of LP. 1200.

Also I see no reason to differ from the finding of fact by the Court below that there was no evidence that the deceased refused to carry out his obligations under clause 23 to provide security for the second advance of capital of LP. 750, which was made on the 1st September,

1933. The deceased could have charged the orchard which still remained to him or under clause 30 he could have offered alternative security acceptable to the Appellants. Mr. Mizrachi, the Appellants' solicitor, stated in evidence that the deceased was willing and anxious to give security for this second sum. I agree with the finding of the District Court that there was no refusal to give security and, therefore, that there was no breach of clause 23 in respect of the second advance. It must be borne in mind that the deceased died on the 12th October, 1935, only six weeks after the second advance was made, that he had the right to substitute other acceptable security if he so wished, and that there had been negotiations, according to Mr. Mizrachi, as to the security to be given, terminated apparently by the death of the deceased.

Holding as I do those views, it seems to me unnecessary to discuss the further questions, whether the LP. 10,000.—, stated to be damages, are in fact liquidated damages, or, as the District Court found, a penalty, or whether the law of Palestine recognizes any difference between these two conceptions; or secondly whether the heirs of a deceased person are liable to pay damages for a breach of a contract of personal service made by their deceased ancestor. This latter question may well be left for determination when necessity therefor arises. Since no damages in my opinion are payable in this case both questions are purely academic.

In the result, for the reasons I have given, I think that the order should be in the terms set out in the judgment of the Senior Puisne Judge.

Delivered this 9th day of July, 1937.

*British Puisne Judge*

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ASSIZE APPEAL No. 7/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, A/C. J., Edwards and Khayat, JJ.

IN THE APPEAL OF:—

Rushdi Abdul Hadi Ali Nofal. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Insanity — Applicability of English law under Art. 46, P. O. in C., O. P. C., Art. 41 — "If it is proved", onus of proof on defence —*

*Tests to be applied — R. v. MacNaughten — Findings of fact — Recommendation to mercy — O. P. C., Art. 170.*

In dismissing an appeal from the judgment of the Court of Criminal Assize, sitting at Jaffa, dated the 14th October, 1936, whereby the Appellant was convicted under Art. 170 of the Penal Code and sentenced to death:—

HELD: Under the MacNaughten rule it is necessary for the defence to establish to the satisfaction of the Court that the accused did not know the nature and quality of the act he was doing, or that it was wrong.

(*Per* Khayat, J.): A person's mind may be deranged without affording him a defence under the above rule.

FOLLOWED: Rex v. McNaughten, 1843, 10 Cl. & F. 200.

ANNOTATIONS: *Cf.* CR. A. 6/42 (1942, S. C. J. 88) and CR. A. 199/42 (1943, A. L. R. 3) and annotations.

## JUDGMENT.

*Manning, A/C. J.*: The Appellant appeals against a conviction by the Court of Criminal Assize, sitting at Jaffa, whereby he was sentenced to death under Article 170 of the Ottoman Penal Code, for the murder of his father. The only defence is that he was, at the time when he committed the act, criminally irresponsible owing to mental disease. Before dealing with the facts, this Court has to decide what law is applicable. The English translation, in Mr. Bentwich's work, of Article 41 of the Ottoman Penal Code merely states that if it is proved that the offender was in a state of insanity at the time he committed the offence, he is exempt from punishment. This does not carry one very far, but it is interesting to note the words "if it is proved". This would seem to be in accordance with English Law which requires that the defence must prove affirmatively, to the satisfaction of the Court, that at the time of committing the act, the Accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. This is known as the rule in MacNaughten's case.

2. That this is still the rule in English Law has been emphasized time and again, recently in the Court of Criminal Appeal in England, presided over by the Lord Chief Justice (Lord Hewart) who has stated in unmistakable terms that this is still the rule and it has not been modified in spite of the clement suggestions of some alienists and

others. In our view, having regard to the provisions of Art. 46 of the Palestine Order-in-Council, 1922, and having regard to the terms of Art. 41 of the Ottoman Penal Code, the rule in MacNaughten's case is the rule applicable in Palestine to-day. The present Appellant did not satisfy the trial Court that the requirements of the rule in Mac Naughten's case had been fulfilled, and it is for us to say whether the trial Court erred in holding that the Appellant had not so satisfied them. It is, therefore, necessary to refer briefly to the facts proved before the trial Court. There is some evidence that, about two years or one and a half years prior to the murder, the Accused was injured and the injury seems to have affected him mentally. His uncle deposed that his relatives could not control him after he left hospital, and thereafter he seems to have improved, but after a short time he had a relapse. There is certainly evidence that the Accused did, at times, behave in a peculiar manner. His uncle, Abdul Kader Ali Nofal, deposed that the Accused was not well at about the time of the murder. As against this, the Accused's brother said that there was no sign of instability before the time of the murder and that he was quite well, and this witness also said that there had been no signs of mental instability since the last visit to the doctor which took place before the disturbances broke out, *i. e.* before 19th April, 1936, (the murder took place on 30th May, 1936). The Accused's sister Shameyeh, aged 10, merely said that the Accused was feeble minded and that his father had taken him to a doctor and to a Sheikh. Cpl. of Police, Saadi Rashid, deposed that when he charged the Accused on May 30th, the Accused seemed to be normal. The Accused, on oath, said that he was not normal when he made a statement to the Police and that he said what came into his mind. Dr. Weissbard, a witness called by the defence, said that he saw the Accused twice, first on 29th December, 1934, and again on 3rd January, 1935. All that this witness could say was that the Accused was suffering from shortness of breath (dyspnoea) due probably to a neurasthenic condition, and he also said that the Accused seemed rather melancholic. Sheikh Abed Hindawi last saw the Accused at about the beginning of the disturbances but he says that after fifteen days the Accused was cured and spoke normally and did not have fits and did not lie on the ground. Sheikh Ahmad Ma'seiri saw the Accused one and a half years ago and so his testimony does not help much. Now, that being the evidence before the trial Court, it seems to us to be impossible for us, as an appellate Court, to say that the trial Court erred in holding that the defence had not succeeded in proving affirmatively the fact of insanity

according to the test as laid down by the Rule in MacNaughten's case. We dismiss the appeal.

Delivered this 5th day of December, 1936.

*Acting Chief Justice.*

*Khayat, J.*: I am of the opinion that the mental condition of the Appellant prior to the date on which the offence was committed would show that he was mentally deranged to a grave extent. I do not think, therefore, that he may be considered as a normal person with full responsibility.

2. While agreeing with the judgment of my learned brothers in dismissing the appeal, but having regard to the doubts entertained by the Court of Criminal Assize as regards the mental condition of the Appellant, and also to the evidence heard respecting the Appellant's antecedents, I am of the opinion that a recommendation be made to His Excellency to use his prerogative of reduction of sentence.

Delivered this 5th day of December, 1936.

*Puisne Judge.*

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CIVIL APPEAL No. 87/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Frumkin, JJ.

IN THE APPEAL OF :—

1. Israel Blumenfeld,
2. Moshe Blumenfeld. APPELLANTS.

v.

Imperial Chemical Industries (Levant), Ltd. RESPONDENT.

*Promissory note — Plea of no consideration — Bills of Exchange Ordinance, sec. 29 — Guarantee notes — Onus of proof — Chalmers Bills of Exchange, p. 116 — Bullen & Leake, p. 616 — Fitch v. Jones — Application for leave to appeal — Specific point of law need not be set out — Code of Civil Procedure, Art. 80 — C. A. 84/22, C. A. 77/32, C. A. 106/32, C. A. 82/25, C. A. 149/35 — Law of Evidence Amendment Ordinance, secs. 2, 12 — Admissibility of oral evidence to impugn consideration — Abbot v. Hendriks — Chalmers pp. 17, 66, 204; Byles pp. 104—5.*

In allowing an appeal from the judgment of the District Court of Tel-Aviv, in its appellate capacity, dated the 25th March, 1937, and in remitting the case to the Chief Magistrate, Tel-Aviv, with directions:—

HELD: 1. The onus of proving that no consideration was given for a promissory note is on the defendant.

2. In an application for leave to appeal from a judgment of a District Court, it is not necessary for the presiding judge to set out the point of law on which leave to appeal is granted.

3. For the purpose of evidence two or more defendants do not constitute one person.

4. Parol evidence is admissible to prove that no consideration was given for a promissory note, whether or not the note purports, on the face of it, to have been given for consideration.

FOLLOWED: Fitch *v.* Jones, 1855, 5 A. & B. 238; Abbot *v.* Hendriks, 1840, 133 E. R. 551; C. A. 149/35 (7, C. of J. 381).

REFERRED TO: C. A. 84/22 (not reported); C A. 82/25 (2, C. of J. 772); C. A. 77/32 (1, P. L. R. 739; 3, C. of J. 803); C. A. 106/32 (1, C. of J. 259); C. A. 106/33 (2, P. L. R. 94; 3, C of J. 821); C. A. 80/36 (7, C. of J. 188).

ANNOTATIONS: This case is still the leading authority on the admissibility of oral evidence although some of its *dicta* have been criticized, *e. g.* in C. A. 168/41 (1941, S. C. J. 642) and in C. A. 89/42 (1942, S. C. J. 444). For the present state of the law generally *vide* annotations to C. A. 247/43 (1943, A. L. R. 689) and, as regards admissions in the Land Registry, see last paragraph of annotations to C. A. 94/43 (1943, A. L. R., at p. 153).

FOR APPELLANTS: Seligman.

FOR RESPONDENT: Pevsner, Levin.

## JUDGMENT.

*Trusted, C. J.*: This case was argued before us at considerable length and it raised a number of interesting and important points.

The Plaintiffs, the Imperial Chemical Industries (Levant) Ltd., sued upon a promissory note given by the first Defendant to a Company known as the Levant Agencies, Ltd., with which the Imperial Chemical Industries was closely associated, and endorsed by that Company to the Plaintiffs and signed *bon pour aval* by the second Defendant, the father of the first. The note in question was one of ten given in similar circumstances.

The case came in the first instance before the learned Chief Magistrate, Tel-Aviv, and in consequence there were no pleadings.

At the beginning of the hearing the learned Magistrate asked the grounds of defence and he was told, so far as the first Defendant was concerned — no consideration; Note given for a special purpose which

had not arisen, and for the second Defendant — Note given as a guarantee only for certain purposes which had not arisen. Neither Defendant took the point that the note had not been presented within a reasonable time after endorsement.

Thereupon it was open to the Plaintiffs to rely upon Section 29 of the Bills of Exchange Ordinance under which a holder is deemed to be a holder in due course — and merely put in the note, formally reserving their right to rebut any defence which might be made against them or to assume the burden and to anticipate the defence which might be made.

They chose the latter course and called their accountant as a witness who stated:—

> "Promissory note given to Levant Agencies in connection with purchases by defendants. We have dealings with Levant Agencies. We received P. N. to their credit in our account with them. Endorsers all entitled to endorse for their companies. Consideration given".

In cross-examination he said:—

> We have 10 exactly similar. This was presented in October, 1936; presented about two years after making. Don't know how many promissory notes sent to Bank. We sometimes keep promissory notes in our safe. We credit Levant Agencies in our books with amount. If we do not succeed we shall lose the full amount. We have not paid cash for promissory note; we received promissory note; don't know when; don't know approximately".

He was also asked about the relationship which existed between Levant Agencies and Plaintiff company.

This closed the case for the Plaintiffs.

The second Defendant gave evidence to the effect that the notes were given as security for his son's honesty, and he had not heard such honesty challenged.

The first Defendant said, "I gave promissory notes as security for my being manager of Plaintiffs' taxi office". He also said they were given for fidelity as he might send cars out of Palestine which might not come back.

In cross-examination he said, "They said we should get back promissory notes after work ended".

He complained generally of his treatment and said that the correspondence which confirmed his story had been taken from the office, and although the police had searched they had found nothing. He also said, "Clerk told me he gave them (*i. e.* documents) to I. C. I. manager.

They refused to deliver them to me. They said office and documents theirs", and as to these latter allegations he was not cross-examined.

The Defendants apparently offered further evidence, but we do not know of what nature, as the Court held it was not necessary.

The Plaintiff's advocate addressed the Court but made no application to call further evidence.

On this the learned Magistrate held:—

> "Question here is whether consideration was given for the promissory note. Plaintiff has dealt with whole case on grounds that plaintiffs were promissee in promissory note and not merely holder in due course. In any event, in the circumstances Plaintiff was a holder with notice.
>
> There was evidence to support that view and it was the true position.
>
> The plaintiffs merely gave book credit for LP. 200.— on promissory note to their own assd. Co. — though that may be a separate legal entity.
>
> The Plaintiff was told the defence was no consideration and proved nothing as to that. He relies on the legal presumption which can be rebutted.
>
> Defendants have rebutted this presumption completely.
>
> Judgment for defendants with costs and advocate's fees LP. 2.—.

It is not easy to follow the findings of the learned Magistrate. He appears to have founded his judgment on the basis that no consideration was given, on the assumption that the onus was upon the Plaintiffs to show that they gave consideration, as the Defendants had rebutted any presumption in the Plaintiffs' favour.

The rule applicable in such cases is no doubt accurately set out in Chalmers Bills of Exchange, 10th Edition, p. 116 as follows:—

> "Mere absence of consideration, total or partial, is matter of defence against an immediate party or a remote party, who is not a holder for value but it is not a defence against a remote party who is a holder for value".

and in Bullen & Leake's 9th Edition, p. 616:—

> "Absence of consideration is a good defence to an action on the bill between immediate parties, and also between remote parties, where the bill has passed without consideration through the intermediate parties, but the want of consideration throughout must be stated in the defence, and must be proved if denied".

The rule when so stated may leave some doubt upon whom the onus of proof lies but it was held in Fitch and Jones (1855) 5 A. and B. 238, that although proof of fraud or illegality shifted the onus to a holder in due course, lack of consideration between the original parties did

not do so — the onus, therefore, of showing lack of consideration throughout remains upon the Defendant.

I cannot be certain that the learned Magistrate intended to find that consideration was at no time given for the bill.

It is not for us to draw inferences of fact but I think that upon the evidence adduced it is at least a matter of argument whether the true position was not that the notes were given in accordance with the terms of an agreement whereby the first Defendant was to be given certain employment, and that in consequence there might have been consideration for them.

This possibility brings one to the other, and in my opinion, equally important defence with which the learned Magistrate did not deal at all, *i. e.* that the note was negotiated in breach of faith.

The matter went on appeal to the District Court and under the present unfortunate practice was not argued. The District Court held:—

> "The action was based on a promissory note signed by the two respondents, the first as a maker and the second as guarantor.
> The respondents pleaded lack of consideration and upon the hearing of the respondents' evidence the learned Magistrate dismissed the appellant's action.
> In our view the evidence of the two Respondents is legally insufficient to contradict a written document, *viz.* a promissory note. There was no corroboration whatsoever of their evidence.
> The appeal is, therefore, allowed and judgment entered for appellant".

Against that judgment appeal was by leave brought to this Court.

Despite the efforts which have been made by this Court to make clear the provisions of Section 6 of the Magistrates' Courts Jurisdiction Ordinance, leave to appeal was granted on certain points of law which were set out.

As I have said before, in my opinion, when application is made for leave to appeal the presiding judge (not President of the Court) must satisfy himself that the case involves a point of law of sufficient novelty or complexity to warrant an appeal and if it does leave should be granted and this Court will then deal with the rights of the parties.

This Court cannot be bound by a number of questions, some possibly theoretical, often the fruits of the ingenuity of counsel, the answer to which, or to some of which may not decide the rights of the parties. The law does not provide in this instance for an appeal by way of case stated.

The District Court dealt with the case on the basis of evidence only.

I have already indicated the matters which I think should have been

considered by the learned Magistrate and it is clearly desirable that there should be no doubt as to the admissibility and legal sufficiency of the evidence necessary for such consideration.

Article 80 of the Code of Civil Procedure, according to Mr. Hooper's translation, provides:—

> "All claims relating to agreements and contracts which, according to local custom are reduced to writing, and all claims relating to partnership, farming out and the granting of loans must be proved by documentary evidence, if the value of such claim exceeds one thousand piastres.
>
> Any action brought in respect to any of the matters mentioned above and which have been reduced to writing, even though they do not exceed one thousand piastres in value, must be proved either by documentary evidence or by the admission of the defendant, or by entries in a register".

(and see Chapter III, paragraph (3) — "Matters which must be evidenced by writing" of his Law of Civil Procedure for Iraq and Palestine, p. 48) when so translated it appears to present no difficulty, but it is not the usually accepted meaning. The Bagdad translation is:—

> "Every obligation and agreement, the terms of which it is customary to reduce to writing and every claim relating to a partnership, lease or loan, shall be proved by documentary evidence when the value thereof exceeds Ps. 5,000. Every claim set up against a document relating to such matters shall be proved either by documentary evidence, or by the admission of the defendant, or by his account books, whether the value of such counter-claim exceed Ps. 5,000 or not (Amendment of 4 *Tishrin-al-awwal* 1330)".

and my brother Frumkin has translated it thus:—

> "Claims relating to all sorts of undertakings and contracts which are customarily reduced to writing, and to partnerships, farming out and loans which exceed pt. 1000 must be proved by a document. A defence set up against such documents even if it does not exceed Pt. 1000 must be proved by a document or by the admission of the opponent or by his books".

and a further translation which I have had prepared is as follows:—

> "All claims relating to undertakings and contracts which, according to Common Use and Custom, are reduced to writing and all claims relating to partnership, farming out and granting of loans, the value of which exceeds one thousand piastres, must be proved by *Sanad*. Any *Da'wa* (action, here rather defence) adduced against a *Sanad* regarding any of the matters mentioned above even though it does not exceed a thousand piastres, must be proved by *Sanad;* or by admission or book of defendant (opponent or other party)".

Again, Young's Corps de Droit reads:—

> "Toutes obligations et conventions qu'il est d'usage de stipuler par

> écrit et les demandes relatives à une association, enterprise ou emprunt, doivent être prouvées par titres, lorsque le chiffre dépasse Ps. 5000. Toute prétention opposée à un titre concernant ces sortes de demandes doit être établie soit par titre, soit par l'aveu, soit par la présentation des livres du défendeur, lors même qu'il s'agirait d'une réclamation inférieure à Ps. 5000. (C. fr. art. 1341)".

It is clear, therefore, that the provisions of this article are not free from obscurity. The difficulty being created by several words being open to alternative English meanings.

In order to ascertain the effect of this Section upon an action based upon a promissory note, it is necessary to go in some detail into the history of its application.

It is not easy to discover the early decisions of these Courts in the absence of reports, but it seems that in Civil Appeal No. 84/1922 it was held that the maker of a note could not raise the defence of lack of consideration or that the instrument was delivered to the payee for a special purpose when it stated that value had been received, nor could he tender the oath to his opponent as to the truth of such statement contained in the instrument.

On my view of the true meaning of the article, this seems to me to be too formalistic an interpretation and may have resulted in some of the difficulties which have arisen.

In 1924 the Law of Evidence Amendment Ordinance (now Chapter 54) was passed. For present purposes it had three important provisions. Section 2 (now 3) dealt with competency of witnesses; Section 5 (now 6) dealt with sufficiency of evidence; and section 12 (now 14) provided that civil parties might give evidence.

The passing of this ordinance was followed by a number of authorities which show considerable divergence of judicial opinion.

In Civil Appeal No. 77/1932 the Court held:—

> "The Law of Evidence Amendment Ordinance, 1924, Section 12, enables either party to give evidence on his own behalf or be summoned to give evidence for the other party. The lower Court were wrong in refusing the request of the Appellant to hear the respective parties. The judgment of the lower Court is, therefore, set aside and the case remitted for the parties to be heard and for the Court to establish in the first place what was the real nature of the transaction between the parties and after having established this issue to complete this case".

This was followed by Civil Appeal No. 106/32, where it was held (Frumkin, J. differing):—

> "This is an appeal against a judgment of the Jerusalem District Court of the 4th July, 1932. The action was upon a promissory

note and the District Court at the request of the Respondent heard the evidence of the two Respondents and Plaintiff in order to contradict the contents of the promissory note. The Plaintiff denied the allegation against the truth of the document set up by Defendants. The Court, however, in their judgment stated they did not believe the Plaintiff and gave judgment in Respondent's favour. Now, the Law of Evidence Amendment Ordinance, 1924, Section 12, enables either party to give evidence on his own behalf or be summoned to give evidence for the other party: and this Court has previously decided that such evidence may be called by Defendant even in case where a written document within the meaning of Section 80 of the Civil Procedure Code is the subject matter of the action — See Civil Appeal 77/32.

It is, however, clear that a document of this nature can only be contradicted by the evidence of the person who is setting the document up and suing upon it and not by the evidence of the person being sued on the document.

Defendants may give evidence contradicting a written document of the nature set out in Article 80 of the Civil Procedure Code, but such evidence cannot be of any avail unless the same is materially corroborated by the evidence of the other party.

The appeal is allowed with costs".

Civil Appeal No. 106/1933 produced three long divergent judgments on the point, which can be conveniently found in Mr. Shems' Manual on Bills of Exchange, pp. 45—49. These decisions seem to go to the "contradiction" of a document, but it is not altogether clear what was meant by contradiction.

Civil Appeal No. 82/1925 would appear to be an authority for the general proposition that evidence of surrounding circumstances is admissible if it does not seek to vary or alter a written document.

The matter was carried considerably further in Civil Appeal No. 149/35, when this Court, consisting of the Acting Chief Justice and Frumkin, J., held:—

"This is an action on a cheque. Defendant admits the cheque. He alleged, however, fraud, duress and want of consideration and asked to be allowed to call evidence on these points. The Court below refused his application apparently on the ground that none of these defences had been put forward.

We think the Court below was wrong and their judgment must, therefore, be set aside and the case remitted to them with instructions to hear the Defendant and his witnesses, if any, in reply, and then to give judgment in the action.

Costs to abide the event.

We think that in an action on a cheque, where the document itself is not contradicted, but other matters such as above are alleged, oral evidence may be heard as to the circumstances under which the cheque was made and negotiated".

In this case it seems clear that the Court held that the parties and their witnesses may give oral evidence as to the circumstances under which a cheque was made and negotiated when the document itself is not contradicted.

With this latter view I agree, whether on the ground that it follows from the true interpretation of the obscure Article 80, or on the ground, which in my opinion is firmer, that it is impossible to say to what the provision of the Ottoman Law in question (*i. e.* the second paragraph of Article 80 of the O. C. C. P.) extends and applies and that jurisdiction should, therefore, be exercised in accordance with the substance of the common law and the doctrine of equity in force in England save as modified, amended or replaced by other provisions.

I think, therefore, the following principles emerge. — Certain contracts as set out in Article 80 of the Ottoman Code of Civil Procedure as set out above, must be evidenced by writing. Where a contract of these classes — even if the value does not exceed P. T. 1000 — has been reduced into writing, parol evidence of the parties and any other witnesses is admissible as to the circumstances in which the document came into existence — and if a bill of exchange was negotiated, — for example to show fraud, duress or want of consideration.

Having regard to the decisions to which I have referred, I may add that in my opinion Section 14 of the Evidence Ordinance does not and was not intended to enlarge or limit the scope of Section 3 of that Ordinance, but was enacted expressly to contradict Article 1703 of the *Mejelle* which provides that a person cannot be both a plaintiff and a witness.

The value of oral evidence and the credibility of witnesses are questions for the Court to decide according to the demeanour of the witnesses, the circumstances of the case and such indication of the truth as may appear during the trial (see Section 12 Evidence Ordinance).

No judgment can be given in any case on the evidence of a single witness unless such evidence is uncontradicted or is corroborated by some other material evidence which, in the opinion of the Court, is sufficient to establish the truth of it. (Section 6 Evidence Ordinance).

To apply these principles to the present case, I think that it is clear that whether a note expresses that value has been given or not, extrinsic parol evidence is admissible between immediate parties and those in privity with them to impeach the consideration and show its absence, failure or illegality — *cf.* Abbot *v.* Hendriks (1840), 133 E. R. 551

and Chalmers Bills of Exchange, 10th Edition at pp. 17 and 66, and Byles on Bills, 19th Edition, pp. 104 and 105.

I am of opinion, therefore, that in the present case the Defendants might call parol evidence to show that no consideration was given by the Plaintiffs or by the payees from whom the Plaintiffs took the note.

I do not think there can be any doubt that parol evidence is admissible to show that a bill was negotiated in breach of faith (*cf.* Chalmers p. 204) and in this case it was open to the Defendants to call parol evidence with that object if they so desired.

I do not think that it can be argued (for the purpose of Section 6 of the Evidence Ordinance) that persons who are jointly and severally liable are not as individuals, separate witnesses. In my opinion, in the present case, if the Defendants had been sued separately each could have given evidence on behalf of the other. The weight which is to be attached to such evidence is a matter for the Court of trial.

No question has been raised as to the liability of an endorser of a note signing *bon pour aval.*

In my judgment this appeal should be allowed and the case sent back to the learned Magistrate to deal with it in accordance with the opinion I have expressed.

Advocate's fee LP. 5.

Costs to abide the event.

Delivered this 19th day of July, 1937.

*Chief Justice.*

*Greene, J.*: I concur.

*British Puisne Judge.*

*Frumkin, J.*: The law governing the admissibility or otherwise of parol evidence in this country is laid down in Article 80 of the Ottoman Code of Civil Procedure as amended.

2. There being certain discrepancies in the two published English translations of that article, some of them affecting its true meaning, I have prepared what I consider to be an accurate translation of this article from the Turkish which reads as follows:—

> "80. Claims relating to all sorts of undertakings and contracts which are customarily reduced to writing, and to partnerships, farming out and loans which exceed Pt. 1,000 must be proved by a document. A defence set up against such documents even if it does not exceed Pt. 1,000 must be proved by a document or by the admission of the opponent or by his books".

3. The first part of this article describes the nature of the transactions which must necessarily be proved by documentary evidence and hence no parol evidence would be admissible. The second part of the article provides that any defence against any such transaction, even if the value of that defence would be less than Pt. 1,000 must also be proved by documentary evidence to the exclusion of parol evidence.

4. It is to be noted that the provision of this law is much narrower than the corresponding provision in English law where parol evidence is inadmissible only to contradict a document or to vary its terms as appear on its face. Here any defence of whatever nature, even if not contradicting the document or varying its terms, would not be admissible. So, for instance, when a defence of payment is set up against a deed English law would allow parol evidence to prove it but it has been the invariable practice of the Ottoman Courts supported by numerous decisions of the Court of Cassation that payment set up against a document cannot be proved by oral evidence even if the amount of such alleged payment were less than Pt. 5,000 as the article stood before its amendment and Pt. 1,000 as it now stands. This practice has always been followed by this Court.

5. I realise the harshness of the strict application of this rule, as there are many cases, such as fraud and mistake, where parol (*sic*) evidence could not be adduced, and it is far from me to advocate the propriety of this rule. But we have to apply the law as it is until it is altered. Meanwhile a certain measure of latitude must be allowed when not inconsistent with the plain wording of the law. In fact in Agassi *v.* Abutbul — Civil Appeal No. 149/35 — where, in addition to want of consideration, fraud and duress was alleged, this Court directed that oral evidence be allowed to prove the circumstances under which a cheque was made and negotiated.

6. There is of course this much to be said in favour of the Ottoman Law in this respect, namely: that it was intended to apply, and is in fact applicable in places where a vast number of witnesses, sometimes subconsciously, fail to distinguish between fact and fiction, truth and imagination. It is no good relying too much on the discretion of a Court in considering the weight of evidence. Judges and Magistrates are after all human beings, and some of them, in the early period of their experience in this country, may be swept away by the smartness or apparent innocence of a skilled or trained witness.

7. The Law of Evidence Amendment Ordinance, now embodied in the Evidence Ordinance, has not altered the law in this respect. Its object was not to widen the scope of the admissibility of oral evidence

but to increase the category of persons who may be heard as witnesses. Prior to the promulgation of this Ordinance certain persons, including parties, were not allowed to be heard as witnesses. Now, they may be so heard, but their evidence would have no more value than the evidence of any other witness; that means that it will be accepted and acted upon only in cases where oral evidence is admissible but will not be so, where oral evidence is not admissible.

8. In this respect the number of witnesses is not material at all. If a party is composed of two or more individuals and if they all join in giving evidence on a certain point, if that point is such that it could not be proved by oral evidence the point will still remain unproved.

9. All this does not mean that a defence against a document can only be proved by documentary evidence. Article 80 in its second part provides for two other means to prove such defences, namely: the admission of the opponent and his books.

10. I would like at this stage to point out that the actual words used in the Turkish text are *"Da'wa"* and *"Mudda'i ale"* technically meaning "action" or "claim" and "defendant" but in the Turkish legislation the word *"Da'wa"* is often used also for *"defi da'wa"* meaning counterclaim or defence. It has been previously held by this Court and recently supported in Shlank *v.* Bahloul — Civil Appeal No. 80/36 — that "defendant" in this section has a wider meaning and extends to such person against whom a counter-claim is brought even if he were a plaintiff in the nomenclature of the case. So, for instance, if "A" as plaintiff brings an action against "B" as defendant, "B" sets up some defence, he is regarded as claimant or counter-claimant in relation to that defence and his defendant or opponent is "A" the plaintiff in the action. It follows that when a defence is put up against a deed which defence could not be proved by oral evidence and written evidence is not available, the party putting up this defence may prove it by the admission of the other side or its books. We are not now concerned with the books of the opponent and I shall deal only with the point as to admission.

11. On this point the Evidence Ordinance is very useful as it gives the party an opportunity to extract an admission from the other side by calling him as a witness. It is for this reason that this Court was always in favour of giving an opportunity to a party to call the other party as a witness so as to give them a chance of proving their case or defence based not on oral evidence but on the admission of the other side.

12. Having now stated the law as to the admissibility or otherwise

of oral evidence as it appears to me to be the law of the country, I will turn to the present action.

13. The Respondent company sued under a promissory note endorsed to them by the Levant Agencies Ltd., and signed by the first Appellant as promisor and by the second as guarantor *pour aval*. The Appellants set up a defence of a twofold nature (a) that the promisor received no consideration, and (b) that the promisee endorsed it to the Respondent company in breach of faith.

14. On the point whether any defence against the Respondent Company could be brought at all, I concur in the view of the learned Chief Justice that in view of the fact that the Respondent, not having relied upon section 29 of the Bills of Exchange Ordinance, assumed the burden to anticipate the defence which might be made against the endorser and in view of the relationship between the endorser and the endorsee, the Magistrate was right in holding that the Respondent company was to be regarded as holder by notice and consequently any defence which the Appellants may bring against the Levant Agencies Ltd., may be brought against the Respondent company.

15. Endorsement in breach of faith is a defence which, by analogy to fraud and duress, might be proved by oral evidence, this being a matter which could never have been foreseen by the parties and there could be no possibility of proving it by written evidence. But this defence in the present case lost its relevance the moment we came to the conclusion that the Respondent company stands in the shoes of the Levant Agencies Ltd. Because even if the endorsement was not made in breach of faith the Appellants could still set up against the endorsee any legal defence they may be able to set up against the endorser. The only defence they are relying upon against the endorser is want of consideration, and the only question is how could they prove this defence.

16. The Appellants, before the Magistrate, wanted to prove it by their own evidence. This, as stated before, they cannot do. This case is distinguishable from Civil Appeal No. 149/35 referred to above, as here there is no clear or even implied allegation of fraud or duress.

17. The only remedy, therefore, open to the Appellants, failing production of any written evidence to support their defence, is the admission or the books of their opponent. In the light of the broader interpretation of the technical meaning of "defendant" and in view of the fact that in the present case the Respondent company stands in the shoes of the Levant Agencies Ltd., I am of opinion that the Appellants should be given an opportunity to call the managers or responsible members of the staff both of the Levant Agencies and the I. C. I. (Levant)

Ltd., who were directly concerned with the transaction and endorsement, and only if the Appellants' defence as to failure of consideration is admitted they will have to succeed in their case.

18. For these reasons I am of opinion that both the judgment of the District Court and that of the Magistrate's Court must be set aside and the case remitted to the learned Magistrate to complete the case as above, and to give a fresh judgment accordingly.

Costs to abide the event.

*Puisne Judge.*

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LAND APPEAL No. 30/22.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Corrie, A/C. J., Khaldi and Frumkin, JJ.

IN THE APPEAL OF :—

Labibeh daughter of Muhd. Agha ibn Haj Khaled El Darfil. APPELLANT.

v.

Haj Huda Radwan. RESPONDENT.

*Evidence — Secondary evidence may be given of lost document — Agreed partition — Evidence of user in accordance with terms of deed.*

In allowing an appeal from a judgment of the Land Court of Jaffa, dated 13.2.22 (In action No. 196):—

HELD: Where the parties admit the existence of a deed of partition, but the deed cannot be produced, secondary evidence of its contents may be led.

ANNOTATIONS:

1. On the effect of unregistered partitions *vide* C. A. 19/43 (1943, A. L. R. 27) and case therein cited.

2. See C. A. 191/42 (1942, S. C. J. 1000) on proof of lost document.

JUDGMENT.

Labibeh, the Plaintiff in this action, is one of the heirs of her father Mahd. Agha who was admittedly the owner of the land in dispute. Haj Huda the Defendant is a purchaser of land from other heirs under

an unregistered deed. Both parties allege that an unregistered deed of partition was made between the heirs, some 13 years ago, which deed is now lost: but while Labibeh alleges that under this partition the land in dispute was allotted to her, Haj Huda alleges that it was allotted to the other heirs from whom he bought. Both parties have named witnesses to prove the contents of the deed of partition but the Land Court, apparently holding that such evidence was inadmissible, has given judgment for Labibeh for the share to which she would be entitled as an heir of her father.

The Court holds that these appeals are well founded. It is established by the parties' admission that there was an agreement of partition affecting the land. If the deed of partition had been produced the Court would have been bound to consider whether it affected the title of the land. The deed not being forthcoming secondary evidence of its contents is admissible, and accordingly the evidence produced by both parties as to the contents of the deed of partition and as to enjoyment of the land since the partition should be heard for what they are worth.

The appeals are allowed and the judgment of the Land Court set aside.

Costs to be costs in the case.

Delivered this 19th day of May, 1922.

*Acting Chief Justice.*

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CRIMINAL APPEAL No. 105/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Greene and Khayat, JJ.

IN THE APPEAL OF:—

Nayef Ibn Nayef Abu Taweh. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

*Confessions — Murder contrary to sec. 214(a) C. C. O. — Court may accept part of the confession.*

In dismissing an appeal from the judgment of the Court of Criminal Assize, sitting at Haifa, dated the 15th September, 1937, whereby the Appellant was convicted of murder under Section 214(a) of the Criminal Code Ordinance, 1936, and sentenced to death:—

HELD: The Trial Court was entitled to accept part of the confession and reject the other part.

ANNOTATIONS: *Cf.* CR. A. 60/44 (1944, A. L. R. 318, at pp. 321—2); note, however, that the whole of the confession must be given in evidence: Halsbury, Vol. 9, *pp.* 208—9, No. 295.

FOR APPELLANT: Koussa.

## JUDGMENT.

*Manning, S. P. J.*: The Appellant was convicted of murder under section 214(a) of the Criminal Code Ordinance, 1936. The particular sub-section constituting the crime of murder in this case provides:—

> "Any person who by any unlawful act or omission wilfully causes the death of his father or mother or grandfather or grandmother is guilty of a felony. Such felony is termed murder".

2. Elias Eff. Koussa, on behalf of the Appellant, has pointed out that the evidence against the Appellant consisted of a confession made by him to the Police and his own evidence on oath before the Court of Criminal Assize. The Court of Criminal Assize gave the fullest consideration to these confessions of the Appellant and said that they did not feel bound to accept them in their entirety and they came to the conclusion that the Accused's story of having found a man committing sexual intercourse with his mother was not to be believed. The Court of Criminal Assize gave reasons as to why they accepted one part of the confessions and did not accept another. We think that any Court is justified in taking this course. There was a definite finding of fact by the Court below and we see no reason to think that they misdirected themselves in any way.

3. It is, therefore, unnecessary to consider the point of law raised by Elias Eff. Koussa as to whether provocation is an element to be considered in a case of this kind.

4. The appeal is dismissed, the conviction and sentence are affirmed.

5. We have no doubt that the Chief Justice, who presided in the Court below, will convey to the proper authority any recommendation which may have commended itself to the Court of Criminal Assize.

Delivered this 2nd day of October, 1937.

*Senior Puisne Judge.*

*Greene, J.*: I concur.

***British Puisne Judge.***

*Khayat, J.*: I concur.

*Puisne Judge.*

HIGH COURT No. 16/37.

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

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Salim Shishan & an. PETITIONERS.

v.

Police Officer in Charge of the Licensing Office, Jerusalem (Department of Police, Jerusalem). RESPONDENTS.

*Road Transport — Interpretation — Roads and Tariffs Rules intra vires Ord., sec. 23 — Maximum number of omnibuses fixed by High Commissioner — Misuse of word "equity".*

In refusing an application for an order to issue to the Respondent, directing him to show cause why he should not be ordered to issue to Petitioners a passenger road service permit for an omnibus in respect of the route between Jerusalem and Bethlehem:—

HELD : The Road Transport (Routes and Tariffs) Rules are *intra vires* the Ordinance.

ANNOTATIONS: *Cf.* CR. A. 69/38 (1938, 2 S. C. J. 43) for an unsuccessful attempt to have Rule 11A of the Routes and Tariffs Rules declared *ultra vires*.

FOR PETITIONERS: H. Atallah.

### ORDER.

This is an *ex parte* application for an Order to issue to the Respondent to show cause why he should not be ordered to issue to Petitioners a passenger road service permit for an omnibus in respect of the route between Jerusalem and Bethlehem.

2. Mr. Hanna Atalla, on behalf of the Petitioners, argued firstly that the Road Transport (Routes and Tariffs) Rules, 1934, are *ultra vires* the Road Transport Ordinance, 1929, (Cap. 128 of the Laws of Palestine), and secondly that in view of the provisions of Section 6 of the said Rules, the permit should have been granted for the period for which the omnibus was licensed.

3. We hold that these Rules are *intra vires* the Ordinance in view of the wide terms of Section 23(s) of the Ordinance, which gives power to the High Commissioner to make rules for "regulating, restricting and controlling the issue of licences for, and the use of,

public vehicles .....". These are very wide powers, and in our opinion include the issue of permits.

4. As regards Mr. Atalla's second point, he admitted that the maximum number of omnibuses allowed by the 1934 Rules, namely 6, was already full. He argued that the maximum number fixed by the High Commissioner in these rules was in accordance with the recommendations of the Police Authorities. What the Petitioner is asking us to do is either to order the Police Authorities to commit a breach of the law or to recommend to His Excellency to alter the provisions of the law. Neither of these two things are within the jurisdiction of this Court. This Court has to see that the provisions of the law have been complied with, and we certainly can not make a recommendation for the alteration of the law.

5. Mr. Atalla further argued that this Court may see fit to exercise its equitable powers in view of the circumstances of this case. We would like to remark that there is no other word which is more misused than the word "equity" in this country. If the facts as alleged by the Police as stated in Exhibit "D" are correct, Petitioner cannot allege that he was placed in any difficulty. If, on the other hand, the facts alleged by the Petitioner are true, Petitioner has to blame himself and no other person, as he did not operate the service between Jerusalem and Beit Jala.

6. For these reasons the Order *Nisi* asked for is refused.

Given this 25th day of March, 1937.

*British Puisne Judge.*

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HIGH COURT No. 12/37.

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

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPLICATION OF:—

Farideh Jiries Salem Kattan,
in her personal capacity and on behalf
of the estate of the late Jiries Salem
Kattan of Bethlehem. PETITIONER.

v.

1. The Chief Execution Officer, Jerusalem,
2. Ibrahim Elias Farah Kattan,
in his personal capacity and on behalf of the estate of the late Elias Farah Kattan of Bethlehem. RESPONDENTS.

*Execution Law, Art. 90 — Member of family does not include married woman with children — Sale in execution.*

In discharging an order issued to the first Respondent to show cause why he should not be ordered to accept Petitioner's application to him under Article 90 of the Execution Law and why he should not refrain from ordering and proceeding with the sale of the Petitioner's dwelling house:—

HELD: Art. 90 of the Law of Execution does not apply to a married woman with adult children; she cannot be considered as being of the family of her father.

ANNOTATIONS: Authorities on Art. 90 of the Execution Law are collated in the note to H. C. 67/37 (1938, 1 S. C. J. 46); see also H. C. 51/38 (1938, 2 S. C. J. 78) and H. C. 26/39 (1939, S. C. J. 288).

FOR PETITIONER: Cattan.

FOR RESPONDENT: No. 2 — Amon.

## ORDER.

In this application the daughter of a deceased debtor is endeavouring on behalf of the heirs and the estate of the debtor to apply the provisions of Article 90 of the Execution Law in her favour.

Although there are other points raised by Counsel for Petitioner, we decided the case on one very simple point and that is the question of the family.

The Petitioner is married and has grown-up children, the youngest of whom is 18 years old. Now that she is married and has children she cannot be considered any more of the family of her father who would be no more responsible for her support.

That being so, it is not necessary to discuss the other points raised by Petitioner, which may be dealt with on another occasion when found necessary.

The Court, therefore, orders that the Rule *Nisi* be discharged with costs and LP. 3.— advocate's fees.

Given this 29th day of April, 1937.

*British Puisne Judge.*

CIVIL APPEAL No. 94/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J. and Khayat, J.

IN THE APPEAL OF :—

Meyer Getzel Shapiro. APPELLANT.

v.

Yehuda Grazovski & 3 ors. RESPONDENTS.

*Sale of land — Registration in name of nominee — Equitable and legal owners — Claim not made in lower Court — Specific performance — Equitable remedy — Laches.*

In dismissing an appeal from a judgment of the Land Court of Jaffa, dated the 21st April, 1937:—

HELD: 1. A claim made by Appellant for the first time on appeal could not be entertained.

2. Appellant's claim was for an equitable remedy which could not be granted as, apart from other considerations, there had been a delay of many years.

ANNOTATIONS: The remedy of specific performance has been recognized in Palestine in C. A. 132/38 (1938, 1 S. C. J. 387). For later authorities see C. A. 157/43 (1943, A. L. R. 482) and C. A. 287/43 (*ibid.*, p. 786) and notes thereto.

FOR APPELLANT: Hoffmann.

FOR RESPONDENTS: No. 1 — Zeiger.
Nos. 2, 3 and 4 — Aisen.

### JUDGMENT.

This is a somewhat complicated case by reason of its facts.

It appears that the Appellant who was the Plaintiff below some years ago received a letter from the management committee of a section of Tel-Aviv, in its young days, and according to his statement of claim that letter transferred to him against a sum of LE. 1000 a certain plot of land. It is quite clear that the land was not registered in the name of the committee, although it may be that the committee were the equitable owners of the land and that the registered owner was only a legal owner, such registration being made to get over the difficulty caused by foreigners being prevented from owing properties during the Turkish regime.

The letter upon which the Plaintiff based his claim was a letter

from the equitable owners and not from the legal owner, and it seems that by other transactions leases were granted with the result that when the Plaintiff brought his action he brought it against the registered owner and the lessees.

It is not altogether clear how he formulated his claim, but I gather from his learned advocate that he is now asking for specific performance. It is clear from the judgment of the Court below that he did not there ask for specific performance. The passage in the judgment dealing with this point is as follows:—

> "We do not think that we are being asked to order or that we can order specific performance".

so that the Appellant, as I understand it, is now making a claim which he did not make before the Court below, and I do not think he can make it now.

Apart from this technical objection, the Plaintiff asks for equitable relief, and while I express no view as to what extent the Courts of Palestine might grant such relief it is clear that there has been in this case a delay of many years. The Plaintiff below (Appellant here) obtained his rights, whatever they were, in 1923. He waited from 1923 until 1931, when he brought his action, which is a matter which would have to be considered if specific performance were to be granted.

In the circumstances, this appeal will be dismissed with costs and advocate's fees at LP. 3.

Delivered this 29th day of September, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 100/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Khaldi and Khayat, JJ.

IN THE APPEAL OF :—

Ata Hussein Aquil & 4 ors. — APPELLANTS.

v.

Sheikh Hassan Abu Seoud & 4 ors. — RESPONDENTS.

*Appeal — Form of Bond — Civil Procedure Rules*, 1935, *rule* 93 — *No good cause shown for omission.*

In dismissing an appeal from a judgment of the Land Court Jerusalem, dated the 8th May, 1937:—

HELD : Appellant had not complied with the provisions of rule 93 of the Civil Procedure Rules in that the bond was not in the proper form. An extension of time could not be granted as no good cause was shown for the delay.

ANNOTATIONS: *Cf.* C. A. 90/40 (1940, S. C. J. 144) and cases cited in annotations thereto and C. A. 69/41 (1941, S. C. J. 227) for authorities on the bond under the Civil Procedure Rules, 1938.

FOR APPELLANTS: Levitsky.

FOR RESPONDENTS: Ousta.

## JUDGMENT.

In this appeal, from the judgment of the Land Court of Jerusalem, a preliminary objection has been raised by Zaki Eff. El-Ousta for the Respondents.

Rule 93 of the Civil Procedure Rules, 1935, lays down that the notice of appeal must be accompanied by a duly authenticated bond which shall be in form 19 in schedule I. That form is of a special kind and it is quite clear from the wording of it that the security required must be a security of real property — the words "such variation as circumstances may require" do not in our opinion contemplate any variation in the nature of this security. This has already been held by this Court in several cases.

The bond in the present case is not in form 19 in schedule I of the Rules. No real property has been guaranteed as security for the costs of the appeal. This objection would not be fatal to the appeal being heard if good cause were shown for the omissions to comply with the law.

No good cause has been shown for the omission. We are, therefore, unable to grant the prayer of Mr. Levitsky, on behalf of the Appellants, to allow this condition to be fulfilled before hearing the appeal. The preliminary objection is upheld, and the appeal is dismissed with costs to include LP. 10.— advocate's fees.

Delivered this 21st day of December, 1937.

*Senior Puisne Judge.*

CIVIL APPEAL No. 99/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF :—

Bertha Shlang-Shapira. APPELLANT.

v.

Miriam Kashi & an. RESPONDENTS.

*Appeals from Magistrates' Courts — Leave to appeal — "Presiding Judge" — Magistrates' Courts Jurisdiction Ordinance, 1935, sec. 6.*

In dismissing an appeal from the judgment of the District Court of Jaffa, sitting at Tel-Aviv, in its appellate capacity, dated the 28th September, 1936:—

HELD: The appeal must be dismissed as leave to appeal had not been granted by the presiding judge.

ANNOTATIONS: The same ruling was given, *e. g.*, in C. A. 89/37, CR. A. 54/37 (*post*) and CR. A. 60/37.

APPELLANT: In person.

RESPONDENT: Absent.

### J U D G M E N T.

This is an appeal from the judgment of the District Court of Jaffa sitting in its appellate capacity.

The District Court when dealing with the appeal from the Magistrate's judgment was composed of Judge Edwards and Judge Mani. Leave to appeal to this Court was granted by Judge Shaw.

Section 6 of the Magistrates' Courts Jurisdiction Ordinance, 1935, clearly provides that the "Presiding Judge" may grant leave to appeal to this Court. It is clear, therefore, that the leave which was granted in this case was not granted by the "Presiding Judge".

For the above reason and following several decisions of this Court, the application should be dismissed.

Delivered this 6th day of July, 1937.

*British Puisne Judge.*

HIGH COURT No. 52/37.

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

BEFORE: Trusted, C. J. and Greene, J.

IN THE APPLICATION OF :—

Afifeh Kaiser Khoury. PETITIONER.

v.

1. Chief Execution Officer, Haifa,
2. Assistant Chief Execution Officer, Acre,
3. Kamel Issa Khoury. RESPONDENTS.

*Religious Courts — Claim for alimony — Alimony and maintenance — Parties belonging to different religious communities — Religious Community (Change) Ordin., P. O. in C., art. 51, 54, 55, 57 — Failure by one party to consent to jurisdiction — Reference to Special Tribunal — Procedure — Sec. 4(2) of Religious Community (Change) Ord. not ultra vires.*

In discharging an order issued to the first and second Respondents, directing them to show cause why they should not proceed with the execution of the judgment for alimony, dated the 27th day of February, 1937, emanating from the Ecclesiastical Court of the Catholic (*Melkite*) Community, Acre, whereby the third Respondent was directed to pay to Petitioner the sum of LP. 6 per month by way of alimony:—

HELD: 1. Where parties belong to different religious communities, a Religious Court has no jurisdiction in matters of alimony unless all parties to the suit consent to the jurisdiction.

2. In case of doubt as to whether the suit refers to alimony or maintenance the matter should be referred to the Special Tribunal. The facts should, as far as possible, be agreed upon.

3. Sec. 4(2) of the Religious Community (Charge) Ord. is not *ultra vires* the Palestine Order in Council, so that a Religious Court continues to have jurisdiction notwithstanding a change of community by one party to a suit.

ANNOTATIONS:

1. On the effect of a change of religious community *vide* H. C. 6/43 (1943, A. L. R. 73) and last paragraph of annotations; see also H. C. 124/43 (1944, A. L. R. 21) and H. C. 7/44 (*ibid.*, p. 192).

2. On the meaning of "maintenance" and "alimony" *cf.* H. C. 146/42 (1943, A. L. R. 22) and note 1 and H. C. 144/42 (*ibid.*, p. 210).

3. On the functions of the Special Tribunal see H. C. 10/41 (1941, S. C. J. 49) and note 4; *cf.* S. T. 2/43 (1944, A. L. R. 185).

FOR PETITIONER: Koussa.

FOR RESPONDENTS: Nos. 1 and 2 — No appearance.
No. 3 — Hawa.

ORDER.

In certain proceedings, commenced on 20th February, 1937, the Court of the Greek Catholic Community at Acre found that Kamil Issa Khoury (the third Respondent before us) had abandoned his wife, Afifeh, (the Petitioner before us) and was not offering her what is necessary for her living, and decreed that he should pay her the sum of LP. 6 as monthly "*nafaka*", translated as "alimony".

This decree was taken for execution to the Civil Court on 24th May, 1937.

The Magistrate at Acre held:—

> "In view of the difference in the religious belief of the husband and wife, I order the judgment-creditor to refer to the competent Court having jurisdiction in the matter".

and on the 26th June, the President of the District Court wrote as follows to the Magistrate:—

> "I shall be glad if you will kindly arrange to notify the judgment-creditor that if she feels aggrieved by your decision of the 24th May, she should apply to the proper Court".

It seems that the parties were married as members of the Catholic (*Melkite*) Community in January, 1926; that the Petitioner changed her community in November, 1932, but in January, 1936, reverted to the Catholic (*Melkite*) Community and that the third Respondent changed his community on 18th Febraury, 1937. The validity of these changes is not challenged before us.

At the date of the institution of the proceedings in the religious Court the parties were, therefore, members of different communities.

The third Respondent before us maintains that the Execution Officer was right in refusing to execute the order as the religious Court had no jurisdiction, basing this contention on several separate grounds.

The grounds involve the consideration of certain articles of the Palestine Order-in-Council and the Religious Community (Change) Ordinance, Chapter 127, which, in my view, are of importance and present some difficulty.

Article 51 provides that, subject to the other provisions of the Order-in-Council, certain religious courts should have jurisdiction in matters of personal status which are defined therein as follows:—

> "For the purpose of these provisions matters of personal status mean suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibition from dealing with property of persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent persons".

Article 54 provides, in paras. (i) and (ii):—

> "(i) Exclusive jurisdiction in matters of marriage and divorce, alimony and confirmation of wills of members of their community other than foreigners as defined in Article 59.
> (ii) Jurisdiction in any other matters of personal status of such persons, where all the parties to the action consent to their jurisdiction".

In these proceedings it is said that the actual payment ordered by the religious Court is "maintenance" and not "alimony" and it is clear from the judgment of the religious Court that the third Respondent did not consent to the jurisdiction of the religious Court. In my judgment, therefore, the latter part of Article 55 applies, and before any religious Court can have jurisdiction, the matter must be referred to the Special Tribunal to decide whether "the case is one of personal status within the exclusive jurisdiction of a Religious Court".

Such a matter can be referred to the Special Tribunal, if necessary, by a Court before which proceedings are brought. It is desirable that upon any such reference, as far as possible, the facts should be agreed.

When the Special Tribunal has decided which is the appropriate Court the matter may be taken before that Court to be heard and determined.

I expressly make no reference to the conflicting decisions as to "alimony" and "maintenance".

As I have stated, the parties are of different religious communities having changed their communities; therefore, if this is a matter for a religious Court, Section 4(2) of the Religious Community (Change) Ordinance, Chapter 127, which provides:—

> "Notwithstanding any change of community, jurisdiction in matters of marriage, divorce and alimony shall continue to be exercised by the court which, before such change, had jurisdiction, unless both parties to the marriage have become members of another religious community".

*prima facie* applies, but it has been argued that that sub-section is *ultra vires*.

Article 55 of the Order-in-Council clearly lays down that where persons of different religious communities are concerned the Chief

Justice, if necessary with assessors, shall decide which Court shall have jurisdiction, but Article 57 of the Order-in-Council vests certain powers of amendment in the High Commissioner and by reason of those powers, in my opinion, the sub-section which presumably is made under them, is not *ultra vires*.

In this case, therefore, the rule will be discharged, and if the parties are unable to settle this unfortunate domestic affair, it must, in the first instance, be referred to the Special Tribunal to decide if the relief sought is a matter of personal status within the jurisdiction of the religious Court in question. Advocate's fees LP. 2.

In my opinion this result is most unfortunate, but I think that is the effect of the Order-in-Council.

Given this 3rd day of November, 1937.

*Chief Justice.*

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ASSIZE APPEAL No. 5/36.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, A/C. J., Evans and Khayat, JJ.

IN THE APPEAL OF:—

Yusef Hassan Qandil. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

*Criminal Procedure — Duplicity in indictment — Point not raised on appeal — Witnesses called by the Court in absence of accused's counsel — Prejudice of accused — R. v. Harris, T. U. I. Ord., sec. 39 — Wrongful exercise of discretion — Statements made by witnesses to police officers — Admissibility of such statements to shake credibility of witness, not to corroborate his statement in Court — R. v. Wainwright — Identification — Previous mistaken identification, expression of doubt as regards one person, and of certainty as regards another — Maxwell v. The Director of Public Prosecutions.*

In allowing an appeal from the judgment of the Court of Criminal Assize, sitting at Jaffa, dated 21st day of October, 1936, whereby the Appellant was convicted under Article 170 of the Ottoman Penal Code and sentenced to death:—

HELD: 1. Two charges of murder should not be preferred against an accused in the same Court.

2. *Quaere* whether the accused may be prejudiced by such duplicity.

3. The trial Court has, under sec. 39 of the Trial Upon Information Ordinance, a discretion to call witnesses. This discretion should not be exercised at the close of the addresses, after the prosecution has failed to satisfy the Court as to the guilt of the accused.

4. It is to the prejudice of the accused when witnesses are called and examined in the absence of his advocate with the leave of the Court.

5. (*Per* Evans, J.): A previous statement made by a witness to a police officer may be adduced to discredit the witness; it is inadmissible to corroborate the evidence of that witness in Court.

REFERRED TO: Rex *v.* Harris, 1927, 2 K. B. 587; Rex *v.* Wainwright, 1875, 13 Cox 171; Maxwell *v.* D. P. P., 1935, 151 L. T. R. 477.

ANNOTATIONS:

1. More than one murder should not be charged on the same count or on the same information — CR. A. 133/41 (1941, S. C. J. 501).

2. On calling and recalling of witnesses by the Court see CR. A. 112/43 (1943, A. L. R. 686) and annotations.

3. See CR. A. 129/43 (1943, A. L. R. 743) and note 2 on the effect of witnesses contradicting their previous statements.

FOR APPELLANT: Cattan.

FOR RESPONDENT: Solicitor General — (Griffin).

## JUDGMENT.

*Manning, A/C. J.*: On the 21st October last the Appellant was convicted of murder with premeditation under Article 170 of the Ottoman Penal Code by a Court of Criminal Assize sitting at Jaffa.

2. I wish to refer to an irregularity which occurred at the very outset of the proceedings. The information reads as follows:—

> "Yusef Hassan Kandeel is charged with the following offence:
> Statement of Offence:
> Murder with premeditation contrary to Article 170 of the Ottoman Penal Code.
> Particulars of offence:
> In that on 20.4.36 at Hatikvah Colony near Tel-Aviv with premeditated intent to murder he did fire with a rifle at Selig Levinson and Shlomo Morrison and caused their death".

3. It is quite clear that the Appellant was charged with two offences in one information, whereas he should have been charged with each offence in a separate count. His advocate did not make this a ground of appeal and in the absence of any argument on the point I am not prepared to say that in this particular case the irregularity was calculated to cause any prejudice to the Appellant. But an accused person

should never be asked to plead to a charge of this kind, and I refer to the matter so that those entrusted with drafting of informations may avoid mistakes of this kind in future.

4. Mr. Cattan, who argued the appeal before us, devoted most of his argument to another alleged irregularity at the close of the proceedings. The facts were that after the evidence for the prosecution and the defence had been heard and the advocates on each side had addressed the Court, the Court reserved judgment till the next day. They at the same time intimated to the advocate for the Appellant that he need not attend the next day, as it would be merely a matter of delivering judgment, and the advocate did not reside in Jaffa. Consequently when the Court opened next day, the Appellant's advocate was not present. The Court did not deliver judgment, it made an order as follows:—

> "Adjourn for further evidence: man wrongfully identified by Turtletaub to be produced".

After a short adjournment, this man was produced and a witness was recalled to give evidence. The Court then gave judgment, convicted the Appellant, and sentenced him to death.

5. The Solicitor-General, who appeared for the Respondent, argued that had Appellant's counsel been present, he could not have affected the procedure in any way, either by objection or by cross-examination of the recalled witness. It is not for this Court to speculate as to what Appellant's advocate, had he been present, might or might not have done, the sole question is whether the procedure adopted was calculated to work an injustice to the Appellant. In my view it was undoubtedly so calculated — the advocate was absent with the permission of the Court, and no evidence should have been taken in his absence.

6. There is another view of the matter put forward by Mr. Cattan. He says that the fact that the Court was unable to deliver judgment on the morning of the 21st October without hearing further evidence showed that it had a reasonable doubt as to the guilt of the Appellant, and that the Court should not call evidence to resolve this doubt after it had adjourned merely to consider its verdict. The Solicitor-General relied on Section 39 of the Trial Upon Information Ordinance, which reads as follows:—

> "39. At any time during the trial the Court may, of its own motion, call upon any person to give evidence as a witness or may cause any person to be brought before it as a witness by warrant or summons as the Court may direct".

7. Mr. Cattan cited the case of R. *v.* Harris, 1927 2 K. B. 587, in which the power of a Court in England to call or recall a witness was discussed. The gist of the decision was that the power is a discretionary one and should be exercised only in a matter which arises *ex improviso* and not in a manner calculated to work injustice to an accused person. The Solicitor General argued that Section 39 of the Trial Upon Information Ordinance was expressed in very wide terms and that the decision in R. *v.* Harris (*supra*) did not apply.

8. I agree with the Solicitor General that the Harris case is not exactly in point, but not because the local section is expressed in wide terms. I agree because each case has to be considered on its own facts and in a matter of this kind it is unsafe to lay down any general rule. It has to be realised in the first place that the power granted to the Court by the section is a very wide one, but that, though very wide, it must have certain limits; in other words it must be exercised with discretion. In the present case the evidence on both sides had been concluded, the advocates had completed their addresses, and the Court had retired to consider its verdict. It is a fair inference from the subsequent action of the Court that it was not prepared to convict the Appellant on the evidence then before it, and that consequently the prosecution had failed to satisfy it of the guilt of the Appellant beyond reasonable doubt. There can be little doubt that this must have been so, for had the Court been satisfied of the guilt of the Appellant, there would have been no necessity for it to call further evidence. In this state of hesitation the Court decided, of its own motion, to call further evidence, and that evidence turned the scale against the Appellant. I have indicated above that there must be a border-line somewhere to limit the exercise of this power, and this case is, in my opinion, on the wrong side of that line. The discretion was unfairly exercised and led to a miscarriage of justice.

9. Mr. Cattan has also argued that the evidence for the prosecution was of such a nature that no Court ought to believe it, but in view of the decision at which I have arrived on the other points I do not propose to consider this ground of appeal.

10. In my opinion the appeal should be allowed and the conviction quashed.

Delivered this 19th day of December, 1936.

*Acting Chief Justice.*

*Khayat, J.*: I concur.

*Puisne Judge.*

*Evans, J.*: I concur in general in the judgment which has been read but with deference to the learned Acting Chief Justice would wish to supplement it on one or two points. In my opinion, the Court should not merely state that the discretion of the Court below has been exercised in a manner calculated to work injustice to the Accused and that a miscarriage of justice has issued without further consideration of the circumstances which lead the Court to hold that such injustice might have been caused. Moreover, I am not prepared to subscribe to the construction that might be placed upon the judgment of the learned Acting Chief Justice that any evidence called at such a stage must work injustice to the accused because in the absence thereof the Court should have acquitted the accused. The provisions of Section 39 of the Trial Upon Information Ordinance are wide enough to cover the admission of evidence at any time up to judgment. The stage which the case has reached is a consideration the Court would bear in mind in exercising its discretion but is not determinant. Furthermore, as will appear, it is not clear that the evidence admitted in this case was evidence which should, or could, have been given by the prosecution at any stage.

2. The counsel for the Appellant addressed this Court at length on the facts in this case. He based most of his observations on statements made by the witnesses to Police Officers. The preliminaries, solemnity and care which accompany a trial would be vain if every statement made to a policeman were regarded as of equal value with the testimony of the witness upon oath before the Court. The evidence on which the Court must act is that given on oath, and such evidence must be relevant to the issue before it. In cross-examination counsel is given a wide latitude and allowed to question witnesses as to matters collateral to the main issue. On such collateral issues the cross-examining counsel is in general bound by the answers of the witness and cannot call evidence to contradict the witness in order to ask the Court, as it were, to make a finding on the collateral issue. The credibility of a witness is one such collateral issue, and on this there are certain exceptions to the general rule. One such exception is that evidence may be given of the witness having made a contradictory statement on another occasion. A statement made to a Police Officer may be evidence as to the credibility of a witness if it contains a statement substantially contradictory to the evidence he gives on oath. If it contains no such contradictions it is evidence of nothing at all. It certainly cannot be used as corroboration of the evidence. The value of such contradictions contained in depositions which are documents

compiled with certainly no less care than police statements was discussed by Cockburn, Chief Justice in R. *v.* Wainwright, 13 Cox 171; he said:—

> "That he did not attach much importance to the accordance between what a witness said at the trial and what he was reported in his deposition to have said before the Magistrate. He knew, from his own experience, how difficult it was to take down a witness's exact words. A witness expressed himself in a long sentence, the Magistrate's clerk struck out a particular word, and with that omission it went down on the notes, and was not the whole sentence. The whole meaning of the sentence which the witness had uttered might thereby be entirely altered. Too much importance ought not, therefore, to be attached to such variations, and if there was a substantial agreement between the evidence at the preliminary inquiry and that adduced at the trial, that was sufficient".

3. I have dealt with this question at length and in general because the evidence called by the Court below and now challenged seems to be a particular instance of the same kind. The witness Turtletaub's evidence of identification of the Accused was that given in Court. To his discredit it might be urged that he had formerly identified some one else. On a previous occasion referring to another person, the witness said: "I believe this to be the man but I am not 100% sure because I saw this man from a distance of 100 metres". There is nothing to show in what language this statement was made.

4. It is not clear that there ever was a contradiction of the positive identification of the Accused. There was no identification of the first man on which any Court would act. The expression of a doubt as to the first man is not a contradiction of his definite statement as to the second, and the expression of doubt on the first occasion does not import any doubt into the second identification, rather the reverse. The relevancy of the statement as to identification is, therefore, not obvious. If the defence wished to suggest that the witness made reckless charges against anyone it was for them, if for anyone, to produce the man afterwards produced. This was not the defence, nor were the words used consistent with a reckless charge. If, as would naturally be inferred, the two men were similar, the production could not show that the supposed identification was a dishonest attempt to identify the man on whom, as the defence allege, the witness had conspired to fix the charge or an honest attempt to identify the man who fired the shots at the deceased. All the production could prove was whether the witness' opinion as to the likeness agreed with the Court's. Likeness in any degree is mainly a matter of opinion, as common experience

of alleged likeness between parent and child or between other persons or things will show. Likeness between persons depends much on race and use so that two Arabs appearing alike to two English Judges might not appear so nearly alike to an Arab. Here we had a Jewish witness who might or might not be new to the country. I mention these matters as illustrating the issues which may be raised by the admission of such evidence.

5. Both the manner of admission of the evidence and the wording of the judgment show that the Court attached great if not conclusive weight to this evidence. It seems improbable that the Court below would have attached the same importance to it had it been admitted, or slipped in, where it would have seemed more appropriate, in the cross-examination or re-examination of the witness Turtletaub. It cannot be urged that the evidence was admitted for the benefit of the Accused, and that, therefore, no injustice can have been done him in admitting what might have been, but proved not to be, in his interest. The defence was not that Turtletaub made reckless charges against any Arab, but that he was a party to a conspiracy against the prisoner. In this country the Judge is Judge of fact and of law. I do not think that a Judge coming to the matter with a fresh mind and free of the difficulties which the jury felt as to the facts would have called such evidence at such a stage of the proceedings for the purpose for which it was used. For these reasons and because of the absence of the Prisoner's counsel, I agree that this discretion vested in the Court was not properly used and that evidence was admitted which should not have been admitted. The L. C. said in Maxwell *v.* Director of Public Prosecutions, L. T. R., 151, at 482:—

> "It must be remembered that the whole policy of British Criminal Law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken, so as to prejudice the chance of the jury fairly trying the true issue. The sanction for the observance of the Rules of Evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed. It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded and discredited".

The same principles seem to apply here to trial by Judges alone, and to the exercise of a judicial discretion as to the calling of evidence, and I, therefore, agree in the result that this appeal should be allowed.

Delivered this 19th day of December, 1936.

*A/Judge.*

CIVIL APPEAL No. 64/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF:—

Hans Jacobi. APPELLANT.

v.

Lucia Guttmann. RESPONDENT.

*Promise of marriage — Plea of failure of consideration — Evidence — Deponent of affidavit.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 19th March, 1937:—

HELD: 1. On the merits of the case, the lower Court had heard the evidence and its finding could not be upset.

2. It was not necessary, under the circumstances, to have brought the deponent of the affidavit to Court.

ANNOTATIONS: *Cf.*, on the second point, H. C. 47/43 (1943, A. L. R. 403).

FOR APPELLANT: Levitsky.

FOR RESPONDENT: Loewenstein.

### JUDGMENT.

This appeal was lodged against the judgment of the District Court of Jerusalem, whereby the present Appellant was ordered to pay Respondent the sum of LP. 1197,300 mils which was alleged to have been given to him by the Respondent on certain conditions. It was alleged that this sum was advanced to the Appellant in view of the promise of marriage held out to her by the Appellant and as this condition was not carried out, the Respondent is claiming back the sums advanced.

2. This matter entirely rests on the evidence which was tendered in the Court below: and that evidence was sufficient to justify the finding of that Court.

3. The only point which we should consider is as to whether the Appellant was entitled to have the deponents of the affidavits brought to the District Court for cross-examination. The Appellant alleged that he had dealings with Dr. David Guttmann, but as the principal sum of LP. 1197.300 mils was sent to the present Appellant by Mrs.

Erna Meyer, née Guttmann, the Respondent's sister, and not by Dr. Guttmann, with whom the Appellant had had certain business relations, we hold that in the circumstances it was not essential for the deponents to be brought for cross-examination.

4. Without calling on the Respondent's advocate, the appeal is dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 6th day of July, 1937.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 117/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Mohammad Ead Abu Taha. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Exhibits — It is desirable that the exhibit be produced in charges under* 8A(1) *Emergency Regulations — No irregularity of procedure.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 20th September, 1937, whereby Appellant was convicted of being in possession of a serviceable rifle of military value and ammunition, contrary to Regulation 8A(1) of the Emergency (Amendment) Regulations (No. 5) of 1936, and sentenced to five years' imprisonment:—

HELD: Although in charges of possession of a serviceable rifle, it is desirable that the weapon should be produced in Court, failure to do so does not amount to an irregularity of procedure.

ANNOTATIONS: *Cf.* Halsbury, Vol. 9, *pp.* 183 *seq.*, No. 268.

FOR APPELLANT: Budeiri.

FOR RESPONDENT: Wa'ari.

JUDGMENT.

It is quite clear that there was evidence before the Court that the Accused was in possession of a rifle and ammunition. It was also proved that the rifle was serviceable, although it was not produced to the Court. We do not think that that involves an irregularity in

procedure, but we would indicate that it would be desirable in cases of this kind that the rifle should be produced to the Court.

The appeal is, therefore, dismissed.

Delivered this 9th day of October, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 58/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Greene and Khaldi, JJ.

IN THE APPEAL OF :—

Kamel Issa Shajrawi. APPELLANT.

v.

Yusef Mansour Rizeq. RESPONDENT.

*Appeals — Magistrates' Courts Jurisdiction Ordinance, sec. 7(2) — No reasonable cause for delay — Extension of time.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, in its appellate capacity:—

HELD: No reasonable cause had been assigned for Appellant's delay in complying with sec. 7(2) of the Magistrates' Courts Jurisdiction Ordinance. *Quaere* whether an extension of time could be granted.

ANNOTATIONS: The question left open in this case has been decided in the negative in C. A. 184/41 (1941, S. C. J. 507).

FOR APPELLANT: S. Abassi.

FOR RESPONDENT: Mu'ammar.

JUDGMENT.

No reasonable cause has been assigned for the Applicant's delay in complying with the law laid down in Section 7(2) of the Magistrates' Courts Jurisdiction Ordinance.

For this reason, we refuse the application and we say nothing on the point as to whether application for extension of time can be made under the law.

Respondent to have costs, to include LP. 3.— advocate's fees.

Delivered this 1st day of July, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 62/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Greene and Khaldi, JJ.

IN THE APPEAL OF:—

Marry Haddad. APPELLANT.

v.

Amin Michael Haddad. RESPONDENT.

*Jurisdiction of Religious Courts in matters of divorce — Ex parte decree is contrary to natural justice — "Alimony" and "maintenance" P. O. in C., 51, 54 — Jurisdiction of Courts.*

In allowing an appeal from the judgment of the District Court of Haifa, dated the 23rd February, 1937, and in remitting the case to the lower Court to hear evidence:—

HELD: 1. Although the Courts of the Community are granted an exclusive jurisdiction with respect to divorce — that does not prevent the Civil Courts from refusing to recognise any decree which is contrary to natural justice. The decree of divorce in the present case was contrary to natural justice as it had been made *ex parte*.

2. "Alimony" is the allowance secured to a wife when the parties have separated by mutual consent, or the amount ordered by the Court when there has been a judicial decree for separation, but the relation of husband and wife is still subsisting. "Maintenance" is always used to describe the allowance ordered to be paid to a wife by a husband who has deserted her.

3. The present claim was for maintenance and, therefore, within the jurisdiction of the District Court.

FOLLOWED: Shaw *v.* Attorney General, 23 T. L. R. 322.

ANNOTATIONS:

1. On the first point *cf.* H. C. 24/41 (1941, S. C. J. 161) and H. C. 103/42 (1942, S. C. J. 582).

2. On the second point see note 1 to H. C. 146/42 (1943, A. L. R., at p. 23) and H. C. 144/42 (*ibid.*, p. 210); *cf.* H. C. 52/37 (*ante*, p. 236).

FOR APPELLANT: Hawa.

FOR RESPONDENT: Atalla.

### JUDGMENT.

The Appellant brought an action in the District Court of Haifa against the Respondent, alleging that he was her husband and that he had deserted her and neglected to maintain her and her child. The

action was tried by the President of the District Court sitting alone. He dismissed the action so far as it related to maintenance for the Appellant herself but ordered the Respondent to pay LP. 1.— a month for the maintenance of the child. The Appellant has appealed.

The principal defence of the Respondent was that he was no longer the husband of the Appellant, the marriage having been dissolved by a decree of the Court of the Eastern (Orthodox) Community at Acre. The Appellant's reply to this was that she had no notice whatever of any proceedings for the dissolution of the marriage, and that consequently any such decree was void and of no effect. The Respondent does not deny that the Appellant received no notice of the proceedings.

The law of the Eastern (Orthodox) Community does not sanction the *ex parte* granting of decrees for the dissolution of marriage. The Courts of the Community are granted an exclusive jurisdiction with respect of divorce — but that does not prevent the Civil Courts of Palestine from refusing to recognise any decree which is contrary to natural justice. Some systems of law may allow marriages to be dissolved on the mere *ex parte* application of a party or without any application at all, but the Eastern (Orthodox) Community has no such provisions in its law. If one spouse desires a dissolution of marriage, then the other spouse has to have notice of the proceedings and an opportunity of resisting them, if he or she thinks fit. If this cardinal element in procedure is omitted then any subsequent decree is null and void. In the case of Shaw *v.* the Attorney General, 23 L. T. R., 322, Lord Penzance said:—

> "A judgment so obtained has, therefore, in addition to the want of jurisdiction, the incurable vice of being contrary to natural justice, because the proceedings are *ex parte* and in the absence of the party affected by them".

The decree of the Eastern (Orthodox) Court cannot be recognised as valid, and for the purposes of this case the parties are still husband and wife.

The learned judge did not deal with this point in his judgment — he dismissed the Appellant's claim on the ground that he had no jurisdiction. If I follow him correctly his reasoning was that what the Appellant was really suing for was "alimony", not "maintenance", and that "alimony" was a matter within the exclusive jurisdiction of the Court of the Community.

There was a great deal of argument in the Court below and before us as to the meanings of "alimony" and "maintenance" in Article 51

of the Palestine Order-in-Council, 1922. The distinction is important, as the Religious Courts have exclusive jurisdiction in matters of alimony, while in matters of maintenance they have jurisdiction only if all the parties consent. (Article 54 of the Order-in-Council). I assume that the Order-in-Council was drafted by English lawyers and that the words have the same meaning as they have in the English Law relating to "Husband and Wife". The word "alimony" has a restricted meaning. It is applicable to the allowance secured to a wife when the parties have separated by mutual consent, or the amount ordered by the Court when there has been a judicial decree for separation. The wife may also be granted an allowance when a matrimonial suit is pending, and this is called alimony *pendante lite*. From this it may be deduced that the word "alimony" is applicable when the relation of husband and wife is still subsisting, but the parties are separated either by consent or in consequence of a judicial order, or because a suit for separation or dissolution is pending.

On the other hand the word "maintenance" is always used to describe the allowance ordered to be paid to a wife by a husband who has deserted her. This is clear from the wording of the Summary Jurisdiction (Married Women) Act, 1895, where the charge against a husband is that he wilfully neglected to provide reasonable maintenance for his wife and children. The order given by the Court is always called a "maintenance order", and the Legislature uses the word in the same sense in the Maintenance Orders (Facilities for Enforcement) Act, 1920. Further, when a marriage has been dissolved by a Court decree, and the former wife wishes an order for payment of a monthly or weekly sum, her application is called an application for maintenance, and not an application for alimony.

There can be no doubt that in the present case, where the Appellant alleged that the Respondent had deserted her and had neglected to support her, she framed her statement of claim correctly when she sued for maintenance. A suit for maintenance is within the jurisdiction of the District Court, and the learned judge erred in declining jurisdiction.

The law of the Eastern (Orthodox) Community requires that a husband should provide reasonable maintenance for his wife if he deserts her without just cause. The Respondent in this case does not deny the desertion; he does not allege any just cause save the invalid decree of dissolution already referred to.

I cannot find in the proceedings below, that there was an admission or proof of the means of the Respondent, and the case will have to go back. The judgment of the Court below should be set aside and

the action should be remitted with directions to hear evidence as to means and to enter judgment for the Appellant for such arrears of maintenance for herself and her child, as may appear reasonable. The Appellant will have her costs of this appeal to include LP. 9 advocate's fees.

Delivered this 29th day of July, 1937.

*Senior Puisne Judge.*

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CRIMINAL APPEAL No. 101/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Khayat, JJ.

IN THE APPEAL OF:—

Muheyddin Ruslan. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Criminal procedure — Election, M. C. J. O., sec.* 3(1) (1935 *Ord.*) — *Onus of proof — Irregularity not amounting to miscarriage of justice — Evidence — Corroboration.*

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 12th July, 1937, sitting in its appellate capacity, confirming the judgment of the Magistrate's Court, Haifa, dated the 17th May, 1937, whereby Appellant was convicted of entering Palestine without a passport, contrary to Sections 5 and 12 of the Immigration Ordinance, 1933, and sentenced to 10 days' imprisonment and recommended for deportation:—

HELD: 1. An accused person should be charged before his election in the Magistrate's Court. The onus, on appeal, of proving that the procedure was not properly complied with is on the Appellant.

2. When the accused is represented by an advocate, a slight irregularity in the procedure on election does not amount to a miscarriage of justice.

3. Two separate admissions, reported by two police constables, satisfy the requirements of the law relating to corroboration.

ANNOTATIONS:

1. See, on the right of election, CR. A. 108/42 (1942, S. C. J. 534) and note 1.

2. Note that since 2.10.1937 the necessity for corroboration in criminal cases has been done away with by the Law of Evidence Amendment Ordinance, 1936. See, on corroboration generally, CR. A. 105/43 (1943, A. L. R. 754) and note 2.

FOR APPELLANT: Ben Israel.

FOR RESPONDENT: Ghussein.

## JUDGMENT.

The first point which is raised in this appeal is a technical point which concerns the construction of Section 3(1) of the Magistrates' Courts Jurisdiction Ordinance, 1935. We think that it is clear from that Section that an accused person should be charged before his election. So far as this particular case is concerned it is for the Appellant to prove to us that the procedure laid down in Section 3(1) was not properly followed, and this he has not done; moreover, it is quite clear from the record that the Accused was represented by an advocate, and if the procedure was not strictly complied with we do not think any miscarriage of justice has occurred.

The second point raised is the question of sufficiency of evidence under Section 6 of the Evidence Ordinance. In this case there was not the evidence of a single witness but of two witnesses, both Police Constables. The first constable said:—

> "When I arrested him he had no passport on him and admitted to me that he entered Palestine without a permit, he did not mention to me the date of entry into Palestine".

The second constable later took a statement from the Accused which he reduced into writing and to which the Accused affixed his thumbprint.

These witnesses were called at the trial and Accused did not deny the statements. We are of opinion that there was sufficient evidence against him.

The appeal will be dismissed.

Delivered this 30th day of September, 1937.

*Chief Justice.*

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CRIMINAL APPEAL No. 115/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Khayat, JJ.

IN THE APPEAL OF:—

Arieh Kutsher. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Western Wailing Wall Order — Appeals — Sentence.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 17th September, 1937, whereby Appellant was convicted of blowing the horn (*Shofar*) contrary to Article 4 of the Palestine Order-in-Council (Western Wailing Wall), 1931, and sentenced to six months' imprisonment:—

HELD: No appeal lies to the Supreme Court under the Palestine (Western Wailing Wall) Order-in-Council.

ANNOTATIONS: The right of appeal is a statutory right; see note 1 to C. A. 274/42 (1943, A. L. R., at pp. 136—7); *cf.* P. C. L. A. 22/43 (1943, A. L. R. 741) and C. A. 257/43 (1943, A. L. R. 802).

FOR APPELLANT: Washitz.

FOR RESPONDENT: Ghussein.

JUDGMENT.

We take the view that there is no appeal under the Palestine Order-in-Council (Western Wailing Wall), 1931. This appeal, therefore, cannot be entertained by this Court.

With regard to the particular case, it is not necessary for me to point out the gravity of an act of this kind and we feel that the sentence was justified.

Owing, however, to the present state of the Appellant, I order in my capacity as Chief Justice that he be given special treatment.

The appeal is therefore dismissed.

Delivered this 8th day of October, 1937.

*Chief Justice.*

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[IN THE SUPREME COURT OF PALESTINE (IN CHAMBERS).]

BEFORE: Manning, A/C. J.

IN THE APPLICATION OF :—

Tibi Arabi El-Sidawi. APPLICANT.

v.

Pauline Schultz. RESPONDENT.

*Breach of promise to marry — No question of personal status — P. O. in C., Art.* 55.

In dealing with an application under Art. 55 of the Palestine Order-in-Council, the A/Chief Justice:—

HELD: An action for damages arising out of a breach of promise to marry is not a matter of personal status.

ANNOTATIONS: *Cf.* C. A. 129/42 (1942, S. C. J. 753) and note 2; see also S. T. 2/43 (1944, A. L. R. 185).

## ORDER.

Upon reading the application of Tibi Arabi El-Sidawi, filed on the 9th of December, 1936, for an Order to issue under Article 55 of the Palestine Order-in-Council, 1922, determining which Court shall have jurisdiction in an action for damages arising from breach of promise of marriage.

I hold that no question of personal status arises and the application is, therefore, dismissed.

Given this 18th day of December, 1936.

*Acting Chief Justice.*

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CIVIL APPEAL No. 82/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Copland and Frumkin, JJ.

IN THE APPEAL OF :—

Abraham Sachs. — APPELLANT.

v.

Sheikh Khalil el Azzeh & 5 ors. — RESPONDENTS.

*Attachment — Jurisdiction of District Court — Variation of order for attachment — Evidence of possession.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 11th March, 1937, and in restoring an attachment which had been removed by the order under appeal:—

HELD: There had been no evidence of possession before the lower Court to justify the finding upon which the Court varied its order for attachment.

FOR APPELLANT: Kehaty.

FOR RESPONDENTS: Nos. 1—3 — Haddad.
Nos. 4—6 — El Abasi.

## JUDGMENT.

This is an appeal from the District Court of Jaffa against an order, dated 11th March, 1937, setting aside an attachment ordered by that Court.

Without going into the wide question which might be raised as to the jurisdiction of the District Court, we are satisfied that on the facts of this case there was no evidence of possession to justify the finding upon which it varied its order for attachment.

The appeal will, therefore, be allowed, the order in question set aside and the attachment restored. The 1st, 2nd, and 3rd Respondents to pay the costs of this appeal to the Appellant with advocate's fee LP. 5, and to pay the costs of the 4th, 5th and 6th Respondents together with travelling expenses of LP. 1.

Delivered this 8th day of July, 1937.

*Chief Justice.*

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LAND APPEAL No. 54/33.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Leon Levy. APPELLANT.

v.

Hanna Khuri on his own behalf and on behalf of his brother Amin Khuri RESPONDENT.

*Jurisdiction of Land Court — Cannot order distribution of proceeds of sale.*

In dismissing, subject to a variation, an appeal from the judgment of the Land Court of Haifa, dated the 1st August, 1933:—

HELD: The Land Court cannot make an order regarding the distribution of the proceeds of sale although it determined the shares of the persons entitled to the property.

ANNOTATIONS: *Cf.* C. A. 70/39 (1939, S. C. J. 383) wherein it was held that "a Land Court is incompetent to give judgment for a sum of money".

JUDGMENT.

The Land Court determined the shares to which the Plaintiffs were entitled in the land in dispute.

It did not lie within the jurisdiction of the Land Court to make any order as to distribution of the purchase money upon sale of the land by the Execution Office: and the direction that the sale price is to be divided accordingly must be set aside.

Subject to this variation, the judgment of the Land Court is confirmed.

No order is made as to costs.

Delivered this 24th day of February, 1935.

*Senior Puisne Judge.*

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HIGH COURT No. 33/36.

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

BEFORE: Manning, A/C. J. and Frumkin, J.

IN THE APPLICATION OF:—

Jiryes Sader. PETITIONER.

v.

1. The Chief Execution Officer, Haifa,
2. Ibrahim Atallah. RESPONDENTS.

*Execution — Property subject to attachment transferred to purchaser in virtue of wakale dawryeh — Amount secured by attachment when paid by purchaser belongs to creditor.*

In making absolute an order issued to the first Respondent, directing him to show cause why his order, dated the 11th April, 1936, should not be set aside:—

HELD: When an attachment is made through the Execution Office on property which is subsequently transferred to a purchaser, the purchaser is liable to pay the debt.

ANNOTATIONS: The facts underlying this application as stated in the petition are as follows:—

"1. A judgment was given on the 7th of June, 1932, by the Magistrate's Court of Haifa in Civil Case No. 2287/32, condemning a certain Miss Lea Attalla Khalil Attalla (hereinafter called the judgment debtor) to pay to the Applicant a sum of LP. 65 together with interest, legal expenses and advocates fees, which judgment was duly submitted to the Execution Office Haifa on the 16th of June, 1932.

2. On the 21st of June, 1932, the Applicant has submitted to the said Execution Officer an extract issued by the Land Registrar of Haifa showing certain property registered in the name of Bahje bint Rafful Shallah, the late mother of the judgment debtor, together with a certificate of succession, showing, *inter alia*, the share of the judgment debtor in the said property, and requested, that the share of the judgment debtor in the said property be seized and sold in satisfaction of the said judgment debt.

3. An order for a seizure was given accordingly on the 23rd of June, 1932, and the said order being forwarded to the Land Registry of Haifa on the 28th of June, 1932, reached the same on the 29th of June, 1932.

4. Thereupon the Land Registrar Haifa has made the following entry in the Land Register: "See attachment for share of Laya Atala, *vide* Pet. 482.32. See No. 20/32".

5. On the 5th of December, 1932, a letter was received by the Execution Office Haifa from the Land Registrar of Haifa, in which it was stated that an irrevocable power of attorney executed by the said late Bahjeh bint Rafoul Shelah, the deceased mother of the judgment-debtor, was produced to the Land Registry

Haifa relating to the property seized, and asking the Execution Office for instructions as to whether the formality of sale in virtue of the said irrevocable power of attorney shall be stayed in view of the said seizure.

6. No decision was given in connection with this letter until the 23rd of May, 1934, when the following ruling was given by His Honour the Chief Execution Officer:—

> "To explain to the judgment creditor that as there is an irrevocable power of attorney from the owner of the property, who is *de cujus* of the judgment debtor, it is impossible to delay the formality as long as the money, receipt of which is admitted by the *de cujus*, is not repaid or the formality which is intended to be carried out in virtue of the irrevocable power of attorney is not stopped by a competent Court".

The Applicant was informed that the seizure will be removed and the formality of sale will proceed in virtue of the irrevocable power of attorney, unless necessary steps are taken by him within 7 days.

7. The Applicant has submitted an application to the High Court of Justice (H. C. 51/34) which Court, holding that an irrevocable power of attorney, executed after the Land Transfer Ordinance, 1920, does not operate as disposition, ruled that the said order of His Honour the Chief Execution Officer be set aside and the formality of sale in virtue of the irrevocable power of attorney, in so far as it affects the share of the judgment-debtor, be stayed (Rule *Nisi*, dated 21.9. 1934 and Order Absolute, dated 12.10.1934). The said order was duly lodged with the Execution Office of Haifa.

8. Notwithstanding the existing seizure and in spite of the said ruling of the High Court of Justice, the beneficiary under the said irrevocable power of attorney — Ibrahim Atalla — (who is the brother of the judgment-debtor) although he was fully aware of the existing seizure and of the said order of the High Court of Justice — has procured on the 19th of November, 1935, the completion of the formality of sale in virtue of the said irrevocable power of attorney.

9. By the letter dated 21.11.34 the Land Registrar has informed the Execution Officer that the sale formality was completed in virtue of a decision given by the High Court of Justice, dated 20.3.1933 in the High Court Case No. 93/32 * and that the transfer was effected *subject to the existing seizure of the share of the judgment debtor.*

10. On the 16th of April, 1935, His Honour the Chief Execution Officer upon the application of the Applicant has given the following order:—

> "It seems that the Land Registry Officer transferred the property (which was subject to an order of attachment) free from such attachment in spite of the High Court Order (final) of 12.10.34. There was no order releasing the original attachment as confirmed previously by the Execution Officer to Land Registrar on 28.6.32 and Land Registrar has no authority to transfer and/or to transfer free from attachment. Since the transfer has been made without proper order of release or authority the Land Registrar is ordered and is hereby requested to enter the attachment in *Tabu* Registers on property in accordance with High Court confirmation order of

* 1, P. L. R. 796; 4, C. of J. 1503.

12.10.1934, which confirms, at least implicitly, Chief Execution Officer's Order of 23.6.32 and to stay any further transactions till further order".

11. On the 31st of May, 1935, the said Ibrahim Attalla (the brother of the judgment debtor), to whom the said property (including the share of the judgment debtor) was transferred in virtue of the said irrevocable power of attorney (subject to the existing seizure), offered to pay the amount of the judgment debt together with interest and expenses against the removal of the seizure, and an order was given to the Land Registrar of Haifa to cancel the seizure upon payment at his office of a sum of LP. 97.250 mils (*i. e.* judgment debt plus interest and expenses) as deposit for the account of the Execution Office.

12. The Applicant applied to the Execution Office for payment to him of the said amount in satisfaction of the judgment debt (application dated 10.10.35), while the said Ibrahim Attalla applied to the same office with a request that the money be refunded to him.

13. On the 1st of November, 1935, His Honour the Acting Chief Execution Officer has given an order that the money in Court, *viz.* LP. 97.250 mils "do remain in Court for a period of four months from this date and be not paid out before the morning of Tuesday 4th February, 1936, without an order from me or successor. If before the 4th February, 1936, there is produced to me or my successor a certified copy of a Court of competent jurisdiction deciding the question of right and title to the sum of LP. 97.250 mils the sum may be paid out in accordance with such order. If too by the morning of 4th February, 1936, no such certified copy order has been produced either party is to be at liberty to apply to myself or to my successor for such order as he may be advised to apply for".

14. No action having been brought by the said Ibrahim Attalla in respect of the said money nor any order having been produced by him within the said period, the Applicant applied on the 6th of February, 1936, with a request, that the said sum of LP. 97.250 mils be paid in satisfaction of his judgment. The said Ibrahim Attalla opposed to this request and insisted that the said money be refunded to him.

15. On the 11th of April, 1936, His Honour the Chief Execution Officer gave an order to refund the money to the said Ibrahim Attalla for the reasons stated in the said order."

FOR PETITIONER: Weinshall.

FOR RESPONDENT: Boustani.

## ORDER.

Order *Nisi* made absolute. The Chief Execution Officer, Haifa, is ordered to refrain from paying the LP. 97.250 mils to Ibrahim Atalla and to pay the said sum to the Petitioner, Jiryes Sader.

Petitioner to have costs of application, to include LP. 5.— advocate's fees.

Given this 11th day of December, 1936.

*Acting Chief Justice.*

CRIMINAL APPEAL No. 78/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Copland and Frumkin, JJ.

IN THE APPEAL OF:—

Ali Said El Wawi. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Corroboration — Statement made by victim of violence repeated by a number of persons — Evidence Ord., secs. 6, 7 — Children's Act, 1908, sec. 30 — English and Palestine Law compared — CR. A. 30/27; A. A. 9/28; R. v. Christie.*

In allowing an appeal from the judgment of the District Court of Haifa, dated the 10th day of June, 1937, whereby the Appellant was convicted under Sections 23 and 222(a) of the Criminal Code Ordinance, 1936, and sentenced to ten years imprisonment:—

HELD: Repetitions by witnesses of the statement of another witness do not corroborate the latter's evidence.

NOT FOLLOWED: CR. A. 30/27 (1, P. L. R. 150; 2, C. of J. 546).

FOLLOWED: A. A. 9/28 (1, P. L. R. 281; 2, C. of J. 547); R. *v.* Christie, 1914, A. C. 595.

ANNOTATIONS:

1. See, on corroboration generally, CR. A. 105/43 (1943, A. L. R. 754).
2. *Cf.* CR. A. 138/40 (1941, S. C. J. 48) — an early complaint is not corroboration.

FOR APPELLANT: Sanders.

FOR RESPONDENT: Ghussein.

JUDGMENT.

*Copland, J.*: 1. We have already intimated that in our opinion this conviction cannot stand, and this is now the considered judgment of the Court giving our reasons for this opinion.

2. The Appellant was convicted by the District Court, Haifa, of attempted murder, contrary to Sections 222(a) and 23 of the Criminal Code Ordinance, of Younis Salim Nurjerini and was sentenced to ten years' imprisonment. Apart from the evidence of Younis who said that the Appellant, whom he said he definitely recognised, fired at him with a rifle at close range at night outside his (Younis) home, the

bullet just grazing his left thigh, the principal prosecution witness was Younis' wife, Hanifeh. Hanifeh said that she was in their house, where she heard a shot from close at hand — that she then opened the door, saw her husband outside and asked him who had fired at him, and in reply, Younis gave the name of the Appellant, and of two other men, who were acquitted in the course of the trial, as the assailants. Hanifeh never saw the Appellant, nor the other two men, who were said to be present. The other evidence against the Appellant was given by three men, Muhammad Sheikh Mustafa Abu Saleh, Muhammad Ali Ahmad, and Eissa Husein Mushemesh, who all say that when they went to Younis' house after the shooting, and questioned Younis about it, the latter told them that the Appellant had fired at him and that two other men had also been present. Only the first named, Muhammad Sheikh Mustafa, would seem actually to have heard the shot, which he said seemed to come from the direction of Younis' house.

3. This was all the evidence for the prosecution, and it will be seen that it consists of the statement of Younis, who was the only person who actually saw the Appellant, and the statements of four persons who all say that Younis told them that the person who had fired at him was the Appellant. The defence was a denial of the charge, and an *alibi* which was not very convincing.

4. The principal ground of appeal is that there is no corroboration of Younis' evidence as required by Section 6 of the Evidence Ordinance (Laws of Palestine Cap. 54).

5. The Sections of the Law which we have to consider are Sections 6 and 7 of the Evidence Ordinance which are as follows:—

> "6. No judgment shall be given in any case on the evidence of a single witness unless such evidence is, in a civil case, uncontradicted, or, in a criminal case, is admitted by the accused person, or, whether in a civil or criminal case, is corroborated by some other material evidence which, in the opinion of the Court, is sufficient to establish the truth of it.
>
> 7. Evidence of a statement made at the time when, or shortly before, or after, an offence is alleged to have been committed and directly relating to a fact or facts relevant in the case is admissible if made by a person who is himself also a witness".

6. It may be convenient to summarise here the provisions of Section 30 of the Children Act 1908, to which reference will be made later in the course of this judgment. This section provides that where a child of tender years has given unsworn evidence in support of a charge in respect of any offence mentioned in the first Schedule to the Act, no person "shall be liable to be convicted of the offence unless the testimony

admitted by virtue of this Section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused".

7. In England, corroboration is only required in certain classes of cases, one of them being offences of a sexual nature committed on children. In Palestine, corroboration of the evidence of a single witness is required in all cases except certain contraventions under the Road Traffic Ordinance.

8. The point which we have to consider is whether a statement given by a witness can be corroborated by evidence of statements made by this witness to other persons, not in the presence of the accused but implicating the accused.

9. Unfortunately, in previous judgments given by this Court, there has been a conflict in the rulings given in different cases. In Abdul Rahman Daoud el Rahal *v.* The Attorney General (Criminal Appeal No. 30 of 1927 — P. L. R. 150), the Court held that a statement made at the time when or shortly before or shortly after an offence is alleged to have been committed, if admissible under Section 6 (now Section 7) of the Evidence Ordinance, can be taken to be material evidence in corroboration of other evidence as required by Section 5 (now Section 6) of the same Ordinance. The Court went on to say that "the Court below was of opinion that the early statement of complainant was material evidence sufficient to corroborate the evidence in the witness box of the complainant, and this Court will not go behind that finding".

10. On the other hand in Abdul Rahim Jamil el Haj Saleh *v.* The Attorney General (Criminal Assize Appeal No. 9 of 1928 — P. L. R. 281) the Court gave this opinion:—

> "The conviction, however, was based on the assumption that the evidence of the deceased was corroborated. Her statement in the village was testified to by two witnesses and supported by her statement to the Magistrate in hospital in the absence of the Accused, but we hold that such repetitions of the evidence of a single witness are not corroboration by some material evidence which Section 5 (now Section 6) of the Evidence Ordinance requires ...".

11. The first cited case has been followed also in recent years.

12. If one turns to the English Law the position is quite clear. The point came before the House of Lords in R. *v.* Christie (L. R. (1914) A. C. 595). It is true that the principal point in this case was on another matter, but the present point before us is dealt with at the end of the judgment of Lord Atkinson, where he says:—

> "Again, he (that is the presiding Judge) treated the evidence of the mother of the boy and the constable, as to what the boy said and did on the occasion of the identification as corroboration of his testimony at the trial, within the meaning of the 30th Section of the Children Act of 1908. This is, of course, wholly erroneous. If the boy himself had been examined, either in chief or in cross-examination, and had detailed what took place at the identification, this portion of his evidence could not be treated as corroboration of the other portion proving the charge. He could not be his own corroborator. It can make no possible difference when others tell what he did and said on that occasion. Their evidence is no more material corroborative evidence in support of his evidence at the trial implicating the accused than bis would be".

And Lord Reading dealing with this point in the same case, said:—

> "Assuming that your Lordships were of opinion that the boy's statement was admissible, this conviction for other reasons, could not stand, and was properly quashed ..... By virtue of Section 30 of the Children Act 1908 (8 Edw. 7, c. 67), Christie could not be convicted unless the boy's testimony was corroborated by some other material evidence in support thereof implicating the accused. There was no sufficient direction, and there was misdirection to the jury of the requisites of corroboration under this Statute. Such direction as was given by the deputy chairman was erroneous, inasmuch as it treated the statement by the boy, given in evidence by the mother and the constable as corroboration of the boy's evidence implicating the accused. This is manifestly wrong".

13. Following this reasoning, Abdul Rahman Daoud el Rahal *v.* The Attorney General (*supra*) and the cases in which it was followed must be taken to have been wrongly decided and we hold that mere repetition by witnesses of statements made to them by another witness cannot be treated as that material evidence sufficient for corroboration as required by Section 6 of the Evidence Ordinance.

14. For these reasons, the District Court erred in convicting the Appellant, and the appeal must be allowed, the conviction quashed, and the Appellant discharged.

Delivered this 30th day of July, 1937.

*British Puisne Judge.*

*Manning, S. P. J.*: I concur.

*Senior Puisne Judge.*

CIVIL APPEAL No. 142/35.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Khaldi and Frumkin, JJ.

IN THE APPEAL OF:—

Elias Gelat and Haj Mahmud & 3 ors. APPELLANTS.

v.

Muhammad Ishaq el Khalidi. RESPONDENT.

*Contracts — Agreement to make a contract — Agreements whether against public policy.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 27th June, 1935:—

HELD: 1. *Quaere* whether a secret partnership agreement made in connection with a future tender is against public policy.

2. In the circumstances of this case, where there was an agreement to contract, damages for breach could not be recovered.

ANNOTATIONS: *Cf.* C. A. 155/44 (1944, A. L. R. 368) where the question was whether there was a partnership or an agreement to form a partnership.

FOR APPELLANTS: Nasri Nasr.

FOR RESPONDENT: Rashed Haddad.

### JUDGMENT.

It seems that the parties in this case were minded to tender for a contract for the supply of stones for the repairs to the Church of the Holy Sepulchre.

They entered into an agreement dated 18th February, 1932, under which they were to tender independently for the supply of these stones.

It was suggested in argument that this agreement was illegal as being contrary to public policy, but this question was not argued and having regard to the view which we take of this case we express no opinion on the point; and it should be clearly understood that we do not decide whether this agreement is or is not contrary to public policy.

Clause 6 of the agreement provided:—

> "After tender the quarry shall be bought. After that an agreement shall be passed as how to conduct the work; whether by authorizing one of the partners, or authorizing a third person, or by employing labourers on the account of the partnership, who shall receive fixed rates for their labour".

It appears that the Respondents obtained the contract from the Public

Works Department, but it is not altogether clear if the agreement contemplated in Clause 6 was made. From the evidence which has been cited some sort of agreement was entered into but from the notarial notice (Exh. B.) it appears that the Appellants' advocate stated that the Respondent did not consent to agree on the way of conducting the works as Article 6 indicates and went on to ask the Respondent to agree on the way of conducting the affairs of the partnership.

In our view the damages and other moneys claimed are not recoverable under the contract of the 18th February in the form in which the action was brought, and we are of opinion, therefore, that the District Court was right and that this action should be dismissed with costs and advocate's fees which we assess at LP. 2.

We make no observations as to whether upon the facts the Appellants are entitled to recover any damages or moneys from the Respondent.

*Chief Justice.*

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LAND APPEAL No. 46/33.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: McDonnell, C. J., Khaldi and Khayat, JJ.

IN THE APPEAL OF:—

Qustandi Habib Hawa & 2 ors. — APPELLANTS.

v.

Fuad Saba & 4 ors. — RESPONDENTS.

*Wakala dawriya — Prescription; L. C., art.* 20; *Mejelle, art.* 1660 — *Power of attorney not used for over fifteen years.*

In allowing an appeal from the judgment of the Land Court of Haifa, dated May 27th, 1933:—

HELD: A *wakala dawriya* not used for fifteen years is prescribed and invalid.

ANNOTATIONS: The head note gives the effect of the case as interpreted by the Court of Appeal in subsequent proceedings between the same parties: L. A. 46/36, *post.*

FOR APPELLANTS: Abcarius.

FOR RESPONDENTS: Nos. 1—4 — Weinshall.
No. 5 — Hanania.

## JUDGMENT.

The main point which has at the outset to be determined is whether or not the power of attorney filed in this case dated 8th February, 1327, equivalent to 22nd February, 1912, is irrevocable, *i. e.* whether it is a *Wakala Dawriya*. On careful consideration, we find that it is such a power of attorney which involves the right of a third party. A period of over fifteen years passed after the execution of the power of attorney before it was given effect to as a result of which property was transferred from the name of Appellants into the name of Respondents. Furthermore, it is important to note that Respondents did not take possession of the property until its registration in their names in 1929 which registration was effected on the strength of the power of attorney and that before that date the property was in the Appellants' possession.

In accordance with Article 20 of the Land Code and Article 1660 of the *Mejelle*, the Respondents' claims cannot be maintained on the ground of prescription.

As the interests of the third party, Farah Salty, were not discussed, the case is remitted for the determination thereof.

Delivered this fourth day of October, 1934.

*Chief Justice.*

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LAND APPEAL No. 46/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Greene and Khaldi, JJ.

IN THE APPEAL OF:—

Farah Salti & 2 ors. — APPELLANTS.

v.

Costandi Habib Hawa & 2 ors. — RESPONDENTS.

*Wakala dawriya — Transfer made in reliance on invalid wakala dawriya — Purchaser with constructive notice.*

In dismissing an appeal from the judgment of the Land Court of Haifa, dated 13th June, 1936:—

HELD: Where the purchaser could have been put on enquiry by reference to the Land Registry file, his title is no better than the vendor's.

ANNOTATIONS:

1. The first appeal in this case is L. A. 46/33 (*ante*).

2. On the duty of a purchaser of land to make enquiries as to the vendor's title see C. A. 119/42 (1942, S. C. J. 755).

FOR APPELLANTS: Eliash.

FOR RESPONDENTS: Abcarius.

## JUDGMENT.

We have already intimated that in our opinion this appeal failed, and we now give our reasons for that opinion.

The facts of the case are very clearly set out in the judgment of the Land Court, and it is unnecessary to repeat them here. It is sufficient to say that, whilst this case was previously on appeal before this Court, the 2nd and 3rd Appellants, taking advantage of the removal of an attachment on the lands in question in 1929, had these properties registered in their names by virtue of an irrevocable power of attorney executed in 1912 but never used, the Land Court having previously dismissed the Respondents' claim for lack of jurisdiction.

The Land Registrar obtained from the 2nd and 3rd Appellants a written acknowledgement that they were aware of the fact that the lands registered in their names were the subject matter of a dispute, and this acknowledgement was kept in the file. Most of the lands were subsequently sold to the first Appellant and later this Court quashed the first judgment of the Land Court and remitted the case for retrial to hear the arguments of the first Appellant, who was not involved in the first hearing in the Court below, his vendors having succeeded there.

From the first judgment on appeal given by this Court, we do not think that there can be any doubt that they decided that the power of attorney had become ineffective through non-user for a period exceeding 15 years. This is the interpretation given by the Land Court in their judgment now under review and in our opinion that is the correct interpretation. Nor does it make any difference that the Appellants took possession of the lands. They took possession by virtue of a power which was subsequently held to be ineffective and void, and they also took possession at a time when the Respondents were strenuously contesting the validity of the power, the case being then under appeal. Nor is the first Appellant in any better position. If he had examined the Land Registry files he would have found on it the acknowledgement of the other Appellants that the ownership of these lands was in dispute and a few simple enquiries would have shewn him that this dispute had not yet been definitely determined.

For these reasons, as well as those given by the Land Court in their very carefully reasoned judgment, to which no exception can be taken and which we adopt, we hold that this appeal fails and must be dismissed with costs and LP. 5.— advocate's fees.

Delivered this 24th day of June, 1937.

*British Puisne Judge.*

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CIVIL APPEAL No. 138/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Greene and Frumkin, JJ.

IN THE APPEAL OF:—

"Palwoodma" (Palestine Woodwork Machinery Trading and Manufacturing Company), Haifa. APPELLANT.

v.

Tewfic Majdalani. RESPONDENT.

*Impossibility of performance — Lease of premises given up during disturbances — Termination of tenancy by lessee on the ground that the premises could not be used as unsafe — C. A. 43/33, and C. A. 77/37 considered — Mejelle, arts. 404, 405, 420, 443, 470, 478, 479, 513—5, 518 — "Valid impediment" in art. 443 — Defect must be in thing hired — English Law of frustration: Halsbury, Whitehall Court Ltd. v. Ettlinger; Matthey v. Curling.*

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 21st May, 1937:—

HELD: The occurrence of riots, making it impossible for the lessee to make use of the premises does not entitle him to terminate the lease. It is neither a defect in the premises nor a "valid impediment". The English doctrine of frustration, in such cases, is to the same effect as the Local Law.

DISTINGUISHED: C. A. 43/33 (8, C. of J. 543); C. A. 77/37 (*ante*, p. 164).

REFERRED TO: Whitehall Court Ltd. *v.* Ettlinger, 1920, 1 K. B. 680; Matthey *v.* Curling, 1922, 2 A. C. 180.

ANNOTATIONS: See C. A. 61/43 (1943, A. L. R. 145) and annotations thereto on the development of the doctrine of frustration.

FOR APPELLANT: Geiger.

FOR RESPONDENT: Sanders.

## JUDGMENT.

*Manning, S. P. J.*: The Appellant Company (hereinafter called the company) on the 10th December, 1935, entered into an agreement with the Respondent. Under the agreement the Respondent was to lease to the company certain premises in Nazareth Street, Haifa. The term of the lease was to be from April 1st, 1936, to March 31st, 1938. The rent was to be LP. 450.— for the two years; of this LP. 25.— was paid on the date of the agreement; and the payment of the balance was secured by four promissory notes, one for LP. 87.500 mils payable on April 1st, 1936, and three each for LP. 112.500 mils payable respectively on October 1st, 1936, April 1st, 1937, and October 1st, 1937.

2. In April, 1936, the Arabs in Palestine started a general strike, and a number of them became active rebels and resorted to violence. Their principal grievance was the Mandate, and as a consequence, the lives and property of Jews were in jeopardy in many parts of the country. The company was a Jewish company and most of its employees belonged to the Jewish community. It took the view that Nazareth Street, Haifa, was an unsafe place in which to carry on business and it decided that it was impossible to make any further use of the leased premises. There was a certain amount of correspondence between the parties which culminated in a letter from the company's advocate dated September 15th, 1936, cancelling the contract of lease on the ground that it had enjoyed no benefit therefrom and asking for the return of the rent already paid in advance and of the three promissory notes in the possession of the Respondent. The Respondent's advocate replied on September 30th, to the effect that there were no grounds for terminating the contract of lease and that he held the company liable to its terms and to the payment of the agreed rent.

3. The company failed to pay the promissory note for LP. 112.500 mils due on the 1st October, 1936, and in consequence the Respondent started an action on the note before the Chief Magistrate, Haifa. The hearing commenced on the 24th December, 1936. The following two issues were framed by the learned Chief Magistrate:—

(a) Was Defendant deprived of benefits contemplated by lease and if so to what extent?

(b) Did that entitle him to cancel the lease?

4. The company called a large number of witnesses to show that, owing to danger from hostile Arabs, it was disabled from using the premises for the purposes of its business. Instead of allowing the Respondent to call evidence on this issue, which he was prepared to do, the learned Chief Magistrate decided to hear argument on the second

issue. He then gave judgment for the Respondent on the ground that, if the company was disabled from using the premises, the cause of this prevention did not arise from the premises themselves but from the status of their occupants.

5. The company appealed to the District Court. There is a curious system in Palestine which allows a District Court to deal with an appeal from a Magistrate without hearing the parties or their advocates. The Judges read the proceedings in Chambers together with the grounds of appeal and any written reply thereto and then pronounce a decision. This was done in the present case. There is a certain amount of confusion in the judgment which may be due to this practice. The judgment states that "the Appellant does not raise the defence of lack of consideration ..... but contends that he is not liable for rent after he has cancelled the lease". In spite of this, it states later, "the defence of lack of consideration is misconceived", and again "he cannot avail himself of the defence of lack of consideration". The Court thought that the company might have a counterclaim because of the failure of consideration due to its rescission of the contract, but on the ground that the consideration for the note was the execution of the contract of lease by the Respondent it dismissed the appeal.

6. The District Court did not deal with the company's case as it was presented to the learned Chief Magistrate. That case was that the company was in the circumstances entitled to cancel the lease, and that consequently no further rent was payable. The promissory note having been admittedly made to cover rent in advance from a period subsequent to the cancellation, the company was not liable, as the lease was no longer in existence.

7. The Presiding Judge granted leave to appeal to this Court, and formulated two points of law on which leave was granted. One of these was whether in the circumstances alleged, a lessee is entitled to cancel a lease — a point on which he himself had given no decision whatever. The other was whether a defendant may plead to an action on a promissory note the same defences as he might plead to an action for rent, if the promissory note was made to cover rent. This point did not arise before the learned Chief Magistrate, nor was any decision given on it by the Presiding Judge of the District Court.

8. The only issue before us is whether the company was entitled to rescind, and in order to determine it, it is necessary to assume that, owing to the disturbances which broke out in April, 1936, it was impossible for the company to derive any further benefit from the lease.

9. The Court is indebted to Mr. Geiger for an able presentment of

the case on behalf of the company. He relied on two decisions of this Court. The first case was Civil Appeal No. 43 of 1933, Yeshivath Hebron Kneseth Israel *v.* Khatib. In that case a Jewish Educational Institution rented from a man named Khatib a house in Hebron for two years, *Muharram* 1929 to *Muharram* 1931. The institution paid the two years' rent in advance, LP. 170.— in cash and LP. 100.— in two promissory notes of LP. 50.— each. In August, 1929, riots broke out in Hebron and a number of Jews were massacred. It then became impossible for the Institution to continue to make any use of the premises. It sued Khatib before the District Court of Jerusalem for the refund of LP. 142.—, a proportionate part of the rent calculated from August, 1929, to *Muharram* 1931, and for the return of the two promissory notes. The District Court found that there were two separate contracts of lease, one for each year. It decided that, owing to the disturbances at Hebron, the Institution was entitled to rescind the first contract as from the date the disturbances broke out. As there were no disturbances during the second year, it held the contract for that year to be of full effect. It gave judgment in favour of the Institution, but for LP. 88.340 mils only, the proportionate part of the rent from the outbreak of the disturbances to *Muharram,* 1930.

10. The Institution appealed. This Court dismissed the appeal holding that the finding of the District Court that there were no circumstances operating in the second year to enable the Institution to avoid the contract, was a finding of fact which it would not interfere with. Khatib did not appeal, and there was consequently no decision on the point whether the disturbances at Hebron in 1929 afforded a ground for rescission of the first year's lease by the Institution.

11. The second case relied on by Mr. Geiger was Civil Appeal No. 77 of 1937, Blum *v.* Estate of Sursok and another. Blum had rented certain premises at Jaffa during the year 1936 and had paid LP. 78.— rent in advance with four promissory notes. Owing to the outbreak of the disturbances in April, 1936, to which I have already referred, Blum, who was a Jew, was unable to occupy the premises. He sued the lessors in the Magistrate's Court at Tel-Aviv for the return of the promissory notes, or their equivalent in value, LP. 78.—. The learned Magistrate found that the circumstances justified Blum in cancelling the lease and gave judgment in his favour for the return of the promissory notes or their value, less LP. 5.632 mils, rent due before the outbreak of the disturbances on the 19th April, 1936.

12. The lessors appealed to the District Court. That Court held that Blum was entitled to cancel the lease, but decided that rent was

due to the lessors up to the date on which they received notice of the rescission. This decision altered that of the learned Magistrate by substituting LP. 27.732 mils for LP. 5.632 mils, as rent due to the lessors.

13. From this decision, Blum appealed. This Court seems to have been under a misapprehension as to what was actually decided in the Yeshivath Israel case (*supra*). I quote from the judgment:—

> "It was decided by this Court in Civil Appeal 43/33 in which the facts would appear to have been similar to those in this case, that in such circumstances the provisions of the *Mejelle* apply and the tenant is relieved of his obligations to pay rent".

14. This was clearly not so. This Court must have been misinformed as to what the actual decision was, but, in spite of this, it showed some uneasiness and went on to say that it expressed no opinion on the point. It reversed the finding of the District Court and restored that of the learned Magistrate.

15. It has been necessary to deal with these two cases at some length in order to show that neither of them is an authority for the proposition for which Mr. Geiger contends, as far as the judgments of this Court are concerned.

16. Mr. Geiger relies on certain Articles of the *Mejelle*. In a recent case before this Court, the Attorney General remarked that everything in Palestine is paradoxical. Certainly, nothing is more paradoxical than that, though there are three official languages in Palestine, a large and important part of the written law is in a language which is not one of the three, namely, Turkish. There are, of course, translations from the Turkish into the official languages, but, as there are various versions, difficulties continually arise as to the correct translation of certain passages.

17. The Articles on which Mr. Geiger relies are Articles 404, 405, 420, 443, 470, 478, 513, 514, 515, 518. I am using Tyser's translation. Articles 404, 405, and 420 deal with the nature of the contract of hire, which includes the letting of houses, and the subject-matter of the contract is said to be "the benefit from a thing". Article 470 lays it down that rent becomes payable simultaneously with the power to receive the benefit, and the example given is that if a man hires a house, he must pay the rent, even if he does not live in it. The other articles are as follows:—

> "Article 443 —When a valid impediment has appeared, which is an obstacle to the carrying out of the object of the contract, the letting is set aside. For example — when a cook has been hired for a marriage festival, if one of the parties, going to be married, dies, the contract of hiring is annulled.

And in the same way, if a man, who is suffering from tooth ache, makes a contract with a dentist to put it out for so many piastres, and afterwards the pain goes away, the hiring is annulled.

Likewise by the death of the person, who seeks for a wet nurse, the hiring is not annulled, but by the death of the child or of the milk mother, the hiring is annulled.

Article 478 — If the benefit from the thing hired ceases to exist, then the rent becomes no longer payable.

For example — if there is need for the repair of a bath, if it remains unused during that time, the share of the hire for that time is not payable.

Likewise, if there is an idle time, consequent on the water of a mill being cut, the rent is considered not to be payable from the time of the cutting of the water.

But the lessee, if he has not made flour, if he has in any way used the house of that mill, he must pay that part of the sum payable for rent, which is attributable to it.

Article 513 — As in sale, there is also an option for defect in hiring.

Article 514 — In hiring a defect which gives an option is a thing which causes the putting an end to, or loss of, the intended benefit.

For example — By a house being wholly destroyed and by the cutting of the water of a mill, by reason of there being a putting an end to the desired benefit, or by the settling of the frame of the roof of a house, or the falling down of a part of a place which is detrimental to habitation, or the back of a hired horse being galled, by reason of all these causing damage to the intended use, these, as regards a contract of hiring, are defects giving a right of option. But defects which do not interfere with the use, like the mane or tail of a horse being cut, or the falling of the plaster in a house to an extent that the rain and cold do not come inside, in a hiring, are not a cause of option.

Article 515 — If there occur a recent defect in the hired thing, before taking the benefit of it, it is as though it had existed at the time of the contract.

Article 518 — If the hirer wishes to annul a hiring before the removal of a recent defect which interferes with the benefit, he can do so in the presence of the letter, but he cannot do so in his absence.

And if, in the absence of the letter, that is to say, without giving him notice, he rescinds the hiring, the rescission is not held good, and the rent of the hired thing is paid as before.

But in case of the complete destruction of the desired benefit, in the absence of the letter, he can annul it.

And whether he annuls it, or whether he does not, in accordance with what is said in Article 478, the rent cannot be enforced.

For example — if part of a house falls down and damages the benefit from a house which is let, the hirer can rescind the hiring, but it is necessary that the rescission should be made in the presence of the letter. If he leaves the house without giving him notice, the payment of the rent is necessary, as if he had not left.

> But if the house has altogether tumbled down, the hirer can annul the letting, without there being any necessity for the presence of the letter. And in any case the rent is not payable".

18. The meaning of the words "valid impediment" in Article 443 can be gathered from the examples given. Two of these examples deal with cases where the deaths of persons rendered impossible the fulfilment of the contract. The case of the tooth ache has always struck me as one of those flashes of humour which occasionally illuminate the pages of the *Mejelle,* but it may be explained on the ground that the whole basis of the contract was that the tooth should continue to ache. The principle to be gathered is that the words "valid impediment" mean that both parties, when making the contract, contemplated the continued existence of certain persons or things, and if these persons or things ceased to exist, the contract was at an end.

19. These considerations show that Article 443 does not apply to the circumstances of this case. The continued existence of peace in Palestine was not a matter within the contemplation of the parties when they made the agreement in December, 1935. When peace ceased to exist in April, 1936, and, as the company contends, it became dangerous for it to occupy the leased premises, this did not constitute a "valid impediment" to the fulfilment of the contract.

20. Article 478 is expressed in very general terms, but taken with the examples, the same principle can be gathered from it as from Article 443. When a bath is hired, both parties understand that it is a bath, and if, owing to need of repair, it cannot be used as a bath, the hirer is excused from paying rent until it is repaired. Mr. Geiger laid great stress on the example of the mill and argued that the cutting off of the water was analogous to the circumstances of this case. But this is clearly not so. The mill is a mill, the machinery of which is worked by water and when it is leased, both parties contemplate that the water will continue to flow. The mill was not let as a mere building, it was let because it was situated near running water, and with the understanding of both parties that no benefit could arise unless the water continued to run. The examples given also illustrate a useful point, namely, that the ceasing of the benefit must be due to something defective in the thing hired, or to the absence of something without which the thing hired loses its character and is no longer available for the purpose for which it was hired. If the benefit in the present case ceased to exist, it was because the lessors were members of the Jewish community — there was no defect in the premises hired and there was nothing to prevent the premises from being used for the purpose for which they were let.

21. Articles 513 and 514 set out the law which regulates the rescission of a contract of hire on account of a defect. They cover much the same ground as the Articles I have already dealt with. A defect is something which puts an end to, or causes the loss of, the benefit. The cutting of the water of the mill is again given as an example. The other examples show that the defect must be a defect in the thing hired.

22. Articles 515 and 518 deal with the case of a defect arising between the making of the contract and the commencement of the lessee's use. The term "defect" meaning a defect in the thing hired or in something appurtenant and necessary thereto, these articles do not apply to the circumstances of this case.

23. From what I have said it is clear that I do not agree with Mr. Geiger when he argues that these Articles of the *Mejelle* support his contention. I agree with Mr. Sanders, advocate for the Respondent, that the Article of the *Mejelle* which most nearly applies to the facts is Article 479, which is as follows:—

> "Article 479—A person by alleging that, after he had rented and taken possession of a shop, there was a time when it was impossible to do business, by reason of the occurrence of a stagnation in the business for selling and buying, and that the shop remained closed, cannot refuse to pay rent for that time".

The company alleges that it was impossible to do business. The stagnation was not due to ordinary causes such as a slump in trade, but to the hostility of the Arab population. This, however, makes no difference to the principle to be gathered, which is that if the impossibility to do business arises from some external cause which has no connection whatever with the leased premises or with anything necessary to their use, then rent continues to be payable and the tenant must bear the loss.

24. References have been made to English Law and there is little difference in principle between it and the Ottoman Law. The following passages in Halsbury's Laws of England, 2nd Edition, Vol. 7, pp. 208 and 210, show that under English Law the company is not entitled to any relief:—

> "Impossibility, as an excuse for non-performance, must as a general rule be a physical or legal impossibility, and not merely an impossibility with reference to the ability and circumstances of the promisor".
>
> "The ordinary rule is that, where the law creates a duty, and the person on whom it is imposed is disabled from performing it, without any default of his own, by the act of God or the King's enemies, the law will excuse him; but when a person by his own contract unconditionally undertakes a duty he is bound to perform it or take

> the consequences, notwithstanding any accident by inevitable necessity".

25. The company alleges impossibility, but it is not a physical or legal impossibility, the impossibility is due to the fact that the company belongs to the Jewish community. The company says it is disabled from performing its promise by the act of the King's enemies, but the duty was not created by law, it was a duty unconditionally undertaken by the company.

26. The other aspect of the matter is treated in the same volume of Halsbury at p. 213:—

> "Where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some specified thing without which the contract cannot be fulfilled, will continue to exist ..... the contract, though in terms absolute, is to be construed as subject to an implied condition, that if before breach performance becomes impossible without default of either party and owing to circumstances which were not contemplated when the contract was made, the parties are to be excused from further performance".

The specified thing in this case which ceased to exist was peace in Palestine and there is nothing in the contract or its surrounding circumstances to indicate that it was an implied condition of the agreement that this should continue.

27. Recent English decisions indicate a tendency to restrict the doctrine of frustration, and the doctrine has never, as far as I am aware, been applied to a contract for the lease of premises. Whitehall Court Ltd. *v.* Ettlinger, 1920, 1 K. B. 680, was a case somewhat similar to the present one. Two flats had been leased to Ettlinger for the three years, 1915 to 1918. In 1917 the military requisitioned the flats and were still in possession when the leases expired in 1918. Ettlinger had had to vacate the flats in 1917 when the military took possession, and contended that he need not pay rent from the time he vacated them. The Court held him liable on the ground that the tenancy had not been determined by the requisitioning of the flats and that the doctrine of frustration did not apply to a contract which created an estate by demise. This case was cited with approval in the House of Lords in the case of Matthey *v.* Curling, 1922, 2 A. C. 180.

28. I am fully in agreement with the learned Chief Magistrate in his decision that, assuming it was impossible for the company to derive any benefit from the lease after the 19th April, 1936, the company was not entitled to put an end to the contract and to refuse to pay any further rent. The lease commenced on April 1st, 1936, and it was after

this date that the circumstances arose which, in the opinion of the company, made it impossible to derive the benefit. The Ottoman Law on the subject, in my interpretation of it, does not contain any provision entitling the company to relief. 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, and these are fatal to the company's case. The appeal should, in my opinion, be dismissed with costs, to include LP. 15.— advocate's fees.

Delivered this 16th day of September, 1937.

*Senior Puisne Judge.*

*Greene, J.*: The facts giving rise to this appeal are as follows:—

On or about March, 1936, Appellants obtained a lease from Respondent for two showrooms and a store situated in Nazareth Street, Haifa. The lease was for a period of two years commencing 1st April, 1936. Under the terms of the lease, the rent was payable every six months in advance, and Appellants paid the sum of LP. 25.000 in cash on the date of the execution of the lease in respect of the first six months, and delivered to Respondent four promissory notes, one for LP. 87.500 and three for LP. 112.500 each for the due payment of the balance of rent.

Appellants occupied the premises in the early part of April, 1936, and shortly after they had entered into occupation the disturbances broke out.

Appellants took the view that the street where the premises were situated was an unsafe place for Jews to carry on business in, and decided that it was impossible to make any further use of the leased premises. There was some correspondence between the parties, and Appellants through their advocate sent a letter to Respondent, dated 15th September, 1936, cancelling the contract of lease, on the grounds that they had been deprived of the benefits contemplated by the lease and asking for return of the rent already paid in advance and of the three promissory notes in the possession of the Respondent.

The Respondent's advocate replied on the 30th September to the effect that there were no grounds for terminating the contract of lease and that he held the Appellants liable to its terms and to the payment of rent due.

Appellants refused to pay the secured instalment of rent due on the 1st October, 1936, and an action was lodged by Respondent against Appellants for the amount of LP. 112.500 mils, representing the rent in respect of the period 1st October, 1936, to 31st March, 1937.

The learned Chief Magistrate divided this case into two issues:—

(1) Were Appellants deprived of benefits contemplated by the lease, and if so, to what extent?

(2) Did that deprivation of benefit entitle them to cancel the lease?

Appellants called thirteen witnesses to establish the fact that, owing to the danger from hostile crowds in the street where the premises leased were situated, the Appellants had to quit the premises as soon as the disturbances broke out, owing to considerable danger from hostile crowds of Arabs.

The Respondent was not called upon to give evidence on this issue.

The learned Chief Magistrate decided to hear arguments on the second issue. He then gave judgment for the Respondent, on the grounds that if Appellants were prevented from using the premises, the cause did not arise from the premises themselves, but from some external cause, namely, the disturbances in the streets. Appellants appealed to the District Court.

The District Court in giving judgment decided that the claim of the Respondent is upon a promissory note and not upon the consideration for which it was alleged to be given, *viz.*, rent.

On the ground that the consideration for the note was the execution of the contract of lease by the Respondent, the Court dismissed the appeal.

The District Court did not deal with the Appellants' case as it was presented to the learned Chief Magistrate.

The only issue before us is whether the Appellants were entitled to cancel the lease and, in order to determine it, it is necessary to assume that, owing to the revolt which broke out in April, 1936, it was impossible for the Appellants to derive any benefit from the lease.

I have had the privilege of reading the judgment of the learned Senior Puisne Judge who deals very fully with the cases cited by Mr. Geiger, and I entirely agree with the learned Judge's finding on the cases cited.

Mr. Geiger for Appellants relies on Articles 404, 405, 420, 443, 470, 478, 513, 514, 515 and 518.

The learned Senior Puisne Judge has dealt very fully with the articles of the *Mejelle* quoted, and I need only say I am in complete agreement with him on all points raised.

Article 479 is significant. I am using Hooper's translation: If a person takes a shop on hire and is given delivery thereof and alleges that on account of slackness of business his trade has stopped and his

shop has been shut, such person cannot refuse to pay rent for that period.

Article 513 deals with defect in the case of a contract of hire, as in a contract of sale.

Defect must be something inherent in the subject-matter, something internal. The meaning of the word "defect" can be gathered from the examples given in Article 514 — A house is entirely destroyed; the utility of a mill is negatived by the water being cut off; the frame of the roof of a house sinks; a place is knocked down so as to be unsuitable for habitation. In all these cases there is an option for defect, if they are taken on hire, on account of the benefits sought to be obtained being destroyed.

If the benefit in the present case ceased to exist, it was because the lessees were afraid to carry on business, owing to the disturbances in the district where the premises were situated. There was no defect in the premises hired and there was nothing to prevent the premises from being used for the purpose for which they were let. It is clear, in this case, that the impossibility to do business alleged by the Appellants was not due to ordinary causes, but to the hostility of the Arab people, in the district . This was due to some external cause which has no connection whatever with the leased premises or anything necessary to their use; the rent continued payable and the tenant must bear the loss.

For the above reasons, I am in agreement with the judgment of the learned Chief Magistrate that the faults or defects or deficiencies which do not spring from the premises themselves but only arise from the status of their occupants give no right to cancel the lease. The obligations incurred by the Appellants to pay the rent continued, and there was no failure of consideration.

In my opinion the appeal should be dismissed with costs to include LP. 10.— advocate's fees.

*British Puisne Judge.*

*Frumkin, J.*: The legal point involved in this case depends upon the proper construction of Article 443 of the *Mejelle,* as this article is the only authority under which the Appellant could possibly succeed.

2. I need not go over again the grounds so masterfully covered by my learned brother Manning in his very instructive judgment. Before dealing with the point I want however to say a few words as regards the two cases referred to all through the proceedings in this trial as

precedents for the present case, so much so as I happened to be a member of the bench on the two occasions.

3. In the so called Hebron case the point did not come up for decision. There was no appeal by the landlord who was deprived from rent for a certain period during which the disturbances took place but there was an appeal by the tenant who wanted to be exempted from payment of rent for another period during which it was found that no disturbances took place.

4. In the second case (C. A. 77/37) again the tenant succeeded in his case in the lower Courts on the main issue that he is not to pay rent during the disturbance and the point on appeal was as from what date exactly the exemption begins. He was not satisfied with the commencing date and he appealed. But there was no appeal by the other side, *i. e.* the landlord, on the main point of exemption.

5. It follows that in neither case was there a decision by this Court determining the point which could now be approached with no authority to follow.

6. In the present case we have the advantage of having before us the very learned and exhaustive judgment of the Chief Magistrate and the able pleadings of counsel for both sides, and in the light of the arguments advanced I feel inclined to agree with my learned brethren that the impediment dealt with in Article 443 of the *Mejelle* must be one inherent in the leased property and not in surrounding circumstances which are not within the control of the lessor to remedy.

7. It is only when such an impediment exists that Article 518 comes into operation governing the period from when exemption to pay rent begins, depending upon the fact of the extent of the impediment and whether or not notice was given.

8. In the circumstances I concur in the results reached by my learned brother presiding followed by my brother Greene, to the effect that the appeal be dismissed with costs to include LP. 15 advocate's fees.

*Puisne Judge.*

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HIGH COURT No. 17/37.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF:—

Michael Binia. PETITIONER.

v.

1. The Chief Execution Officer, Jerusalem,
2. Estate of the late Nicola Akel, through his widow as heir and administratrix Shafiqa Akel. RESPONDENTS.

*Execution — When execution of judgment renounced, part thereof relating to costs may not be enforced — High Court practice — Laches.*

In refusing an application for an order to issue to the first Respondent, directing him to show cause why his order in Execution File No. 3245/30, dated the 19th June, 1936, should not be set aside, and why the second Respondent should not be ordered to pay to Petitioner the sum of LP. 73.— which forms the costs and advocate's fees:—

HELD: 1. If a person renounces his right to execute a judgment, he cannot later ask to enforce part thereof dealing with costs.

2. A delay of one year in asserting alleged rights in execution may be fatal to a High Court application.

ANNOTATIONS: On the effect of laches *cf.* H. C. 102/43 (1943, A. L. R. 830) and note 3 thereto.

FOR PETITIONER: Goldberg.

FOR RESPONDENT: *Ex parte.*

ORDER.

This is an application for an order to be directed to the Chief Execution Officer of Jerusalem to order him to execute that part of the judgment of the District Court of Jerusalem, relating to the costs awarded by it in case No. 338/28.

The mortgage-deed which Petitioner received from the late Nicola Akel in security for the loan, did not provide for interest on the money lent, but separate bills were made to provide for the interest on the loan.

The amount of the bills not having been paid on date of maturity, the Petitioner brought an action in the District Court of Jerusalem and obtained judgment on the amount of the bills and costs.

Before the execution of this judgment, the mortgage fell due and Petitioner obtained an order from the Chief Execution Officer for the foreclosure and sale of the mortgaged property to settle the amount of the loan and interest.

Having received an order for the payment of interest on the mortgage deed, the Petitioner has given up his claim to the execution of the

judgment of the District Court regarding the interest and asked the Chief Execution Officer to order the execution of the second part of the judgment regarding the costs of the case.

The Chief Execution Officer rightly refused this application, and we cannot see any reason to interfere with his decision. If a party renounces his right to the execution of a judgment, he cannot ask for the enforcement of that subsidiary part which is only incidental thereto.

Moreover, the alleged order which the Petitioner seeks to set aside is dated 19th June, 1936. He has thus slept over his alleged right for a year.

For the above mentioned reasons, we are not inclined to give him the order he seeks.

Delivered this 9th day of July, 1937.

*British Puisne Judge.*

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CIVIL APPEAL No. 185/33.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Corrie, S. P. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Anton Tayan. APPELLANT.

v.

Angeline Tayan. RESPONDENT.

*Promissory note — Allegation that no consideration given — Evidence of plaintiff as defendant's witness — Admissions — Interest.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 20th October, 1933:—

HELD: 1. When the plaintiff gives evidence of consideration as the defendant's witness, the Court cannot hold that there is no evidence of consideration.

2. But if, on the plaintiff's admission, it appears that more than capital and interest are demanded on the note, the entire amount of the note cannot be adjudged to him.

ANNOTATIONS:

1. The proceedings terminated in C. A. 17/36 (1937, 1 S. C. J. 96).

2. Note that there is no presumption of consideration in the Ottoman Commercial Code; *vide* Art. 74 thereof.

3. On the effect of a party calling the other party as a witness see C. A. 24/42 (1942, S. C. J. 851).

## JUDGMENT.

The action which gives rise to this appeal was brought by the Appellant, Anton Tayan, against the Respondent Angeline Tayan, claiming LP. 2000 upon a promissory note for that amount made by the Respondent in favour of the Appellant on 27th June, 1919.

The defence set up by the Respondent was that no consideration was given for the note, which was intended only to be enforced by the Appellant against the estate of the Respondent, who is the aunt of the Appellant, in the event of her death.

To establish this defence, the Respondent relied upon the evidence of the Appellant.

The Appellant gave evidence in the course of which he stated that he had lent the Respondent various sums of money at various dates, the last being in 1913, amounting to a total of LP. 930.— including interest.

Calculating the interest accruing on this sum between 1913 and 1919, the District Court arrived at a total of LP. 1430; and finding no relation between this sum and the sum of LP. 2000 secured by the note, held that the Appellant had failed to prove that consideration had been given for the note and dismissed the action.

The Appellant in his appeal maintains that consideration was proved by his own evidence to have been given, and claims the value of the note.

We hold that the evidence of the Appellant, given as a witness called by the Respondent, does prove that consideration was given, and hence that the District Court's judgment cannot stand.

At the same time, the Appellant's evidence contains the admission that the note was given to secure repayment of loans made by him to the Respondent, and that the total amount of such loans including interest did not exceed LP. 930. It follows that the Appellant cannot recover more than the sum lent and interest.

The judgment of the District Court is set aside and the case remitted to the District Court to determine the amount of the loans and enter judgment for the Appellant for such amount with interest at 9% from the date of protest, 4th May, 1932.

The Respondent will pay half the costs of the Appellant here and below.

Delivered this 3rd day of April, 1935.

*Senior Puisne Judge.*

CIVIL APPEAL No. 70/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Suleiman Abu Ghazaleh. APPELLANT.

v.

Elias Bouzo. RESPONDENT.

*Jurisdiction of Courts — Action for return of promissory note — Value of claim — Magistrates' Courts Jurisdiction Ord.*, 1935, *sec.* 2(1)(*d*)(*i*).

In allowing an appeal from the judgment of the District Court of Jaffa, (C. D. C. Ja. 26/37), dated March 18th, 1937:—

HELD: An action for the return of a promissory note for LP. 246 is within the jurisdiction of the Magistrate's Court and cannot be entertained by the District Court.

ANNOTATIONS: The statement of claim was framed to be for "an order of injunction to restore the note".

APPELLANT: : In person.

FOR RESPONDENT: Shehadeh.

JUDGMENT.

The Respondent brought an action in the District Court, Jaffa, for the return of a promissory note which he has entrusted to the Appellant. The value of the promissory note is LP. 246.

2. The only point in this appeal is whether the competent Court to deal with this claim is the District Court or the Chief Magistrate.

3. Section 2(1)(d)(i) of the Magistrates' Court Jurisdiction Ordinance, 1935, gives power to the Chief Magistrate to exercise jurisdiction where the subject matter of the claim does not exceed LP. 250.—.

4. It is clear, therefore, that the District Court had no jurisdiction to entertain the present action since the subject matter of the claim was a promissory note under the value of LP. 250.—. For this reason the appeal is allowed, the judgment of the District Court set aside, and the Respondent's claim dismissed with costs here and in the Court below. Costs of this Court to include LP. 1, Appellant's travelling expenses.

Delivered this 14th day of June, 1937.

*British Puisne Judge.*

LAND APPEAL No. 11/29.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Baker, A/S. P. J., Khaldi and Frumkin, JJ.

IN THE APPEAL OF:—

Salim Farah. APPELLANT.

v.

Hanna Haddad & an. RESPONDENTS.

*Civil Procedure — Point taken by Court ex officio — Evidence heard by Court constituted differently from the Court which gave judgment.*

In allowing an appeal from the judgment of the District Court of Haifa, dated the 1st December, 1928:—

HELD: The fact that judgment had been given by a Court differently constituted from the Court which had heard the evidence was a point which the Court of Appeal was bound to raise even if no appeal was made thereon.

ANNOTATIONS: On points which may be taken by the Court of its own motion *cf.* C. A. 148/43 (1943, A. L. R. 366). See also C. A. 16/44 (1944, A. L. R. 401).

## JUDGMENT.

There is a point in this case which although not raised in the grounds of appeal the Court must and is bound to take judicial notice of and that is that the evidence in the case was heard by a Court constituted of His Honour Judge Litt, presiding, and Strumza, J., and then judgment was presumably reserved.

On the 1st of December, 1928, a judgment was given signed by the President and Hasna, J. There is no evidence or suggestion that Hasna, J., ever heard the evidence and accordingly the judgment cannot stand and the case must be returned for a judgment to be given by the Court which heard the evidence or for the case to be reheard. No costs.

Delivered this 3rd day of July, 1929.

*Acting Senior Puisne Judge.*

CIVIL APPEAL No. 3/35.

# IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Baker and Frumkin, JJ.

IN THE APPEAL OF :—

The Anglo-Palestine Bank Ltd. APPELLANT.

v.

Ashrai Bank, Co-operative Society, Ltd. RESPONDENT.

*Bills of exchange — Rights of discounting bank on bill with forged or unauthorised endorsement — B/E Ord., secs. 23, 37.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 12th September, 1934 (6th August, 1934):—

HELD: 1. A bank discounting a bill is not paying it within the meaning of sec. 23(1) of the Ordinance and is, therefore, not entitled to the protection of that sub-section.

2. The bank's position is governed by sec. 37 read subject to the provisions of sec. 23(1): Even a holder in due course is unable to recover under a forged or unauthorised signature which has not been ratified.

ANNOTATIONS:

1. The judgment of the District Court (Copland and Nammar, JJ.) was as follows:—

"This is an action by the Ashrai Bank against The Anglo Palestine Bank for the equivalent of the sum of 4000 dollars being the amount of a draft issued by the latter on a bank in New York, discounted by the Plaintiffs and dishonoured on presentation in New York.

On the 3rd January, 1934, one Asher Karlinsky obtained from the Defendants this draft, paying for it by means of a cheque drawn by him on the Plaintiffs, which cheque was subsequently dishonoured by the Plaintiffs there being no cover to meet it with them. The draft for $4000 was drawn in favour of Max Karlinsky, the brother of Asher Karlinsky. Asher Karlinsky acting, so he says, on the authority of Max Karlinsky, endorsed the draft in Max's name to himself, presented it to the Ashrai Bank, who paid him cash for it, less discount. Max Karlinsky has filed an affidavit saying that the signature in his name on the draft was authorised by him. The draft when presented in New York was dishonoured on the instruction of the Defendants, and was duly protested. Hence this claim.

Now, even if there was an irregularity in the endorsement, the Plaintiffs had no notice of that irregularity but negotiated the draft in good faith and without notice.

The Plaintiffs paid on the strength of the last endorsement which was that of a customer whom they knew well, and who was dealing in such matters. Under Sec. 23 of the Bills of Exchange Ordinance, 1929, the Plaintiffs are protected.

There is no proof of any collusion between Max and Asher Karlinsky.

In these circumstances, the Defendants are clearly liable, and judgment must be given against them for the amount of the claim, with interest from the date of protest".

2. On forged and unauthorised signatures see Halsbury, Vol. 2, p. 644, para. 887.

FOR APPELLANT: Levin.

FOR RESPONDENT: Fortuna.

## JUDGMENT.

This is an appeal against a judgment dated the 6th August, 1934, of the District Court of Jaffa, whereby the present Appellant, the Anglo-Palestine Bank, Ltd., was ordered to pay to the Respondent, the Ashrai Bank Co-operative Society, Ltd., the sum of $4000, being the amount of a draft drawn on a Bank in New York by the Appellant which was dishonoured when presented for payment by the holder, the Respondent.

The material facts are stated in the judgment of the District Court. The Court held that as the Respondent Bank acted in good faith without notice of any irregularity in the indorsement of the bill, it was protected by the proviso contained in the second paragraph of the first sub-Section of Section 23 of the Bills of Exchange Ordinance, 1929:—

> "Provided further that when a person pays a bill in good faith and in the ordinary course of business, it is not incumbent on him to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be; and the person so paying the bill is deemed to have paid the bill in due course although such indorsement has been forged or made without authority".

That proviso, however, applies only to a person who pays a bill in good faith; and hence is clearly inapplicable to the Respondent who, as indorsee, is not a person paying the bill but a person seeking to be paid.

The position of the Respondent, therefore, is governed by Section 37 of the Ordinance. But that Section must be read as subject to the provisions of Section 23(1); so that even a holder in due course is unable to recover under a forged signature or an unauthorised signature which has not been ratified.

The judgment of the District Court must, therefore, be set aside and the case remitted for the Court to determine whether the signature of the name of Max Karlinsky on the indorsement to the bill was,

1. forged; or
2. an unauthorised signature not amounting to forgery; or
3. authorised.

In the event of the Court finding that the signature was an unauthorised signature not amounting to forgery, the Court must further find whether or not the signature had been ratified at the date of the action.

Costs will follow the event.

Delivered this 27th day of February, 1936.

*Senior Puisne Judge.*

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HIGH COURT No. 12/36.

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

BEFORE: Trusted, C. J. and Khayat, J.

IN THE APPLICATION OF:—

Haim Hari. PETITIONER.

v.

1. The Chief Execution Officer, Haifa,
2. Rachel Hari. RESPONDENTS.

*High Court — Jurisdiction — Divorce, Sephardic and Ashkenazi Communities.*

In dismissing an application for an order to issue to the first Respondent, directing him to show cause why his order, dated the 11th January, 1936, in Execution File No. 3867, should not be set aside:—

HELD: It is not for the High Court to determine which of the two Courts, the Ashkenazi Court or the Sephardic Court, is competent to hear a suit relating to marriage, between members of the community.

ANNOTATIONS: For the history of this dispute and for further proceedings therein see H. C. 27/36 (9, C. of J. 745).

ORDER.

It is not for this High Court to decide whether the Court which gave judgment on the 20th *Elul* 5695, which appears to have been an Ashkenazi Court, or that which gave judgment on the 25th *Elul* 5695, which was a Sephardic Court, was competent to hear a suit regarding marriage as between these two parties.

For this reason, the petition is dismissed.

Delivered this 26th day of February, 1936.

*Chief Justice.*

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CRIMINAL APPEAL No. 152/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Manning, S. P. J. and Khaldi, J.

IN THE APPEAL OF:—

Mohammad Suleiman Abu Tabour (*alias* el Saghir) & an. APPELLANTS.

v.

The Attorney General. RESPONDENT.

*Wilful killing, C. C. O. 24, 214(c) — Shooting at a truck with intent to rob.*

*Evidence — Corroboration of the evidence of an accomplice — Procedure — Information — Sec. 24 C. C. O. need not be set out.*

In dismissing an appeal from the judgment of the Court of Criminal Assize, sitting at Jerusalem, dated the 14th December, 1937, whereby Appellants were convicted of wilful murder contrary to Sections 214(c), 215 and 23 of the Criminal Code Ordinance, 1936, and sentenced to death:—

HELD: 1. When armed persons fire at close range upon a truck with the intention of stopping it and robbing it, and one of the occupants is killed, that must constitute wilful killing.

2. In view of the wording of sec. 24 C. C. O., it is not necessary to refer to it in the information even though the prosecution must rely on it.

3. The evidence of an accomplice usually requires corroboration.

ANNOTATIONS:

1. On the second point see CR. A. 30/43 (1943, A. L. R. 308, at p. 313) which is to the same effect.

2. On the necessity for corroboration of the evidence of an accomplice see CR. A. 105/43 (1943, A. L. R. 754) and annotations; *cf.* CR. A. 18/44 (1944, A. L. R. 158).

FOR APPELLANTS: No. 1 — Saleh.
No. 2 — Elia.

FOR RESPONDENT: Crown Counsel — (Hogan).

### J U D G M E N T.

The Appellants in this case were convicted before the Court of Criminal Assize of murder under Section 214(c) of the Criminal Code Ordinance, which paragraph reads: "wilfully causes the death of any person in preparing for or to facilitate the commission of an offence or in the commission of an offence", and the case against them was that

they killed a man in the commission of the offence of highway robbery.

The case for the prosecution turned, to a large extent, upon the evidence of an accomplice. It is undoubtedly desirable that the evidence of an accomplice, at any rate, in the majority of cases, should be corroborated.

We have heard here a considerable argument as to the evidence in this case and our attention has been directed to a good deal of it, and we are satisfied that, so far as both the Accused are concerned, there was evidence to corroborate the evidence of the accomplice, both as to the commission of the offence and the connection of the Accused with it, and we think that the Court below was justified in coming to the conclusion to which it came.

It has been urged before us that the killing was not wilful. There can be no doubt that if several persons, armed, open fire at close range upon a motorcar or truck with the intention of stopping the car or truck and of robbing it, and death to the occupant of the car or truck results that must constitute wilful killing.

Reference has been made to Section 24 of the Code:—

> "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose any offence or offences is or are committed of such a nature that the commission is a probable consequence of the prosecution of such purpose, each of such persons being present at the commission of any of such offences is deemed to have committed the offence or offences committed".

and it may be that the prosecution must rely upon that Section. It is true that it is not referred to in the information, but having regard to the last lines of that Section it seems to us that it is not necessary to refer to it.

For these reasons, this appeal is dismissed in the case of both prisoners.

Delivered this 23rd day of December, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 30/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Shlomo Fried. APPELLANT.

v.

Chaya Esther Wolansky. RESPONDENT.

*Bills of exchange — Interest — Agreed rate continues to apply after maturity.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 2nd March, 1936:—

HELD: When the parties agree on a rate of interest it continues to apply even after the maturity of the bill.

ANNOTATIONS: *Cf.* C. A. 253/40 (1941, S.C.J. 104) and case cited in note 4 thereto.

FOR APPELLANT: Frank.

FOR RESPONDENT: Goitein.

JUDGMENT.

We are of opinion that there was evidence to support the District Court's finding that the agreed rate of interest between the parties was 2½%, and we cannot, therefore, interfere. And this rate having been agreed upon, it continues even after the maturity of the bill.

The appeal is, therefore, dismissed with costs and LP. 3.— advocate's fees.

Delivered this 24th day of March, 1937.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 125/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Copland and Khayat, JJ.

IN THE APPEAL OF:—

Martha Czernichovsky. APPELLANT.

v.

Attorney General. RESPONDENT.

*Criminal Procedure — Constitution of Courts — Courts Ord., sec. 11 — Failure to object to court as constituted — Information — Failure to give correct date — Irregularity causing no miscarriage of justice — Two informations — Evidence.*

In dismissing an appeal from the judgment of the District Court, Jerusalem, in Criminal Case No. 36/36, dated 8.10.1937:—

HELD: 1. Although an accused person is entitled to elect that the President sit alone, a Court constituted by the President (or R/President) and two Judges has jurisdiction and, if not objected to, may try the offence notwithstanding the election.

2. The Court may proceed to try on an information notwithstanding the existence of a previous information in respect of the same offence.

3. The insertion, in the information, of a wrong date of committal is not an irregularity which causes a miscarriage of justice.

ANNOTATIONS: On defective informations see the annotations to CR. A. 57/43 (1943, A. L. R. 450).

FOR APPELLANT: Goitein.

FOR RESPONDENT: Crown Counsel — (Hogan).

JUDGMENT.

1. The Appellant was charged before the District Court of Jerusalem for the following offence: that during September, 1935, and on the 14th—15th March, 1936, she being a medical practitioner, caused the miscarriage of one Yona Zadok knowing her to be pregnant by making use of special means. She was convicted and sentenced to imprisonment for one year and obtained leave to appeal to this Court.

2. The first ground of appeal is that the Court had no jurisdiction to try the Appellant for the offence, and Mr. Goitein who argued the appeal, referred to section 11 of the Courts Ordinance as amended by the Courts (Amendment) Ordinance, 1935.

That section lays down the constitution of the District Court in trials upon information and says that the Court shall be constituted of a President or Relieving President and two judges, but there is a proviso that on the application of an accused person the Court shall consist either of a President or a Relieving President sitting alone.

In this case such an application was made on behalf of the Appellant; but when the case came on for trial the Court was constituted of the Acting President and two judges. No objection was made to this constitution either by the Appellant or her advocate.

It is quite true that in criminal cases there can be no waiver by an accused person of any of his rights but the relevant provisions of the Courts Ordinance have no counterpart in English Criminal Procedure and they must be considered solely with reference to local circumstances.

In this case the Court, as constituted, had jurisdiction to try the Appellant. There was nothing to show how the application on behalf

of the Appellant was dealt with and we think that the advocate for the Appellant should immediately have drawn the Court's attention to the fact that the Court was not constituted in accordance with the application. No question of waiver arises and the Court as constituted had jurisdiction to try the offence.

3. The second ground of appeal is that a second information was filed and the Appellant should have been tried on the first and not on the second information. It is also objected that the date of the committal was wrongly stated in the information.

With regard to this we hold that there was a proper information before the Court filed on behalf of the Attorney General, and there was nothing to prevent the Court from proceeding to the trial of the Appellant on that information.

With regard to the wrong date of committal it should be unnecessary to say that that caused no miscarriage of justice and this ground of appeal must fail.

4. Thirdly it was urged by Mr. Goitein that there was no evidence apart from the evidence of Yona Zadok that the Appellant knew the girl to be pregnant. If the evidence is looked at as a whole we think there was ample evidence before the Court below to justify the conclusion that the Appellant knew the girl to be pregnant.

5. The fourth ground of appeal is that the witnesses for the prosecution who gave evidence implicating the Appellant were all accomplices. There is a specific finding by the Court below that Dr. Nussbaum was not an accomplice and we do not propose to interfere with or comment in any way upon that finding.

6. The last ground of appeal relates to the sentence imposed and as regards that we certainly think that it was not excessive. The appeal must be dismissed and the conviction and sentence affirmed.

Delivered this 26th day of November, 1937.

*Senior Puisne Judge.*

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HIGH COURT No. 31/36.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF:—

Meir Chelouche. PETITIONER.

v.

1. The Chief Execution Officer, Jaffa,
2. Alexander Koppel. RESPONDENTS.

*Execution — Custodians as third party under Arts. 77—78 Execution Law — Liability joint and several — Mejelle 647 inapplicable.*

In partly allowing an application for an order to issue to the first Respondent, directing him to show cause why his order, dated the 13th March, 1936, in Execution File No. 76/35, should not be set aside, and in discharging the order:—

HELD: The liability of custodians under Arts. 77 and 78 of the Execution Law is joint and several. Art. 647 of the *Mejelle* is not applicable.

ANNOTATIONS:

1. Petitioner's first point was that he had never been in actual possession of the goods in respect of which he was appointed Custodian and that Arts. 77 and 78 were, therefore, inapplicable to him. In addition thereto, he alleged that as no decree was ever issued against him, as required by Art. 8 of the Execution Law, no proceedings could be taken against him.

2. For other authorities on Art. 77 of the Execution Law see H. C. 76/43 (1943, A. L. R. 626) and H. C. 112/43 (1944, A. L. R. 19).

FOR PETITIONER: P. Joseph.

ORDER NISI.

We are of opinion that the Chief Execution Officer correctly directed himself in law when he held that Art. 77 of the Execution Law applied. A custodian is, in our opinion, a third party, and when he accepts the legal custody of goods he is liable to the provisions of Art. 77. The first point of the Petitioner, therefore, fails and we make no order on it.

With regard to the second point, the question of joint or several liability, order *nisi* to issue to the first Respondent to show cause, if he so desires, why the Petitioner should not be liable only for one half of the value of the goods seized.

Given this 14th day of December, 1936.

*British Puisne Judge.*

BEFORE: Trusted, C. J. and Frumkin, J.

ORDER.

This now comes before us as the return to a rule *nisi*, calling upon the Chief Execution Officer of Jaffa to show cause why the Petitioner should not be liable only for one half of the value of certain goods seized.

It seems that the Petitioner was a third party to certain execution proceedings in which he undertook, together with another person, "to keep the attached goods and to deliver them to the Execution Office otherwise he would be responsible for the payment of the debt civilly and criminally".

The order of the Execution Officer was as follows:—

> "You have accepted to be third party and responsible for the goods seized, which is also admitted in your application, dated 10.12.36. You failed to deliver the goods to the Execution Office when so requested to do and, therefore, in accordance with Sections 77 and 78 of the Execution Law and failing to deliver the goods seized you are personally responsible and your own property will be seized and sold.
>
> You can appeal to the High Court".

In his application for the rule, the Petitioner stated:—

> "In the alternative it is submitted that the Petitioner may be held liable only for half of the actual value of the attached property. The Petitioner was a co-custodian of certain property and as such he may be liable only for half of the value of the attached property. There is no provision in law that a co-custodian is jointly and severally liable with the other custodian and in the absence of express provision in law to this effect he may be only liable for half".

It is clear, therefore, that before the Chief Execution Officer and in the application to this Court the matter turned on the safe custody of the goods.

It is now argued that the real liability is based upon the responsibility for the payment of the debt and that in consequence Article 647 of the *Mejelle* applies and the Petitioner is only responsible for half the debt.

In our view the question before this Court is as to the liability for the goods, and we are of opinion that that Article of the *Mejelle* does not apply and that there is no Article of *Mejelle* applicable.

We, therefore, hold that upon the true construction of the undertaking given the responsibility is several and the rule is in consequence discharged. Advocate's fees LP. 3.—.

Delivered this 12th day of February, 1937.

*Chief Justice.*

HIGH COURT No. 60/37.

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

BEFORE: Copland and Greene, JJ.

IN THE APPLICATION OF :—

The General Mortgage Bank of Palestine Ltd. — PETITIONERS.

v.

1. President District Court, Tel-Aviv,
2. S. B. Sassoon, trustee in bankruptcy of Tova Halperin. — RESPONDENTS.

*Bankruptcy — Sale of bankrupt's property in satisfaction of mortgage debt — L. T. Ord., sec. 14, Bankruptcy Rules, r. 47 — Construction, Bankruptcy Ord., secs. 8(1)(2), 10(3), 141 — English practice, Waddell v. Toleman — P. D. C. exercising powers of sale under Sec. 14 not a Court; C. A. 16/27, C. A. 67/28; Courts Ord., secs. 11, 19; Succession Ord., sec. 26; Courts (Temporary Constitution) Ord., sec. 3(a)(d).*

In making absolute an order *nisi*, issued to the first Respondent, directing him to assume and exercise jurisdiction in the matter of an application submitted to him under Sec. 14 of the Land Transfer Ordinance:—

HELD: 1. A President District Court dealing with an application for an order of sale under sec. 14 of the Land Transfer Ordinance, does not constitute a Court.

2. A mortgagee may apply for the sale of the mortgaged property notwithstanding the bankruptcy of the mortgagor.

FOLLOWED: C. A. 16/27 (1, P. L. R. 126; 1, C. of J. 282); C. A. 67/28 (1, P. L. R. 346; 2, C. of J. 498); Waddell *v.* Toleman, 1878, 9 Ch. D. 212.

ANNOTATIONS:

1. The first Respondent's Order is reported in P. P. 8.xi.37.

2. See, on the first point, H. C. 4/38 (1938, 1 S. C. J. 91) and cases cited in the penultimate paragraph of the annotations at p. 92.

FOR PETITIONERS: Horowitz.

FOR RESPONDENTS: No. 1 — No appearance.
No. 2 — In person.

### JUDGMENT.

In this case the Petitioners are the mortgagees under two deeds of mortgage from one Tova Halperin, who has since become bankrupt, and is now represented by her trustee in bankruptcy.

It is not disputed that the moneys secured by the mortgages have now become due, and the mortgagees applied to the President of the District Court under Section 14 of the Land Transfer Ordinance for an order for sale of the mortgaged properties. The learned President refused to make the order, holding that the mortgagees must proceed under Rule 47 of the Bankruptcy Rules, 1936, and that Section 14 of the Land Transfer Ordinance did not apply in a case where the mortgagor had become bankrupt, since in his opinion Section 14 must be read subject to the provisions of Rule 47.

An order *nisi* was granted to the mortgagees by this Court, calling on the President of the District Court and the trustee to show cause why the President of the District Court should not assume and exercise jurisdiction under Sec. 14 of the Land Transfer Ordinance.

On the return to the rule, the trustee has supported the reasoning of the learned President and has advanced a further argument that the application for sale was wrongly addressed to the President of the District Court in his capacity as Chief Execution Officer. He has argued that the President of the District Court when exercising the functions conferred on him by Section 14 of the Land Transfer Ordinance constitutes a Court and is not sitting in his capacity of Chief Execution Officer, and, if that is so, then the High Court has no jurisdiction to entertain this present petition. He further asked us to hold that the cases of Max Ben-Zion and another *v.* The American Palestine Bank Ltd., Civil Appeal No. 16/27 (P. L. R. 1, p. 126), and Shahin *v.* El-Hayek, Civil Appeal No. 67/28 (P. L. R. 1, p. 346) which laid down that a President of a District Court, when determining an application for sale under the Land Transfer Ordinance, was exercising the functions of a Chief Execution Officer, were wrongly decided and are bad law.

We should have in any case very considerable diffidence indeed in over-ruling a decision of ten years' standing and which has been followed in thousands of applications by Presidents of District Courts even if we thought that it were wrong, but here no question of diffidence arises since we think that both the above cases correctly state the law. In every instance where a President of a District Court or Relieving President of a District Court is to be held to constitute a Court, the Ordinance specifically states that he shall — *cf.* Section 11 and 19 of the Courts Ordinance, and Section 26 of the Succession Ordinance. See also Section 3(a) and (d) of the Courts (Temporary Constitution) Ordinance, 1936. Section 14 of the Land Transfer Ordinance (Laws of Palestine, cap. 81, p. 834) on the contrary states that "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...". It will be observed that here there is no mention of any application being made to a "Court" — it is to be made to the President of the District Court. The President of the District Court, therefore, for the purposes of Section 14 of the Land Transfer Ordinance does not constitute a Court.

With regard to the other point, that the procedure under Sec. 14 cannot be applied in the case of a bankrupt mortgagor, the law is in our opinion equally clear and admits of no doubt.

There is nothing in the Bankruptcy Ordinance, 1936, to support the view taken by the learned President, and we must stress this point that a Rule cannot take away or diminish any right conferred by the Ordinance under which the Rule is made. The provisions of the Bankruptcy Ordinance on the contrary specifically lay down that the existing rights of a secured creditor shall in no way be diminished. Section 8(1) and (2) states:—

> "8. (1) On the making of a receiving order, the Official Receiver attached to the Court shall be thereby constituted Official Receiver of the property of the debtor, and thereafter, except as directed by this Ordinance, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with leave of the Court and on such terms as the Court may impose.
>
> (2) But this section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed".

and further, Section 10(3) is in these terms:—

> "Notwithstanding anything to the contrary in this section, the Court shall not restrain a mortgagee or other secured creditor in the exercise of his legal remedies in respect of any mortgage or security".

These sections must mean that a mortgagee can still apply for an order for sale under Section 14 of the Land Transfer Ordinance, and they are in no way curtailed by Rule 47.

In the English Courts it has been repeatedly held that a mortgagee, where the mortgagor is bankrupt, may take proceedings for foreclosure or sale in the Chancery Division and is not obliged to realise his security in the Bankruptcy Court — he has a choice of what course he will take. Perhaps the strongest case is Waddell *v.* Toleman (1878) 9 Ch. D. 212, where this principle was laid down. In this case the mortgagee was also bankrupt, but it was held that his trustee could take proceedings outside the Bankruptcy Court. In England the con-

sent of a Court, either the Bankruptcy Court or the Chancery Division, has to be obtained for the sale of mortgaged property — in this country it is the consent of the President of a District Court which is necessary, or that of the Bankruptcy Court. Sections 8 and 10 of the Bankruptcy Ordinance and Rule 47 are in practically the same terms as the corresponding provisions in the English Bankruptcy Act, and by Section 141 of the Bankruptcy Ordinance that Ordinance must be interpreted in accordance with English Law.

For these reasons we think that the rule must be made absolute. The second Respondent must pay the costs and LP. 5 advocate's fees to the Petitioners.

Delivered this 29th day of November, 1937.

*British Puisne Judge.*

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HIGH COURT No. 30/36.

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

BEFORE: Manning, S. P. J. and Frumkin, J.

IN THE APPLICATION OF :—

Shafiq Qa'war. PETITIONER.

v.

1. Chief Execution Officer, Nazareth,
2. Sharif Omar el Fahoum. RESPONDENTS.

*Execution — Bidder going back on sale before expiration of 30 days from final order of adjudication.*

In refusing an application for an order *nisi* to issue to the first Respondent, calling upon him to show cause why his order for final sale of 2nd Respondent's property to Petitioner should not be set aside and why the deposit paid by Petitioner should not be returned to him:—

HELD : The Petitioner was not entitled to cancel the sale and claim the return of the deposit on the ground that the property had not been transferred to him, as thirty days had not elapsed from the date of the final order until the time the Petitioner applied to cancel the sale.

ANNOTATIONS: The following are the facts underlying this application: On 2.8.35 an order for final sale of 2nd Respondent's property was made in favour of a third person. On 25.9.35 Petitioner was permitted to make a higher bid and he deposited 10% of his bid. From 26.9.35 until 12.11.35 Petitioner endeavoured to obtain transfer in the Land Registry but was unsuccessful as the file had not yet been sent back by Respondent No. 1. On 12.11.35 Petitioner asked for the

refund of his deposit alleging that transfer had not been effected within 30 days from the final order as prescribed by Art. 111, Execution Law. Respondent No. 1 on 21.11.35 refused Petitioner's request on the ground that final sale had not yet taken place in favour of Petitioner. At the same time Respondent No. 1 declared the Petitioner to be the highest bidder and a final order of sale to him was issued. Hence this application.

PETITIONER: In person.

ORDER.

After a final sale, on 2nd August, 1935, in favour of others, the auction was reopened and a deposit accepted from the Petitioner. It was not until the 21st November, 1935, that a final sale in favour of Petitioner was ordered. Had there been no transfer within thirty days of that date, he would be entitled to have his deposit refunded: but the transfer could not be effected owing to Petitioner's fault. He claimed his money back prior to the order for final sale in his favour.

There will, therefore, be no order.

Given this 16th day of October, 1936.

*Senior Puisne Judge.*

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CRIMINAL APPEAL No. 126/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Copland and Khayat, JJ.

IN THE APPEAL OF:—

'Isa Sa'id Adb Er-Rahman of Ijzem Village. APPELLANT.

v.

1. The Attorney General,
2. Ahmad Ibn Kazem 'Isa of Ijzem Village. RESPONDENTS.

*Criminal procedure — One accused acquitted and the other convicted on the same evidence — Court may disbelieve part of the evidence — Attempted murder — Wounds need not be dangerous to life — C. C. O. sec. 43 — Circumstances to be taken into account in assessing compensation — Sufferings to be taken into account.*

In dismissing an appeal from the judgment of the District Court of Haifa,

dated 12.10.37, sentencing Appellant to five years' imprisonment and ordering him to pay LP. 30 to the Civil Claimant, the second Respondent:—

HELD: 1. A Court of trial is entitled to believe part of a witness's statement and to disbelieve another part, so that one co-accused may be convicted and the other, on the same evidence, be acquitted.

2. In charges of attempted murder the wounds inflicted need not be proved to have been dangerous to life.

3. A separate enquiry need not be held by the Court to assess the amount of compensation payable under sec. 43, C. C. O. The assessment is made immediately after conviction, in a summary manner.

4. (*Semble*): Suffering may be taken into account in assessing the compensation.

ANNOTATIONS:

1. On the first point *cf.* CR. A. 88/41 (1941, S. C. J. 303) and note.

2. On the requisites for a conviction of attempted murder see CR. A. 86/43 (1943, A. L. R. 692) and note 1.

3. See CR. A. 113/42 (1942, S. C. J. 500) and note 2 on compensation under sec. 43 of the C. C. O.

FOR APPELLANT: Abcarius.

FOR RESPONDENTS: No. 1 — Assistant Government Advocate — (Ghussein).

No. 2 — No appearance.

## JUDGMENT.

In this case the Appellant was convicted by the District Court of Haifa of attempted murder and sentenced to five years' imprisonment and to pay LP. 30 compensation.

The first ground of appeal is that another person has been charged at the same time as the Appellant with the same offence and that, though the evidence against both of them was almost identically the same, the other person was acquitted while the Appellant was convicted.

The logical conclusion from that is that the other person ought to have been convicted also, but it must be clearly laid down that any court trying a criminal case is at liberty to disbelieve part of a witness's statement and to believe any other part and that is what must have happened in this case. This Court is unable to put itself in the position of the Court below and we have not seen the witnesses nor had any opportunity of observing their demeanour. The point is that there was ample evidence before the Court below to justify it in convicting the Appellant, and whether any other person ought to have been convicted or not is irrelevant.

The second ground of appeal is that the medical evidence shows that the three wounds inflicted on the injured person were not dangerous.

In a charge of attempted murder it is not necessary for the prosecution to show that any of the wounds inflicted are dangerous to life. The evidence in this case showed three wounds inflicted by a sharp instrument and that another wound was inflicted by a blunt instrument. They necessitated the stay of the injured person in hospital for seventeen days and, after his discharge from hospital, he had to report daily to the hospital for another eight days. From the nature of the medical evidence and from the evidence of the witnesses who saw the wounds inflicted the Court below was justified in finding that the charge of attempted murder had been established.

The last ground of appeal is with reference to the compensation of LP. 30 which was awarded to the injured person. Abcarius Bey for the Appellant stated that the Court below had no evidence to enable it to assess any compensation. We are not in agreement with that. The Court below had evidence of the murderous assault on the injured person and of the wounds which were caused, and must have had a fairly accurate idea of the suffering which was caused to the injured person. Section 43 of the Criminal Code Ordinance does not mean that the Court has to hold a separate enquiry in the matter of compensation — it gives the Court the power to assess that compensation immediately after the conviction. It is meant to be a summary method of awarding compensation for loss caused to a person injured by an offence.

There are no merits in any of these grounds of appeal, and the appeal must be dismissed, the conviction and sentence affirmed including the amount of compensation awarded.

Delivered this 17th day of November, 1937.

*Senior Puisne Judge.*

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HIGH COURT No. 36/37.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :—

Father Haroun Karam. PETITIONER.

v.

1. Chief Execution Officer, Jaffa,
2. Mrs. L. Tayyan & 2 ors. RESPONDENTS.

*Religious Courts — Maronite Court of Appeal sitting in Lebanon has*

*no jurisdiction in Palestine, P. C. 47/32 — Religious waqfs, Courts having jurisdiction under the Succession Ord. and the Civil and Religious Courts (Jurisdiction) Ord. — Execution and stay of execution of Religious Courts' judgments — S. T. 3/26 — Quaere jurisdiction of Maronite Religious Courts under art. 51, P. O. in C.*

In discharging an order *nisi*, calling upon the first Respondent to show cause why he should not refrain from executing a judgment of the Maronite Ecclesiastical Court of Haifa, dated 22.7.36:—

HELD: 1. A Maronite Court of Appeal, sitting in the Lebanon, has no jurisdiction in Palestine and cannot alter or order stay of execution of a judgment of the local Maronite Religious Court.

2. *Quaere* whether it would make any difference if that appellate Court sat in Palestine.

3. *Quaere* the jurisdiction of the local Maronite Court.

FOLLOWED: P. C. 47/32 (1, P. L. R. 831; 2, C. of J. 406). S. T. 3/26 (not reported).

ANNOTATIONS: The decision in this case is referred to in subsequent proceedings regarding the same *waqf*: C. A. 84/40 (1940, S. C. J. 313).

FOR PETITIONER: Hazou.

FOR RESPONDENTS: Nos. 2—4 — Moghannam and Anabtawi.

ORDER.

The facts of this case are simple and are not in dispute.

The matter arises in connection with a *waqf* known as the Alexander Awad *Waqf*, which is under the administration of the Maronite Religious Court, situated at Haifa. This Court on 28.3.36 gave a judgment ordering the payment of certain shares in the said *waqf* income to the 2nd, 3rd and 4th Respondents, and on 23.7.36 the Maronite Court confirmed their previous judgment of 28.3.36. The Petitioner who is one of the *Mutawallis* of the *waqf*, the other *Mutawalli* being the District Commissioner of the Southern District, has appealed against the judgment of the Maronite Court at Haifa to the Maronite Patriarchal Tribunal at Bikirkeh, which is within the territory of the Lebanese Republic, and this Patriarchal Tribunal on the 29th September, 1936, purported to order a stay of execution of the judgment of the lower Court. The 2nd, 3rd and 4th Respondents applied to the 1st Respondent, the Chief Execution Officer of Jaffa, for execution of the judgment of 23.7.36, and the parties were duly summoned to a hearing before the Chief Execution Officer. The Maronite Religious Court of Haifa on 8.6.37 issued what they call a judgment, reciting the order of the Patriarchal Tribunal ordering a stay of execution, and in accordance with these orders staying the judgment of the Haifa Court pending

decision by the Maronite Appellate Court. The Chief Execution Officer to whom this judgment was produced declined to acknowledge its validity on two grounds, first, that the Maronite Court of Appeal in the Lebanon has no jurisdiction in Palestine and, secondly, because he was not aware of any statutory enactment which entitled a Religious Court in Palestine to stay execution of a judgment which had been lodged in the Execution Office.

In the first place it is beyond all doubt that the Maronite Court of Appeal in the Lebanon has no jurisdiction whatsoever in Palestine. This is quite definitely decided by the case of Abdullah Beq Chedid and others *v.* Tannenbaum (P. L. R. 831, Privy Council No. 47 of 1932) where their Lordships held that the Religious Courts in Palestine were the only Religious Courts which have jurisdiction under the Succession Ordinance, 1923, and the same reasoning applies to jurisdiction under the Civil and Religious Courts (Jurisdiction) Ordinance (Laws of Palestine Cap. 18), and it makes no difference whether that jurisdiction is exercised in first instance as in the case quoted above or in an appellate capacity as here; the Religious Courts in Palestine are the only Religious Courts having jurisdiction in this country. Their Lordships' expression of opinion admits of no exceptions.

This being so, the Maronite Patriarchal Tribunal situated in the Lebanon had no jurisdiction to stay the execution of the judgment of the Maronite Religious Court at Haifa and their order to this effect is invalid and void, and the so-called judgment of the Haifa Court, based as it is expressed to be on this invalid order, is itself also invalid and the first Respondent was fully entitled and indeed bound to disregard it.

It has been argued before us by the Petitioner that it was premature to decide this question. I do not agree, because if a foreign Religious Court has no jurisdiction, appellate or otherwise, in this country then no judgment given by it can in any way affect the judgment already given by the Maronite Religious Court in Palestine, and it would, therefore, be wrong to prevent the 2nd, 3rd and 4th Respondents from executing the judgment which they have already obtained in their favour and which so far as the Courts of this country are concerned has now become final.

I do not think that the case of Khayat *v.* Beyrouti (Special Tribunal No. 3 of 1926) has any bearing on this present case. The point as to the jurisdiction of a foreign Religious Court in Palestine was never argued before that Tribunal, and no pronouncement was made on the point; in the absence of argument it would seem to have been assumed for the purpose of that case that there might be jurisdiction. If it had

been decided that a foreign Religious Court had jurisdiction in Palestine, then it would now be overruled by Chedid and others *v.* Tannenbaum (*supra*).

I have assumed for the purpose of this judgment that the Maronite Religious Court in Palestine was in the words of Art. 51 of the Palestine Order-in-Council, 1922 "established and exercising jurisdiction" at the date of the Order-in-Council in September, 1922. I have very grave doubts if there were in fact any legally recognised Maronite Religious Courts established and exercising jurisdiction in Palestine in 1922, since the only Religious Courts recognised by the Turkish Government were the Moslem *Sheri'a* Courts, the Rabbinical Courts and the Courts of the Eastern Orthodox Church, and possibly those of the Armenian Church. I must not be taken, therefore, to be expressing any definite opinion on this point, which thus remains open.

It has also been argued that the Maronite Patriarchal Tribunal as an appellate Court may sit in Palestine — the answer to that is that it has not been alleged that it has in fact ever sat in Palestine and I profoundly doubt if it has ever even contemplated sitting in Palestine, and in any case the Appellate Court which purports to deal with the appeal is definitely situated in the Lebanon.

In any event I doubt if, even if it sat in Palestine, it would be a tribunal which would be legally recognised, since it would not be a Tribunal established and exercising jurisdiction in September 1922, in Palestine.

In my opinion the rule must be discharged and the interim order of stay granted on 23rd June, 1937 rescinded.

The Petitioner must pay all the costs of the 2nd, 3rd, and 4th Respondents with LP. 4 advocate's fees for each advocate.

Given this 13th day of July, 1937.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 128/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Copland and Khayat, JJ.

IN THE APPEAL OF:—

Dr. Arieh Ulitski & an. — APPELLANTS.

v.

The Jerusalem Local Building and Town Planning Commission. — RESPONDENTS.

*Town planning — Local Commission may sue, T. P. Ord.* (1936) *sec.* 3*a*(1), *Municipal Corp. Ord.* 131 — *"Proceedings" include criminal prosecution — Appeals — M. C. J. O.* 1935, *sec.* 5 — *Only A. G. or accused may appeal — Costs in Criminal Case.*

In allowing an appeal from the judgment of the District Court of Jerusalem, dated 30.6.37, and in restoring the judgment of the Magistrate:—

HELD: 1. A Local Commission, being a Municipal Corporation, may institute criminal proceedings.

2. An appeal from an acquittal in such prosecutions can only be filed by the Attorney General or his representative.

ANNOTATIONS:

1. Note that sec. 35(8) of the Town Planning Ordinance as enacted by the 1941 Amendment Ordinance now gives a right of appeal to "any party to the proceedings".

2. On the meaning of the word "proceedings" see the annotations to C. A. 67/44 (1944, A. L. R. 387).

FOR APPELLANTS: Levitsky.

FOR RESPONDENTS: Said.

JUDGMENT.

In this case the Appellants were acquitted in the Magistrate's Court of Jerusalem of a contravention under the Town Planning Ordinance, No. 28 of 1936. The complainants in that case, the Jerusalem Local Building and Town Planning Commission, appealed to the District Court and were successful in their appeal. Leave was granted to appeal to this Court.

The first point taken by Mr. Levitsky for the Appellants is that the Jerusalem Local Building and Town Planning Commission had no power under the law to institute proceedings of a criminal nature against any person. We are against him on this point. Section 39(1) of the Town Planning Ordinance, 1936, says "A Local Commission, being a Municipal Council, may institute proceedings in or appear before any Court in accordance with the provisions of Section 131 of the Municipal Corporations Ordinance, 1934"; and when we turn to the latter section we find there the words "any municipal corporation or council may institute proceedings in and appear before any Court". The word "proceedings" in those two sections is not limited in any way, and we have no hesitation in holding that the word applies equally to civil and criminal proceedings.

Mr. Levitsky's second point is that the Respondents had no right of appeal from the judgment of the learned Magistrate. On this we are in agreement with him. Under section 5 of the Magistrates' Courts

11, 1938 Bvdce.

Jurisdiction Ordinance, No. 16 of 1935, only two persons have a right of appeal: firstly a convicted person, secondly the Attorney General or his representative. It has been clearly laid down in previous cases that when there has been an acquittal in the Magistrate's Court, the only person who can appeal is the Attorney General or his representative.

In the present case also we hold that the Respondents had no right to appeal from the judgment of the learned Magistrate acquitting the Appellants, and for this reason the present appeal is successful, and the judgment of the learned Magistrate restored.

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

Delivered this 17th day of November, 1937.

*Senior Puisne Judge.*

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HIGH COURT No. 59/37.

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

BEFORE: Manning, S. P. J. and Khayat, J.

IN THE APPLICATION OF:—

Farha Abboud Mansour & 2 ors. PETITIONERS.

v.

1. The Chief Execution Officer, Jaffa,
2. Farid Knesevitch. RESPONDENTS.

*Execution — Sale by auction — Re-assessment.*

In discharging an order issued to the first Respondent to show cause why his order made in Execution File No. 578/35, dated the 16th July, 1937, ordering the re-assessment of the Land should not be set aside and why he should not be ordered to order the registration of the property in the name of Petitioners:—

HELD: The Chief Execution Officer may order a re-assessment of property sold by auction.

ANNOTATIONS: *Cf.* H. C. 64/42 (1942, S. C. J. 658) and H. C. 84/42 (*ibid.*, p. 733).

PETITIONERS: In person.

RESPONDENTS: No. 1 — In person.

### O R D E R.

1. This application arises out of a judgment obtained against the second Respondent in the District Court of Jaffa. Petitioners attached

property of the second Respondent in execution and the property was assessed at LP. 351.202 mils. The property was put up to auction and the only bid that was received was a bid by Petitioners for LP. 112.

2. Some time later the Chief Execution Officer ordered that the property should be re-assessed, and this is the order which is challenged in these proceedings.

3. We are of the opinion that the making of such an order was a matter within the discretion of the Chief Execution Officer, and that it was in the circumstances a proper use of the exercise of his discretion.

4. For this reason the order *nisi* must be discharged with costs to include LP. 2.— advocate's fees.

Delivered this 3rd day of December, 1937.

*Senior Puisne Judge.*

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CRIMINAL APPEAL No. 71/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Khayat, JJ.

IN THE APPEAL OF:—

Yousef Sarhan el Mulla. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Possession — Manner in which it may be inferred — Constitution of Court and sentence in disturbance cases — Order of High Commissioner of 4.5.36 — Recommendation by Trial Court.*

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 3rd June, 1937, whereby Appellant was convicted of being in possession of firearms and ammunition, contrary to Section 8A(i) of the Emergency Regulations, as amended, and sentenced to five years' imprisonment:—

HELD: 1. When several people live in the same house in which arms are found the Court is entitled to find that all or that one of them was in possession.

2. The Court of Appeal cannot, by virtue of the Emergency Regulations, interfere with the findings of the Trial Court that an offence is a disturbance case for the purpose of the constitution of the Court. Nor can the sentence be reduced below the statutory limit.

ANNOTATIONS:

1. *Cf.*, on the possession point, CR. A. 77/43 (1943, A. L. R. 654).
2. On the second point *vide* CR. A. 97/37 (*post*, p. 319).

FOR APPELLANT: Abdul Hadi.
FOR RESPONDENT: Ghussein.

JUDGMENT.

It is quite clear that there was evidence in this case upon which the Court below came to the conclusion to which it came.

If several people live in a house in which arms are found they may all be in possession of them, but the Court is perfectly entitled, having regard to the facts of the case, to find that one is in possession and to give the others the benefit of the doubt.

With regard to the second point raised as to the constitution of the Court, the Court below has found:—

> "Court holds it is a disturbance case within meaning of High Commissioner's order of 4.5.36 for purpose of the constitution of the Court here".

With that finding we are, by the provisions of the Ordinance, unable to interfere. We would point out that this point goes to the constitution of the Court and not to the merits of the case.

With regard to the sentence, we have no jurisdiction to reduce it below five years.

A recommendation was made by the President of the District Court, and that recommendation will be passed to the High Commissioner.

The appeal will be dismissed.

Delivered this 10th day of July, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 60/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

"Hanahag" Cooperative Society, Ltd. & an. APPELLANTS.

v.

Lloyd's Underwriters. RESPONDENTS.

*Insurance — Arbitration as condition precedent to claim in Court — Construction of policy — Arbitration waived by tacit consent — When arbitration proceedings could be said to have been pending — Suing*

*local agents on a Lloyd's Underwriters policy — Limitation of time to bring action — Estoppel.*

In allowing an appeal from the judgment of the District Court of Jaffa, (sitting at Tel-Aviv), dated the 9th March, 1937:—

HELD: Where a party, relying on representations made to him by another party, is out of time in filing action, the party making the representaton is estopped from pleading that the action was filed out of time.

ANNOTATIONS:

1. *Cf.* C. A. 39/37 (*ante*, p. 129) for another instance of action being brought against the General Insurance Office instead of against Lloyd's Underwriters.

2. On the effect of the limitation clause *vide* C. A. 96/35 (*ante*, p. 60) and for a recent English case see the decison of the House of Lords in Heyman & an. *v.* Darwins Ltd., 1942, All E. R. 337.

FOR APPELLANTS: Smoira.

FOR RESPONDENTS: Seligman.

## JUDGMENT.

1. This appeal arises out of a claim for indemnity under a policy of insurance on a motor car and the goods being conveyed therein. The motor car was destroyed by fire on the 21st March, 1935, and the insured (the Appellants) made a claim. This claim was not made to the Respondent but, in accordance with the terms of the policy, to the General Insurance Office at Tel-Aviv. The General Insurance Office repudiated the claim and under the terms of the policy before the Appellant could submit the matter for decision in a Court of Law, the amount of the damage had to be assessed by arbitration. Arbitrators were appointed, but no award was made, as the Appellants and the General Insurance Office came to an agreement as to the damage on the 18th June, 1936. The Appellants then started an action in the District Court of Jaffa against the General Insurance Office, but the action was dismissed apparently on the ground that the present Respondents were the proper Defendants to be sued and that the General Insurance Office had been wrongly made a Defendant.

2. The Appellants then brought the present action against the Respondents — the date of the filing of the statement of claim being the 11th January, 1937. Their action was dismissed on the ground that, in accordance with certain conditions attached to the policy the claim had been filed out of time.

3. There were two sets of conditions attached to the policy; for purposes of distinction they were marked A and B in the Court below. There was a good deal of argument both here and below on behalf of

the Appellants to the effect that the conditions marked B did not apply to the car but only to the goods conveyed in the car. I do not agree, conditions A and B clearly cover the whole policy, and apply to the insurance effected both on the car and the goods.

4. The two relevant conditions are clauses 13 and 19 in conditions B. I shall deal first with clause 19. This reads as follows:—

> "In no case whatever shall Lloyd's Underwriters be liable for any loss or damage, after the expiration of 12 months from the happening of the loss or damage unless the claim is subject of pending action of arbitration".

5. There was some discussion in the Court below as to whether the words "of arbitration" should not be 'or arbitration" and the Court inclined to the view that "of" was a misprint for "or". Otherwise the meaning of the clause is clear, it bars any action on the policy against the Respondents after the exipration of 12 months from the loss, unless there are, at the time of the said expiration, arbitration proceedings pending. The loss in this case was on the 21st March, 1935, and the twelve months expired on the 20th March, 1936.

6. The arbitrators had been appointed in February, 1936 and had held their first and only meeting on March, 17th, 1936. They did not arrive at any agreement, nor did they appoint an umpire. The parties, as has been seen, came to an agreement as to the amount of the loss on 18th June, 1936. There is a finding by the Court below that the arbitration proceedings were dropped by the tacit consent of the parties and this finding is a fair inference from the pleadings and the argument in the Court below. Under the Schedule to the Arbitration Ordinance the arbitrators had a period of three months to make their award from the time of their entering on the reference. That gave them up to the 17th June, 1936, and by section 10 of the said Ordinance this period could have been enlarged at any time after that date. The date of the agreement between the parties, June 18th, 1936, may be taken as the date of the dropping of the arbitration proceedings by consent. This being so it is clear that arbitration proceedings were pending on the 20th March, 1936, and that clause 19, therefore, did not apply to bar the action of the Appellants.

7. I am unable to understand the decision of the Court below on this point. What it said in its judgment was this:—

> "We are unable to find that the existence of arbitration proceedings on 21.3.36 avoided the 12 months period. What it did was to keep alive the liability of the defendant beyond the twelve months period for so long as the arbitration proceedings might continue, the result being that any decision that might be given in the arbitration pro-

> ceedings would be binding upon the defendants in spite of the fact that the twelve months had expired. We must, therefore, find whether any arbitration proceedings were pending at the date when the suit was brought, *viz.* 11.1.37".

It must be remembered that liability had been repudiated and that no action could be brought by the Appellants until the amount of the loss had been determined by arbitration. The arbitration was binding upon the Respondents only so far as the amount of loss was concerned; when this amount was ascertained the Respondents were still free from liability until their liability or otherwise was determined by the Court of Law. Clause 19 would be barren of result if its only effect was to extend the twelve months' period until the completion of the arbitration proceedings. And there was no justification in the Court below seeking to find whether arbitration proceedings were pending when the action was commenced on January 11th, 1937. Arbitration proceedings had to be completed before any action could be brought. The true view of clause 19 is that the twelve months' bar operates only if no arbitration proceedings are pending when the period expires. If such proceedings are pending then the clause does not come into operation at all, and one has to turn to clause 13 to see what time limit is fixed in which the Appellants must take action.

8. The last part of clause 13 is as follows:—

> "... or if the claim be made and rejected and an action or suit be not commenced within three mouths after month after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this policy shall be forfeited".

9. The clause contains a misprint of "mouths" for "months" and the words "month after" are repeated. There is however no ambiguity. The Appellants did take action within a period of three months after the agreement, but they took it against the General Insurance Office, and not against the Respondents. They contend that this was sufficient compliance with the condition, the Respondents contend it was not.

10. The outside of the policy is headed "Lloyd's London" and between these two words appear the words "Incorporated by Act of Parliament". The insurers are Lloyd's Underwriters and the Appellants were directed in the event of any occurrence likely to result in a claim to give immediate notice to the General Insurance Office at Tel-Aviv. The policy consists of seven pages, two of these are devoted to the signatures of the underwriters, the remaining five embody the agreement between the parties. For purposes of convenience, I shall number these pages in the order in which I have mentioned them; pages 1 and 2 will then contain the signatures; page 3, certain introductory matter;

page 4, the general scope of the agreement; page 5, the conditions which were marked A in the Court below; and pages 6 and 7 the conditions which were marked B in the Court below.

11. Clause 8 on page 4 indemnifies the assured against law costs incurred with the written consent of Lloyd's Underwriters or the General Insurance Office. Clause 9 of the same page deals with certain repairs and prescribes that the sanction of the General Insurance Office must be obtained. Clause 10 on the same page allows the General Insurance Office at its option to represent the assured at legal proceedings. Exception (h) on the same page exempts the insurers from liability under an indemnity contracted by the Insured without the written authority of the General Insurance Office or Lloyd's Underwriters.

12. Clause 1 on page 5 prescribes various notices to be given to the General Insurance Office, and directs that the assured shall in a criminal matter "cooperate with the General Insurance Office in securing the conviction of the offender". It also contains the words "should the insured obstruct or oppose any action on the part of the General Insurance Office or Lloyd's Underwriters which Lloyd's Underwriters are entitled to take by virtue of this policy .....". Clause 2 on the same page requires the written consent of Lloyd's Underwriters or the General Insurance Office to any admission by the insured. Clause 6 on the same page gives certain powers of inspection to Lloyd's Underwriters or the General Insurance Office. Clause 7 on the same page is important, as it gives the General Insurance Office, without mentioning Lloyd's Underwriters, liberty to determine the policy by notice in writing, and empowers the General Insurance Office to return a part of the premium.

13. Clause 2 on page 6 makes the General Insurance Office the proper person to give a receipt for the premium. Clause 3 on the same page requires notice of other insurances to be given to the General Insurance Office. Clause 8 on the same page requires the sanction, by endorsement on the policy, of the General Insurance Office to any alteration in the property insured. Clause 10 on the same page gives the insured a right to terminate the policy, in which case the General Insurance Office retains part of the premium. Clause 11 on the same page prescribes that claims for loss are to be made to the General Insurance Office.

14. Clause 12 on page 7 gives the General Insurance Office the rights of insurers *re* salvage. And in clause 13 the words "if the insured .... shall hinder or obstruct the Underwriters in doing any of the acts referred to in condition 12" occur, showing the identification of the General Insurance Office with the Underwriters.

15. I have analysed the policy at some length in order to show the part played by the General Insurance Office in its provisions. It represents the Underwriters in every contingency that may arise. Mr. Seligman, for the Respondents, admitted that the Underwriters have no place of business in Palestine. There was, in my opinion, ample excuse for the Appellants in choosing to sue the General Insurance Office. There are, moreover, certain letters which make the action of the Appellants still more excusable.

16. There are letters from Mr. Seligman, advocate for the Respondents, leading to the view that the Appellants were misled by him as to the proper party to make a defendant in the action. In a letter of January 30th, 1936, he speaks of "repudiation of liability by my clients"; and in a letter of February 10th, 1936, he says "my clients agree to proceed to arbitration". There is a further letter of June 18th, 1936, which I think it better to set out in full:—

> "My clients, the General Insurance Office, Ltd., have handed to me your letter, Ref. No. 1204, of the 16th June, 1936, with instructions to reply to the same.
>
> My clients are prepared to agree with your clients that the amount of the loss in respect of the vehicle is LP. 550.—, including the return of the vehicle, or LP. 600.— without the return of the vehicle.
>
> This agreement is merely an agreement as to the amount but without prejudice whatsoever to the repudiation by my clients of liability under the policy in respect of the claim or otherwise.
>
> My clients will agree to return the vehicle to your clients, but it must be understood that the vehicle can only be returned after all proceedings in connection with the claim have been finally disposed of."

17. This, at any rate, is clear. Mr. Seligman's clients were the General Insurance Office, Ltd. It was they who repudiated the liability, it was they who agreed to proceed to arbitration, and it was they who agreed to the amount of the loss. The letters were practically an invitation to the Appellants to regard the General Insurance Office, Ltd., as the proper defendant to be sued, when the time for action arrived.

18. Referring again to the clause 13, there was of course no award by the arbitrators, but there is a decision of this Court which lays it down that in such a case the relevant date is the date of the agreement. The Appellants did commence an action within the period of three months specified, but they lost it because the District Court held they had sued the wrong Defendant. It is clear that the Appellants sued the wrong Defendant because they were misled both by the clause in the policy and by the letters written to them by Mr. Seligman. There can be little doubt that the policy is a distinct admission that the Ge-

neral Insurance Office represented the Respondents in Palestine for all purposes connected therewith. Mr. Seligman said he held a power of attorney for the Respondents in Palestine — he was the advocate who negotiated with the Appellants on behalf of the General Insurance Office — this office was acting on behalf of the Respondents. In these circumstances and as the Respondents have no place of business in Palestine, there was a representation to the Appellants that the action might be brought against the General Insurance Office. The Appellants brought an action accordingly but it was dismissed, and the three months had elapsed. Their position had been altered for the worse by the representation.

19. The matter may be looked at from two points of view. The first is that the Appellants did take action within three months after agreement, and action against the person whom they were led by the Respondents' representatives to consider to be a defendant who might be sued. The other is that the Respondents' representatives made such representations that it was reasonable for the Appellants to act on them and to sue the General Insurance Office. By so acting, the position of the Appellants has been altered to their prejudice and the Respondents are estopped from denying that the Appellants did take action within the three months after the agreement.

20. On this view of the matter the appeal should be allowed, the judgment of the District Court should be set aside and the case remitted to it for a new trial on the other issues involved. Costs to abide the event.

Delivered this 25th day of June, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 159/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Khayat, JJ.

IN THE APPEAL OF:—

Meir Gorodissky & an. — APPELLANTS.

v.

Husni Ramadan Abu Khadra. — RESPONDENT.

*Bankruptcy — Setting aside a bankruptcy notice — New notice may be issued — Proceedings in bankruptcy are not commenced when bank-*

*ruptcy notice is set aside — No appeal when proceedings have not commenced.*

In dismissing an appeal from the order of the District Court of Jaffa (C. D. C. Ja. 82/37), dated July 9th, 1937:—

HELD: 1. A bankruptcy notice may not be set aside otherwise than in accordance with the provisions of the Bankruptcy Ordinance and the rules.

2. There is no appeal from an order setting aside a bankruptcy notice as bankruptcy proceedings cannot be said to have commenced.

3. Even if the setting aside of a bankruptcy notice is invalidly made, a fresh notice may be issued.

ANNOTATIONS: The following is the text of the District Court judgment:—

"Attachment and sale of property is a remedy for the creditor to collect his debt. It is in fact in the nature of security for the debt and in that light, proceedings in Bankruptcy are a remedy incompatible with that remedy. The result is the same, *i. e.* the sale of the property to satisfy the debt. The creditor can ask for either remedy but not for both at the same time. The Bankruptcy Notice is, therefore, set aside. Costs and LP. 2 advocate fees".

FOR APPELLANTS: Lindermann.

FOR RESPONDENT: G. Salah.

JUDGMENT.

In the first place we think that there is no appeal from the District Court, as proceedings in bankruptcy have not commenced, but it seems to us that the District Court misdirected itself in setting aside the bankruptcy notice otherwise than in accordance with the provisions of the Bankruptcy Ordinance, 1936, and the Rules.

We see no reason why another bankruptcy notice should not be issued, and this view which I have indicated will be conveyed to the Court below.

The appeal will, therefore, be dismissed with costs and LP. 3 advocate's fees.

Delivered this 5th day of October, 1937.

*Chief Justice.*

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CRIMINAL APPEAL No. 142/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Plunkett and Khayat, JJ.

IN THE APPEAL OF:—

Tewfiq Ali El Khatib. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Construction of statutes — Constitution of Court and procedure in case of offence against Emergency Regs. 8A(i); Courts (Temporary Constitution) Ord., 1936, Courts (T. C.) (Further Provisions) Ord., 1936; Ords. 69/36, 70/36 amending the Courts Ord. and the T. U. I. Ord. — Retroactivity of statutes, Abeyesekera v. Jayatilake — Jurisdiction retroactively conferred — Construction by intention — Guilty knowledge.*

In allowing an appeal from the judgment of the District Court of Haifa, dated the 18th August, 1936, whereby the Appellant was convicted under Regulation 8A(i) of the Emergency Regulations, 1936, and Section 26(2) of the Firearms Ordinance, 1922, and sentenced to five years' imprisonment, and in remitting the case with directions:—

HELD: 1. The Turkish law relating to the retroactive effect of penal statutes applies only to the construction of such statutes.

2. The legislator in Palestine has the power to enact laws with retrospective effect.

3. So also, the legislation may validate irregular acts previously committed.

4. Unlike in the case of charges under the Firearms Ordinance, guilty knowledge is a necessary element in offences under Reg. 8A(i) of the Emergency Regulations. *Mens rea* may, however, be inferred.

REFERRED TO: CR. A. 109/36 (7, C. of J. 300).

FOLLOWED: Abeyesekera *v.* Jayatilake, 1923, 48 L. T. R. 71.

ANNOTATIONS:

1. On the powers of the legislature of Palestine in respect of penal legislation *cf.* CR. A. 88/37 (*post*).

2. On the fourth point *cf.* CR. A. 71/37 (*ante*, p. 308) and note 2.

FOR APPELLANT: Moghannam.

## JUDGMENT.

1. On the 18th August last the Appellant was convicted by a District Court for being in possession of a pistol and ammunition contrary to Section 8A(i) of the Emergency Regulations, 1936.

2. The District Court consisted of a President, sitting alone and there had been no preliminary investigation previous to the trial. It was decided in the case of Hauptmann *v.* the Attorney General, Criminal Appeal No. 109 of 1936, that up to the 24th August, 1936, cases under the Emergency Regulations could not be tried by a President, sitting alone and that there must be a preliminary investigation. The ground

of the decision was that cases under the Emergency Regulations must be tried under the provisions of the Courts Ordinances and the Trial Upon Information Ordinances or any amendments thereof, and that the actual Ordinances under which Hauptmann was tried, *viz.* the Courts (Temporary Constitution) Ordinance No. 27 of 1936, and the Courts (Temporary Constitution) (Further Provisions) Ordinance No. 47 of 1936, were not such amendments.

3. To get rid of the effect of this decision two Ordinances were passed on the 12th October, 1936, Nos. 69 and 70 of 1936. By these Ordinances Nos. 27 and 47 were deemed to be amendments of the Courts Ordinances and the Trial Upon Information Ordinances and Ordinance No. 69 was deemed to have come into operation on the 30th April, 1936, and Ordinance No. 70 on the 26th June, 1936.

4. Mr. Moghannam, who appeared for the Appellant in this appeal, argued that the Legislature had no power to make retrospective enactments, and quoted the following provision of the Ottoman Law:—

> "No law or rule shall have retrospective effect except in cases where a lesser penalty is substituted for a greater".

It is clear that this provision refers only to the question whether a law can be construed retrospectively, it has no bearing on the question whether a legislature has the power to make laws having a retrospective effect. And there can be no doubt that legislatures, even controlled ones like that of Palestine, have this power. In the case of Abeyesekera *v.* Jayatilake, 48 L. T. R. 71, Lord Darling, in delivering the judgment of the Privy Council, said at p. 73:—

> "Legislators have certainly the right to prevent, alter or reverse the consequences of their own decrees".

5. Mr. Moghannam took another point, *viz.* that jurisdiction cannot be conferred retrospectively. On the 18th August, 1936, the District Court as constituted had no jurisdiction to try the Appellant for this offence. Mr. Moghannam says that the legislature cannot now clothe the tribunal with jurisdiction as if there had been no irregularity. I do not see why the legislature cannot do this, but I have been much exercised as to whether they have actually done it. It would have made matters much clearer if all irregularities previously committed had been expressly validated. However, I feel bound to give effect to what I conceive to have been the intention of the legislature and I am against Mr. Moghannam on this point.

6. The third ground of appeal was that the President misdirected himself in holding that proof of guilty knowledge was not necessary. In his written judgment the President does not indicate that he infers

guilty knowledge from the facts as found by him. These facts were that the Appellant was the owner of the room in which the pistol and ammunition were found, that the room was used only by him and the members of his family and that there was easy access to the place where the pistol was found. From these facts he infers that the Appellant was found actually in possession of the pistol and ammunition. But he goes on to say this:—

> "I think there can be no doubt in such cases as this that the owner of the premises who as here is also living therein with his family must be held *prima facie* responsible for such things found in his house even if placed there by other members of his family and possibly without even his actual knowledge".

7. This is a mis-statement of the law. There is no provision in the Emergency Regulations similar to that contained in the Firearms Ordinance, 1922, which deems the occupier of a house or premises to be the possessor of firearms or ammunition found therein in the absence of proof to the contrary. In the absence of such a provision proof of *mens rea* is necessary — *mens rea* may be inferred from facts and could be inferred from the facts found in this case. But it must be clear that the Court did find it.

8. The conviction is accordingly quashed and the case is remitted to the Court below for a new trial and a definite finding as to whether the Appellant had knowledge of the presence of this firearm and this ammunition in his house.

Delivered this 14th day of November, 1936.

*Senior Puisne Judge.*

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CRIMINAL APPEAL No. 97/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Greene and Khaldi, JJ.

IN THE APPEAL OF:—

Ijbara Abdel Aziz el Fakhoury. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

*Criminal Procedure — Offences under the Emergency Regulations — Constitution of Court — Offence need not arise out of the disturbances — Court may not amend the charge before proceeding with the trial.*

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 30th July, 1937, whereby Appellant was convicted of being in possession of firearms contrary to Section 36(2)(a) of the Firearms Ordinance, and sentenced to two years' imprisonment:—

HELD: 1. When a charge is preferred by the Attorney General the Court is not entitled to alter the charge, though it may find the accused guilty of a lesser offence.

2. In cases under the Emergency Regulations it is not necessary to establish that the offence was committed during the course of disturbances, riots *etc.*

ANNOTATIONS:

1. The Court below (Curry, A/J.) decided at the outset of the case to amend the charge to one under sec. 36(2)(a) of the Firearms Ordinance "as no evidence was offered that the offence arose out of the disturbances".

2. On the duty of the Court to try the case *cf.* CR. A. 7/40 (1940, S. C. J. 40).

APPELLANT: In person.

FOR RESPONDENT: Ghussein.

## JUDGMENT.

In this case the Appellant was charged before the District Court of Jerusalem with possession of firearms and ammunition contrary to the Emergency Regulations. The Court was composed of the Acting President sitting alone. The Acting President had no jurisdiction to sit alone unless an application was made to that effect by the Appellant, or unless the Acting President was satisfied that the offence charged arose out of the incidents or disturbances which occurred on or after the 19th April, 1936.

At the very beginning of the case, the Acting President came to the conclusion that this offence did not arise out of any such disturbances. Having come to that conclusion, he had no jurisdiction to try the case sitting by himself. But he proceeded with the trial sitting alone and convicted the Appellant.

For the reasons which I have given already, this conviction cannot be upheld and the appeal must be allowed and the conviction and sentence quashed.

We have been asked by the Government Advocate to take the course of remitting the case to the Court below for a retrial. We are not in favour of taking that course.

In connection with the trial, there are two points to which I wish to refer.

The first point is this: when a charge is preferred by the Attorney General, the Court is not entitled to alter that charge to a charge of

a different kind. The Court is bound to try the charge as it stands, subject to any amendment to make it correct, and at the end of the case, the Court may find the accused guilty of a lesser offence, but at the beginning of the trial the Court must take the charge as it stands.

The second point is this; and it is a misconception which requires to be cleared up, and that is that the Emergency Regulations have anything to do with any disturbances or riots or any similar events in Palestine. There is no provision in the law which says that you cannot try a man under the Emergency Regulations unless the offence arises out of the disturbances. The only provision analogous to that is that a Judge, President or Relieving President, cannot try a case sitting alone unless it arises out of the disturbances. In the present case, the Appellant was charged with possession of firearms and ammunition. There was no necessity whatever for the prosecution or anybody else to consider whether it arose out of the disturbances or not. As I have said, if the President or Relieving President wishes to sit alone, he must be satisfied that it arose out of the disturbances.

Delivered this 2nd day of September, 1937.

*Senior Puisne Judge.*

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## PRIVY COUNCIL LEAVE APPLICATION No. 9/36.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Haj Hassan Hammad. APPLICANT.

v.

Monseigneur Louis Barlassina, Latin Patriarch of Jerusalem. RESPONDENT.

*Privy Council appeals — Guarantee limited as to time upheld — Final leave granted — Practice of banks.*

In granting final leave to appeal to His Majesty in Council from a judgment of the Supreme Court, sitting as a Court of Appeal, in Land Appeal No. 1/36:—

HELD : Final leave to appeal granted upon Appellant undertaking to renew one year guarantee.

ANNOTATIONS:

1. The judgment which it is sought to appeal, L. A. 1/36, is reported in 7,

C. of J. 340. The proceedings terminated with the grant of a certificate of non-prosecution. See P. C. L. A. 9/36 (1939, S. C. J. 100).

2. For a contrary decision see P. C. L. A. 20/43 (1944, A. L. R. 264).

FOR APPLICANT: Goitein.

FOR RESPONDENT: Y. Amon.

ORDER.

On January 26, 1937, this Court gave a conditional leave to appeal to the Judicial Committee of the Privy Council from the judgment of the Supreme Court, sitting as a Court of Appeal, dated October 15, 1936, in Land Appeal No. 1 of 1936, subject to the Applicant's entering into a good and sufficient security in the sum of LP. 300 and upon condition that the Applicant would prepare within six weeks of the date of the order a list of documents for the preparation of the Record.

The Applicant submitted the security and the list of documents within the prescribed period and asked this Court to grant him final leave to appeal.

The Respondent objected that the guarantee was not in order as it was made for one year only. The Appellant answered, and it is a fact, that no bank will give a guarantee for more than one year and he undertook to renew the guarantee should the case take a longer period to be disposed of than the period covered by the guarantee.

As the Respondent can, through his agents in England, ask the Judicial Committee of the Privy Council not to proceed with the appeal as soon as the period covered by the guarantee expires, there is no point in postponing granting of this appeal any longer for the mere reason that the guarantee is made for one year only.

Final leave to appeal is, therefore, granted in the light of Applicant's undertaking to renew the security.

Given this 3rd day of May, 1937.

*British Puisne Judge.*

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HIGH COURT No. 19/36.

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

BEFORE: Copland, A/S. P. J. and Frumkin, J.

IN THE APPLICATION OF :—

Hamad Abdullah El-Shehadeh. PETITIONER.

v.

1. The Chief Execution Officer, Nablus,
2. Mahmud esh-Shak'a & an. RESPONDENTS.

***Prescription — Sale of land, possessed during the period of prescription, in satisfaction of registered owner's debts — Prescription available only by way of defence — H. C. 91/36.***

In making absolute an order issued to the first Respondent, directing him to show cause why his order, dated the 9th September, 1935, in Execution File No. 113/35, should not be set aside:—

HELD: When property possessed during the period of prescription is sold in satisfaction of the registered owner's debts, the possessor should not be called upon to establish his rights in the Land Court as prescription is available only by way of defence.

FOLLOWED: H. C. 91/36 (*ante*, p. 8).

ANNOTATIONS:

1. On the principle that prescription is only valid as a defence see, in addition to H. C. 91/36 (*supra*), C. A. 390/43 (1944, A. L. R. 415) and note 1.
2. See, on the other hand, H. C. 40/33 (*post*).

## ORDER.

The Petitioner in the present application prays for a stay of execution on the ground that he has been in possession of the attached land which is being put up for sale for the last twenty years. The report of possession supports this contention, in that it states that the land, though registered in Judgment-Debtor's name, is actually in Petitioner's possession.

There are several decisions of this Court which lay down the rule that prescriptive possession, though it may constitute a valid defence, is by itself insufficient to sustain a claim for ownership.

This being the case, a person claiming possession cannot fairly or effectively be directed to apply to the Land Court for a remedy (*Vide* High Court No. 91/36).

For these reasons, the Court decides to make the Order *Nisi* absolute with costs and advocate's fees assessed at LP. 3.— against the Respondents Nos. 2 and 3.

Given this 21st day of December, 1936.

*Acting Senior Puisne Judge.*

HIGH COURT No. 40/33.

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

BEFORE: Baker and Frumkin, JJ.

IN THE APPLICATION OF:—

Sheikh Mahmoud Palaki. PETITIONER.

v

1. Chief Execution Officer, Jerusalem,
2. Rabbi Meir Cahana. RESPONDENTS.

*Jurisdiction of High Court — Usurious loans — Plea which may be taken only by way of defence — High Court will not intervene.*

In discharging an order *nisi*, calling upon the first Respondent to show cause why his order, dated 30.6.1933, should not be set aside:—

HELD: Although the defence of usurious interest could (before the new Law) not be taken except by way of defence, the High Court would not intervene when a person, relying on that plea in execution of a mortgage, was ordered to apply as plaintiff to the competent Court.

ANNOTATIONS:

1. Petitioner alleged before the C. E. O. that a mortgage which Respondent No. 2 was executing included usurious interest. On the C. E. O. refusing to stay execution Petitioner applied to the High Court contending that no other Court had jurisdiction on the ground that usurious interest (on the law as it then stood) could only be raised as a defence which meant that he could not apply to Court and had no other remedy available.

Reference was made, *inter alia*, to H. C. 90/32 (1, C. of J. 291) and to L. A. 64/32 (1, P. L. R. 784; 3, C. of J. 1098).

2. *Cf.* H. C. 19/36 (*ante*).

FOR PETITIONER: Kemal.

FOR RESPONDENTS: No. 2 — Eisenberg.

### O R D E R.

The petition does not lie within any of the judgments cited and the order must be discharged with costs and advocate's fees, assessed at LP. 2.—.

*British Puisne Judge.*

LAND APPEAL No. 29/36.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: McDonnell, C. J., Khaldi and Khayat, JJ.

IN THE APPEAL OF:—

Rashid Ahmad Abu Laban. APPELLANT.

v.

Ali Abd or Rahman Katamto & an. RESPONDENTS.

*Awlawiya — L. C. Art. 41 — Shufa compared, L. A. 13/25, L. A. 49/34 — Value as at the time of the claim.*

In allowing an appeal from the judgment of the Land Court of Jaffa, dated the 11th May, 1936, and in remitting the case to the Land Court:—

HELD: In a claim for *awlawiya* the plaintiff is entitled to acquire the property against its value at the time of the claim and not as at the time of judgment.

DISTINGUISHED: L. A. 13/25 (1, P. L. R. 46; 4, C. of J. 1515); L. A. 49/34 (8, C. of J. 682).

ANNOTATIONS: The judgment of the Land Court was as follows:—

"In this case the Plaintiff claims to be allowed to exercise his right of *"Awlawiya"* over certain land. It is not disputed that the land over which he seeks to exercise that right is at this very moment (and was at the time of filing the suit and the hearing of this suit) in process of being sold by Public Auction in satisfaction of a mortgage. It is clear that the present Plaintiff (were the land not being in process of being so sold) would have to pay the market price of the land should he wish to exercise his right of *"Awlawiya"*. It is equally clear that there is nothing to prevent the Plaintiff from bidding at the Public Auction and so securing the property. Even if he were to be the highest bidder he would still have the land knocked down to him at what would be a price which would be the very best test of what was the market value.

In these circumstances, and having regard to what are the basic principles underlying the right of *'Awlawiya"* as exemplified in the Supreme Court Judgments in Land Appeal No. 13 of 1925 (Palestine Law Reports, p. 46) and Land Appeal No. 49/34, we consider that the Plaintiff was not justified in bringing this action.

We, accordingly, dismiss this action: Plaintiff must pay the costs of each of the Defendants Nos. 1 and 2 and must pay to each of those Defendants LP. 1.— advocate's fees.

Dated this 5th day of May, 1936".

FOR APPELLANT: Ayoubi.

FOR RESPONDENTS: No appearance.

JUDGMENT.

The two cases L. A. No. 13/25 and L. A. 49/34 are concerned with *Shufa* and have no relevance to *awlawiya* with which this case is concerned. It is also clear from Art. 41 of the Ottoman Land Code that the value to be paid is the value at the time of the claim.

We, therefore, allow the appeal, set aside the judgment of the Land Court and remit the case thereto for the Court to nominate experts to assess the value of the land involved at the time of the claim with costs to include LP. 2.— advocate's fees.

Judgment by default, subject to opposition.

Delivered this 16th day of June, 1936.

*Chief Justice.*

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HIGH COURT No. 23/36.

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

BEFORE: Manning, S. P. J. and Frumkin, J.

IN THE APPLICATION OF:—

Karl Schneider & an. — PETITIONERS.

v.

1. The Chief Execution Officer, Nazareth;
2. Shafiq Ka'war. — RESPONDENTS.

*Judgment of Magistrate's Court by consent — No consent expressed before the Magistrate — Proper remedy.*

In discharging an Order *nisi*, issued to the first Respondent, directing him to show cause why his order, dated the 6th February, 1936, refusing stay of execution against Petitioners of an alleged judgment in favour of the second Respondent, should not be set aside:—

HELD: If a magistrate purports to give a consent judgment otherwise than with the consent of the parties, the proper remedy lies in an appeal.

ANNOTATIONS: For a later High Court application in connection with the same judgment see H. C. 112/36 (*ante*, p. 148).

FOR PETITIONERS: J. Levy.

FOR RESPONDENTS: F. Atalla.

JUDGMENT.

We are asked to order the Chief Execution Officer to refrain from executing what is on the face of it a judgment issued by a Magistrate.

The Petitioners rely on two grounds, the one is that the judgment is not a judgment at all, but a confirmation of a compromise which in fact was never completed; and the second ground is that even if it were a judgment it was never delivered in their presence, although it was so stated in the judgment.

We do not think there is any substance in any of the grounds. It is clear from the judgment that the parties have compromised on certain points but did not agree on another minor point: and it was with regard to this point not agreed upon that the judgment was given. It may be that the Magistrate was wrong in so doing, but the Petitioners should seek their remedy by appealing the judgment.

As regards the second point that the judgment was never delivered, the Petitioners have submitted no evidence whatsoever to support their serious allegation that what was stated in the judgment was not true, but even if it were so and they only heard of the judgment against them for the first time when they were notified by the Chief Execution Officer, it was still open to them to have the judgment served upon them and take the legal steps to set it aside.

The order is discharged with costs to include LP. 3.— advocate's fees.

Delivered this 30th day of October, 1936.

*Senior Puisne Judge.*

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CRIMINAL APPEAL No. 33/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: McDonnell, C. J., Manning, S. P. J. and Khayat, J.

IN THE APPEAL OF:—

Hamd Ahmad Yunes Zarrakou. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Construction of statutes — Amendment made* ex abundante cautela *— Sec. 4 of Emergency (Amendment) Regs. (No. 8), 1936 — "Explosive" in Emergency Regulation.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 13th July, 1936, whereby the Appellant was convicted under Sec. 3(b)(i) of the Emergency (Amendment) Regulations No. 5, 1936, as amended under Regulation 8A of 1936, and sentenced to five years imprisonment:—

HELD : A round of rifle ammunition is an explosive article within the meaning of the Emergency Regulations.

ANNOTATIONS: Appellant's submission that rounds of ammunition are not "explosive articles" was overruled in the District Court. After the Appellant had been convicted and before the hearing of this appeal, the Regulations were amended and Appellant submitted that this showed that the law was different at the time of his trial.

FOR APPELLANT : Moghannam.

FOR RESPONDENT: Junior Government Advocate — (Ghussein).

JUDGMENT.

The appeal is dismissed and the conviction and sentence are affirmed as the Court hold that a round of rifle ammunition must be held to be an explosive article, and sec. 4 of the Emergency (Amendment) Regulations (No. 8), 1936, must be assumed to have been made only *ex abundante cautela* in view of conflicting decisions by the District Courts.

Delivered this 5th day of August, 1936.

*Chief Justice.*

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HIGH COURT No. 16/36.

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

BEFORE: Trusted, C. J. and Khaldi, J.

IN THE APPLICATION OF:—

Hassan 'Uthman Ikneibi. PETITIOER.

v.

The Commissioner for Migration and Statistics. RESPONDENT.

*High Court jurisdiction — Order cannot issue against Commissioner for Migration in respect of act by High Commissioner — Impounding passport under Immigration Ord., sec. 3.*

In refusing an application for an order to issue to the Respondent, directing him to show cause why his order, dated the 5th December, 1935, whereby he (a) impounded Petitioner's Palestine Passport, and (b) decreed that Petitioner was not habitually resident in Palestine on 6th August, 1924, or on 1st August, 1925, and thus not a Palestinian citizen, should not be set aside:—

HELD : The High Court cannot issue a rule against the Commissioner of Migration and Statistics in respect of an order made by the High Commissioner.

ANNOTATIONS: *Cf.* H. C. 92/41 (1941, S. C. J. 483) and H. C. 65/42 (1942, S. C. J. 533).

FOR PETITIONER: A. Hanania.

ORDER.

In his letter of the 5th December, 1935, the Commissioner for Migration does not say that he impounded the passport: he says on the contrary that "it was impounded under the 4th proviso to Sec. 3 of the Passport Ordinance, 1934", that is to say, that it was impounded by the High Commissioner who is under that proviso empowered to do so without assigning any reasons.

For this reason, the petition is dismissed as there is no order by the Respondent as to which we can issue a rule calling upon him to show cause why it should not be set aside.

Given this 18th day of March, 1936.

*Chief Justice.*

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HIGH COURT No. 24/36.

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

BEFORE: Trusted, C. J. and Khayat, J.

IN THE APPLICATION OF :—

Henkel & Co. G. m. b. H. PETITIONERS.

v.

Sherf Soap Factory Rishon-le-Zion. RESPONDENTS.

*Trade Marks — Opposition to registration of mark — "Persil" — "Sherfil", "Herogen — "Ceregen", "Neola" — "Pianola".*

In making absolute an order, directed to the Respondents to show cause why their application for registration of the word "Sherfil" should not be set aside:—

HELD: The words "Persil" and "Sherfil" were too closely resembling to allow registration of the latter word.

FOLLOWED: *Re* Pianotist Co. Ltd.'s Application, 1906, 23 R. P. C. 774; *Re* British Drug Houses Ltd.'s Trade Mark, 1912, 107 L. T. 756, 30 R. P. C. 73.

ANNOTATIONS: It appears from Halsbury (Hailsham Ed., Vol. 32, p. 567) that the cases relied upon by the Supreme Court were cases of wordmarks which were held *not* to be so nearly resembling as to forbid of registration.

FOR PETITIONERS: Auster.

FOR RESPONDENTS: No appearance.

ORDER.

On the authority of cases of "Herogen" and "Ceregen" and "Neola" and "Pianola", Halsbury Vol. 27, p. 702, order absolute with costs to include LP. 2 advocate's fee.

Given this 3rd day of June, 1936.

*Chief Justice.*

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ELECTION PETITION No. 1/27.

IN THE SUPREME COURT.

BEFORE: Corrie, S. P. J.

IN THE APPLICATION OF:—
(EX PARTE).

Khalil El Kassis & an. — PETITIONERS.

v.

Salem Zaarour & an. — RESPONDENTS.

*Franchise — Municipal Franchise Ord., 1927, sec. 4; sec. 3 compared — Whether foreign bankruptcy disqualifies a person from being elected — Construction of statutes.*

In dismissing an application under Article 4 of the Municipal Franchise Ordinance, 1926, for an order declaring the Respondents unduly elected to the Municipal Council of Ramallah:—

HELD: A bankruptcy declared elsewhere than in Palestine does not make a person ineligible under sec. 4(c)(i) of the Municipal Franchise Ordinance.

ANNOTATIONS: Note that Sec. 11(1)(a) of the Municipal Corporations Ord., 1934, contains the same disqualification whilst Sec. 2(1)(c) of Schedule 2 and Sec. 1(c) of Schedule 3 thereof are in identical terms with Sec. 3(c) of the Municipal Franchise Ordinance.

ORDER.

This petition raises a question as to the meaning of Section 4 of the Municipal Franchise Ordinance, 1927, which prescribes the qualifications of a member of a Municipal Council.

The Section contains the proviso:—

> "Provided that no person shall be eligible who (1) is an undischarged bankrupt".

The question is whether these words apply only to a bankruptcy declared by a Court in Palestine, or include also a bankruptcy occurring elsewhere.

Reference has been made to Section 3 which prescribes the qualifications of a voter and requires him to be a person who

> "(c) has not been sentenced by a Court of law in Palestine to a term of imprisonment of one year or upward, or, if so sentenced, has received a free pardon for the offence for which he was sentenced".

It has been argued for the Petitioners that if a similar limitation to Palestine were intended in Section 4(c)(i) it would have been expressed.

It is, however, to be noted that no conviction for any offence however serious by a Court other than a Palestine Court is a disqualification; and it would in my opinion be unreasonable to hold under these circumstances that bankruptcy elsewhere than in Palestine disqualifies.

It is clear that a bankruptcy declared elsewhere than in Palestine can have no effect upon the property of the debtor situate in Palestine except under a judgment of a Palestine Court, and, in the absence of any authority to the contrary, I can see no ground of principle upon which a foreign bankruptcy should disqualify while a foreign conviction does not.

The petition must be dismissed.

Delivered this 10th day of June, 1927.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 161/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Khayat, JJ.

IN THE APPEAL OF:—

The Palestine Building Syndicate Ltd. APPELANTS.

V.

K. Hoffman and Sons & 2 ors. RESPONDENTS.

*Arbitration — Requirements in connection with leave to appeal —*

*Sec. 15(3) — Appointment of arbitrator under sec. 7 — Failure by all parties to sign appointment, C. A. 151/35.*

In allowing an appeal from the judgment of the District Court of Jaffa, sitting at Tel-Aviv, dated the 23rd June, 1937:—

HELD: 1. Leave to appeal. (This matter has been rendered obsolete by later cases).

2. Before applying to the Court for the appointment of an arbitrator under sec. 7, the Applicant should send a notice in compliance with sub-sec. (2) of that section. If the applicant comprises more than one person, all persons should sign the notice.

ANNOTATIONS:

1. It is now settled law that leave to appeal is necessary in every case where it is desired to test a decision of the District Court in an arbitration matter: See C. A. 164/37 (*ante*, p. 121) and the later cases cited in note 1 thereto.

2. It was, however, held in C. L. A. 12/34 (*ante*, p. 82) and in C. A. 239/41 (1941, S. C. J. 557) that leave to appeal must first be sought from the District Court and that the Supreme Court can only be approached after leave has been refused by the lower Court.

3. *Cf.* C. A. 151/35 (7, C. of J. 182) cited in the judgment of the District Court.

FOR APPELLANTS: Rosenbluth.

FOR RESPONDENTS: Hamburger.

JUDGMENT.

This is an application which comes to us from the District Court of Jaffa, sitting at Tel-Aviv, by way of appeal from an order of that Court.

There has been some argument as to whether or not under Section 15(3) of the Arbitration Ordinance, the matter comes to this Court as of right, or whether or not leave is necessary. In the course of argument, it has been submitted that in the first place leave to appeal should have been sought from the District Court, and if the Applicant failed to obtain leave, he should make an application to this Court. With this view we do not agree, we think the application may be made to either Court. If leave from this Court is necessary, we grant leave and proceed with the hearing.

The whole case is whether or not, in the circumstances, the District Court could be approached under Section 7 of the Arbitration Ordinance to appoint an arbitrator. The District Court decided:—

> "This is an application for the appointment of an arbitrator under the Arbitration Ordinance, 1926.
>
> The Applicants base their claim on a contract whereby the parties to that contract undertook to refer their dispute to arbitration.

On behalf of the Respondent it was argued that the Applicants alone do not constitute one of the parties of the contract and, therefore, they could not sue the Respondent. The Supreme Court case 151/35 is relied upon wherein it was held that when a contract is joint and several all the parties of the contract must sue together. After consideration, it is difficult for us to decide if the contract in question contains joint and several liability without entering into the merits of the case. Tbis point must be decided by the arbitrators.

We, therefore, grant the application and appoint as arbitrator for the Respondent Mr. Bar Shira, with costs and LP. 2 advocate's fees".

The matter turned upon a contract entered into between the Palestine Building Syndicate Ltd. and a group of traders who are described as the contractors. We are told that there are special reasons why this contract was entered into in this form which appears to us to raise considerable difficulties, but with this we are not concerned. The particular point is what is to be done when a dispute arises, as has now arisen. A clause has been provided in the agreement dealing with arbitration which reads as follows:—

"25. Arbitration.

All differences of opinion or disputes arising between the two parties shall, in accordance with the laws regarding arbitration in force at the time of such dispute, be submitted to a single arbitrator after both parties shall have informed each other about the subject matter of the dispute. If within 5 days from the date of such information the parties shall not arrive at an agreement with regard to the nomination of the single arbitrator, each party shall nominate its own arbitrator. If the two arbitrators should not be able to arrive at an agreement during the proceedings, they shall nominate a third arbitrator and if the two arbitrators shall not be able to arrive at an agreement such arbitrator shall be appointed by Mr. Frumkin.

The three arbitrators may decide by a majority.

Any dispute or difference of opinion which is being examined shall not serve as a reason for interrupting the work or proceeding with it at a slower pace, or for postponing any payment.

The arbitrator or arbitrators shall be entitled to inspect all documents as they may deem necessary and both parties have to produce to them such documents without delay.

The employer and the contractors hereby declare that in case of any dispute or difference of opinion arbitration shall come before any legal steps whatsoever".

I understand from the learned advocates of the parties that they agree that Section 7 is the appropriate section. That section lays down as follows:—

"Where a submission provides that the reference shall be to two or more arbitrators, of whom one or more are to be appointed by

each party, then, unless the submission expresses a contrary intention:—

(a) If any of the appointed arbitrators refuses to act or is incapable of acting or dies, the party who appointed him may appoint a new arbitrator in his place;

(b) If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, within fifteen days after the other party, having appointed his arbitrator, has served the party making default with a notice to make an appointment, the party who has appointed an arbitrator may apply to the Court to appoint an arbitrator to act with the arbitrator already appointed".

It seems to us the whole point in this case is: can it be said that the Applicants in the District Court had themselves complied with Section 7(b), so as to be entitled to invoke it. It is clear that for the purposes of arbitration the firms who were described as "the contractors" were the second party, and it seems to us that on the construction of the agreement, in order to comply with the arbitration clause and Section 7(b) of the Arbitration Ordinance, the five constituent firms must join in the appointment of an arbitrator: this admittedly was not done.

The result will, therefore, be that this appeal will be allowed, the decision of the District Court will be reversed with costs and LP. 3 advocate's fees.

Delivered this 6th day of October, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 194/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland and Khayat, JJ.

IN THE APPEAL OF:—

Marcus Maier. APPELLANT.

v.

The Joint Liquidators of "Phoenix" Life Insurance Company, Vienna, in Liquidation. RESPONDENTS.

*Jurisdiction — Foreign Court named in policy as forum for actions on policy — Ouster of jurisdiction.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated 2nd August, 1937:—

HELD: The Courts of Palestine have no jurisdiction when the parties have agreed to refer disputes to a named foreign court.

ANNOTATIONS: For a similar case see C. A. 3/39 (1939, S. C. J. 86).

FOR APPELLANT: Natan.

FOR RESPONDENTS: B. Joseph.

## JUDGMENT.

1. The present Appellant took out five insurance policies with the Phoenix Life Insurance Company of Vienna. To suit the convenience of the Appellant, the company agreed to issue the policies in Palestine. The parties, by agreement, inserted a clause in the policies that any dispute arising out of these policies is within the jurisdiction of the Courts of Zurich.

2 The Respondent Company is being wound up and the Appellant submitted his proof of claim to the Liquidators which was rejected. He then appealed to the District Court, Jerusalem, against that rejection. The District Court dismissed his petition.

3. The parties having agreed that all disputes arising out of the policies are within the jurisdiction of the Courts of Zurich, and this being a dispute arising out of the policies, the Courts in Palestine are not the competent Courts to deal with it.

4. For these reasons and for the reasons given by the District Court, and without calling on Mr. Joseph, the appeal should be dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 1st day of November, 1937.

*British Puisne Judge.*

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CIVIL APPEAL No. 196/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Mahmoud Suleiman Kowa'ly & an. APPELLANTS.

v.

Hassan Abu Iskout & an. RESPONDENTS.

*Arbitration — Reference to arbitration in Land Court — Record of Court — Objection to award.*

In allowing an appeal from a judgment of the Land Court, Jerusalem, sitting at Beersheba, dated 21.7.1937:—

HELD: When an action before the Land Court is referred to arbitration and the award comes again before the Court, the record of the Court should make it clear what objections were made against the award.

FOR APPELLANTS: No. 1 — In person.
No. 2 — No appearance.

FOR RESPONDENTS: R. Shawa.

JUDGMENT.

This is an appeal from the judgment of the Land Court, sitting at Beersheba. It presents some difficulty in that the first Appellant appears in person, and Rushdi Eff. Shawa who appears for the Respondents, was not present in the Court below on the last two hearings, so that it is not easy to find out precisely what occurred.

It is clear that the parties agreed to the dispute being referred to an arbitrator, presumably under the provisions of the Land Courts Ordinance. That was on the 2nd March, 1936. Now it seems that the present Appellant submitted objections to the arbitration award on the 2nd of April, 1936. It may be it is a matter of argument whether those objections were merely a request that the arbitration should not be confirmed or an application to set aside the award, and difficulties may arise on the amount paid for fees thereon. Be that as it may, on that date (2.4.36) the Appellants wrote to the Court raising some form of objection to the award. The matter came before the Court again on the 6th April, 1936, and the record of the learned President is this:—

> "Award was on 1st of March but has not been renewed. No service."

The award was actually made on the 31st March. It is impossible for us to know what was meant by this record. It does not enable us to know what enquiry the Court has made, if any was made upon the application of the Appellant, or what matters were present to the mind of the Court when it gave that ruling.

This case went to sleep for more than a year and on the 21st July, 1937, it again came before the Land Court and on that occasion the parties appeared in person. The award was read out and Defendants (Appellants here) asked for an adjournment in order to brief an advocate, but their request was overruled and the award was confirmed.

Again we do not know what opportunity was given to the Appellants to state their objections to the award, and we do not know whether the Court took into consideration the written objections filed by the present Appellants.

We feel on the whole that the result is so unsatisfactory, and that this case will have to be sent back to the Land Court.

The judgment of the Land Court will, therefore, be set aside and the case remitted to that Court, and in the light of the objections filed on the 2nd of April, 1936, and in the light of any arguments which may be submitted by the parties, a fresh judgment will have to be given.

Costs to abide the event.

I think it is a matter which should be brought to the notice of District Courts that when cases come before them, no matter what the judgment of the Court may be, there should be a record, adequate to enable this Court to know what was done, in case the matter should later come before this Court.

Delivered this 2nd day of November, 1937.

*Chief Justice.*

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CRIMINAL APPEAL No. 32/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: McDonnell, C. J., Manning, S. P. J. and Khayat, J.

IN THE APPEAL OF:—

The Attorney General. — APPELLANT.

v.

'Uthman Abdalla El-Kurdi. — RESPONDENT.

*Punishments — T. U. I. Ord., sec. 49; P. (Defence) O. in C., Arts. IV (1)(ii), V(12) — Construction, "Any".*

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 30th June, 1936, whereby the Respondent was convicted under Article 8A(i) of the Emergency Regulations, 1936 (Amendment Regulation (5) 1936), and sentenced to two years' imprisonment:—

HELD: Art. IV(1)(ii) of the Palestine (Defence) O. in C., which empowers the High Commissioner to prescribe penal servitude for life or *any* less punishment authorizes the imposition of minimum punishments.

ANNOTATIONS: *Cf.* CR. A. 142/36 (*ante*, p. 316).

FOR RESPONDENT: Cattan.

JUDGMENT.

We are not concerned with the fact that Section 49 of the Trial Upon Information Ordinance abolished minimum penalties as enacted by the Ottoman Penal Code.

This has no relevance whatever to the present case in which we are concerned solely with the interpretation of Art. IV(1)(ii) of the Palestine (Defence) Order-in-Council, 1931, which empowers the High Commissioner by Regulations to authorise the infliction by a District Court of imprisonment for life or any less punishment.

Art. V(12) of the Palestine (Defence) Order-in-Council does not help us, as Mr. Cattan suggests, in his favour. That Article itself imposes the penalty and does not empower it to be imposed by Regulations.

The conclusion to which we have come is that Art. IV(1)(ii) does empower the High Commissioner to impose a minimum penalty inasmuch as it empowers him to prescribe penal servitude for life or *any* less punishment; and the word "any" must mean "any, no matter what" punishment. In other words the subsection gives him, subject to the maximum which he may prescribe, an unlimited discretion as to the punishment which he may provide for by the Regulations.

For these reasons the appeal is allowed and the sentence of two years' imprisonment with hard labour is increased to one of imprisonment for five years.

Delivered this 5th day of August, 1936.

*Chief Justice.*

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CIVIL APPEAL No. 166/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Greene, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Hanna Khayat. APPELLANT.

v.

Joseph Klein & an. RESPONDENTS.

*Brokerage — Broker not entitled to his fees unless the transaction could*

*be performed by the parties — Incompetence of one party — Evidence of insanity.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 10th April, 1935:—

HELD: A broker is not entitled to any fee if the transaction could not have been carried out by reason of the legal incompetence of one of the parties.

ANNOTATIONS: For other proceedings between the parties see C. A. 58/34 (*ante*, p. 27) and cases cited in annotations thereto.

FOR APPELLANT: Goitein.

FOR RESPONDENTS: Felman.

## JUDGMENT.

The Court holds that the Appellant, in order to be entitled to the brokerage, the parties to the agreement in respect of which he claims brokerage must be legally competent to perform their obligations under the agreement and suffer its consequences in case of breach of the terms thereof.

In this action, the District Court dismissed the Appellant's claim on the ground that one of the vendors, Zaki Rock, was insane and did not sign the agreement, and that the person who signed on his behalf, as his agent, had no valid power of attorney whereby he could sign a binding signature. This judgment of the District Court is not based on any evidence as to the degree of insanity and the date it started, and which is legally admissible.

It has been argued before this Court that there is a case still pending before the District Court and which has been remitted from this Court for the determination of the degree and date of insanity of Zaki Rock and arising out of the same agreement which is the basis of this action. This point has not, till the present moment, been decided.

We are, therefore, of opinion that the judgment of the District Court should be set aside, the case remitted to the Court below, and that a fresh judgment be given based on the finding the District Court arrives at on the point of insanity.

Costs to abide the event.

Delivered this 22nd day of September, 1937.

*British Puisne Judge.*

CIVIL APPEAL. No. 49/35.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Baker, Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Moshe Rojani. APPELLANT.

v.

Aviah Ratner. RESPONDENT.

*Brokers — C. A. 121/34 — Licence not required — Three elements required under Mejelle* 564.

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 20th December, 1934:—

HELD: 1. (C. A. 49/35) A claim for brokerage may be made independently of the Brokers Ordinance.

2. (C. A. 154/37) In such claims the three requirements of *Mejelle* Art. 564 should be satisfied, *viz*:—

a) A request to undertake the service,

b) a promise to pay,

c) performance of the service.

FOLLOWED: C. A. 121/34 (2, P. L. R. 436; 7, C. of J. 75).

ANNOTATIONS: For authorities on brokers see annotations to C. A. 264/42 (1943, A. L. R. 117); *cf.* C. A. 320/43 (1944, A. L. R. 139).

FOR APPELLANT: Eisenberg.

FOR RESPONDENT: Karwassarsky.

### JUDGMENT.

In the light of the judgment of this Court in Civil Appeal Case Aziz Lamman *v.* Hanna Asfour, Civil Appeal No. 121/34, the judgment of the lower Court must be quashed and the case returned for retrial and for the lower Court to hear evidence as to whether (independent of the Brokers Ordinance) Appellant is entitled to any fees for services rendered if services were in fact rendered, and if they were, to assess the value of such services and to give a fresh judgment.

Costs in the cause.

Delivered, this 5th day of March, 1936.

*British Puisne Judge.*

CIVIL APPEAL No. 154/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Greene and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Aviah Ratner. APPELLANT.

v.

Moshe Rojani. RESPONDENT.

In dismissing an appeal from the judgment of the District Court of Tel Aviv, dated the 2nd of July, 1937:—

(*For headline, etc., see C. A. 49/35 — ante*).

FOR APPELLANT: Eliash.

FOR RESPONDENT: Eisenberg.

## JUDGMENT.

This is an appeal from the judgment of the District Court, sitting at Tel-Aviv, in which the Appellant was ordered to pay the sum of LP. 210 with interest as from the date of action and half the costs and LP. 2 advocate's fees.

Mr. Eliash for the Appellant relies on Art. 564 of the *Mejelle* and submits that three ingredients are necessary under this Article and also submits that two do not exist in this case. He also submits that the vital element necessary, namely clear undertaking to pay money for the services rendered is absent in this case and there was no agreement to pay commission or any money.

It is only necessary to say that the Court below after hearing the parties found as a fact the following:—

1. That the Respondent acted as intermediary in the transaction at the request of Appellant.

2. That Appellant promised to reward Respondent but did not fix the amount.

3. That the Respondent did carry out the work required by him and that the Court fixed his remuneration for the work done at the sum of LP. 210 with half costs and LP. 2 advocate's fees.

We see no reason to upset this judgment and the appeal will be dismissed and the judgment of the Court below will be confirmed with costs and LP. 3 advocate's fees.

Delivered this 29th day of September, 1937.

*British Puisne Judge.*

CIVIL APPEAL No. 13/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

The Liquidator of the Cooperative Building Society Neve Shaanan. APPELLANT.

v.

Shmuel Ashkenazi & an. RESPONDENTS.

*Companies — Leave to sue company in liquidation before completion of winding up — Discretion — Companies Ord., sec. 56 — Return of purchase price.*

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 8th December, 1935:—

HELD: The District Court has a discretion to allow an action against a company before completion of winding up, under sec. 56 of the Companies Ordinance.

ANNOTATIONS: *Cf.* Halsbury, Vol. 5, pp. 718 *seq.*, para. 1202.

FOR APPELLANT: Belkovsky.

FOR RESPONDENTS: Lebel.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jaffa, dated the 8th December, 1935.

On the 6th February, 1934, the District Court granted the Respondents (who were Plaintiffs in the Court below) permission to lodge an action against Neve Shaanan Ltd. in accordance with Section 56 of the Companies Ordinance as the liquidation of the Company had, at that time, not yet been completed.

The matter was one of discretion for the Court, and it does not appear to us that it exercised its discretion upon any wrong principle.

So far as the claim is concerned, the Court found as a fact that certain sums of money have been paid to the Company by the Plaintiffs in respect of certain land, but not the full purchase price. In those circumstances, it ordered the return of the moneys so paid.

We see no reason to interfere with the judgment of the Court below, and the appeal is dismissed.

Delivered this 22nd day of March, 1937.

*Chief Justice.*

CIVIL APPEAL No. 185/37.

# IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF:—

George Yousef El Khoury. APPELLANT.

v.

Ne'emeh El Khoury. RESPONDENT.

*Bills of exchange — Promissory notes entrusted to a bank for collection — Whether endorsement by the bank to holder required.*

In allowing an appeal from the judgment of the District Court of Haifa, dated 28th June, 1937:—

HELD: When promissory notes have been passed for collection to a bank, the holder may maintain an action thereon, and no indorsement by the bank is necessary.

FOR APPELLANT: Elia.

FOR RESPONDENT: Sahyoun.

## JUDGMENT.

1. In this case the Appellant sued the Respondent on three promissory notes for LP. 135, LP. 150., and LP. 200 respectively. The Appellant was suing as the holder of these notes.

2. When the case came before the District Court Haifa, the judges disagreed as to two of these bills, namely those for LP. 150 and LP. 200: Judge Namar held that it was not necessary that these two notes should have been endorsed by the Bank to whom they had been passed for collection; Judge Shems held the contrary. The Court did not deal with the remaining promissory note as its amount was within the jurisdiction of a Magistrate.

3. We are in agreement with the judgment of Judge Namer and in the circumstances we desire to say nothing further as to the merits.

4. The appeal will be allowed, the judgment of the Court below set aside and the case remitted for a new trial. Appellant will have the costs of this appeal to include LP. 3 advocate's fees.

Delivered this 13th day of October, 1937.

*Senior Puisne Judge.*

CIVIL APPEAL No. 167/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Greene and Khayat, JJ.

IN THE APPEAL OF:—

Haim Blumenthal. APPELLANT.

v.

Bank Bnei Brak. RESPONDENT.

*Debt assignment — Fictitious credit — What debts may be assigned under the Ordinance.*

In dismissing an appeal from the judgment of the District Court of Tel-Aviv, dated the 12th July, 1937:—

HELD: A debt not in connection with trade or business cannot be assigned under the Debt (Assignment) Ordinance.

ANNOTATIONS: For previous proceedings between Appellant's predecessor and the Respondent see C. A. 2/35 (*ante*, p. 69).

FOR APPELLANT: Margalit.

FOR RESPONDENT: Dunkelblum.

JUDGMENT.

In this case, the Appellant sued the Respondent in the District Court of Tel-Aviv for the amount of LP. 200. The Appellant was suing as an assignee of a man named Elberg.

The Court below, after taking a considerable body of evidence and having occupied themselves with the case for several days, came to two definite findings of fact. The first of these was that the debt alleged to be due to Elberg from the Respondent was a fictitious credit to enable him to get his daughter married. The second finding was that this alleged debt of LP. 200 was not due for salary and was not due for commission; Elberg having been already paid all sums due to him by way of commission.

There was evidence before the Court below to justify it in coming to these conclusions. We see no reason to think that it misdirected itself in any way with regard to the evidence.

That being so, the debt which Elberg alleges was due to him by the Respondent bank was not a debt in connection with trade or business and, therefore, could not be assigned under the Debt (Assignment).

Ordinance. For this reason the appeal must be dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 7th day of October, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 169/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Elia Ibrahim Sinani. APPELLANT.

v.

Elie Baroukh Masoudeh. RESPONDENT.

*Evidence — Copy not certified — Waqfieh — Requirements to establish proof as to Waqfs.*

In allowing an appeal from the judgment of the District Court of Jerusalem, dated 28th July, 1937:—

HELD: 1. A copy not properly certified is inadmissible in evidence.

2. To establish the existence of a *waqf*, a description of the property is required.

ANNOTATIONS: On proof of a *waqfieh* see also C. A. 64/43 (1943, A. L. R. 507) and L. C. Jm. 43/43 (1944, S. C. D. C. 175).

FOR APPELLANT: Amon.

FOR RESPONDENT: Dajani.

JUDGMENT.

1. The Respondent applied to the District Court of Jerusalem for an order appointing him to be the *Mutawalli* of a *waqf* alleged to have been created by one Sadaqa. He made the Appellant a defendant. The Appellant urged that the document produced by the Respondent, an alleged copy of the original *waqfieh*, was not properly authenticated. The District Court said nothing about this in its judgment, and it granted the application of the Respondent.

2. From a perusal of the document we think that the objection of the Appellant was sound. The document is not properly certified as a correct copy. All that is indicated is that it conforms to *"une piece"* presented by one Erian Masri and taken away at once. We think the

District Court misdirected itself in accepting this document as satisfactory proof. Further, as far as we can ascertain from the proceedings, there was nothing before the District Court to show where the property of the alleged *waqf* is at present situated in Jerusalem or of what it consists.

3. We order that the order of the District Court be set aside, and that the matter be remitted to it for a new trial, in order to give the Respondent a further opportunity of proving his case.

Costs to abide the event.

Delivered this 11th day of October, 1937.

*Senior Puisne Judge.*

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HIGH COURT No. 53/35.

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

BEFORE: Manning, S. P. J. and Baker, J.

IN THE APPLICATION OF:—

Sheikh Daoud Hashem. PETITIONER.

v.

1. Supreme Moslem Council,
2. Sheikh Mohammad Tuffaha. RESPONDENTS.

*Supreme Moslem Council — Appointment of Mufti to be in accordance with sec. 8(1)(c) of the Regulations — Temporary appointments.*

In making absolute an Order issued to the first Respondent to show cause why their decision and order appointing the second Respondent as *Mufti* of Nablus should not be cancelled and why they should not cancel the said appointment and notify Government accordingly in order to delete his name from the staff of officials drawing salary from the Government of Palestine; and why they should not carry out the provisions of Section 8(1)(c) of the Regulations of the Supreme Moslem Council before an appointment is made of *Mufti* of Nablus:—

HELD: A *mufti* may only be appointed in accordance with the provisions laid down in sec. 8(1)(c) of the Regulations of the Supreme Moslem Council. There is no power, outside the section, to appoint a temporary *mufti*.

ANNOTATIONS:

1. The Supreme Moslem *Sharia* Council Regulations are set out in Rotenberg's Laws of Palestine, 1918—1925, Vol. 2, pp. 704 *et seq.*

2. Contrast H. C. 14/44 (1944, A. L. R. 228) and see cases cited in annotations thereto.

## JUDGMENT.

This is a return to an order of this Court made on the 18th September, 1935, calling upon the first Respondent, the Supreme Moslem Council, to show cause why their order appointing the second Respondent, Sheikh Mohammad Tuffaha, as *Mufti* of Nablus should not be cancelled; and why they should not cancel the said appointment and notify Government accordingly in order to delete his name from the staff of officials drawing salary from the Government of Palestine; and why they should not carry out the provisions of Section 8(1)(c) of the Regulations of the Supreme Moslem Council before an appointment is made of *Mufti* of Nablus.

The provision of the Regulation to which reference is made which was enacted by order of the High Commissioner, dated the 20th December, 1921, and published in Official *Gazette* No. 58 on the 1st January, 1922, is as follows:—

> "8(1). The duties of the Council shall be:—
> (c) To appoint *Muftis* from among the three candidates to be elected by the special Electoral College in accordance with a special Regulation to be passed by the Council."

It is not denied that the appointment of the second Respondent was not made in accordance with this provision. It is admitted that no election of candidates ever took place, and that the special Regulation for such elections has never been passed by the Council.

It is, however, denied by the Council that the second Respondent has actually been appointed to be *Mufti* as it is maintained that his appointment is only an acting appointment to fill a vacancy.

To this, the Petitioner replies that the words used were the ordinary form employed in making a substantive appointment; the fact being that before the British Occupation the *Sheikh al Islam* was *Mufti* for the whole of the Turkish Dominions and the local *Muftis* were only his representatives.

On this issue no evidence has been submitted by either party.

In our view, however, it is immaterial whether the appointment was a substantive or only an acting appointment.

The power of the Supreme Moslem Council under the Regulation cited is a power to appoint one of the persons qualified by election in the manner prescribed by the Regulation, and the Regulation does not confer upon the Council power to appoint as *Mufti*, even temporarily, a person lacking this essential qualification.

If follows that the appointment of the second Respondent was invalid.

An order will issue to the first Respondent, the Supreme Moslem Council, directing the Council to inform the Government that the appointment of *Mufti* of Nablus is vacant and further directing the Council that in proceeding to fill such vacancy the Council shall observe the provisions of Section 8(1)(c) of the Regulations of the Supreme Moslem *Sharia* Council published on the 1st January, 1922, in Official *Gazette* No. 58.

The costs of this petition will be paid by the Respondents together with LP. 3.— advocate's fees.

Given this 12th day of March, 1936.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 166/35.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Yousef Morcos. — APPELLANT.

v.

Costandi Theodori. — RESPONDENT.

Shafiqa el Husseini. — THIRD PARTY.

*Consideration — Mutual promises — Construction of Contracts.*

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 20th July, 1935:—

HELD: Consideration in a contract may be constituted by mutual promises. ANNOTATIONS: On consideration under Palestinian law see Hooper, The Civil Law of Palestine, Vol. 2, pp. 92 *seq.*

FOR APPELLANT: 'Nasr.

FOR RESPONDENT: Hanania.

FOR THIRD PARTY: El-Husseini.

### JUDGMENT.

This case arises out of a claim which was made by the present Appellant based upon an agreement, dated the 26th December, 1934.

The District Court took the view that there was no consideration for this agreement and they, therefore, dismissed the claim made by the present Appellant.

The agreement is not very clear in its terms, but it begins by reciting that the parties thereto agreed to be partners in the profits of a certain plot of land, and it goes on to provide that such profits shall be halved between them.

The agreement further provides what shall happen "if it will be discovered hereafter that either of the two parties above mentioned has obtained some profits without the knowledge of the other party".

It seems, therefore, that the parties to this agreement intended it to be something more than a mere agreement whereby an agent was to be paid commission if he succeeded in finding a purchaser and that the expression "partners" implies mutual promises.

We are of opinion, therefore, that the District Court was wrong in holding that there was no consideration, but unfortunately as the District Court did not go fully into the case we have no complete findings of fact and we are, in consequence, unable to express a final judgment thereon. It should not be overlooked that in the proceedings before the District Court, the Respondent admitted that he made a promise to the Plaintiff (Appellant) to give him a share of the profits if he succeeds to sell the land but, in the absence of full findings of fact, we do not know what bearing, if any, this admission may have on the case.

The judgment of the District Court is set aside and the case is remitted to the District Court, with an intimation that we take the view that there is consideration to this agreement, so that that Court may consider this claim under the agreement in the light of the facts that may be established before it and give judgment accordingly.

Costs will follow the event.

Delivered this 3rd day of March, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 84/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: McDonnell, C. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Renze de Pasquale. APPELLANT.

v.

David Srour. RESPONDENT.

*Bills of exchange — Promissory notes made in one country and payable in another — No presentment for payment is necessary — B/E Ord., secs.* 51(1), 72(3), 89(1)(3).

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 31st December, 1934:—

HELD: 1. No presentment for acceptance is required for promissory notes.
2. Promissory notes drawn in one country and payable in another need not be presented for payment.

ANNOTATIONS: Note that Secs. 87 and 89 cited in the judgment are numbered in Drayton as Secs. 88 and 90, respectively. The reference to Sec. 51(1) is unclear.

FOR APPELLANT: Maman.

FOR RESPONDENT: Margolin.

## JUDGMENT.

Leave to appeal has been given on the following two points of Law:—

(1) Is Section 72(3) of the Bills of Exchange Ordinance, 1929, to be interpreted as of general application or to be limited to the case of bills drawn in one country and negotiated, accepted or payable in another, *etc.* (see Sec. 72).

(2) Do the bills in this case fall within the operation of the provision of Sub-Section 3 of Section 72 and if so, how?

Now, in the first place, the documents sued upon are not bills of exchange but promissory notes. This being so, Section 87 of the Bills of Exchange Ordinance applies as the two notes in the body thereof are made payable at a particular place, namely Beyrouth. Under Section 89(3) of that Ordinance, the provisions of the Ordinance as to the presentment for acceptance of bills of exchange do not apply to promissory notes.

By Section 89(1) the provisions as to bills of exchange, other than those set out in Section 89(3), apply to promissory notes; therefore, Section 51(1) applies and presentment of the promissory notes for payment was not necessary.

The answer, therefore, to the first question put in the grant of leave to appeal is that Section 72(3) is limited to the case of bills drawn in one country and negotiated, accepted or payable in another: and the answer to the second question is that the promissory notes sued upon in the present case do not fall within the provisions of Section 72(3) for the reason that, as we have seen, they need not be presented for acceptance or payment.

For the above reasons, the appeal is dismissed with costs to include LP. 3.— advocate's fee.

Delivered this 9th day of April, 1936.

*Chief Justice.*

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CIVIL APPEAL No. 170/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Shimon Yacoub Shimon. APPELLANT.

v.

Ezra Koukia. RESPONDENT.

*Onus of proof — Allegation of overpayment — Proof on party affirming — H. C. 47/34 distinguished.*

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

HELD: A party suing for the return of an amount allegedly overpaid on a mortgage should establish the fact that there has been overpayment.

DISTINGUISHED: H. C. 47/34 (2, P. L. R. 226; 7, C. of J. 391).

FOR APPELLANT: Levanon.

FOR RESPONDENT: Aboulafia.

JUDGMENT.

1. In this case the Appellant sued in the District Court of Jerusalem for a sum of LP. 500.—. There had been proceedings in connection with a mortgage before the Chief Execution Officer, Jerusalem.

2. The mortgage deed showed that the amount of loan was LP. 2000, both parties agreed that that figure was not correct, and that the amount was something less than LP. 2000.

3. When the property was sold, the Respondent succeeded in having paid to him the sum of LP. 1500. The Appellant alleged before the District Court that this was LP. 500 too much and he sought for an order that the Respondent pay him this LP. 500. The District Court held that the burden of proof was on the Appellant. We think that

the District Court was right. The maxim is that he who asserts must prove and the burden was quite clearly on the Appellant to show that the amount of loan was not LP. 1500, but LP. 1000 only.

4. Mr. Levanon, who argued the case for the Appellant, cited as an authority High Court case No. 47 of 1934 but that case clearly applies only to proceedings before the President of a District Court when he is dealing with mortgages in his capacity as Chief Execution Officer. The case has no application to an action such as the present one where the Appellant is suing for the refund of money alleged to have been wrongly paid.

5. The judgment of the District Court was right, the appeal is dismissed with costs to include LP. 3.— advocate's fees.

6. The Appellant has the right to administer the oath to the Respondent in the District Court.

Delivered this 11th day of October, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 172/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Greene, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Nimer Khazin of Bineb Village, Acre Sub-District. APPELLANT.

v.

Mahmoud Muhammad Ali Abdul Rahim on behalf of all the heirs of his father. RESPONDENT.

*Procedure — Decision on a preliminary point — Case should be remitted if decision set aside on appeal — Stamp Duty Ord., secs.* 16(4), 68, 69, *Mejelle* 1817, *L. T. O., sec.* 11.

In allowing an appeal from the judgment of the District Court of Haifa, dated 25.3.37, given on appeal from the judgment of the Magistrate's Court, Acre, dated 29.12.36, and in remitting the case:—

HELD: When a case is decided on a preliminary point which is overruled on appeal, the case should be sent back for completion.

FOR APPELLANT: Abcarius.

RESPONDENT: In person.

## JUDGMENT.

This is an appeal from the judgment of the District Court of Haifa, dated 25.3.37 setting aside the judgment of the Magistrate's Court of Acre and entering judgment in favour of the present Respondent.

The Magistrate held that the document on which the claim was based was insufficiently stamped at the time of its execution and relying on Sections 16(4), 68 and 69 of the Stamp Duty Ordinance dismissed the action.

The District Court, sitting in chambers, on the record of the Magistrate's Court set aside the judgment of the Magistrate on the ground that notwithstanding the inadmissibility of the document the fact that there was an admission of the receipt of the amount involved in the document the present Appellant was liable to refund to the present Respondent the amount of the loan under Art. 1817 of the *Mejelle* and in view of the provisions of Section 11 of the Land Transfer Ordinance.

On the application of the Appellant, the President of the District Court of Haifa gave leave to appeal to the Supreme Court on the following point of law:—

> "Whether, in the circumstances referred to in its judgment, the District Court was right in deciding the case itself or ought to have remitted it to the Magistrate to find out whether the Appellant (Defendant) had any defence to make upon the finding of the District Court as to the purport of the document forming the subject-matter of the action."

We have listened at length to the points raised by Abcarius Bey, who appeared before us on behalf of the Appellant, and we are satisfied that the Magistrate of Acre decided the case on the preliminary point, *i. e.* as to the insufficiency of the stamps on the document the subject matter of the action, without giving the parties an opportunity to complete their defence. We are of the opinion that the District Court ought to have remitted the case to the Magistrate to hear the defence of the parties and to give judgment thereon.

We, therefore, hold that this case should be remitted to the Magistrate's Court of Acre to hear the pleadings of both parties to the action as to the merits of the case and to give judgment accordingly.

Costs to follow the event.

Delivered this 26th day of October, 1937.

*British Puisne Judge.*

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CIVIL APPEAL No. 112/35.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: McDonnell, C. J., Baker and Frumkin, JJ.

IN THE APPEAL OF :—

Ahuzath Ben Ari Co. Ltd. APPELLANT.

v.

Registrar of Companies. RESPONDENT.

*Companies — Registration of charge — Secs.* 127(1), 132, *Companies Ordinance — Time for registration — Power of Court to extend the time.*

In allowing an appeal from the judgment of the District Court, Jaffa (Civil Case 136/35), dated the 11th April, 1935:—

HELD: 1. *Quaere* within what period the fees payable for the registration of a charge should be tendered.

2. The Court may extend the time for registration.

ANNOTATIONS:

1. Appellant had submitted a mortgage deed for registration with the Respondent within the 21 days' period prescribed in sec. 127 of the Companies Ordinance. Registration was, however, refused owing to Appellant's failure to pay the registration fee in time. Appellant thereupon applied to the District Court for an order directing Respondent to register the mortgage and/or — in case the Court held that the registration fee should also have been paid within the above period of 21 days — for extension of time under sec. 132 of the Companies Ordinance. The application was refused although the Respondent did not appear; Appellant appealed and counsel for Respondent stated that he had no objection to the appeal being allowed.

2. For other authorities on Secs. 127 *et seq.* of the Companies Ordinance see C. A. 26/40 (1940, S. C. J. 286) and cases cited in note 2 thereto, and H. C. 82/40 (1940, S. C. J. 421). *Cf.* Halsbury, Vol. 5, pp. 512—3, paras. 828—9.

FOR APPELLANT: P. Joseph.

### JUDGMENT.

The appeal is allowed and under Section 132 of the Companies Ordinance, 1929, the time for registration of the mortgage is extended to January, 23rd, 1936.

No costs.

Delivered this 22nd day of January, 1936.

*Chief Justice.*

CIVIL APPEAL No. 44/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Simon Rosenberg. APPELLANT.

v.

Cecilie Bermann. RESPONDENT.

*Sale of land — Breach of contract — Option to reject — Purchaser entitled to refuse transfer for non-compliance with building permit.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 26th February, 1937:—

HELD: A purchaser is entitled to refuse transfer of property where the house thereon was not built in accordance with the building permit.

ANNOTATIONS: *Cf.* C. A. 95/39 (1939, S. C. J. 531 at p. 535).

FOR APPELLANT: Levitsky.

FOR RESPONDENT: Buxbaum.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jerusalem whereby the claims of both the Plaintiff and Defendant were dismissed. The District Court rejected the claim of the vendor as it held that the house, which he undertook to transfer to the purchaser, the Respondent, was defective and it dismissed the Respondent's claim as it found as a fact that she was not willing and ready to accept the transfer of that house.

2. The District Court found as a fact that the said house was not built in accordance with the building permit and that was a defect which entitled the Respondent not to accept the transfer.

3. We agree with the District Court and we cannot usefully add anything to its judgment.

The appeal is dismissed with costs and LP. 4.— advocate's fees.

Delivered this 1th day of June, 1937.

*British Puisne Judge.*

CIVIL APPEAL No. 35/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Said Awad & an. — APPELLANTS.

v.

Joseph P. Albina. — RESPONDENT.

*Evidence — Auditor's report — Cross-examination.*

In allowing an appeal from the judgment of the District Court, Jerusalem, dated the 18th February, 1937:—

HELD: Cross examination of the auditors who make a report on the books of a partnership should be allowed.

ANNOTATIONS:

1. The proceedings culminated in C. A. 47/38 (1938, 1 S. C. J. 230).
2. *Cf.* C. A. 43/43 (1943, A. L. R. 154).

FOR APPELLANT: G. Salah.

FOR RESPONDENT: Moghannam.

JUDGMENT.

In this case the Appellants had sued in the District Court of Jerusalem for the recovery of money paid by mistake. They were the guardians of the children of Issa Awad, who had been a partner of the Respondent and who died in February, 1929. An account had been made and one of the Appellants had paid the Respondent LP. 1055 which he agreed to be due. Subsequently it was alleged that a certain book and certain documents were found which showed that this LP. 1055 had been paid in error. The District Court referred this book and documents to a firm of auditors. The firm made two reports. In the second report, which was dated November 28th, 1936, the firm suggested that the book was false. The advocate for the Appellants then asked to be allowed to cross-examine the firm on its report, but this application was refused by the Court.

We think the Court erred in so refusing and we, therefore, order that the judgment of the District Court be set aside and that the case be remitted for a new trial.

Costs to follow the event.

Delivered this 2nd day of June, 1937.

*Senior Puisne Judge.*

CIVIL APPEAL No. 177/34.

# IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Baker and Frumkin, JJ.

IN THE APPEAL OF :—

Saleh Yusef Setty. APPELLANT.

v.

Katy (Khatoum) Setty. RESPONDENT.

*Personal status — Jurisdiction of Civil and Religious Courts — Whether divorce previously granted — Rabbinical Court has no jurisdiction outside Palestine, P. O. in C., art. 53(a), 59 — Claim for maintenance in Religious and in Civil Courts — Law applicable — Religious law to be proved — In action for maintenance, what may be raised by way of counterclaim.*

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 21st November, 1934:—

HELD: 1. The exclusive jurisdiction of the Rabbinical Court does not extend over persons not residing in Palestine.

2. When a claim for maintenance is made in the Rabbinical Court, the District Court cannot entertain a claim of the same nature before being satisfied that the Defendant did not submit to the jurisdiction of the Rabbinical Court.

3. Actions for maintenance between Iraqi Jews before the Civil Courts are governed by Jewish Law which must be proved.

4. A claim for the return of a passport is not a matter of personal status. A claim for vacation of premises, although not a matter of personal status, may give rise incidentally to questions of personal law.

ANNOTATIONS:

1. Note that at the time of these proceedings the parties were not "foreigners" within the meaning of Art. 59 of the Order in Council. The position would now differ in this regard as a result of the 1939 amendment of the Article.

2. On the first point see also P. C. 58/39 (1941, S. C. J. 357), following P. C. 47/32 (1, P. L. R. 831; 2, C. of J. 406). *Cf.* H. C. 36/37 (*ante*, p. 302) — no jurisdiction of a Religious Court functioning outside Palestine.

3. On the second point see C. A. 201/43 (1943, A. L. R. 557) and note 1.

4. *Cf.* H. C. 26/42 (1942, S. C. J. 205) — wife not entitled to reside in husband's house.

## JUDGMENT.

This is an appeal against a judgment of the District Court, Jerusalem,

given on the 21st November, 1934, whereby the Appellant, Saleh Yusef Setty, was ordered to pay to the Respondent, Katy (Khatoum) Setty, LP. 12 per month from the 1st January, 1934, by way of maintenance.

The parties are of the Jewish faith, and at the time of action the Appellant was a national of Iraq.

The Appellant maintains that the District Court had no jurisdiction to make an order against him, because at the date when the Respondent's action was begun, she had ceased to be his wife in consequence of a decree of the Rabbinical Court issued on 29th *Heshvan*, 5684, dissolving the marriage between the parties.

Alternatively, the Appellant alleged lack of jurisdiction in virtue of the fact that an application for an order of maintenance had been made by the Respondent to the Rabbinical Court, which in such matter had jurisdiction concurrent with that of the Civil Court.

With regard to the first of these objections, we are satisfied that the proceedings in the Rabbinical Court, which resulted in the decree dated 29th *Heshvan*, 5684, were invalid. The exclusive jurisdiction conferred upon the Rabbinical Courts by Article 53(a) of the Palestine Order-in-Council, 1922, with respect to "members of their community other than foreigners as defined in Article 59", must be understood to extend only to members of the Jewish Community who are or have been resident in Palestine. The Respondent was not in Palestine when the decree was issued, and it is not suggested that at that time she had ever resided in this territory.

Under these circumstances, we hold that the Rabbinical Court had no jurisdiction over her.

With regard to the subsequent proceedings in the Rabbinical Court, the position is not clear.

It appears from the Rabbinical Certificate submitted, that an application to the Rabbinical Court was made by the Respondent, but the Certificate does not state the nature of the application.

If the Respondent applied for maintenance, the fact that she did so would disentitle her from claiming maintenance in the District Court, unless the Appellant had refused to submit to the jurisdiction of the Rabbinical Court.

As the matter affects the jurisdiction of the Court, we hold that the District Court should have required evidence as to the nature of the application to the Rabbinical Court before proceeding further, and the case must go back to the District Court for such evidence to be submitted.

The parties are in agreement that the claim is governed by Jewish Law: and in the event of the District Court deciding that it has jurisdiction to hear the claim, evidence must be submitted as to the relevant provisions of Rabbinical Law.

The Appellant filed a counterclaim, praying for an order to the Respondent to leave the Appellant's house and lands, and also for an order for delivery to the Appellant of his Iraqi passport. Neither of these claims, however, is a matter of personal status, though the former may raise questions of personal law incidentally.

These claims, therefore, cannot be made by way of counterclaim in an action for maintenance, and the appeal against the rejection of the counterclaim is dismissed.

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

Delivered this 5th day of March, 1936.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 175/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Abraham Eisenmann. APPELLANT.

v.

Palestine Potash, Ltd. RESPONDENT.

*Workmen's compensation — Declaration of liability.*

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 2nd March, 1935:—

HELD: An arbitrator may, under the Workmen's Compensation Ordinance, give an award for a declaration of liability.

ANNOTATIONS: The facts underlying this appeal are set out as follows in an application by the Appellant to the arbitrator (H. W., Mr. Zuckermann):—

"In this case, an accident occurred to the Workman on the 15th of October, 1933, arising out of and in the course of his employment with the Employers. The Workman was out of work until the 14th of April, 1934, when he returned to his employment with the employers and was earning his pre-accident wages. As there was partial physical incapacity of the Workman and as future physical

incapacity could be apprehended (The Workman had returned to work of a lighter nature), application was made for the registration of a Memorandum of Agreement containing a declaration of liability. The Employers refused to admit the genuineness of the said Memorandum of Agreement and, therefore, the Workman applied for arbitration. You were appointed Arbitrator, and the Workman claimed that an Award be issued declaring the liability of the Employers, or, alternatively, for the payment of nominal compensation of 1 mil per week, with liberty to apply.

The question was raised whether such an award may be issued by an arbitrator under the Workmen's Compensation Ordinance. I respectfully submit that such power is included in section 2 of the Workmen's Compensation (Amendment) Ordinance, 1927. This section is identical with section 1(3) of the English Workmen's Compensation Act, 1906, and is almost identical with section 21(1) of the Workmen's Compensation Act, 1925. It is submitted that the question at issue is as to the liability to pay compensation in the future, and that such liability is clearly covered by the wording of section 2 of the Workmen's Compensation (Amendment) Ordinance, 1927 .....".

The following two questions were thereupon submitted by the arbitrator to the President District Court under sec. 3 of the third Schedule to the Workmen's Compensation Ordinance:—

"(a) Whether Section 2 of the Workmen's Compensation (Amendment) Ordinance, 1927, (Sec. 3(3) in Drayton) gives an arbitrator the power to issue an award, declaring liability of the employer, or to issue an award for a nominal compensation in cases where there is a physical incapacity, but no present pecuniary loss.

(b) Whether in a case where the wording of a section of the Workmen's Compensation Ordinance (which is based on the English Workmen's Compensation Acts) is identical — or almost so — with the wording of a section of the English Workmen's Compensation Acts, reference may be made to the decisions of the English Courts."

The President District Court, on 2.3.1935, gave the following ruling:—

"With regard to point (1) on which a ruling is sought:—

Section 2 of the Workmen's Compensation Amendment Ordinance, No. 19 of 1927, provides, *inter alia*, that questions arising *as to the liability to pay* compensation shall be settled by arbitration in accordance with the third Schedule of the Principal Ordinance.

It appears from para. 3 of Counsel for Petitioner's statement that the workman returned to his employers by whom he was paid his pre-accident wages and that, while the workman did not suffer any present pecuniary loss, further physical incapacity could be apprehended. It further appears that when the Petitioner asked for a memorandum of agreement to be recorded, the Respondent Company refused to agree to such request.

It seems to me that the circumstances of this case are covered by the provisions of section 6(b) of the Third Schedule of the Workmen's Compensation Ordinance, 1927, which, although not specifically referring to the nature of the relief prayed for by Petitioner

(Declaration of Liability), empowers the District Court, in the circumstances outlined above, to record a memorandum of agreement, on such terms as the District Court, under the circumstances, may think just.

I need not now decide the other question raised in your letter under reference as to whether or not the controverted points may or may not be decided by reference to English Law, as I am of opinion that my ruling on point (1) is sufficient to dispose of the matter in issue."

This ruling was, by leave, appealed to the Supreme Court.

FOR APPELLANT: Krongold.

FOR RESPONDENT: Seligman.

## JUDGMENT.

The decision of the President of the District Court is set aside — the matter referred is remitted to the arbitrator to make an award finding the facts and deciding the points in issue between the parties.

No order as to costs.

Delivered this 17th day of February, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 198/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Copland and Khaldi, JJ.

IN THE APPEAL OF:—

Suleiman Abu Ghazaleh. APPELLANT.

v.

Agudath Shechunat Hazrifim "Macabi" Cooperative Society Ltd. RESPONDENT.

*Musha' — Occupation by co-owner — How a corporation occupies land — Members occupying land belonging to cooperative society — Unsuitability of provisions of Mejelle to modern conditions — Mejelle, 1075, Cooperative Societies Ord., sec. 2; C. A. 115/29.*

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 15th July, 1937:—

HELD: The members of a cooperative society may exercise, on behalf of

the cooperative, the rights of the latter as co-owner of land in *musha'* tenure.

REFERRED TO: C. A. 115/29 (1, P. L. R. 606; 4, C. of J. 1161).

ANNOTATIONS: On the unsuitability of the *Mejelle* to modern conditions *cf.* C. A. 70/44 (1944, A. L. R. 426).

FOR APPELLANT: Cattan.

FOR RESPONDENT: Olshan.

## JUDGMENT.

*Trusted, C. J.*: The Plaintiff (now the Appellant) in his statement of claim alleged that the Defendants — a cooperative society — were in occupation of certain land, and further alleged that in the circumstances he was entitled to claim the estimated rent from the society amounting to LP. 421.750 mils.

The District Court found that the Defendants are the partners, in the sense of being co-owners of *musha*-shares, with the Plaintiff in the land in question. It is obvious that the incidents of *musha* tenure, when interpreted in accordance with the obscure provisions of the *Mejelle*, are unsuitable to modern conditions, but this is a question for the consideration of the Legislature.

It is not easy to discover exactly what the Plaintiff's case was. The trial Court made the following preliminary order:—

> "The Plaintiff has to prove that the society has let the land to definite persons for a definite period and received a definite rent for that letting, *i. e.* rent for leasing the land of the society".

and that Court further found, at the end of its judgment:—

> "Wherefore the Court is of opinion that the Plaintiff has failed to prove his contention to the effect that the Defendant lets part of the said land to others, and asserts that all the persons occupying the said land are members in the society and have acquired this share of theirs by virtue of the relevant paragraph of Article 2 of the Cooperative Societies Ordinance, No. 50/33 (Drayton, page 395). The society, therefore, cannot be held responsible for the rent claimed by the Plaintiff in accordance with the last paragraph of Art. 1075 of the *Mejelle*. Wherefore Plaintiff's claim is dismissed."

If this is a finding by the Court that the Defendants are themselves occupying the land, I agree with the majority of the members of this Court that the Plaintiff cannot recover. Moreover, having regard to C. A. 115/29, P. L. R. 606, I am doubtful if in any circumstances the Plaintiff could recover rent from the Defendants, but I reserve my judgment, as to the position of the Plaintiff *vis-à-vis* the members of the society as distinct from the society, if any, occupying the land, which does not arise in these proceedings.

I agree, therefore, that the appeal should be dismissed, with costs. Advocate's fees LP. 5.—.

Delivered this 8th day of December, 1937.

*Chief Justice.*

*Copland, J.*: We have already intimated that in our opinion this appeal fails and we now give our considered reasons for that opinion.

This is an appeal from a judgment of the District Court of Jaffa dismissing the Plaintiff's claim for rent for land which he alleges has been let by the Defendants, who are a cooperative society, and in which land they are partners with the Plaintiff in undivided shares, it being further alleged that in so letting the property the Defendants made a profit.

The District Court found as facts that the Plaintiff and Defendants were partners in the land, in respect of which the Plaintiff's claim for rent was made, each having a specified *musha*-share — further that there was nothing in the evidence of the witnesses nor elsewhere which supported the Plaintiff's allegation that the Defendants had let the property to persons other than members of the society, and had thereby made a profit. The burden of proof was on the Plaintiff since he alleged that plots of land had been let to non-members — that burden he failed to discharge and we cannot interfere with the findings of the trial Court.

The District Court have dealt very fully with the facts and we agree with their statement of the law and with the conclusions at which they arrived. This being so it is unnecessary to state in other language that which has already been said. The antiquated provisions of the *Mejelle* were obviously intended to deal with the question of village *musha* and never to apply to a case where a cooperative society, a purely modern conception, is one of the partners. It is agreed that, if two individuals own property in undivided shares, each is entitled to work his share himself, and is entitled to make a profit therefrom by reason of his own efforts without being liable to account to his partner for that profit. However unsuitable they may be one must apply the principles of the *Mejelle* to the case now before us, and it seems to us, in the circumstances of this case, and each case must be considered on its own facts, that the Respondents (the Defendants in the Court below) have used and worked this property themselves in the only way in which they could so work it, and in the only way in which their purposes permitted them to do so, namely, by means of their members.

We think, for these reasons and for those given by the District Court,

that this appeal fails and must be dismissed with costs and LP. 5 advocate's fees

Delivered this 8th day of December, 1937.

*British Puisne Judge.*

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CIVIL APPEAL No. 52/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Baker, Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

American Zion Commonwealth. APPELLANT.

v.

Isaac Kesselmann. RESPONDENT.

*Consideration — Agreement supported by consideration.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 28th December, 1934:—

HELD: An agreement supported by consideration is enforceable.

ANNOTATIONS: On consideration in Palestinian Law see C. A. 167/33 (*ante*, p. 12) and annotations; *cf.* C. A. 60/36 (*ante*, p. 167) and C. A. 166/35 (*ante*, p. 348).

JUDGMENT.

Respondent in his evidence before the lower Court admitted writing an undertaking to re-transfer 500 square metres of the land transferred to him by Appellants and then goes on to say "I had to sign the undertaking in order to get transfer owing to difficulties with the Company".

We are satisfied that it was not a gratuitous promise but that of a promise on the faith of which Appellant was induced to transfer the land in question and that but for such promise he would not have done so and, therefore, there was consideration for the undertaking.

Accordingly, the appeal must be allowed, the judgment of the lower Court quashed and the case returned for evidence to be heard with regard to the value of the land undertaken to be transferred to Appellant and a judgment for the value thereof to be given.

Costs, costs in the cause.

Delivered this 5th day of March, 1936.

*British Puisne Judge.*

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CIVIL APPEAL No. 18/36.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :—

The Palestine Land Development Co. APPELLANT.

v.

Salem Samaan. RESPONDENT.

*Sale of land — Agent appointed by both parties — Breach of contract by agent's fault — Responsibility for breach — Interest on return of deposit.*

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 4th February, 1936:—

HELD: When two parties to a contract agree on an agent to perform certain conditions of the contract and the agent defaults, the Court should determine which of the parties, if any, is responsible for the agent's default.

FOR APPELLANT: Olshan.

FOR RESPONDENT: Salah.

## JUDGMENT.

The Respondent in these proceedings entered on the 24th August, 1934, into an agreement whereby he undertook to sell and transfer certain plots of land. Clause 4 of the said agreement is as follows:—

> "Second party undertakes to appear in the *Tabu* in order to accept the transfer of the said plots within the limited time, after 1st party fulfils his undertaking in accordance with the above mentioned terms. Second party undertakes to appear in the *Tabu* within a week after he receives the registered letter to the effect that the transfer transaction is ready and awaiting the fixing of signatures in the *Tabu*. Both parties agreed that first party should appoint Shehadi Ahmad El-Mustafa Baraket or any other person to complete the transfer transaction in the *Tabu* but second party should pay the expenses."

2. The said Shehadeh Ahmad Barakat resigned without having completed the transfer transaction in the Land Registry.

3. The Appellant brought an action in the District Court claiming the return of the sum of LP. 225 paid in advance on account of the purchase price with LP. 1500.— damages, alleging that the said She-

hadeh Ahmad Barakat was unable to prepare and complete the transfer as the Respondent committed a breach of his undertakings under the agreement. The Respondent filed a separate action claiming damages.

4. The District Court dismissed both Appellant's and Respondent's claims for damages, and gave judgment in favour of the Appellant for the return of the sum of LP. 225 with interest.

5. It is clear from the wording of clause 4 of the agreement that Shehadeh Ahmad Barakat was the agent of both parties. But he acted in two separate capacities. Had the agent committed a personal breach, which was not due to the fault of either party, it would seem that both parties would be responsible for that breach and no claim for damages by either party would arise. But in case the breach committed by the agent is due to the fault of one of the parties, that party alone would be responsible for damages: and the innocent cannot be held responsible.

6. The lower Court heard no evidence on this point. We, therefore, set aside the judgment of the lower Court on this point to hear evidence as to who of the parties, or both, was responsible for the breach, if any.

7. The Appellant took another point regarding the date from which interest is payable on the sum of LP. 225.— which was paid in advance on the account of the purchase price. The District Court did not state in its judgment the date from which the interest is payable on that sum. Clause 8 of the agreement, however, provides that interest is payable on that sum from the date of payment, and we, therefore, amend this part of the judgment of the lower Court accordingly.

8. The Respondent is to pay the costs of this appeal to include LP. 3.— advocate's fees.

Delivered this 22nd March, 1937.

***British Puisne Judge.***

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CIVIL APPEAL No. 83/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Taufiq Ibrahim el Khamra. APPELLANT.

v.

Sara Said Anani. RESPONDENT.

*Oath under Mejelle, art.* 1818 — *Allegation of indebtedness.*

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 30th November, 1934:—

HELD: It is proper and sometimes essential that the form of the oath under art. 1818 of the *Mejelle*, administered to the defendant that he is not indebted to the Plaintiff, should include the date of the alleged indebtedness.

ANNOTATIONS:

1. Respondent sued Appellant for repayment of a debt of LP. 75.—. A P/N for that amount was given by Appellant on 20.6.29, but Respondent did not sue on the note (which was apparently unstamped) nor was the note produced in evidence; instead, Respondent asked for an oath to be administered to Appellant "that he did not incur the said debt to her (Respondent) on June 20, 1929", *i. e.* the date of the above P/N. As Appellant refused to take the oath in that form judgment was given against him and an appeal to the District Court failed. Hence this appeal.

2. On the decisive oath under the *Mejelle see* C. A. 349/43 (1944, A. L. R. 364) and note 2.

FOR APPELLANT: El Aidi.

RESPONDENT: No appearance.

## JUDGMENT.

The only point in respect of which leave to appeal has been granted, is whether in administering the oath to Defendant it was essential to make reference to a specific date.

The Appellant contends that the inclusion of a particular date in the form of the oath is illegal, for such an oath according to him should merely refer to the indebtedness or otherwise of the person to whom it is administered.

While not going into the question of whether the oath was in the circumstances properly administered, or whether it is in the proper form or not, as leave to appeal on these points has not been granted, this Court holds that the inclusion of a specific date in the body of the oath as administered by the Court below is essential, and was thus properly incorporated therein.

The appeal is, therefore, dismissed with costs.

Delivered this 24th day of December, 1936.

*British Puisne Judge.*

CIVIL APPEAL No. 35/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Baker, Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Eliyahou Gabrilovitz & 2 ors. APPELLANTS.

v.

Yehia Lugashi & an. RESPONDENTS.

*Joint and several liability — Construction of contracts — "All the three as one".*

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 26th December, 1934:—

HELD: By giving these words their common ordinary and popular sense, "all the three as one" in a contract imposes a liability which is joint and several.

ANNOTATIONS: *Cf.* Halsbury, Vol. 7, pp. 74 *et seq.*, para. 95.

JUDGMENT.

The material question for decision in this appeal is the construction to be placed on certain words in a contract entered into between Appellants and Respondents for the sale of land. The three Appellants (the vendors) are described as the parties thereto of the one part and then come the words "all the three as one".

Appellants have argued that this term does not render the Appellants jointly and severally liable under the contract, but its true construction is to render each Appellant liable for one-third part of their undertaking, in other words, imposes a several liability. With this contention we do not agree and are of opinion that, giving the said words their common ordinary and popular sense, they must be construed to render the three Appellants as jointly and severally liable for the obligations under the contract and that where one signs a receipt for money such receipt binds all three vendors. This conclusion was arrived at by the lower Court, and as we find no merit in the other grounds of appeal, the judgment of the lower Court is affirmed and the appeal dismissed with costs and advocate's fees assessed at LP. 3.—.

Delivered this 13th day of March, 1936.

*British Puisne Judge.*

CIVIL APPEAL No. 26/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Butras Salem Wahhab & an. — APPELLANTS.

v.

Ali Saleh Ala ed-Din. — RESPONDENT.

*Sale of land — Breach of contract — Interpretation — Vendor's duty to prepare file — Disagreement of Judges.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated 12th June, 1936:—

HELD: In the absence of any stipulation to the contrary, it is the vendor's duty to prepare the file for transfer.

FOR APPELLANTS: Moghannam.

FOR RESPONDENT: Ayoubi.

JUDGMENT.

In this case a contract was entered into between the parties whereby Respondent undertook to sell to Appellants a plot of land for the agreed price.

Clause 5 of the said agreement, on the construction of which this appeal depends, declares it to be the duty of the Appellants to pay the expenses of the transaction and all fees and taxes that may fall due after the date of the contract.

The transfer did not take place, and the Appellants, therefore, brought an action before the District Court claiming the sum of LP. 120.— which they have paid in advance plus the sum of LP. 250.— as liquidated damages.

The two judges constituting the Court of trial disagreed, one of them holding that both parties were equally at fault and that thus no damages can be awarded, while the other held that Plaintiff's willingness to perform his obligations was never questioned and that judgment must thus be given for the full amount of the claim. The former being the view advantageous to the Defendant, it was adopted, and judgment was, therefore, given ordering him to refund the sum of LP. 120.—, but Plaintiff's claim for damages was dismissed.

There is nothing in the contract to vary the general rule that it is

the vendor's duty to arrange for and complete the transaction of sale. Clause 5 of the agreement merely entitles the Respondent, who is the vendor in this case, having prepared the transaction, to call upon the Appellants to reimburse him for what he has spent, but it is not the latters' duty to tender the money beforehand.

As a matter of fact, however, the Respondent failed to prepare the transaction or even to open a file in the Land Registry, and though the Appellants went out of their way in calling Respondent's attention to that effect, the latter still did nothing and did not even care to reply.

For these reasons, we are of the opinion that Appellants failed in nothing that it was their duty to perform under the contract, and their appeal must, therefore, be allowed and judgment entered for them in the sum of LP. 250.— as damages, in addition to the sum of LP. 120 awarded by the District Court with costs and advocate's fees assessed at LP. 3.—.

Delivered this 24th day of March, 1937.

*British Puisne Judge.*

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CIVIL APPEAL No. 66/36.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Khaldi and Frumkin, JJ.

IN THE APPEAL OF:—

Shaoul Halevy & an. APPELLANTS.

v.

Moshe Eckhaus. RESPONDENT.

*Partnership — Construction of agreement — Action by a partner cannot be brought before dissolution — Walker v. Hirsch; Davis v. Davis — Partnership Ord., sec. 3(4).*

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 14th May, 1936:—

HELD: An action by a partner against another cannot be brought before dissolution of the partnership.

ANNOTATIONS:

1. The following is the text of the judgment of the District Court (Edwards and Mani, JJ.):—

"In this case the Plaintiffs sue on a document (the original of

which was in German), dated 6th March, 1935. The Plaintiffs contend that the document is an agreement of sale, whereas the Defendant contends that it is, in reality, a partnership agreement and that, accordingly, the present action is wrong in form, as the Plaintiffs should have asked for a dissolution of partnership. It is for this Court to say whether or not it is a partnership agreement. The law relating to this type of question is to be found set out in Halsbury's Laws of England Vol. 22, page 9, para. 11 * :—

> "The terms of the arrangement between the parties must be fairly considered as a whole, and if the receipt of profits is only one of such terms it is not conclusive, and the court will give effect to the entire arrangement. The whole question to consider is — what, on the contract between the parties, are the rights which that contract has, *inter se*, given to one as against the other. (Walker *v.* Hirsch (1884) 27 Ch. D. 460 C. A.). But the receipt of a share of profits, ..... if it is the only circumstance from which the intention of the parties can be inferred, they are partners". (Davis *v.* Davis (1894) 1 Ch. 393)".

Our attention has been called by the Plaintiffs' advocate to the provisions of Section 3(4), Partnership Ordinance, 1930, which is in the following terms:—

> "A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business shall not of itself make the servant or agent a partner in the business".

That Sub-Section, of course, deals with what is usually known as a service agreement.

The document now before us has none of the attributes of a service agreement. The advocate for the Plaintiffs has also drawn our attention to the words in Sec. 3(8) "shall be *prima facie* evidence that he is a partner in the business, but this evidence may be rebutted having regard to all the circumstances of the transaction between the parties".

Now, the Plaintiffs' advocate relies solely on the document, and he has not suggested to us how, or in what manner, the "*prima facie* evidence" referred to may, in the case before us, be rebutted, nor has he indicated to us any circumstances by which the presumption should be or is in this case rebutted. Now, to turn to the translation of the document itself we find, *inter alia*, such provisions as the following, *viz.* "Mr. Eckhaus (Defendant) is, therefore, participating with 33.1/3%". "The inventory remains the property of the business and none of the partners shall be entitled to dispose thereof or any part thereof on his own authority and alone". "As long as the advanced amounts are not repaid by Mr. Eckhaus, Mr. Eckhaus is only an employee of the business with remuneration of 33.1/3% of the net profits". It is true that there also appears the

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* Hailsbam, Vol. 24, pp. 401—2, para. 783.

(*Ed.*)

following, *viz.* "after the payment of the debts on the part of Mr. Eckhaus the ownership shall automatically be retransferred to Mr. Eckhaus and then Mr. Eckhaus will be accepted as partner of the business". But we consider that that provision cannot be construed, (having regard to the provisions of the document as a whole) as a circumstance rebutting the *prima facie* evidence that Mr. Eckhaus is a partner. The parties specifically in terms referred to themselves as "partners". Then again we find "Messrs. Eckhaus and Dr. Portnoi undertake to devote their whole energy and knowledge to the business". "The partners shall not be entitled during the existence of the partnership to carry on any business of same or similar nature, *etc.* Non-compliance therewith shall cause the expulsion from the partnership. One partner shall not be entitled to act on behalf of the enterprise". "All acts on behalf and on account of the partnership shall be done by two partners". Then (and this is very important) "all matters concerning the business shall be decided upon by majority and every partner shall be bound by the majority". Now, it is to be remembered that, including Eckhaus, there are only three parties to the document. Now, if Eckhaus is not a partner, this reference to a majority would be entirely meaningless. Then again, there are provisions for the wife or heirs of a deceased partner joining the partnership. Then, finally, there is this provision, *viz.*: "The partnership shall be dissolved automatically when the partners will decide not to prolong the contract of lease of the shop".

We are satisfied that the document relied upon by the Plaintiffs is in the nature of a Partnership Agreement. It follows, therefore, that the present action is wrong in form.

The Plaintiffs' remedy would appear to be a suit for the dissolution of partnership. We dismiss this case with costs and LP. 3.— advocate's fees.

Judgment given this 14th day of May, 1936".

2. *Cf.* C. A. 52/37 (*ante*, p. 128) which is to the same effect.

FOR APPELLANTS: Hoffman.

FOR RESPONDENT: Frankel.

## JUDGMENT.

It appears from the agreement entered into between the parties and relied upon by both of them, that the Appellants bought two-thirds of the business of Respondent: and further undertook to advance a certain amount of money for payment of his debts. It appears that they further bought the other third of the business remaining with the Respondent with an obligation that this third will automatically be retransferred to the Respondent after he repaid the sums advanced.

From the general terms of the agreement it appears that it was from the beginning intended to be an agreement of partnership between the

parties concerned, at the rate of two-thirds to the Appellants and one-third to Respondent. The proviso as to sale and re-sale of the one-third remaining with the Respondent was merely to secure to Appellants the sums advanced over and above the purchase-price of the two-thirds.

The Court below was, therefore, right in the conclusion they arrived at and the appeal must be dismissed and the judgment of the District Court affirmed with costs and LP. 3.— advocate's fees.

Delivered this 1st day of February, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 164/35.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Jacob Bluvstein & 7 ors. APPELLANTS.

v.

Y. Grazovsky & 2 ors.
Executors of the estate of the late Isaac Leib Bluvstein. RESPONDENTS.

*Charitable trusts — Waqf under Jewish law — Cannot be in respect of property not in existence or in respect of miri property — Jurisdiction of Civil and Religious Courts — Succession — Probate Court and Court under sec. 9(1) of the Succession Ord. — "The administration and distribution of the estate" — Sec. 7(2), P. O. in C., art. 53(i)(iii), exclusive jurisdiction of Rabbinical Court — Construction of wills — Protection of executors who act on invalid provisions of will confirmed by Religious Court — Time for distribution.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 19th day of March, 1935, and in remitting the case:—

HELD: 1. A P. D. C. sitting in a succession matter transferred to the District Court under sec. 9(1) of the Succession Ordinance is not sitting as a Probate Court and, if the will has already been proved in the Religious Court, can exercise powers in connection with the distribution and administration.

2. The exclusive jurisdiction of the Rabbinical Court in matters relating to the constitution and internal administration of religious

*waqfs*, refers only to such *waqfs* as were constituted before the Rabbinical Court.

3. A *waqf* of the income of a *mulk* property is invalid according to Jewish law, referring as it does to property which has not yet come in existence; when made in a will, the result is that the income goes to the heirs.

4. A will cannot create a *waqf* of *miri*. Notwithstanding the exclusive jurisdiction of the Religious Court to confirm the will, the disposition is invalid even though confirmed by such Court.

ANNOTATIONS:

1. For further proceedings in connection with this will see C. A. 117/40 (1941, S. C. J. 343) and do. (1942, S. C. J. 371).

2. On sec. 9(1) of the Succession Ordinance see C. A. 23 & 33/43 (1943, A. L. R. 60) and last paragraph of annotations; *cf.* C. A. 66/43 (*ibid.*, p. 95).

3. See C. A. 288/43 (1944, A. L. R. 587) on the impossibility of disposing of *miri* land by will.

FOR APPELLANTS: Smoira, Bar-Shira and Hoffman.

FOR RESPONDENTS: Ben-Ari.

## JUDGMENT.

*Manning, S. P. J.*: Isaac Leib Bluvstein, hereinafter referred to as the testator, died on January 13th, 1924. He left a will disposing of his property, and appointed as executors the persons who are the Respondents to the present appeal. The will was confirmed by a Rabbinical Court at Tel-Aviv and on appeal by the Supreme Rabbinical Court of Jerusalem, but the latter Court, in confirming the will, declared invalid certain dispositions of the testator.

2. On the 13th July, 1932, on the application of Jacob Bluvstein, a son of the testator, the administration of the deceased's estate was transferred from the Rabbinical Courts to the jurisdiction of the District Court of Jaffa.

3. On the 10th January, 1934, an application for distribution was made by five of the present Appellants. In the application it is stated that the testator had attempted in his will to create a *waqf* of *miri* land, that this was contrary to the law of Palestine, that there was, therefore, an intestacy as regards such land and that it should be regsitered in the names of the heirs of the deceased. It was also asked that the executors render accounts with respect to this land. The other Appellants subsequently joined in this application.

4. The District Court considered it had no jurisdiction to decide the question with respect to *waqf*. It refused to make an order for distribution of the estate on the ground that the time for distribution had not yet arrived.

5. The Appellants have appealed. When the appeal came up for argument before us the Appellant Jacob Bluvstein had died, but all parties agreed that the appeal should proceed although his estate was not represented. The Appellant David Bluvstein did not appear, although he had been legally served with notice. The other Appellants were represented by advocates and Mr. Ben-Ari, who appeared for the Respondents, took a preliminary objection that the relevant powers of attorney were not in order. They had been granted in Russia and Mr. Ben-Ari said they had not been authenticated in accordance with Section 18 of the Evidence Ordinance. I have examined these powers of attorney and I find that the provisions of the section have been substantially complied with. The preliminary objection should, in my opinion, be overruled.

6. Before dealing with the various grounds of appeal, it may be useful to refer to certain provisions of the law relating to succession. The testator was a Palestinian citizen and a member of the Jewish Community. Article 53(i) of the Palestine Order-in-Council, 1922, confers upon the Rabbinical Courts exclusive jurisdiction in the matter of the confirmation of the wills of members of the Jewish Community other than foreigners. In the present case the Rabbinical Court had, therefore, exclusive jurisdiction so far as the confirmation of the will of the testator was concerned.

7. Section 7(2) of the Succession Ordinance reads as follows:—

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

In its judgment confirming the will of the testator the Rabbinical Court did declare valid, as will be seen later, a disposition which was contrary to law. In view of the above sub-section such a declaration was ineffective and it must be regarded as a nullity.

8. There is another exclusive jurisdiction conferred on a Rabbinical Court, by Article 53(iii) of the Order-in-Council, and that is an exclusive jurisdiction over any case as to the constitution or internal administration of a *waqf* or religious endowment constituted before the Rabbinical Court according to Jewish Law. The wording is important. The case must be one as to the constitution or internal administration of a *waqf* and that *waqf* must itself have been constituted before the Rabbinical Court. This part of the article can, therefore, have no reference to the case of a *waqf* purporting to have been created by a will,

where the question arises whether it has been validly created. I am strengthened in this opinion by the fact that wills are expressly mentioned in Article 53(i), and that the exclusive jurisdiction of the Rabbinical Court is confined to confirming them.

9. I have already referred to the fact that in July, 1932, the administration of the testator's estate was transferred from the jurisdiction of the Rabbinical Court to that of the District Court. The relevant Section is Section 9(1) of the Succession Ordinance and is as follows:—

> "The President of a District Court may, upon the application of any person interested in the estate of a deceased person and if he deems it just or convenient, make an order prohibiting the Court of any of the religious communities from taking cognisance of, or from dealing further with, the succession of any deceased person, and from the date of such order the administration and distribution of the estate shall be within the exclusive jurisdiction of the Civil Courts, and any proceedings which may be pending shall be forthwith transferred to the District Court."

10. The words "the administration and distribution of the estate" are important, because they show that the District Court, as soon as the order of transfer has been made, has the jurisdiction to administer and distribute, *i. e.* a jurisdiction similar to that of the Chancery Division in England, as distinct from the jurisdiction of the Probate, Divorce and Admiralty Division. This consideration disposes of the ground on which the learned President of the District Court decided that he had no jurisdiction to determine the question with respect to the *waqf*. He said: "This is a question which I, sitting as a Probate Court, cannot decide". The learned President was not, however, sitting as a Probate Court; the will had already been confirmed; he was sitting as a Court to give directions as to the administration and distribution of the estate, and this included a jurisdiction to pronounce as to the validity or otherwise of any testamentary disposition, and should there be an intestacy as to any part of the testator's estate, to determine the succession.

11. With regard to the dispositions made by the testator of his immovable property, the matter has to be considered from two standpoints. At the time of his death he possessed immovable property of the *mulk* category in Lilienblum Street, Tel-Aviv. This property yielded an income, and by his will he dedicated this income for a charitable purpose, *i. e.* he created a *waqf* with respect to it. This was an invalid disposition, it is not allowed by the Jewish Law, and the Chief Rabbinate for Palestine dealt with the matter correctly when it came before it. To quote the words of the judgment:—

> "But the part of the *waqf* consisting of the income of the houses

> which the deceased has built during his lifetime for himself and the revenue of which he has dedicated, as this *waqf* is a thing which was not yet in existence when dedicated, it shall be void and is at the disposal of the heirs of the deceased."

12. The testator bequeathed his *mulk* property to the executors directing that the income should be devoted to a charitable purpose. This direction being invalid, the income remains undisposed of. But the invalidity of this disposition has a further effect. It is clear from the will that the testator had no intention of devoting the property itself to a charitable purpose. He made arrangements that his widow and his children should occupy the property, the children paying a rent; and the executors were empowered to let any part of the premises that might be vacant. The property itself was never to be sold — the testator tied up so that the income might be available for a charitable purpose. This charitable intention has failed, and I do not see in the circumstances how the bequest can be made divisible. The testator in effect said: "I bequeath my property A to my executors and their successors for ever, directing them to pay the income therefrom to X". The direction with regard to income being invalid, it follows that the whole bequest fails. The purpose for which the property was tied up has turned out to be contrary to law, and the property itself, therefore, remains undisposed of.

13. The testator possessed other immovable property in Mazeh Street, Tel-Aviv. This property was registered in the name of one Levontin, but there is no dispute as to the fact that it belonged to the testator. It was of the *miri* category and by the law of Palestine it could not be disposed of by will. In spite of this the testator created a *waqf* with respect to it. This disposition was, therefore, also invalid. In the judgment to which I have referred, the Chief Rabbinate declared this to be a valid *waqf*. I have already held that this declaration was a matter outside its jurisdiction, and that it must be regarded as a nullity. The disposition of the *miri* property was invalid, and this property also is at the disposal of the heirs of the deceased.

14. With regard to this *miri* land, the matter is a little complicated owing to the fact that the executors have already erected buildings on it, in order to carry out the charitable intention of the testator. According to the law these buildings also acquire the character of *miri* land and are at the disposal of the heirs of the deceased. But I do not think it fair that the executors should be out of pocket as regards any money they may have expended on these buildings, and in the order which I propose should be made I shall embody a provision for their protection.

15. There was a further sum of LP. 1,600.— which the testator dealt with, bequeathing it to the executors for the same charitable purpose as the other bequests, *viz.*, the erection of a shelter for the orphans in Tel-Aviv. This was a valid bequest, but the land on which it was intended to erect the orphanage and the buildings already erected are no longer available, owing to the failure of the devise already referred to. I do not think that this bequest of money should fail altogether and I shall make an order with regard to its disposal.

16. There has been an intestacy with respect to the property both in Lilienblum Street and in Mazeh Street. This being the case, there is nothing in the contention of the executors that the time for distribution has not yet arrived.

17. One of the directions in the will was that the widow of the testator should be allowed to reside during her lifetime on the upper floor of the house described as No. 6, Lilienblum Street, and to let any rooms therein. An order to secure this will be embodied in the order which should, in my opinion, be made. That order is as follows:—

It is ordered:—

(a) That, notwithstanding any testamentary disposition of the testator, his successors according to law are entitled to succeed to the testator's immovable property situated in Lilienblum Street and Mazeh Street, Tel-Aviv.

(b) That, during the lifetime of Nechema Mushe, widow of the testator, the said Nechema Mushe has the right to occupy the upper floor of the house situated at No. 6, Lilienblum Street, Tel-Aviv, and to let any rooms comprised in the said upper floor.

(c) That the executors are not to sell the said house situated at No. 6, Lilienblum Street, Tel-Aviv, without seeing that the rights of the said Nechema Mushe to the upper floor during her lifetime are fully secured.

(d) That out of the estate of the testator an amount of sixteen hundred pounds be paid to the executors, to be used by them, under the supervision of the Chief Rabbinate of Tel-Aviv, for providing shelter to orphans in Tel-Aviv.

(e) That within three months from this date the executors do submit to the District Court of Jaffa accounts as follows:—

(i) An account of all revenue received by them arising out of the immovable property situated in Lilienblum Street and in Mazeh Street, Tel-Aviv.

(ii) An account of all movable property, including cash and se-

curities, belonging to the testator, other than the revenue referred to in (i), which has come into the hands of the executors since the death of the testator.

(iii) An account of all sums owing to the testator at the time of his death and in particular of all sums owing by any of the Appellants in this case.

(iv) An account of all disbursements made by the executors out of the estate since the death of the testator.

(v) An account of all monies borrowed by the executors for the purpose of carrying out any ostensible intention (whether valid or otherwise) of the testator, showing repayments and payment of interest, if any.

(vi) Any further accounts that may be ordered by the District Court.

(f) That if out of any monies borrowed by the executors as mentioned in (e)(v) above there remain any sums due to the lenders, such sums shall be repaid out of the estate to the executors in trust for the said lenders.

(g) That the judgment of the District Court be set aside and that the matter be remitted to it:—

(i) To determine the succession to such part of the testator's estate as has not been disposed of by will.

(ii) To deal with the accounts submitted by the executors and to make any consequential orders thereon.

(iii) To make any order necessary to give effect to this order.

Liberty to all parties to apply.

18. The costs of all parties, here and below, will be paid out of that part of the estate which has not been disposed of by will — such costs in this Court to include an advocate's fee of LP. 15.— for each advocate who appeared before us.

Delivered this 25th day of June, 1937.

*Senior Puisne Judge.*

*Frumkin, J.*: I concur.

*Puisne Judge.*

*Khayat, J.*: I concur.

*Puisne Judge.*

HIGH COURT No. 28/36.

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

BEFORE: Manning, S. P. J. and Khayat, J.

IN THE APPLICATION OF:—

S. Zeev Rubin: PETITIONER.

v.

1. The Chief Execution Officer, Jerusalem,
2. M. Amdur, Syndic in the Bankruptcy of Asher Karlinsky. RESPONDENTS.

*Costs — Only the Court which gave judgment may make an order regarding costs.*

In making absolute an order issued to the first Respondent, directing him to show cause why his order, dated the 4th February, 1936, in Execution File No. 6010/35, should not be set aside:—

HELD: A Court differently constituted from that which gave judgment cannot make an order as to costs.

ANNOTATIONS: See, however, the interlocutory ruling in C. A. 91/31 (2, P. L. R. 2; 2, C. of J. 512) wherein a change in the constitution of the Court was held not to be fatal for the reason that the differently constituted Courts were concerned with entirely different issues.

FOR PETITIONER: Eisenberg.

FOR RESPONDENTS: No. 1 — No appearance.
No. 2 — In person.

ORDER.

In giving its judgment the District Court was silent on the question of costs. Mr. Amdur then went to a differently constituted Court and got an order for costs in his favour. This was irregular and vitiated the subsequent proceedings made on that Order.

Order made absolute. Petitioner to have the costs of this application to include LP. 2.— advocate's fees.

Dated this 24th day of July, 1936.

*Senior Puisne Judge.*

HIGH COURT No. 58/37.

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

BEFORE: Greene and Abdul Hadi, JJ.

IN THE APPLICATION OF:—

Yehya Hafez Sarras. PETITIONER.

v.

Commissioner for Migration and Statistics. RESPONDENT.

*Citizenship — Application for Palestine passport and for declaration of citizenship under art. 1 of the Citizenship Order, 1925 — Article 1 to be read subject to art. 6.*

In discharging an order, directed to the Respondent to show cause why he should not consider Petitioner as a Palestinian citizen under Article 1 of the Palestine Citizenship Order, 1925, and why he should not issue a Palestinian Passport to Petitioner:—

HELD: Article 1 of the Citizenship Order should be read in the light of art. 6 which makes special provision for minors and married women.

ANNOTATIONS: On statutes to be read as a whole *cf.* H. C. 45/42 (1942, S. C. J. 273) and note 2.

FOR PETITIONER: Bustany.

### JUDGMENT.

1. The Petitioner is asking this Court to order the Respondent, the Commissioner for Migration and Statistics, to consider him a Palestinian Citizen under article 1 of the Palestine Citizenship Order, 1925, and to issue to him a Palestinian Passport.

2. The Petitioner was 12 years old in 1925 when the Order came into force. Petitioner's father, who was an Ottoman subject, was and is still living in Homs, Syria. There is evidence, which is not denied, that Petitioner has been living in Palestine since 1923 and was only absent for a short period from Palestine.

3. Mr. Bustany, on behalf of the Petitioner, argued that the provisions of article 1 of the Order are general and are not restricted by those of article 6.

4. Article 6 provides that the status of the minors follows that of their parents, and article 21(5) fixes the age of majority at 18 years.

5. In spite of the ingenious and able arguments of Mr. Bustany we

hold that article 1 should be read in the light of article 6. The true construction to be given to article 1, in view of article 6, is that Turkish subjects habitually resident in the territory of Palestine upon the 1st day of August, 1925, shall become Palestinian citizens, while married women and children follow the status of their husbands and parents respectively.

6. For this reason the application must be dismissed, as the Petitioner must follow the status of his father.

Delivered this 6th day of November, 1937.

*British Puisne Judge.*

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CIVIL APPEAL No. 163/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Meshek Gesher,
Kvutzat Poalim Lehityashvut Shetufit,
Beeravon Mugbal. APPELLANTS.

v.

The General Manager, Palestine Railways,
Haifa. RESPONDENT.

*Claim against Railways — Negligence — Fire, whether excluded — Railways Bye Laws sec. 25.*

In allowing an appeal from the judgment of the District Court of Haifa, dated the 4th day of July, 1937:—

HELD: The Railways authorities may be held liable for damage by fire if the fire was due to their negligence.

ANNOTATIONS:

1. The proceedings terminated in C. A. 200/38 (1938, 2 S. C. J. 146).

2. For other Railway cases see note 2 to C. A. 146/40 (1940, S. C. J., at p. 210).

FOR APPELLANTS: Bar Shira.

FOR RESPONDENT: Salant.

## JUDGMENT.

1. In this case the Appellants sued the Respondent in the District Court of Haifa for damages. The Respondent was the General Manager of the Palestine Railways and under the law the *fiat* of the High Commissioner had to be obtained. There is no allegation of negligence in this petition which was treated by the Court below as a statement of claim. It is quite clear, however, that the Court below treated the action as one based on negligence.

2. At the outset of the proceedings in the Court below, an objection was taken by the Respondent that the action could not succeed under any circumstances because it was alleged that the damage was due to fire, and under Bye law 25 of the Railways Bye laws the Railway Administration was exempted from liability in the case of fire. The Court was divided with regard to this objection and dismissed Appellants' case. One judge holding that whenever goods are damaged by fire, the Railway was exempt from liability. The other judge holding that where the fire was due to the negligence of the Railway or its servants, then the Railway might be liable.

3. We do not express any final opinion on this point, but we both think there is a good deal to be said for the contention that the Railway may be liable if the fire arises owing to the negligence of the Railway or its servants.

4. In the present case from the allegations made by the Appellants it is quite possible that it may be found that the negligence of the Railway was leaving the property of the Appellants without protection and thus exposing it to the risk of fire. For this reason we think it unsatisfactory that the Court below did not hear the evidence of the Appellant and his witnesses and such evidence as the Respondent might have adduced and make definite findings of fact which would have assisted this Court in saying whether the law had been correctly applied. We, therefore, order that the judgment of the District Court be set aside, and that the case be remitted to it with directions to hear the evidence produced by the Appellants and the evidence, if any, produced by the Respondent, and set out in its judgment the findings of fact deduced therefrom and the conclusions of law.

Costs to abide the event.

Delivered this 6th day of October, 1937.

*Senior Puisne Judge.*

CIVIL APPEAL No. 24/36.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: McDonnell, C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Jacob Hershkovitz. — APPELLANT.

v.

Dov Hershkovitz & an. — RESPONDENTS.

*Waiver in succession — Waiver affecting land — Jurisdiction of P. D. C. — Reference to competent Court — Rider.*

In allowing an appeal from the judgment of the District Court of Haifa, dated the 31st January, 1936:—

HELD: 1. The P. D. C., when dealing with an application for an order of succession, is not entitled to decide questions of ownership of land.

2. When such questions arise either the parties should be referred to the competent Court, or a succession order should issue with a rider that the immovable property is not to be registered pending determination of the land dispute.

ANNOTATIONS:

1. It has been held in H. C. 98/44 (1944, A. L. R. 540) that a renunciation made with the intention of its being embodied in the certificate of succession may properly be taken into account when issuing the certificate.

2. On riders in connection with certificates of succession see Pr. D. C. Jm. 126/44 (Selected District Court Cases, 1944, p. 301) and cases therein cited.

FOR APPELLANT: Weinshall.

FOR RESPONDENTS: Eliash.

### JUDGMENT.

The Appellant in this case applied to the President of the District Court, Haifa, for an order declaring the succession of his late father. The Respondents, who are the brothers of the Appellant, opposed the application on the ground, *inter alia*, that Appellant waived all his rights to the succession of their deceased father in consideration of pecuniary compensation he had received, by virtue of a declaration dated 28th March, 1927. The President of the District Court, after dealing with other objections, which are not at issue in this appeal, held that in view of the waiver the Appellant is not entitled to any share in the inheritance of his father and, therefore, refused to grant the order applied for.

Against this refusal the present appeal has been lodged.

The Respondents do not contest the fact that Appellant is one of the sons of their father and that were it not for the declaration of waiver he would have been entitled to certain shares in the estate of their deceased father. But they rely on this waiver and argue that if an order declaring the succession were issued by the President of the District Court, the Appellant could apply to the Land Registry and obtain registration in his name of the rights he has given up.

Against this argument of the Respondents the Appellant maintains that the waiver is of no legal effect in so far as it relates to immovable property it being an unregistered disposition of land.

We hold that the President of the District Court in dealing with the grant of an order declaring the succession of a deceased is not entitled to decide questions involving ownership of land, and that when such questions arise he should either refer the parties to the competent Court or issue the declaration with a rider to the effect that as regards immovables it will not be subject to registration until the determination of the land dispute.

In so far as the judgment is based on a waiver of rights in land, it cannot, therefore, stand and should be set aside. We hold, however, that no useful purpose will be served by remitting the case, as it is open for the Appellant now to apply to the Land Court where the Respondents will be in a position to bring up the defence under the waiver. Inasmuch as the Respondents do not contradict the fact that the Appellant is a co-heir, a declaration of succession is not necessarily wanted merely for the purpose of lodging the action.

For this reason the appeal is allowed and the judgment of the President of the District Court set aside with costs to include LP. 3 advocate's fee.

Delivered this 2nd day of July, 1936.

*Chief Justice.*

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CIVIL APPEAL No. 4/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Ismail Ali El-Absi. APPELLANT.

v.

Yonina Shlank. RESPONDENT.

*Usurious loans — Oral evidence may be adduced to show real nature of transaction once the allegation is made.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 12th November, 1935:—

HELD: Where an issue alleging usurious interest is put forward oral evidence may be led to show the real nature of the agreement between the parties.

ANNOTATIONS:

1. The allegations made in the trial Court were that an agreement for the sale of land on which the Respondent sued for the return of purchase price and liquidated damages had in fact not been intended as a genuine agreement to sell but as a cloak for a loan at a usurious rate of interest.

2. Authorities on usurious interest are collated in note 4 to C. A. 49/40 (1940, S. C. J. 108); for later cases see C. A. 99/42 (1942, S. C. J. 551) and note 2, C. A. 139/42 (*ibid.*, p. 668), C. A. 185/42 (*ibid.*, p. 923), C. A. 7/43 (1943, A. L. R. 623) and C. A. 94/43 (*ibid.*, p. 152).

FOR APPELLANT: Elia.

FOR RESPONDENT: No appearance.

JUDGMENT.

The Court below mis-directed itself on a question of law. When an issue alleging usurious interest is put forward, oral evidence may be allowed to show what was the real agreement between the parties.

We, therefore, set aside the judgment of the Court below and remit the case to it with directions to hear such witnesses as the Appellant may produce in support of this allegation of usurious interest and such witnesses, if any, as the Respondent may wish to call in rebuttal, and to decide the case then according to law.

Costs to abide the event.

Delivered this 9th day of March, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 6/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Hamdi Muhammad Sharab. APPELLANT.

v.

Yousef Ahmad Sharab. RESPONDENT.

*Enforcement of Egyptian judgment — Cap. 73 — Certification of judgment.*

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 14th November, 1935:—

HELD: An Egyptian judgment not legalised by the Minister of Justice or his representative cannot be enforced in Palestine under Cap. 73 and the Rules.

ANNOTATIONS: Authorities on foreign judgments are collated in annotations to C. A. 145/38 (1938, 2 S. C. J. 67); for later cases see C. A. 210/40 (1940, S. C. J. 540) and note 1, C. A. 230/41 (1942, S. C. J. 115), C. A. 155/43 (1943, A. L. R. 577) and C. A. 360/43 (1944, A. L. R. 313).

FOR APPELLANT: Nijem.

FOR RESPONDENT: Abcarius.

## JUDGMENT.

The Appellant applied to the District Court of Jaffa for registration of a judgment obtained in Egypt under the provisions of Cap. 73. In the certified copy of the judgment produced by him in support of his application the signature of the authority granting the certified copy was not legalised by the Minister of Justice or his representative. The District Court on this ground dismissed the application. We think the District Court could not do otherwise in the circumstances and we dismiss the appeal with costs to include LP. 2.— advocate's fees.

Delivered this 18th day of March, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 7/36.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Khaldi and Frumkin, JJ.

IN THE APPEAL OF:—

Ador Halbian. APPELLANT.

v.

Alexander Antabilian. RESPONDENT.

*Attachments — Damages for wrongful attachment in Magistrate's Court — Magistrates' Law, Art. 7, O. C. P. C., Art. 279 —Delay in exercise of right.*

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 25th December, 1935:—

HELD: A third party who claims damages for wrongful attachment should not sleep on his rights.

ANNOTATIONS: Note that Arts. 271 *et seq.* of the Ottoman C. P. C. are still in force as they have been specifically preserved by Sec. 2 of the Civil Procedure Ord., 1938; *cf.* also Sec. 2 of the Civil Procedure Ord., 1939, which has, however, not yet been brought into force.

FOR APPELLANT: El Ousta.

FOR RESPONDENT: Cattan.

## JUDGMENT.

On 24th August, 1928, in connection with an action brought before the Magistrate's Court, Jerusalem, against one, Yacoub Kiforkian, the Respondent in this case obtained an order for the conservatory attachment of a car which he assumed to be the property of the said Yacoub.

The car was at that time in the possession of the present Appellant, and it was later established to be his property.

The order for the conservatory attachment was confirmed by the Magistrate's Court on 14th October, 1928, in its judgment for the Respondent against the said Yacoub.

On 20th October, 1928, the Appellant informed the Respondent by notarial notice that he is the owner of the said car by purchase from the said Yacoub which sale he alleged took place on the 7th March, 1928.

The Appellant filed an action in the District Court to establish his ownership of the car, which the Court dismissed for want of jurisdiction. He then, on the 31st December, 1929, obtained a judgment from the Magistrate's Court establishing his ownership of the car. The Respondent appealed and the judgment of the Magistrate's Court was upheld on 25th June, 1930.

The Appellant then filed the present action before the District Court claiming damages for the period the car was out of work, namely from the 20th October, 1928, the date of the notarial notice, until the 25th June, 1930, being the date of the judgment of the District Court in its appellate capacity confirming his ownership of the car.

The District Court dismissed the action and hence this appeal.

The first point which arises out of the appeal is whether there is any legal liability at all upon a person attaching the property of others to compensate the owner of the property if the attachment was not warranted.

As the attachment was ordered by the Magistrate in an action before the Magistrate's Court, the case must be governed by Article 7 of the Ottoman Magistrates' Law, of which the relevant portion reads as follows:—

> "The Applicant for attachment should apply to the Magistrate and submit his documents and deeds or be accompanied by witnesses in support of his claim and demand. The Magistrate shall examine the Plaintiff alone or the Plaintiff and his witnesses, and if he finds that the claim for attachment is rightful and in accordance with the provisions of the Code of Civil Procedure, he demands from him an attested guarantee made by a considerate guarantor to indemnify the person whose property is to be attached for all damages and losses that may later accrue to him. He then decides on the attachment. The guarantee may be attested by the body of the elders of the village or quarter. The Magistrate shall, on deciding upon the attachment, fix the day for the trial and summon the parties. If there is a third party in the attachment, he shall also summon him".

Mr. Cattan for the Respondent argued that the Magistrates' Law is a law of procedure and not of substantive law and can, therefore, impose no liability for damages. I do not think that this principle can apply to Ottoman Laws where, for instance, the Law of Procedure itself contains provisions of the nature of substantive law while the Civil Code contains entire books dealing with procedure. In my view the principle of liability for damages is established by the said provision of the Ottoman Law which provides that no conservatory attachment shall be ordered unless the parties claiming it produce a sufficient guarantee to make good any possible damage to the person whose property has been attached.

Before we come to the question of the measure of damages and the period from which such damages may be claimed, it is necessary to deal with the procedure to be adopted in a claim of this nature.

Article 7 of the Magistrates' Law provides that the third party who is in possession of the property alleged to belong to the debtor must be summoned before the Magistrate's Court for the purpose of hearing his objection. Had this Rule been applied the matter of ownership would have been settled there and then; but the Appellant was

not so summoned and the question now arises whether the omission of the Magistrate to summon him entitles the third party to sleep on his rights for over a year and then to come forward with a claim for damages.

In my view, matters of this nature must not be allowed to protract for unnecessarily lengthy periods without good cause. The Appellant was duly informed that his car was attached for payment of the debt of another and he should have taken steps at once to have the attachment removed. If he was not summoned to appear before the Magistrates' Court, he could have entered an appearance himself and asked for his objections to be heard. If any legal authority is wanted, he could avail himself of Article 279 of the Code of Civil Procedure which Code is imported by the same Article 7 of the Magistrates' Law and which gives that party 8 days within which to apply. Instead of so doing, he waited until the attachment was confirmed and only then lodged an action in the wrong Court and so allowed time to pass without any justification.

The Appellant argues that he could not object at once as he had first to go to Amman to obtain evidence to prove his ownership of the car. There is nothing in this argument, as he could have applied to the Magistrate asking for an adjournment for the purpose.

The Appellant's remedy lies in Article 7 of the Magistrates' Law which provides for an expeditious procedure to safeguard the interests of all parties concerned. Had he availed himself of the provisions of this Article, he would have been entitled to damages from the date of attachment until the date of the restitution of the property to him, which would necessarily have been a short period. Nothing to this effect having been done, his claim must fail.

Having come to this conclusion, it is not necessary for me to deal with the question of the measure of damages and whether or not the liability for damages is to be restricted to the guarantee given at the time of attachment.

For the reasons cited, the judgment of the District Court is confirmed and the appeal dismissed with costs to include LP. 3.— advocates' fees.

Delivered this 25th day of March, 1937.

*Chief Justice.*

CIVIL APPEAL No. 158/37.

# IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J. and Khayat, J.

IN THE APPEAL OF:—

Leib Neussihin & 2 ors. — APPELLANTS.

v.

Miriam Neussihin. — RESPONDENT.

*Marriage — Validity of religious marriage contracted between foreigners abroad and subsequently confirmed by Court of community to whose jurisdiction parties consent — Subsequent naturalisation — Succession Ord., sec. 23 — P. O. in C., Art. 64 — Constitution of Court — P. O. in C., Art. 65 — Discretion of Court of Appeal where no objection taken to constitution in lower Court.*

In dismissing an appeal from the judgment of the District Court of Tel-Aviv, dated the 9th day of July, 1937:—

HELD: 1. The Rabbinical Court may declare the validity of a marriage contracted between foreign Jews abroad in religious form.

2. The Court of Appeal has a discretion not to entertain an argument directed against the constitution of the lower Court if the facts affecting the constitution were not brought to the knowledge of the lower Court during the trial.

FOR APPELLANTS: Smoira.

FOR RESPONDENT: Eliash.

## JUDGMENT.

*Manning, S. P. J.*: Abraham Neussihin died on the 5th December, 1934. He had made a will before his death and no question arises as to its validity. He, however, had been in possession of certain property which local law did not allow him to dispose of by will, and a lady named Miriam Marie Neussihin (hereinafter called the Respondent) claimed a share of this property by virtue of her being the widow of the deceased. Before the District Court of Jaffa the Appellants (children of the deceased by a former marriage) strenuously contested the fact that the deceased had ever married the Respondent. The Court decided the issue in the Respondent's favour; hence this appeal.

2. Section 23(a) and (b) of the Succession Ordinance lays down certain rules for determining the issue. These are as follows:—

"23. For the determination of any question as to whether any person is a member of a class, or possesses a character or quality whereby he is entitled to a share in a succession, the Civil Courts shall apply the following rules:—

(a) if the claimant is a Moslem or a member of one of the communities, the Moslem law or the law of the community shall apply;

(b) if such claimant is a foreigner, his national law shall be applied in accordance with the rules prescribed by section 4(iii)(c)".

Article 64 of the Palestine Order-in-Council, 1922, enacts that matters of personal status affecting foreigners are to be decided in accordance with the law of the nationality of the foreigner concerned. It is clear from this that in section 23(a) of the Succession Ordinance, "member of one of the communities" means a member who is not a foreigner.

3. If the Respondent in this case was a foreigner at the time of deceased's death, the question will fall to be decided by her national law. If she was not a foreigner at the time, it falls to be decided by Jewish Law, as she was a member of the Jewish faith. The deceased and the Respondent had been married according to the Mosaic Law and the Law of Israel at Wiesbaden in Germany on the 5th September, 1924. They then came to Palestine and in 1926 the deceased became a Palestinian citizen. If the Respondent was his wife, she also became a Palestinian citizen; if she was not his wife, she remained a foreigner.

4. It is agreed that there was no other ceremony of marriage between these parties except the ceremony at Wiesbaden in 1924. There is no finding by the Court below as to whether this was a valid marriage according to German Law; and the argument, both here and in the Court below, has been conducted on the assumption that it was invalid according to German Law.

5. The principle of English Private International Law as regards marriage is that, apart from capacity, *locus regit actum*. Mr. Eliash, for the Respondent, urges that in a case such as the present, the principle cannot be applied in Palestine. In Palestine there are Courts of the various religious communities, in many matters exercising a jurisdiction entirely independent of the Civil Courts, and in many other matters exercising a concurrent jurisdiction. One of the matters in which they exercise an exclusive jurisdiction is any suit regarding the marriage of members of the particular community concerned, other than foreigners. Under Article 65 of the Palestine Order-in-Council, 1922, they may also exercise this jurisdiction as regards foreigners, provided that the foreigners consent. One of these religious Courts is the Rabbinical Court of the Jewish Community.

6. The deceased and the Respondent were both of the Jewish faith. On the 19th November, 1924, they appeared before the Rabbinical Court at Tel-Aviv. They were at that time both foreigners but in the circumstances the fact that they agreed to the jurisdiction cannot be contetsed. The Court investigated the circumstances of the marriage at Wiesbaden and gave them a certificate of marriage reciting that they had been married at Wiesbaden in accordance with the Mosaic Law and the Law of Israel.

7. It is possible to put a narrow construction on these proceedings, and to say that the Court merely decided that the parties before it had been married in accordance with the Mosaic Law and the Law of Israel, but left the question open as to whether such a marriage at Wiesbaden was to be regarded as valid in Palestine. I do not think, however, that such a construction ought to be adopted. The proper construction is that the parties had been married in accordance with the law of the community and that no further formalities would be of any avail to validate what was already valid in the eyes of that law. Judged by that law the parties were husband and wife, and the result of the proceedings was a decree accordingly.

8. There is a Rabbinical Court of Appeal at Jerusalem but there was naturally no appeal against the decision. Neither has any opposition been entered by any of the parties interested. There has been no allegation that there was any departure from recognised procedure such as might make the decree a nullity in law. In the circumstances it would be improper for this Court to canvass the correctness of the decision or to consider whether religious Courts, in dealing with questions of marriage abroad, should embody in their law any principles of Private International Law. The decision was a decree as to the status of these parties delivered by a competent Court and is entitled to recognition by the Civil Courts in Palestine.

9. This disposes of the issue. At the time of deceased's death the Respondent was a Palestinian citizen and a member of the Jewish faith. The question whether she is the widow of the deceased falls to be determined by the Law of the Jewish Community. There can be no doubt that according to that law she has established her claim. I am in agreement with the decision of the Court below, but on somewhat different grounds.

10. Dr. Smoira, for the Appellants, raised a question as to the jurisdiction of the Court below. Article 64(iii) of the Palestine Order-in-Council, 1922, enacts that a District Court, in dealing with matters of personal status affecting foreigners, shall be constituted by a Presi-

dent sitting alone. In the present case it was constituted of a Relieving President and another member which is a usual constitution of a District Court. Neither the deceased nor the Respondent were foreigners, they having become Palestinian citizens in 1926; but it is alleged that the three Appellants are foreigners. The point was not raised in the Court below. If in a case such as the present, a party consents to a lengthy hearing before a Court composed in a certain manner and finds at the end that he is unsuccessful, it is a matter within our discretion whether he ought to be heard to say on appeal that there were certain facts, undisclosed in the Court below, which made the composition of the Court a wrong one. I am against any exercise of our discretion in favour of the Appellants in this instance.

11. For the reasons given I am of opinion that this appeal should be dismissed, and that in the circumstances the costs should not be paid out of the estate, but should be paid by the Appellants themselves to include LP. 15.— advocate's fees.

Delivered this 17th day of December, 1937.

*Senior Puisne Judge.*

I concur.

*Puisne Judge.*

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CIVIL APPEAL No. 101/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF:—

Abraham Gottlieb. APPELLANT.

v.

Moshe Haimovitz. RESPONDENT.

*Breach of contract — Readiness and willingness to perform — Payment — Bank draft, whether equivalent to cash.*

In dismissing an appeal from the judgment of the District Court of Tel-Aviv, dated the 25th March, 1937:—

HELD: Tender of a bank draft is equivalent to tender of cash if the bank is reputable.

## JUDGMENT.

1. The Respondent sued the Appellant in the Chief Magistrate's Court, Tel-Aviv, for the payment of the sum of LP. 200.— liquidated damages for breach of contract of sale of land.

2. The Chief Magistrate dismissed Respondent's claim for damages on the ground that, in his opinion, the Banker's draft, which the Respondent had in his possession in the Land Registry, was not equivalent to cash. The Chief Magistrate also held that the present Appellant was in default for not having the land ready and free for transfer.

3. On appeal, the District Court, sitting at Tel-Aviv, reversed the Chief Magistrate's judgment as it held that the Banker's draft was the equivalent of cash and entered judgment in favour of the present Respondent.

4. Leave to appeal to this Court was granted by the presiding Judge on the following two points of law:—

a) Was the cheque legal tender, and was the Respondent in this case ready and willing to perform his obligations by tendering it?

b) Was the District Court right in law in entering judgment in favour of the Respondent against the Applicant without giving the Applicant opportunity to put up his defence and prove it in the Court below?

5. Taking the second point first: Respondent was under no obligation to perform any other act except of tendering the price of the land to be transferred; and it is hard to see why the Respondent who had gone to the trouble of obtaining a Banker's draft for the price should have gone to the Land Registry only to refuse to accept transfer. Therefore, it was not necessary, in the circumstances, for the lower Court to have remitted the case to the Chief Magistrate to enable the present Appellant to put up his own defence on this point.

6. As regards the question as to whether the Banker's draft in this case is equivalent to cash or not. The banker was the Ashrai Bank, Tel-Aviv, a bank which is well known in Tel-Aviv and of long standing.

7. We are of the opinion that the District Court was right in their judgment.

For the reasons given above, and without calling on the Respondent, the appeal is dismissed with costs and LP. 4.— advocate's fees.

Delivered this 13th day of July, 1937.

*British Puisne Judge.*

CIVIL APPEAL No. 178/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Muhammad Ismail As'ad & 4 ors. APPELLANTS.

v.

Ahmad Salim Ibrahim Ayesh. RESPONDENT.

*Right to water — Jurisdiction of Land Court — Proper parties — Expert appointed by the Court — Failure to object to expert's evidence on time.*

In dismissing an appeal from the judgment of the Land Court of Jerusalem, dated the 20th July, 1937:—

HELD: A dispute over water rights is within the jurisdiction of the Land Court.

ANNOTATIONS: *Cf.* C. A. 312/43 (1943, A. L. R. 748) and note 1.

FOR APPELLANTS: Elia.

FOR RESPONDENT: A. Hanania.

### JUDGMENT.

In this case the Respondent took an action against the Appellants in the Land Court of Jerusalem alleging that they were preventing him from exercising his rights to water. In spite of the way in which the statement of claim has been drawn it is quite clear to us that this action involved a dispute as to rights over land and was, therefore, within the jurisdiction of the Land Court. This disposes of the first ground of appeal raised by George Eff. Elia on behalf of the Appellants. The second ground of appeal is that the proper parties were not before the Court. As to this the allegation was that the five Appellants had interferred with the Respondent's right to water, and it was quite clear that they were claiming certain rights to the same water. There was no evidence that any other members of the same family had contested the right of the Respondent and for this reason we think that the five Appellants were properly made parties to the action. Another ground of appeal is that there was a gross error in procedure. A gentleman named Shepherd was appointed by the Court as an expert to investigate the dispute. He investigated the dispute and gave the result of his investigation in evidence on oath. No objection was taken at the time

by the advocate for the Appellants and we refuse to consider this ground of appeal for this reason. Lastly it is said that the judgment is too ambiguous. George Eff. Elia said that the finding of the Court that the Respondent was entitled to two and a half hours every nine days from the water of the As'ad family is an ambiguous finding. We are of opinion that this finding was justified by the evidence. It does not affect in any way the order of the Court which was an order against the five Appellants ordering them to refrain from interfering with Plaintiff's rights to the water. There are no further grounds of appeal and the appeal must be dismissed with costs to include LP. 3.— advocate's fees.

Delivered this 12th day of October, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 115/33.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Baker, Khaldi and Khayat, JJ.

IN THE APPEAL OF:—

Hashem Abu Khadra. APPELLANT.

v.

Hanoum Abu Khadra & 4 ors. RESPONDENTS.

*Construction of contracts — Concurrent obligations — P. C. 47/32 — Damages, readiness and willingness.*

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 22nd May, 1933:—

HELD: Where a contract provides for concurrent obligations, no damages may be claimed for non performance of a condition unless the claimant establishes that he had been ready and willing to comply with his obligation.

FOLLOWED: P. C. 47/32 (1, P. L. R. 831; 2, C. of J. 406).

ANNOTATIONS: On readiness and willingness to complete see C. A. 60/42 (1942, S. C. J. 352) and note 2.

FOR APPELLANT: Eliash.

FOR RESPONDENTS: No. 3 — Husseini.
Nos. 1, 2, 4, and 5 — Moyal.

## JUDGMENT.

Judgment has been reserved in this case for a considerable length of time in the hope that the parties, who are respectively a son, and his mother and brothers and sisters, might effect a settlement. This now, however, appears impossible.

The appeal arises out of a contract entered into between Appellant and Respondents whereby Appellant claimed £ 10,000, the sum prescribed in the said contract, as a penalty to be paid by either party to the other in case one or the other failed to fulfil his part of the contract.

The learned Judges of the lower Court disagreed and accordingly Appellant's action failed. From this decision, Appellant has now appealed and Respondents have filed a cross-appeal.

The grounds of this appeal are that in arriving at their conclusion the lower Court misconstrued the said contract and the facts with regards thereto; that upon a proper construction Appellant is entitled to £ 10,000 as a penalty on account of Respondents' failure to fulfil their part of the contract.

The contract dated 3rd August, 1930, is a faulty, ambiguous, ill-drawn and barely intelligible instrument, contained in what purports to be two parts.

The case was previously returned to the lower Court for the said Court to ascertain to whom the land should be transferred and under what terms and conditions the transfer should be effected. At the same time, this Court held that Respondents did in fact make an undertaking for the transfer of land, so that the part of the agreement containing such an undertaking cannot now be held to be unilateral and not binding on Respondents.

After reciting that, Appellant, by virtue of a general power of attorney given to him by Respondents, had been empowered to manage the estate of his late father, to pay the debts owing by the said estate and to borrow monies for this purpose and that he had in fact borrowed numerous sums from many creditors personally and in his quality as an agent on behalf of his father's heirs, the contract then continues as follows:—

> "I therefore authorised and empowered my mother and my sisters to settle in conjunction with my brothers the amounts due by me and by them to the said creditors by virtue of the said power of attorney above mentioned and by reason of the debts to which was liable my father's estate and because of the foregoing my mother and my above named sisters undertook effectively to sell and transfer their shares in all the lands of Barka village, and four hundred and

ten *dunums* from what belongs to Husn, Akifa, Rayssa and Zakiya in equal shares amongst themselves, out of what belongs to them in the lands of Yazour village and 200 from what belongs to my said sisters in the 'Al Raffoulieh' orchard only. The foregoing being in consideration of the following matters:—

(A) That their liability be discharged from all the rights and debts due by them to me personally or to the creditors whoever they be and whichever the value of the debt both if that debt arises by way of the estate, or by way of the said power of attorney.

(B) I undertake towards them to pay and settle every debt that may exist or what may be claimed in addition to the debts stated above by whomsoever equally if that arise by reason of the estate or because of the power of attorney, of whichever amount it be and out of all that, they are not to bear anything neither the whole nor in part.

(C) I undertake to pay all the legal as well as the customary costs necessary to the enactment of these sales and their registration in the names of the purchasers and the expenses required thereto out of the LP. 550 which were left from the LP. 1,000 paid by Mr. Tadros and if these amounts should not cover the expenses, I undertake to spend from my private pocket till the end; if any balance be left out of that, I am ready to hand over the shares of my mother and said sisters therein.

(D) I undertake to enact all the transactions undertaken by them towards the said purchasers, whether of partition, division, preparation of papers relating to procedure and the release of the attachments occassioned by reason of any debt due by the estate or any debt arising out of the said power of attorney and in summary I am liable for the execution of all that which they undertook towards those purchasers and for the damage and loss resulting from the infringement of any of the provisions of those contracts."

E, F, G, H and I, I am of opinion, are of no material importance with respect to this appeal.

Adopting the common and universal principle that an agreement ought to receive that construction which its language will admit, that will best effectuate the intention of the parties, we cannot agree with the construction given to the contract by the learned President of the lower Court, that the properties were to be transferred to the Appellant to enable him to discharge the various debts of the estate and also his own debts.

In the first place it is not disputed that at the time the contract was entered into, the Appellant was a bankrupt, being declared bankrupt on the 15th June, 1930: and we cannot conceive that Respondents with full knowledge of Appellant's bankruptcy ever intended to agree to transfer their lands to Appellant's Trustee in bankruptcy for the benefit

of Appellant's estate: by doing this, they would not be discharging their deceased father's debts or their own which appears to be the sole intention of the agreement.

Again, the agreement specifically states: "Respondents undertake to sell and transfer their lands". There is no mention of transferring to the Appellant. In paras "C" and "D" are the following words:—

> "I undertake to pay all the legal as well as the customary costs necessary to the enactment of these sales and their registration in the names of the purchasers. I undertake to enact all the transactions undertaken by them towards the said purchasers."

In view of the foregoing and the fact that a great proportion of the Respondent's properties were sold and transferred to parties other than Appellant, we are of opinion that an undertaking to transfer to the Appellant cannot be construed from the agreement and that Respondents did not commit a breach by their refusal to transfer the Yazour lands to Appellant.

Respondents, however, failed to fulfil their part of the agreement contained in paras 3 and 4 of the so-called annex to the contract — to give bills for monies therein mentioned to Appellant: and Appellant does not deny that owing to the failure to transfer properties to him, he has not paid the debts which he undertook to pay.

In our opinion, these were two concurrent obligations and Appellant having failed to prove that his obligation to pay the debts was subject to Respondents' properties being transferred to him; in accordance with the decision of the Privy Council in Abdullah Bey Chedid and others *v.* Tennenbaum, P. C. 47 of 1932, we find that both Appellant and Respondents have failed to discharge the onus of proving their readiness and willingness to perform their parts of the concurrent obligations, and that both appeal and cross-appeal must fail.

No fees or costs.

Delivered this 9th day of January, 1936.

*British Puisne Judge.*

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CIVIL APPEAL No. 187/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J. and Khayat, J.

IN THE APPEAL OF:—

Yacoub Hassan Saghir Khamra. APPELLANT.

v.

Itzhack Bitty & an. RESPONDENTS.

*Recovery of possession — Magistrates' Law, Art. 24 — Evidence of prior possession.*

In allowing an appeal from the judgment of the Land Court of Haifa, sitting in its appellate capacity, dated the 2nd July, 1937, setting aside the judgment of the Chief Magistrate of Haifa, dated the 8th May, 1937:—

HELD: The visits of a watchman may, in certain cases, constitute evidence of possession for the purpose of Art. 24 of the Magistrates' Law.

ANNOTATIONS: On Art. 24 of the Ottoman Magistrates' Law *cf.* C. A. 4/43 (1943, A. L. R. 306) and note 2.

FOR APPELLANT: Khamra.

FOR RESPONDENTS: Gavison.

## JUDGMENT.

This is an appeal from a decision of the Land Court of Haifa which reversed a decision of the Chief Magistrate.

The proceedings were brought by the Plaintiffs (Respondents here) to recover possession of a certain land, and Article 24 of the Ottoman Magistrates' Law would appear to apply, which requires in such circumstances:—

> "If a person is in possession (*mutassarref*) of immovable property by virtue of a title-deed, and another person trespasses on it and interferes with his possession and establishes himself on it, the person in possession may, if he brings an action for the restitution of his possession and proves that he is the actual possessor and by other evidence that he has been in possession of the property previous to the trespasser, the trespasser shall be adjudged to remove his interference with the property and it shall be restituted to the original possessor. And if the holder of the title-deed takes possession of the immovable property without taking this legal course, but by force and coercion, and the other party applies to Court, the previous position would be restored, and the holder of the deed warned that he should take the legal steps."

In other words, he has to prove his title when he applies for possession. The earlier possession must presumably be reasonably recent possession and possession must be very largely a question of fact. There are various ways in which possession may be had, *e. g.* by the owner occupying the property himself or by an agent, by fencing, or by regular visits to the property.

In this particular case we find that the land is not cultivable land

and that it is intended to be used for building purposes. Various matters were considered by the Chief Magistrate and eventually he based his decision on the fact that a watchman visited the premises. He says:—

> "I have therefore to decide whether the visits of a watchman to a vacant piece of ground, when that watchman serves an employer who may or may not be the owner, constitutes possession by that employer. In my opinion it does not and reluctant as I am to refuse relief to the Plaintiff, in view of my opinion of the Defendants' case, I cannot, when deprived of the power to decide the issue of ownership in his favour, hold that he was in such effective possession of this land as would justify my making an order of dispossession against the Defendant, satisfied though I am that the latter has produced no shred of right to justify his position."

It seems to us that it must be a question of degree, how far visits by a watchman can amount to possession, and must depend upon the facts of the particular case, and this would seem to be a question for the Court of trial.

It seems to us that there was evidence in this case which justified the Magistrate in the view he took, the question of possession being a question of degree, and he was the person to decide whether the facts in this case amounted to possession or not.

The appeal will therefore be allowed, the decision of the Land Court quashed and the judgment of the Chief Magistrate restored, with costs and LP. 3 advocate's fees.

Delivered this 18th day of October, 1937.

*Chief Justice.*

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CRIMINAL APPEAL No. 3/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: McDonnel, C. J., Baker and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Zaki Hussein Ghaleb. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Criminal Law — Principals and accessories — Criminal Law Amendment Ord., secs.* 3(1)(*d*), 4, 9 — *"An offence is actually committed"*

(*sec. 5*), *whether attempt included — Amendment of the judgment on appeal.*

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 7th November, 1935, whereby the Appellant was convicted under Article 174 of the Penal Code and Sections 3, 4, and 9 of the Criminal Law Amendment Ordinance (No. 2) of 1927, and sentenced to six months' imprisonment:—

HELD: A person can be convicted as an accessory when he counsels another to commit an offence if in fact an offence is committed after such counsel, whether the same offence or another.

ANNOTATIONS: Secs. 3(1)(d) and 5 of the Criminal Law (Am.) Ord. (No. 2), 1927, correspond to secs. 23(1)(d) and 25 of the C. C. O., 1936.

FOR APPELLANT: Joseph.

## JUDGMENT.

The District Court convicted the Appellant, Zaki Hussein Ghaleb, who was then the second Accused, of procuring the commission of an attempted unpremeditated murder by the first Accused contrary to Article 174 of the Ottoman Penal Code and Sections 3(1)(d), 4 and 9 of the Criminal Law Amendment Ordinance (No. 2), 1927.

We are satisfied that the Court below had before it sufficient evidence to justify it in convicting the Appellant under Section 3(1)(d) and 9 of the Criminal Law Amendment Ordinance (No. 2), 1927.

The Appellant's advocate has objected to the fact that in the considered judgment, the Court cited Section 5 of the Criminal Law Amendment Ordinance (No. 2), 1927, and he asked us, among other reasons, to quash the conviction for that reason because he submitted that Section 5 by the use of the words "an offence is actually committed" contemplates the commission of a substantive offence and not a mere attempt to commit one.

Now, in the first place, the conviction was not under Section 5 and it was not therefore necessary, as suggested by Mr. Joseph, to alter the Information which itself contained no reference to that Section.

Section 5 appears to us not to contain any provision creating a new offence but to serve as a gloss upon Section 3(1)(d), and to lay it down that a person can be convicted as an accessory when he counsels another to commit an offence if in fact an offence is committed after such counsel, notwithstanding that the offence may be either the same as that counselled or some other offence.

With regard to the inclusion of Section 4 of the Criminal Law Amendment Ordinance (No. 2), 1927, in the judgment, we find that

the Court erred in embodying this as being one of the sections of the law broken by the Accused. We, therefore, delete all reference to that section from the judgment, but inasmuch as this has no bearing upon the culpability of the Accused, subject to this correction, we dismiss the appeal and confirm the judgment and sentence.

Given this 18th day of March, 1936.

*Chief Justice.*

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CIVIL APPEAL No. 179/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J. and Khayat, J.

IN THE APPEAL OF:—

Alice Hanna Dahdah, widow of Nicola Andrawes Za'rour in her personal capacity and also as guardian of her minor children Fawzy, Andrawas, Georgetie, Shuheila, Farid and Afrodite. APPELLANT.

v.

Karimeh bint Khalil Ghazaleh. RESPONDENT.

*Succession — Waiver of right in succession — Distribution by Religious Court on the basis of the waiver — Confirmation of will — Opposition — Application for order of prohibition under sec. 9, Succession Ord. — Appeal from such order, C. C. P., Art. 176 — P. D. C. to state reasons when making order.*

*Succession — Order under sec 9(1) of the Succession Ord. — Cannot be made to revise order of Religious Court — When may be made.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated 23rd July, 1937:—

HELD: 1. (In the Order): When making an order under sec. 9 of the Succession Ordinance, transforming a matter from a Religious to the District Court, the P. D. C. should give the grounds on which he exercised his jurisdiction.

2. These orders are appealable.

3. (In the Judgment): An order under sec. 9(1) of the Succession Ordinance can be made either to prohibit the Religious Court from taking cognizance of the succession of a deceased (*i. e.*, commencing

a succession suit), or continuing to deal with such a succession matter. It cannot be made to amend or vary an order made by the Religious Court.

ANNOTATIONS:

1. The ruling on the second point has become obsolete by the enactment of the C. P. R., 1938; see C. A. 66/43 (1943, A. L. R. 95).

2. On sec. 9(1) of the Succession Ordinance generally see last paragraph of annotations to C. A. 23 & 33/43 (1943, A. L. R. 60).

FOR APPELLANT: Levitzky & Faragalla.

FOR RESPONDENT: Germanus.

## ORDER.

1. Nicola Zarour died on the 20th October, 1936. By his last will and testament dated September 1st, 1935, he appointed his widow, the present Appellant, his executrix and the guardian of his children, and made certain dispositions as regards his property.

2. The will made no provision for the mother of the testator, the present Respondent, and, on the 2nd November, 1936, she executed a document waiving any right she might have had to succeed to any part of the estate of the testator, on condition that she should not be liable for any of the debts. This document is clear and unequivocal and in it the Respondent renounces her right to any share, not only in the *mulk* property of the testator, but also in his *miri* land.

3. The testator had been a Palestinian citizen and a member of the Eastern (Orthodox) Community. The Appellant applied to the Court of that community for a certificate of succession and the Court gave its decision on the 29th December, 1936. It had before it the waiver of the Respondent to which I have already referred and not unnaturally decided that the Respondent was no longer a party to any question with regard to the succession. It stated that all the other heirs consented to the jurisdiction and made an order with regard to the distribution of the testator's estate, including his *miri* land.

4. The Court of the Community had confirmed the will of the testator and on the 2nd March, 1937, dealt with an application by the Respondent objecting to the said confirmation. It decided that there were no legal grounds to set aside its judgment confirming the will. The Respondent appealed to the Court of Appeal of the Community and that Court gave its decision on the 28th September, 1937. It decided that the Respondent was not an heir of the testator according to the Byzantine Law, as the testator had left a wife and children, and that consequently she was not entitled to oppose the confirmation of

the will. It pronounced the will to be valid in form and otherwise made in compliance with the law and upheld its confirmation by the Court below. It held that any *miri* land should be excluded from the dispositions in the will.

5. During the time when her appeal was pending before the Court of Appeal of the Community the Respondent applied under Section 9 of the Succession Ordinance for an order prohibiting the Court of the Community from dealing further with the succession of the testator. She succeeded in getting an order to this effect from the President of the District Court of Jaffa on the 23rd July, 1937. From this order the Appellant has appealed.

6. It was urged before us by Mr. Germanus, the advocate for the Respondent, that no appeal lies from an order made under Section 9 of the Succession Ordinance. With this I do not agree. There have been several decisions of this Court to the effect that an appeal does lie from such an order and I think the matter is concluded by Article 176 of the Code of Civil Procedure which enacts that judgments in matters in which no question of value is in issue are appealable.

7. The learned President gave no reasons for his order. The section gives him a discretion to make the order "if he deems it just or convenient". In the earlier part of this judgment I have set out at some length the history of the case in the Court of the Community in order to show that the matter is one in which it was desirable that the learned President should have assigned reasons for the exercise of his discretion. I have come to the conclusion that it is impossible for this Court to deal with this appeal until it knows why the learned President deemed it just or convenient to make the order. In my opinion the matter should be remitted to him for a statement of the reasons on which his order was based. When this statement is before us we shall be in a position to decide the appeal. Meanwhile the decision will be postponed.

Delivered this 2nd day of November, 1937.

*Senior Puisne Judge.*

## JUDGMENT.

The facts out of which this appeal arose have been fully stated in the Order of this Court dated 2nd November, 1937.

This Court called upon the President of the District Court of Jaffa to give reasons why he deemed it just and convenient to make an order under Section 9(1) of the Succession Ordinance. The learned President

has now set out his reasons. It is clear from those reasons that he ordered the case to be transferred to the District Court in order that the District Court may have an opportunity of amending and revising certain decisions already come to by an Ecclesiastical Court. We do not think that this procedure is intended by Section 9(1) of the Succession Ordinance.

Under that Section the President of a District Court may make an order and that order may take one of two forms:—

(1) He may make an order prohibiting the Ecclesiastical Court from taking cognizance of the succession of a deceased person — this means an order preventing the Ecclesiastical Court from commencing any suit with regard to such succession.

This obviously was not the order intended in the present case.

(2) The President may also make an order prohibiting an Ecclesiastical Court from dealing further with a succession suit.

This clearly what was intended in the present case. The scope of such an order must be in most cases confined to matters of succession not already dealt with by the Ecclesiastical Court.

One of the reasons given by the learned President for ordering the transfer was that there were certain legal points involved which could be more justly and conveniently dealt with by the District Court than by the Ecclesiastical Court. The particular legal point referred to was one of waiver. When the question of succession first came before the Ecclesiastical Court, that Court had before it a document admittedly signed by the Respondent, renouncing her claim to any share in the succession. The Ecclesiastical Court inferred from this document that the Respondent did not desire to be considered any longer a party in the suit and that consequently her consent to the jurisdiction was unnecessary. We think that there was material before the Ecclesiastical Court to justify this conclusion and we do not think that this matter should be retried again by the District Court.

We are of opinion that the learned President of the District Court made an erroneous exercise of his discretion and that this appeal be allowed with costs to include LP. 5 advocate's fees.

The attachment ordered on 17th July, 1937, will be released.

Delivered this 22nd day of December, 1937.

*Senior Puisne Judge.*

CIVIL APPEAL No. 177/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Copland and Khayat, JJ.

IN THE APPEAL OF :—

Gottleib Bauerle. APPELLANT.

v.

1. Moses Doukhan,
2. Bernard Joseph,
Joint liquidators of the Phoenix Life Insurance Company, Vienna. RESPONDENTS.

*Insurance — Policy to discharge loan — Maturity of policy — Winding up of insurance company — English law.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 16th July, 1937:—

HELD: An insurance policy comes to an end when the insuring company goes into liquidation.

If the policy was taken to discharge, on maturity, a loan due to the company, the loan is not discharged if the company is wound up before maturity of the policy.

FOR APPELLANT: Amdour.

FOR RESPONDENTS: Doukhan.

### JUDGMENT.

*Copland, J.*: This is another case arising out of the liquidation of the Phoenix Life Insurance Company, Vienna. At the date when the order for liquidation was made, the Appellant had two policies with the Company, one for £ 2000 sterling and one for £ 306 sterling. This later policy came into existence in the following manner:—

The Appellant had received £ 306 from the Company as a loan secured on a £ 2000 gold policy which he then held. As the result of an agreement between him and the Company, the £ 2000 gold policy was changed into one for £ 2000 sterling, and a further policy was issued for £ 306 in which there was a condition in effect that in consideration for the premiums on this second policy the loan would be considered discharged on the death of the Appellant, or on the maturity of the policy, but that in the event of the termination of the policy under Article 4 of the Regulations — which deals with the provisions regulat-

ing the conversion of the policy into a paid-up policy for a reduced amount — and also in the event of any payment by the Company prior to the expiration of the period for which the premiums are payable, the loan will revive and interest would become payable thereon, with a set-off for premiums already paid. The policies do not mature until 1948.

The Appellant filed a proof of debt with the liquidators, and claimed that the loan should be deemed to be discharged. The liquidators, in accordance with the instructions of the District Court to apply the Rules of English Law contained in the 6th and 7th Schedules of the Assurance Companies Act, 1909, have duly valued both policies for £ 2000 and £ 306 and have deducted from the valuation the amount of the loan for £ 306. The Appellant appealed to the District Court who have upheld the decision of the liquidators, holding that, in the events which had happened, a payment was being made prior to the expiration of the period for which premiums were payable, and that therefore the loan had revived. The Appellant has now appealed to this Court.

It is an established principle in English Law that a policy of insurance comes to an end if the insurers, being a company, go into liquidation. See Laws of England, Hailsham Edition, Vol. 18, page 454. This is exactly what has happened here. The contract between the parties has been terminated by operation of law, and since the full consideration for the discharge of the loan, namely, the payment of premiums until 1948 or until the death of the insured, whichever event should first happen, has not been, and in fact cannot now be given, the loan has not been discharged, and the decision of the liquidators is, in our opinion correct. If we were to hold otherwise the effect would be that the Appellant would receive not only the amount of the present valuation of the policy of £ 306, but also the loan which this policy was issued to secure, in other words, a greater benefit than he could ever have got if the Company had not gone into liquidation and the policy had matured in the formal way.

The appeal fails and must be dismissed with costs and LP. 5 advocate's fees.

Delivered this 22nd day of December, 1937.

*British Puisne Judge.*

*Manning, S. P J.*: I concur.

*Senior Puisne Judge.*

*Khayat, J.*: I concur.

*Puisne Judge.*

CIVIL APPEAL No. 103/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Zissel Narziss. APPELLANT.

v.

Eliahu Mizrahi. RESPONDENT.

*Damages — Breach of condition for which liquidated damages provided — Other claims not excluded.*

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 8th May, 1935:—

HELD: A claim for liquidated damages stipulated for the breach of a specified condition in an agreement does not exclude other claims in connection with the agreement, such as a claim for disbursements made on behalf of the Defendant.

FOR APPELLANT: Kleinzeller.

FOR RESPONDENT: Sh. Mizrahi.

JUDGMENT.

On 9th August, 1931, Respondent agreed to assign certain rents to Appellant and another and to register the transfer. Respondent bound himself further to pay LP. 100 damages if he failed to register within ten days. He did so fail and Appellant recovered the LP. 100 damages against him.

On 4.10.1931 by letter the Respondent authorised Appellant to carry out certain repairs. These were carried out and Appellant sued for their cost and certain other expenses.

Her claim was rejected by the District Court save as to a small amount for rent. The District Court proceeded on the ground that the LP. 100 damages already recovered included all damage or loss suffered by Appellant. This is clearly wrong: the LP. 100 was damages only for breach of one condition, failure to register.

It is therefore necessary to set aside the judgment and remit the case to the Court below to take note of this ruling, and to assess the amount expended by the Appellant on repairs and to give judgment then on the whole action.

Appellant to have costs of this appeal to include LP. 6.— advocate's fees, LP. 2.— of 4.6.1936 to be set off.

Delivered this 29th day of October, 1936.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 144/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland and Khayat, JJ.

IN THE APPEAL OF:—

Rashid Ahmad Hassan Abu Laban & 2 ors. APPELLANTS.

v.

Muhammad Ahmad Abu Laban. RESPONDENT.

*Contracts — Construction — Declaration and undertaking — Damages.*

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 20th May, 1935:—

HELD : Damages may not be awarded for the withdrawal of an admission.

ANNOTATIONS :

1. Clause 4 of the contract referred to is in the following terms:—
   "4. The second party Muhammad Eff. Abu Laban admits that he has no right to claim anything in the Partnership Ahmad Hassan Abu Laban & Sons, which is being managed by the first party, neither in its cash money nor in its liabilities, assets, immovable property or anything else related thereto. His only claim being to the two *Kirats* in the Jabrieh orange grove previously mentioned."
2. See C. A. 105/37 (*ante*, p. 173) and note.

FOR APPELLANTS: No. 1 — Ayoubi.
Nos. 2—3 — F. Haddad.

FOR RESPONDENT: Eliash.

JUDGMENT.

This is an appeal against a judgment of the District Court of Jaffa dated 20th May, 1935, whereby Appellants' claim for LP. 5000 damages, by virtue of Clause 4 of a compromise-agreement entered into by the parties, was dismissed.

Clause 10 of the said agreement provides for the payment of LP. 5000 as liquidated damages by either party who commits a breach of any of his obligations under the contract.

This Court is of the opinion that Clause 4 of the agreement in question is merely a declaration wherein the Respondent makes certain admissions. He did not undertake therein either to do or to desist from doing anything.

We do not agree with the Court below that the said Clause is an introductory one to the agreement, but hold that it is of a declaratory nature, and we cannot see how it can be made the basis for an action of damages.

The withdrawal of an admission can never, in the absence of an express undertaking, give rise to a claim for damages.

The appeal, is, therefore, dismissed with costs and advocate's fees assessed at LP. 2.—

Delivered this 26th day of November, 1936.

*Puisne Judge.*

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HIGH COURT No. 75/36.

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

BEFORE: Manning, S. P. J. and Frumkin, J.

IN THE APPLICATION OF:—

Salim Haddad. PETITIONER.

v.

Archbishop Melliton, President of the Ecclesiastical Orthodox Court, Jaffa, & 4 ors. RESPONDENTS.

*Jurisdiction of High Court — Courts Ord., sec. 6, P. O. in C., Art. 43 — Judgment of Orthodox Ecclesiastical Court.*

In refusing an application for an Order to issue to the Respondents, directing them to show cause why their decision dated the 18th March, 1936, in Case No. 110/240, should not be set aside:—

HELD: The High Court has no jurisdiction to set aside a judgment of the Orthodox Ecclesiastical Court.

FOR PETITIONER: R. Dajani.

FOR RESPONDENTS: *Ex parte.*

## ORDER.

The prayer of this petition is that a judgment of the Orthodox Ecclesiastical Court of Appeal be set aside.

The High Court has no jurisdiction to deal with a petition of this kind. It does not come under any matter mentioned either in Sec. 6 of the Courts Ordinance, 1924, or in Art. 43 of the Palestine Order-in-Council, 1922.

We make no Order.

Given this 16th day of October, 1936.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 93/36.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Husni Khalifeh. — APPELLANT.

v.

Sheikh Subhi Kheizaran & 4 ors. — RESPONDENTS.

*Abatement of nuisance — Demolition of dangerous structures — Jurisdiction of Courts — Municipal Corporations Ord., sec. 98.*

In allowing an appeal from the judgment of the District Court of Haifa, dated the 15th July, 1936:—

HELD : The District Court is the only Court which has jurisdiction to hear a case for the abatement of a nuisance constituted by a dangerous structure.

ANNOTATIONS: The Appellant in his capacity as Mayor of Acre had filed an action in the District Court of Haifa praying for an order of demolition in respect of Respondents' premises on the ground that Respondents had failed to comply with an order of the Acre Municipal Council, issued under Sec. 98 of the Mun. Corp. Ord., ordering them to demolish the said premises which the Council considered to constitute a dangerous structure.

The District Court (Judges Nammer & Abu Ghazaleh) dismissed the action on the grounds, *inter alia*, that one of the Judges was of opinion that the Court had no jurisdiction. On appeal reference was made to C. A. 5/32 (1, P. L. R. 721; 4, C. of J. 1371).

FOR APPELLANT: Shawa.

FOR RESPONDENTS: Khoury.

JUDGMENT.

Appeal allowed.

We hold that the District Court is the only Court which has jurisdiction to hear a case of this nature which is a case for the abatement of a nuisance, *i. e.* a dangerous structure.

Further, Section 98 of the Municipal Corporations Ordinance contains a specific provision that Municipal Corporations have power to order demolition.

The judgment of the District Court is set aside and the case sent back to be heard on its merits.

Costs to be costs in the action.

Delivered this 12th day of November, 1936.

*Puisne Judge.*

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CIVIL APPEAL No. 137/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Shukri Saba. APPELLANT.

v.

Adeeb Habayeb on his own behalf and on behalf of his father's heirs. RESPONDENT.

*Contracts — Whether rights inherited by heirs — Option of pre-emption — Transfer by gift or sale — Construction of contract.*

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 1st April, 1935:—

HELD: 1. A contract granting a right of pre-emption passes to the heirs of the donee.

2. A gift of the property without a first offer to the other party constitutes a breach of the promise to offer in pre-emption.

JUDGMENT.

In a contract between Michael Habayeb and the Appellant and another the Appellant agreed that he had no right to sell certain property to a foreigner unless he offered it to Michael Habayeb first.

The Appellant transferred his property to his wife as a gift and is now sued by the heirs of Michael Habayeb for breach of contract.

There were two main grounds of appeal, first that Michael's right under the contract did not pass to his heirs, second that the gift was not a sale.

We are against the Appellant on both points. The intention of the parties is to be primarily looked to and we decide that the right of Michael Habayeb did pass to his heirs and that what was intended was that Appellant should not dispose of the property in any way without first offering it to Michael Habayeb or his representative, as there was nothing to prevent the wife from transferring it to another.

Appeal dismissed with costs to include LP. 4.— advocate's fees and travelling expenses.

Judgment of District Court affirmed.

Delivered this 8th day of July, 1936.

*Senior Puisne Judge.*

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HIGH COURT Nos. 2 & 14/37.

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

BEFORE: Bourke, A/Chief Registrar.

IN THE APPLICATION OF :—

Registrar of Trade Marks. PETITIONER.

v.

Messrs, Salomon, Levin & Elstein & an. RESPONDENTS.

*Taxation — High Court proceedings — Applicability of English law — C. P. R., part XXVII, Advocates' Ord., sec. 25, O. 65, r. 27(29) — C. A. 52/36, L. A. 1/36, C. A. 88/37.*

In determining an application by the second Respondent for the taxation of the costs awarded to him against the first Respondent in H. C. 2/37 and H. C. 14/37:—

HELD : In the absence of specific rules, the English Rules of the Supreme Court would apply to tax High Court proceedings costs.

REFERRED TO: C. A. 52/36 (7, C. of J. 105; P. P. 7.7.36); L. A. 1/36 (7, C. of J. 340; P. P. 30.10, 1, 3, 4, 5, 8.11.36); C. D. C. Jm. 88/37 (not reported).

ANNOTATIONS: This decision was given before the C. P. R., 1938, came into force, but it has been held by the Chief Registrar in H. C. 8/39 (1939, S. C. J.

265) that the scale provided by those Rules could not be applied to High Court proceedings and that, consequently, there was no "machinery with which to tax" such costs.

FOR PETITIONER: No appearance.
FOR RESPONDENTS: No. 1 — Baker.
No. 2 — Seligman & Wittkowski.

## ORDER.

This is an application for the taxation of costs awarded in High Court Cases Nos. 2 and 14 of 1937.

It is clear that under Sections 3 and 9 of the Registrars Ordinance, 1936, the Chief Registrar is the Taxing Master for the Supreme Court. The matter of taxation of costs is more specifically dealt with in Part XXVII of the Civil Procedure Rules, 1938, which have not as yet been brought into force.

The Court awarded costs and also advocates' fees, which were fixed, against the first Respondent. A bill of costs has been submitted for taxation which includes items other than Court fees and advocates' fees. Mr. Baker, for the first Respondent, contends that the Chief Registrar can only assess the Court fees under the Registrars Ordinance, 1936. He admits that there is also power to assess advocates' fees under Section 25 of the Advocates Ordinance. He does not dispute the amount claimed in respect of these items.

For the second Respondent it is argued that all such costs, charges and expenses as shall appear to the Taxing Master to have been necessary or proper for the attainment of justice or for defending his rights should be allowed under Order 65, Rule 27 (29) of the Rules of the Supreme Court in England, which it is submitted is applicable under Article 46 of the Palestine Order-in-Council.

It is admitted by Mr. Baker that there is no corresponding rule in the local Law and that if the rule of English practice and procedure is to be applied the bill would no doubt tax. He relied upon Civil Appeal 52/36 as authority for his contention that Order 65, rule 27 (29) could not be applied. In that case the Court expressed itself as follows:—

> "The arguments which Mr. Eliash has addressed to us are based upon the English Rules of the Supreme Court. We are not concerned with procedure based upon those rules except in so far as they have been embodied in the practice of the Courts of Palestine by Rules of Court amending the Ottoman Code of Civil Procedure. No suggestion that this was so in respect of any of the English Rules relied upon was made by the Appellant's advocate."

In reply Mr. Seligman referred me to the later case of Hammad *v.*

Barlassina, Land Appeal 1/36, which appears to me to be a more direct authority. In that case the practice and procedure in England based upon Order 49, rule 8, regarding the consolidation of actions was held applicable and followed in the absence of anything in the local law. The following striking passage is taken from the judgment of the Senior Puisne Judge (Manning, J.).

> "Mr. Goitein took a further objection that the Court below was not justified in consolidating the cases. He admits that there is nothing one way or the other in local procedure — but again he seems to forget that there is such a thing as the Order-in-Council that lays down that so far as the Ottoman Law, local Ordinances and Regulations do not extend or apply, the jurisdiction of the Civil Courts shall be exercised in conformity with the powers vested in, and according to the procedure and practice observed by or before the Courts of Justice in England as on the 1st November, 1914, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions. Under English practice a Court of Justice has a discretion to allow actions between the same Plaintiff and the same Defendant to be consolidated. In the present case I see no reason to think that the Court below made any improper exercise of its discretion, and this ground of appeal fails."

A similar view of the practice and procedure to be followed as regards the consolidation of actions was expressed by Abdul Hadi, J. in the same case.

I would also refer to Civil Case No. 88/37 heard by the District Court of Jerusalem, where it was held that Order 16, rule 14, of the Rules of the Supreme Court in England was applicable in Palestine in the absence of any rule of procedure governing the matter before the Court in the law of this country.

I have no doubt that I can and should apply the practice and procedure based on Order 65, rule 27, in considering this application for taxation of costs. A contrary view would, I consider, be unfair in its application and work a hardship in its result towards the Applicant. I accordingly hold that the Chief Registrar has power to allow such costs, charges and expenses itemised on the bill for taxation as have been necessary or proper for the attainment of justice and for defending the rights of the second Respondent.

The Chief Registrar will accordingly proceed to taxation of the costs on the lines indicated on Tuesday, May 3rd, at 9.30 *a. m.*

Parties to attend.

Copy of this ruling to be served on parties.

Given this 19th day of April, 1938.

*A/Chief Registrar.*

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Annotated Supreme Court Judgments, 1937 (27).

CIVIL APPEAL No. 65/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Alberto Farran. APPELLANT.

v.

Josephine Anker. RESPONDENT.

*Custody of minors — Discretion of District Court.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 19th March, 1937:—

HELD : The question of the custody of a minor is within the discretion of the District Court.

ANNOTATIONS: On custody of minors see annotations to H. C. 19/43 (1943, A. L. R. 119).

FOR APPELLANT: Atallah.

FOR RESPONDENT: Sanders.

JUDGMENT.

The District Court of Jerusalem appointed the Appellant, Respondent and Mr. W. H. Chinn, the Probation Officer, guardians over the child Mary Tewfik. The Court further ordered that the child should be kept in the custody of the Respondent and granted the Appellant reasonable access to visit the child.

2. This appeal is directed against that part of the order granting custody of the child to the Respondent.

3. The question of custody is a matter wholly within the discretion of the District Court. The Respondent, to whom the custody of the child was given, is of the same religious belief; and the child's father, during his lifetime, granted her the custody of the child.

4. The Appellant adduced no grounds to show that the District Court exercised this discretion unreasonably.

For the above reasons, the appeal is dismissed.

No order is made as to costs.

Delivered this 11th day of June, 1937

*British Puisne Judge.*

CIVIL APPEAL No. 181/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Khalil Malas & Co., Haifa. — APPELLANTS.

v.

Bucovina Society. — RESPONDENTS.

*Foreign company — Damages — Foreign company suing in Palestine though not registered locally — C. A. 140/26 — Measure of damages on a contract for the delivery of goods — Construction of contracts.*

In dismissing an appeal from the judgment of the District Court of Haifa, dated 25th May, 1937:—

HELD: 1. A foreign company which does not do business in Palestine is not an illegal body and it is entitled to sue in Palestine.

2. The measure of damages for a breach of contract to sell goods is the difference between the agreed price and the market price at the time of the breach. Other expenses may also be claimed as part of the damages.

DISTINGUISHED: C. A. 140/26 (1, P. L. R. 99; 1, C. of J. 342).

ANNOTATIONS: See, on the second point, C. A. 139/44 (1945, A. L. R. 40) and note 3.

FOR APPELLANTS: Aweidah.

FOR RESPONDENTS: Margolin.

### JUDGMENT.

This appeal arises out of an agreement between the Appellant and the Respondent company with regard to the sale of wood. The wood was to be shipped in five consignments, first consignment to be in April or May 1935 and the remaining consignments at intervals of thirty days. The first consignment arrived in June, 1935, the Appellant made no objection whatever to this delay. He made an objection that the wood was not up to the standard as laid down in the agreement. He made no attempt to prove this before the District Court and it need not be any further considered. The District Court having heard evidence awarded the Respondent company LP. 236.332 mils damages. The first ground of appeal is that the Respondent company was not entitled to sue in Palestine. Khader Eff. Awaida who argued the appeal,

cited Civil Appeal No. 140 of 1926, reported in the Palestine Law Reports, page 99. A perusal of that decision shows that the facts were entirely different in that case. It was decided that a foreign company carrying on business in Palestine without being registered was an illegal company and could not present a petition under the Bankruptcy Law. In the present case the Respondent is a company resident abroad with whom the Appellant has entered into contractual relations. The Company has not committed any illegality and is entitled to sue in Palestine for any breach of contract. The other ground of appeal was with reference to the question of damages. Khader Eff. Awaida has referred to the well known principle that in cases of breach of contract for the sale of goods, the measure of damages is the difference between the agreed price and the market price at the time of the breach; but that does not prevent the company from proving that they incurred other expenses following directly from the breach of contract. In the present case they proved to the satisfaction of the District Court that other damages had been incurred and the District Court was justified in allowing these further damages. An attempt was made to make the delay in the first consignment a ground for repudiating the contract, but it is quite clear from the terms of the contract that if the Appellant sustained any damages owing to the delay he had to submit the matter to a tribunal specially mentioned in the contract. There was a further term in the contract that the Appellant was bound to grant additional time if necessary for the completion of the contract. We order that the appeal be dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 13th day of October, 1937.

*British Puisne Judge.*

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CIVIL APPEAL No. 72/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Nijmeh Muhammad Abdul Qader. APPELLANT.

v.

Zahra Muhammad Ahmad Nasr. RESPONDENT.

*Rectification of Registers — Land Settlement Ord., sec. 66 — Completion of settlement.*

In dismissing an appeal from the judgment of the Land Court of Jaffa, dated the 23rd March, 1937:—

HELD: 1. Land settlement is deemed to be completed in respect of any particular piece of land with the posting of the Schedule of Rights containing that particular piece of land.

2. Thereafter a claim for rectification on the ground of fraud or omission or mistake may be made in the Land Court.

ANNOTATIONS: On Sec. 66 of the Land (S. of T.) Ordinance see C. A. 106/43 (1943, A. L. R. 188) and note 3.

FOR APPELLANT: Kanafani.

FOR RESPONDENT: El Din.

## JUDGMENT.

The present Respondent brought an action in the Land Court of Jaffa under Section 66 of the Land (Settlement of Title) Ordinance, 1928, for the rectification of the registers.

2. That Section gives the Land Court power to order the rectification of the registers where it is satisfied that the registration of any person in respect of any right to land has been obtained by fraud or that a right recorded in the existing registers has been omitted or incorrectly set out in the register.

3. We hold that the Land Court was correct in its judgment that the provisions of this Section are wide enough as to include the facts in this case.

4. As regards the question raised that the Respondent did not appeal from the judgment of the Settlement Officer within the period prescribed, since settlement was not completed, we hold that settlement of a particular plot is completed when the Schedule of Rights containing that particular plot has been posted. The fact that settlement of the whole village lands has not been completed is immaterial. In this case, the settlement of this plot was completed before the Appellant was in a position to appeal from the Settlement Officer.

5. For these reasons, the appeal should be dismissed with costs to include LP. 4.— advocate's fees.

Delivered this 14th day of June, 1937.

*British Puisne Judge.*

CIVIL APPEAL No. 186/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J. and Greene, J.

IN THE APPEAL OF:—

Rivka Cashman (otherwise Rivkin). APPELLANT.

v.

Lindsay Gordon Cashman. RESPONDENT.

*Nullity of marriage — Jurisdiction of District Court where parties are foreigners — P. O. in C., Art. 64 — Dissolution and nullity — Inverclyde v. Inverclyde — Art. 65 as amended — Construction of statutes.*

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 29th July, 1937:—

HELD: A decree of nullity is included in dissolution of marriage and therefore falls within the prohibition of Art. 64 of the Palestine Order in Council.

FOLLOWED: Inverclyde *v.* Inverclyde, 1931, p. 29.

ANNOTATIONS: *Cf.* Misc. Appl. 20/43 (1943, A. L. R. 12) and annotations.

FOR APPELLANT: Shapiro.

FOR RESPONDENT: No appearance — served.

### JUDGMENT.

This appeal raises an interesting point under the Palestine Order-in-Council, involving the jurisdiction of the Civil Courts in dealing with matters of personal status of foreigners.

For the purposes of this case, it has been said that the parties are British subjects domiciled in Palestine. The question of domicile has not been argued in this Court and we desire to make it clear that we must not be taken as agreeing with the view taken by the District Court, and we do not express any opinion as to this point.

The main issue before us is whether or not a decree of nullity comes within the prohibition of Article 64 of the Order-in-Council which says:—

> "That the Courts shall have no jurisdiction to pronounce a decree of dissolution of marriage until an Ordinance is passed conferring such jurisdiction."

It is not suggested that any Ordinance has been passed conferring that jurisdiction.

In the ordinary meaning of words, dissolution of marriage includes a decree of nullity, and that seems to us to be supported by the decision of Inverclyde *v.* Inverclyde (Law Reports, Probate Division, 1931, page 41), an important case from the decision in which no appeal was made.

Now an argument against that construction is based on the amendment of Article 65 of the Order-in-Council dated 1st April, 1935, dealing with Religious Courts. Religious Courts, other than Moslem Religious Courts, have a similar limitation under the Order, in that they have no power to grant a decree of dissolution of marriage of a foreign subject; that provision of Article 65 was implemented by the amendment which provides: — "For the purposes of this Article, decree of dissolution of marriage includes a decree of divorce and a decree of nullity". We think that Article 64 must be construed in its ordinary meaning and it is not necessarily depending upon Article 65, and we do not think it can be argued that because Article 65 has been amplified by the amendment of 1935, Article 64 has in consequence been limited in any way. It may be that that amendment was made because the Civil Courts have no control over the Religious Courts by way of appeal from Religious Courts and they may have been misinterpreting their powers — whereas no such explanation was considered necessary in the case of the Civil Courts.

This appeal will therefore be dismissed.

Delivered this 15th day of October, 1937.

*Chief Justice.*

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CRIMINAL APPEAL No. 48/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Greene and Khaldi, JJ.

IN THE APPEAL OF:—

Murshid Muhammad Mordas. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

*Criminal appeal — Time for appeal, T. U I. Ord., sec. 36(1) — Court may not enlarge time.*

In dismissing an appeal from the judgment of the District Court of Haifa, datd the 27th April, 1937, whereby the Appellant was convicted under Section

8A(i) of the Emergency Regulations, 1936, and sentenced to 15 years' imprisonment:—

HELD : The Court of Criminal Appeal has no power to enlarge the time for filing an appeal.

ANNOTATIONS: On the impossibility of extending a period laid down by statute *cf.* C. A. 380/43 (1944, A. L. R. 271) and note.

FOR APPELLANT: H. Hawa.

FOR RESPONDENT: Wa'ari.

## JUDGMENT.

This is an appeal against the judgment of the District Court of Haifa, dated the 27th April, 1937, whereby the Appellant was convicted of being in possession of a rifle under Section 8A(i) of the Emergency Regulations, 1936, and sentenced to fifteen years' imprisonment.

2. The appeal lodged by the Appellant was filed in this Court on the 10th May, 1937, that is to say, it was lodged after the period fixed, namely ten days, by Section 36(1) of the Criminal Procedure (Trial Upon Information) Ordinance, Cap 36, Laws of Palestine, Vol. I, page 495.

3. In the circumstances of this case, it is unfortunate that this Court, sitting as a Court of Criminal Appeal, has no power to extend the period within which appeals should be lodged.

4. The appeal should be dismissed.

Delivered this 19th day of June, 1937.

*A/British Puisne Judge.*

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CIVIL APPEAL No. 188/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Ibrahim Adhan el Farouki the *Mutawalli* of the Abdul Ruda *Waqf*,

and

his sons Hidayet Allah and Taj Eddin of Jaffa. APPELLANTS.

v.

Ahmad Eff. Seif Eddin Husseini in his capacity as Mayor of Lydda. RESPONDENT.

*Expropriation — Judgment for compensation — Conditions should not be imposed.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated 20.7.1937:—

HELD: A judgment awarding compensation for expropriation of land by a Municipality should not be limited by conditions.

APPELLANT: In person.

FOR RESPONDENT: No appearance.

JUDGMENT.

In this case the Municipal Council of Lydda decided to appropriate a *Karm* belonging to a *Waqf* for the purpose of a public market. The price agreed upon was LP. 2717 of which LP. 2400 was paid to the Appellant. He sued for the balance in the District Court of Jaffa which gave judgment in his favour, but attached to the judgment certain conditions: one of these conditions was that the amount should be taken from a deposit in the Execution Office, the other that the payment to the Appellant should depend on whether objection was made by a person named Salim el-Masri.

We do not see any reason why any conditions should be attached to the judgment. The judgment of the District Court must be set aside, and judgment entered for the Appellant for the LP. 317 with legal interest from the date of action, *i. e.* 19.6.1937, and costs.

The Appellant should also receive LP. 1 the costs of this appeal.

Delivered this 3rd day of November, 1937.

*Senior Puisne Judge.*

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CRIMINAL APPEAL No. 81/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Copland and Frumkin, JJ.

IN THE APPEAL OF:—

Ahmad Aref Faddah. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Evidence — Corroboration in sexual offences — Unsworn evidence of a child of ten.*

In allowing an appeal from a judgment of the District Court of Nablus, (CR. D. C. Na. 61/37), dated June 26, 1937, whereby the Appellant was convicted under Section 152(1)(c) of the Criminal Code Ordinance, 1936, and sentenced to two years imprisonment:—

HELD : The unsworn evidence of a child of ten cannot be accepted in corroboration.

ANNOTATIONS :

1. Appellant was charged before the District Court with having unlawful sexual intercourse with a child under the age of 16 and was convicted (Evans, J., *dissentiente*) on the evidence of the complainant "corroborated" by that of her brother, a boy of 10 years.

2. See CR. A. 105/43 (1943, A. L. R. 754) and notes.

FOR APPELLANT: Nasr.

FOR RESPONDENT: A. G. A. — (Ghussein).

JUDGMENT.

In this case we are in agreement with the dissenting judgment of the learned President in the Court below. The unsworn evidence of a child of ten years cannot be accepted as corroboration.

The appeal is allowed, conviction and sentence quashed.

Delivered this 21st day of July, 1937.

*Senior Puisne Judge.*

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CRIMINAL APPEAL No. 43/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Copland and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Fadwa Mussa Abboud. APPELLANT.

v.

Elias Mussa Abboud. RESPONDENT.

*Criminal procedure — No appeal from acquittal may be filed by civil claimant — Statutory right.*

In dismissing an appeal from the judgment of the District Court of Haifa, (CR. A. D. C. Ha. 14/37), dated March 2, 1937; dismissing the Appellant's

appeal against a judgment of the Magistrate's Court, Haifa, dated January 11, 1937, acquitting the Respondent of a charge of assault:—

HELD: A civil claimant may not appeal from an acquittal of the Accused.

ANNOTATIONS: On the right of appeal being a statutory right see note 1 to C. A. 274/42 (1943, A. L. R. 133).

FOR APPELLANT: F. Atalla.

FOR RESPONENT: Elia.

## JUDGMENT.

This appeal will be dismissed. In our opinion a civil complainant has no right to appeal from an acquittal

The right to appeal from an acquittal is by statutory provision vested in the Attorney General, who can appeal from a judgment when he considers it necessary to do so.

The appeal is therefore dismissed with costs and LP. 5 advocates' fees.

Delivered this 8th day of May, 1937.

*Chief Justice.*

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CRIMINAL APPEAL No. 93/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Khayat, JJ.

IN THE APPEAL OF:—

Yitzhak Shertok. APPELLANT.

v.

Arthur Quadow. RESPONDENT.

*Compensation in criminal cases — C. C. O., sec. 43(1) — Whether claimant need constitute himself a civil party.*

In dismissing an appeal from the judgment of the District Court of Jaffa, sitting at Tel-Aviv, in its appellate capacity, confirming the judgment of the Chief Magistrate at Tel-Aviv, whereby Appellant was convicted of Libel contrary to Sections 201 and 203 of the Criminal Code Ordinance, 1936, and was sentenced to pay a fine of LP. 25 or three months' imprisonment, and also ordered to pay LP. 25 compensation to complainant under Section 43(1) of the Criminal Code Ordinance, 1936:—

HELD : Compensation under Sec. 43(1) C. C. O. may be awarded by the Court whether or not the claimant has constituted himself a civil party.

ANNOTATIONS: On compensation under Sec. 43 of the C. C. O. see CR. A. 107/42 (1942, S. C. J. 407) and note.

FOR APPELLANT: Levanon.

RESPONDENT: In person.

JUDGMENT.

We are of opinion that it was within the Magistrate's power to award compensation under Section 43(1) of the Criminal Code Ordinance, 1936, to the injured person, whether such person has or has not constituted himself a civil party.

The appeal will be dismissed.

Delivered this 30th day of September, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 148/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Yusef Anis Shehadeh Alayan & an. APPELLANTS.

v.

Fares Yacoub Hassouneh. RESPONDENT.

*Damages — Amount which may be claimed — Produce of land — Construction of contract.*

In dismissing an appeal from the judgment of the District Court of Nablus, dated the 12th June, 1935:—

HELD : Damages, purchase price and the produce of land undertaken to be transferred may, under the terms of a contract, be claimed together.

ANNOTATIONS: The judgment of the District Court (Nammar and Shehadeh, JJ.) was as follows:—

"Upon consideration, it appeared that this action was brought by Fares Yacoub Hassouneh of Lydda against the Defendants, Youssef and Mahmoud Anis Shehadeh Alayan of the village of Yahoudieh. It consists in that the Defendants have

entered into an agreement whereby they undertook to sell to Plaintiff a certain plot of land. The agreement is dated 6.1.34. They were paid the sum of LP. 60 by way of advance. They, however, have failed to transfer the land to Plaintiff. He claims therefore the refund of the advanced sum plus damages.

Defendants have appeared before this Court and from their statements it was apparent that they have failed to execute the sale. They did not execute any of the transactions required for the transfer nor did they transfer the land to the Plaintiff as they undertook to do in the agreement.

Therefore in accordance with Arts. 66—106 of the Code of Civil Procedure, judgment is hereby concurrently given in favour of Plaintiff Fares Yacoub Hassouneh and Defendants Youssef and Mahmoud Anis Shehadeh Alayan are hereby ordered to return to Plaintiff the sum of LP. 66, being the amount given to them by way of advance money, together with LP. 3,200, being his share of the produce of the land and LP. 100 as damages, or a total of LP. 166,200, with costs.

Judgment subject to appeal given this 12th day of June, 1935".

APPELLANTS: In person.

RESPONDENT: In person.

## JUDGMENT.

This is a frivolous appeal. No notice was necessary.

The agreement was on 6th January, 1934, and Respondent waited till 2nd December, 1934, before taking action. He was entitled to damages as agreed and to refund of money paid.

The appeal is dismissed with costs to include LP. 2.— advocate's fees.

Delivered this 18th day of February, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 168/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Greene and Khayat, JJ.

IN THE APPEAL OF:—

Mohammad Nasr ed Din Bashiti & 2 ors. APPELLANTS.

v.

Olaf Lind. RESPONDENT.

*Cause of action — Action based on P/N which Court holds to be conditional — Plaintiff may proceed on action for debt — Onus of proof altered.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 8th July, 1937:—

HELD : Although the cause of action was based on a promissory note which the Court held not to be valid as such, the Plaintiff should be allowed to proceed on the debt in the same action.

ANNOTATIONS :

1. The following is the wording of the District Court judgment:—

"Plaintiff is suing for LE. 200.— on a bill or P/N for LP. 200. According to the wording of the document Defendant undertook to pay LE. 200.— to the order of Hussein Omar Abu Nasr against receipt of the title deed, upon the institution of the Land Registry, in respect of the land called Ord el Mukabber.

It is perfectly clear from the wording of the document that the money is payable conditionally on the receipt of a certain title deed.

The document is dated 8.3.1919 and therefore in my opinion the Ottoman Commercial Code applies as to whether or not the document is a P/N. Whether the Ottoman Commercial Code or the Bills of Exchange Ordinance applies however, there can be no doubt that under either law the payment of a negotiable instrument must be unconditional. Any action therefore based on this document as a P/N must in my opinion fail and I accordingly dismiss the claim of Plaintiff with costs and advocate's attendance fee of LP. 2.—.

Delivered this 8th day of July, 1937".

2. Contrast C. A. 193/43 (1943, A. L. R. 597).

FOR APPELLANTS: Haddad.

FOR RESPONDENT: Olshan.

## JUDGMENT.

The Plaintiffs sued in the District Court of Jerusalem for the sum of LE. 200. The claim was based on a document dated 8th March, 1919. The discussion in the Court below was entirely confined to the fact whether this document was a promissory note or not. The learned Judge rightly decided that the document was not a promissory note, and that if the Appellants were suing on it as a promissory note, they must fail. The learned Judge gave judgment then for the Defendant.

In the circumstances, we think that the fairest course is to remit the case to the Court below for a new trial with the understanding that the document is an agreement and that the burden of proving that any money is due under it is on the Appellants.

In view of the course which the case took in the Court below, we order that the Appellants shall pay the costs of this appeal to include LP. 2.— advocate's fees.

Delivered this 7th day of October, 1937.

*British Puisne Judge.*

HIGH COURT No. 72/36.

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

BEFORE: Manning, S. P. J. and Frumkin, J.

IN THE APPLICATION OF:—

Sudki Abdul Muhsen Ed Daoudi. PETITIONER.

v.

1. The Chief Execution Officer, Jerusalem,
2. Hay Elyasher. RESPONDENTS.

*Sale in execution — Remedy which High Court may give — Position of highest bidder when auction is reopened — Art.* 111 *Law of Execution explained.*

In discharging an order issued to the first Respondent to show cause why he should not be ordered to make an order of sale in favour of the second Respondent as highest bidder:—

HELD: When the auction proceedings are reopened the highest bidder may withdraw his bid.

ANNOTATIONS: On withdrawal of bids in execution *cf.* H. C. 30/36 (*ante*, p. 299), C. A. 255/40 (1941, S. C. J. 88) and note 1, and H. C. 26/41 (1941, S. C. J. 196).

FOR PETITIONER: Cattan.

FOR RESPONDENTS: No. 2 — Olshan.

### JUDGMENT.

1. In a public auction relating to the sale of immovable property belonging, in joint ownership, to the Petitioner, the second Respondent and other partners, the second Respondent has, on the 16th December, 1935, entered a bid, as the third bidder for LP. 9000, and has since then remained the last bidder. After the auction had been extended for several periods, and the second Respondent had heard that a further extension of one month was ordered he, on the 18th May, 1936, informed the Chief Execution Officer that he withdrew his bid. The Petitioner opposed the withdrawal and after hearing the parties, the Chief Execution Officer on the 30th June, 1936 made the following order:—

> "The last bid may be withdrawn as a fresh publication is being made. Execution to proceed".

2. In his written application to this Court, the Petitioner applied for an order against the Chief Execution Officer to show cause why his

said order should not be cancelled. When it became clear to him that such an order could not be made by this Court as it was neither to direct the Respondent to do or to refrain from doing a certain thing but merely to cancel an order which has already taken effect, he, in open Court, amended his petition and obtained an order *nisi* for the first Respondent to show cause why he should not be directed to make an order of sale in favour of the second Respondent as the highest bidder.

3. After hearing counsels for Petitioner and the second Respondent we came to the conclusion that the order *nisi* could not be made absolute.

4 The whole point in this case turns on the question whether the Chief Execution Officer may allow a bidder, or the highest bidder, to withdraw his bid. The Ottoman Law of Execution which governs this matter contains no authority one way or the other. The Petitioner wants to rely on Article 111 of the said law which allows a purchaser to cancel the sale if the property which has been finally sold to him has not been transferred within one month. He argues that only then and not at any other stage may a bidder withdraw. But far from being in favour of the Petitioner the said article is clearly against him. The article deals with a final sale and, had it not been for the provision contained therein, the purchaser would not be in a position to cancel a contract duly concluded. The main object of the article is to impose a duty upon the vendor, namely the Execution Office, to give effect to the sale within one month. But in the case before us the proceedings never reached the stage of a concluded sale. All that the second Respondent has done by his bidding was to make an offer subject to the acceptance of the Chief Execution Office and the elementary principles of offer and acceptance are applicable. True a bid under the Execution Law differs from an ordinary offer in that the bidder has to deposit certain sums when entering his bid and it may be that at some other occasion we might have to consider the fate of such deposit or any other liability of the bidder in case of a withdrawal. In this case this point does not arise. The Chief Execution Officer did not consider the bid adequate which amounts to his not accepting the offer, and he ordered a fresh publication to invite better offers, and under these circumstances we can see no reason in law to prevent him from allowing the second Respondent to withdraw his bid.

5. The order is discharged with costs and LP. 2.— advocate's fees.

Delivered this 4th day of December, 1936.

*Senior Puisne Judge.*

CIVIL APPEAL No. 190/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Yaqeen el Khayat. — APPELLANT.

v.

Maliha Khalil Ramadan El Qeisi. — RESPONDENT.

*Construction of contracts — Whether contract made in the name of agent or of principal — Recital in contract.*

In dismissing an appeal from a judgment of the Land Court of Jaffa, dated the 25th March, 1937:—

HELD: Where an agent contracts in his own name the principal may not be sued.

ANNOTATIONS: The following is the text of the District Court judgment:—

"The Court desires to give a ruling on the preliminary legal point taken in the first two paragraphs of the written Statement of Defence, dated 12th February, 1936, to the effect that there is no privity of contract between the Plaintiff and the present Defendant, Maleha. The contract itself cites the parties as Yaken Ibn Haj (present Plaintiff) as the first party and Sheikh Hawamel, as the second party. The contract is signed by the first party and by Hawamel, personally, without any reference to the alleged principal (*i. e.* present Defendant Maleha). The only reference to the present Defendant is the recital where it is stated that Hawamel had a power of attorney and power to sell the land in question. The recital goes on to say "Whereas the second party undertook to sell". After the recital it appears in the first clause "The second party undertook to sell this land which is registered in the name of Maleha". This we regard to have been a personal undertaking on the part of Hawamel. Clause 4 of the contract says "The second party also undertook to come to the Settlement Officer or to the *Tabu*". Clause 6 says: — "If the second party fails to fulfil *etc.*, he must pay *etc.*".

We consider that all the obligations are personal obligations on the part of Hawamel. We consider that Art. 1461 of the *Mejelle* requires that a contract (if it is to bind the principal) (word in Arabic *"Bill Idafeh"* in Art. 1461) should contain the name of the principal as a party, or at any rate, should describe the attorney as being the agent or attorney of the principal who should be named. In this case all the obligations are personal obligations of Hawamel (who is no longer a party to this case) and we do not consider that the contract can be binding on the present Defendant. We would add that in any event, it is doubtful whether the recital on a contract can be regarded as a part of the operative portion of the contract.

We dismiss this action with costs and LP. 2.— advocate's fees.

Delivered this 25th of March, 1937".

FOR APPELLANT: O. Saleh.

FOR RESPONDENT: Lipkin.

## JUDGMENT.

1. In this case, the Appellant sued in the District Court of Jaffa for damages for breach of contract. Originally he sued two persons namely the present Respondent and her son Howeimel. In the course of the proceedings in the District Court, he abandoned the case against Howeimel. The District Court gave judgment in favour of the Respondent on the ground that there was no privity of contract between her and the Appellant.

2. The Respondent had given a power of attorney to her son authorising him to sell certain land, to receive the price, and to bring actions in the Courts with respect thereto. With the authority of this power of attorney, Howeimel entered into an agreement with the Appellant to sell the land to him for LP. 50. An examination of this agreement shows that it is an agreement between the Appellant and Howeimel. It is nowhere said in it that Howeimel is merely acting as the agent for the Respondent, he makes himself personally liable for any damage for breach, and he has signed the agreement in his personal capacity.

3. Omar Eff. Saleh, for the Appellant, has referred us to the preamble, but the preamble is really only introductory matter showing that Howeimel was authorised to sell and transfer the land.

4. We think therefore that the District Court was right and that this appeal should be dismissed with costs to include LP. 4.— advocate's fees.

Delivered this 18th day of October, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 189/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J. and Khayat, J.

IN THE APPEAL OF:—

The Government of Palestine. APPELLANT.

v.

Ahmed Hassan Kathkuda, in his capacity as the *Mutawalli* of the *Waqf* of the Mosque of Qisaria, Land Owner, Haifa. RESPONENT.

*Waqf — Whether a waqf can acquire title to miri land by long posses-*

*sion — Land Code, Art. 78 — Mejelle, Art. 100 — Omar Hilmy, Goadby and Doukhan — Principles of miri and waqf discussed — Estoppel — C. A. 197/37.*

In allowing an appeal from a judgment of the District Court of Haifa, sitting in its appellate capacity, dated the 26th July, 1937, confirming the judgment of the Land Settlement Officer, dated the 4th January, 1937:—

HELD: *Miri* cannot become *waqf* by long occupation or (*obiter*) by purchase.

ANNOTATIONS: For further proceedings in this case see C. A. 33/41 (1941, S. C. J. 113) and P. C. L. A. 6/41 (*ibid.*, p. 171).

FOR APPELLANT: A/Government Advocate.

FOR RESPONDENT: Asfour.

JUDGMENT.

By a *wakfieh* dated 8th *Jamadi el Awal*, 1321 *A. H.*, Fatmeh — known as Rohdil Khanum, wife of Ali Bey Jarkass, dedicated as *waqf, inter alia,* "all the garden, orchard and house situated at Hudeidun farm owned by her as per *Kushan* dated July, 1319; bounded on S.: *Miri* lands belonging to it; E.: Main road; N.: Ard el Burj; W.: Main road and Sand Dunes."

It is clear that part only of the dedicator's property was affected by this *wakfieh* and that in addition to the property affected she had *miri* lands.

It seems that the property was registered in the Land Registry, Haifa, on 13th March, 1922, as *miri* in the name of the Mosque of Qisaria, *i. e.* the *waqf* to which the *waqfieh* relates.

In 1933 there were proceedings between the Government, which alleged the land was *mahlul,* and the heirs of Fatma, which were settled by a consent judgment in Land Appeal No. 50/32 in this Court as follows:—

> "That the land in dispute be granted to Appellants on payment of *Bedl Misl,* the grant to take effect after the expiration of the present lease by Government to the Palestine Jewish Colonization Association".

The area in which the land in question is situated became subject to settlement and before the Settlement Officer the Government became the Plaintiff — the *Mutawalli* of the *Waqf* of the mosque of Qisaria the Defendant — and the heirs third parties. The Settlement Officer, in paragraph 5 of his judgment, summarised the position as follows:—

> "The third parties based their claim on the consent judgment of the Supreme Court referred to above, although they had never been in possession of the land. The bases of the claim of the Defendant are longer and in the main are as follows:—

(1) Registration, for which extracts were produced, in the name of the Fatima bint Ahmad, otherwise known as Rudail Hanum, who died in 1326 (Turkisb Year).

(2) A dedication by her on 8th *Jumad al-Ula,* 1321, of tbe land and of the trees and buildings then standing on the land as *Waqf.* The *Waqfieh* is in order as to form.

(3) Registration of 13tb March, 1922, at the Land Registry at Haifa in the name of the Mosque of Qisaria as *Miri.*

(4) Possession by the grantor before the dedication by her and possession by the *Mutawalli* of the *Waqf,* undisputed and undisturbed, since 1326, and until the conflicting claims in this case were presented by the Plaintiff and the Third Parties".

It is clear that the dedication being before 1331 *A. H.*, the land on which the trees and buildings were could be property dedicated, and the only question which arises as to it now is its present extent.

The difficulty of the case is presented by the balance of the land which is *miri,* registered in the name of a *waqf,* and which has been found by the Settlement Officer to have been in the possession continuous, undisputed and undisturbed of the *Mutawalli* since 1321.

The Land Settlement Officer in para. 11(2) of his judgment held:—

"(2) The alleged dedication of the *Miri* land did not have the consent of the proper authorities and must be held to have been invalid. The land must therefore be considered as *Miri* but to be held by the *Mutawalli* of the *Waqf*".

It is clear from the *waqfieh* that the dedicator did not purport to dedicate her *miri* land.

The only question — but an important and difficult one — is: Can a *waqf,* by occupation by the *Mutawalli* for a period, in this case from 1321 *A. H.* to 1355 *A. H.* (1936), acquire a title to *miri* land?

The Land Settlement Officer takes the view that a *mutawalli,* on behalf of the *waqf,* is in the same position as an ordinary individual, and that Article 78 of the Land Code applies, and in para. 12 he states:—

"A further point remains to be dealt with; namely, whether *Miri* land can be registered in the name of a *Mutawalli* on behalf of a *waqf.* The Director of Land Registration in his letter No. Ld. 2/38—5024 of 18th June, 1935, to the Settlement Officer has given various instances, five in number, wbere *Miri* land since 1925 has been registered by Land Registrars in Palestine in the names of various *Waqfs* or in the names of *Mamurs Avqaf;* he does not allege that such registrations were invalid. In one other instance given by him certain property in Safad was in 1284 *A. H.* registered as *Mulk* (not *Waqf Sahih*) in the name of the *Waqf* of the Mosque of Abu Yusuf. From these instances and even independently of them the Settlement Officer concludes that the *Mutawalli* of a *Waqf* may hold *Miri* land without its being in any way *Miri Mavqufa.* The land

> subject to this action will accordingly be registered as *Miri* but in the name of the *Mutawalli* for the time being of the *Waqf* of the Mosque of Qisaria on behalf of the said *Waqf*".

The Land Court (para. 6) agreed with the Settlement Officer that the Government's claim was prescribed and held that possession by him would undoubtedly give the *Mutawalli* a prescriptive title against the State under Article 78 of the Land Code.

It further takes the view (para. 9) that it is not open to the Government to attack title deeds issued by the Land Registry by reason of Article 100 of the *Mejelle*, a maxim which according to Hooper states:—

> "If any person seeks to disavow any act performed by himself, such attempt is entirely disregarded".

It is true that in this particular case the *Mutawalli* is in the position of a Defendant, but I do not think that that affects the question.

No authority was relied upon by the Settlement Officer except the somewhat obscure references to the practice in the Land Registry in para. 12 of his judgment to which I have referred.

No authority was relied upon by the Land Court and no authority touching the point was cited before us.

I have done my best to find such authority — for which reason the delivery of this judgment has been delayed — and I have not succeeded.

According to Omer Hilmi (Tyser translation) Article 330 of the Law of *Evqaf* provides:—

> "The *Mutevelli* of a *vaqf* cannot by use of the property of the *vaqf* acquire *Arazi mirié*, or *Arazi mevqufe*, or an *Ijaretein* property in order that revenues from them may be obtained for the *vaqf*. If he do so, he is made to pay back the property of the dedication which he gave as the price for the thing acquired, and is liable to be dismissed".

and Article 55 provides:—

> "If the *Mutevelli* of a *Vaqf* buy something on account of the *vaqf* out of the income of the *vaqf*, this thing does not become *vaqf* by the mere fact that it has been purchased out of the income of the *vaqf*.
>
> Therefore the *Mutevelli* can, with the consent of the vendor, annul the sale or sell that thing to another.
>
> But if the *Mutevelli* has, after the purchase, limited the thing, in accordance with the law, by a decree of the judge, for the benefit of the *vaqf*, then the thing becomes *vaqf*.
>
> But if the *Mutevelli* does not buy the said thing with the income of the *vaqf*, and acquires it by the expenditure of the thing originally dedicated, in such a case that thing becomes *vaqf* by the mere purchase.

> *E. g.* If the *Mutevelli* buy a property with dedicated money appointed to be converted into property, such property becomes *vaqf* by the mere purchase.
>
> For this, the consecration of the dedication by the decision of the judge is not necessary".

I am told that these provisions are not inconsistent, any apparent inconsistency being removed by the decree of the judge (*qadi*).

The Ottoman Land Code deals, *inter alia*, with *miri* land which, according to Goadby and Doukhan, means land over which a heritable right of possession (*tessaruf*) is granted by the State to a private person, though the ownership (*raqabe*) remains in the State. The primary object of this tenure is to ensure that land is available for cultivation, and the primary incident of this form of tenure is that the land reverts to the State in order that it may be regranted (subject to certain rights) on failure of heirs or upon failure to cultivate.

It is a fundamental principle of *waqf* that a dedicator cannot dedicate what he does not own. In Turkish times he could only dedicate *mulk*, or *miri* dedicated with the consent of the Sultan (I express no view as to the devolution of the Sultan's power), the theory no doubt being, that by the making of land *waqf*, the State — and through the State the members of the State — lost certain rights. At pages 75 and 76, of Goadby & Doukhan, it is stated:—

> "No true dedication of *Miri* is possible. *Miri* made *Waqf* without being granted as *mulk* remains *Miri*. *Miri* made *Waqf* in that way belongs to the dedicator as before, and can be sold to another. On the death of the dedicator it passes to those who have the right of succession, and if there is no one having the right to succeed, it belongs to the *Beit-el-Mal*. In short, the dedication of *Miri* made *Waqf* without any grant as *Mulk* and without the leave of the Sultan cannot be given effect to and cannot be valid. And the grant of the *Raqabe* must be by way of gift".

If one accepts the principle, which I think must be accepted, that *miri* (without sepcial *firman*) cannot be created *waqf*, on the broad ground of public policy in the sense of public interest, in my view, unless there is any express provision of the law authorising it, *miri* cannot by occupation, and in my opinion, although it is unnecessary for the decision of this case, by purchase, become *waqf*. I know of no such provision.

If such land cannot lawfully become *waqf*, it follows that it cannot legally be registered as *waqf*, and I do not think any estoppel can arise from such registration.

In my judgment this appeal should be allowed and the case returned to the Settlement Officer to decide what land, originally dedicated, should

now be registered as *waqf;* and in whose name, having regard to the facts including the consent judgment, the balance should be registered. It is not suggested that the occupation by the *Mutawalli* was otherwise than on behalf of the *waqf*.

This being an appeal by the Government of Palestine, and having regard to the circumstances, there will be no order as to costs or advocate's fees.

At the hearing before us all concerned agreed that Civil Appeal 197/37, Ibrahim Ahmed Sharkas and Ismail Ahmed Sharkas *v.* Ahmed Hassan Kathkuda, in his capacity as the *Mutawalli* of the *Waqf* of the Mosque of Qisaria, Land Owner, Haifa, could conveniently be heard together with this case, and it was so heard.

That appeal will also be allowed, with costs here and in the Court below, and the judgment in this case will apply equally to that case. Advocate's fees LP. 5.

Delivered this 4th day of December, 1937.

*Chief Justice.*

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CRIMINAL APPEAL No. 88/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Greene and Khaldi, JJ.

IN THE APPEAL OF:—

Shobash Yousef Ahmad & 3 ors. — APPELLANTS.

v.

The Attorney General. — RESPONDENT.

*Criminal procedure — Information signed on behalf of A. G. — T. U. I. Ord., sec. 28 "filed" — Committal on charge different from that in investigation, sec. 18(2), Mottes v. A. G. — Findings of fact — C. C. O. not ultra vires P. O. in C. (Art. 46; Arts. 18, 39, 52) "as amended", "and", "as amended by any Ordinance or Rules" — "Peace, order and good government", Riel v. The Queen — Construction of statutes.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 13th July, 1937, whereby Appellants were convicted of manslaughter contrary to Sections 212, 213 and 23 of the Criminal Code Ordinance, 1936, and whereby the first Appellant was sentenced to fifteen years' imprisonment and the other three Appellants to six years' imprisonment each:—

HELD: 1. The word "filed", in Sec. 28 of the Trial Upon Information Ordinance, does not include the word "signed".

2. A Magistrate holding an investigation on a charge of murder may commit for manslaughter.

3. The Criminal Code Ordinance is not *ultra vires* the Palestine Order-in-Council.

FOLLOWED: Riel *v.* The Queen, 1885, 10 App. Cas. 675, 55 L. J. (P. C.) 28.

NOT FOLLOWED: M. A. 9/32 (1, P. L. R. 740; 2, C. of J. 620).

ANNOTATIONS:

1. On acts to be done by the A. G. personally see note 2 to C. A. 274/42 (1943, A. L. R. at p. 137).

2. On the second point see CR. A. 24/44 (1944, A. L. R. 361) and notes and *cf.* the T. U. I. (Am.) Ord., 1944.

3. See, on the last point, CR. A. 142/36 (*ante*, p. 316).

FOR APPELLANTS: No. 1 — Dajani.
Nos. 2, 3 & 4 — Yehuda.

FOR RESPONDENT: Solicitor General (Rose) & Wa'ri.

## JUDGMENT.

*Manning, S. P. J.*: The Appellants were convicted of manslaughter by the District Court of Jerusalem. The first ground raised in this appeal by Hassan Sidqi Dajani, advocate for the Appellant Shobash, is that the information was irregular. It was signed by one Issa Aqel, "for Government Advocate", and Section 28 of Cap. 36 enacts that an information should be "filed" by or on behalf of the Attorney General. Omar Wa'ri who appeared for the Respondent, made it quite clear that Issa Aqel was entitled to sign informations on behalf of the Attorney General. The word used is "filed", not "signed", and there can be no doubt that this information was filed on behalf of the Attorney General. This ground of appeal fails.

2. If I understand correctly Hassan Sidqi's second ground of appeal it is that the learned Magistrate holding the preliminary investigation had before him a charge of murder, whereas he committed on a charge of manslaughter. Section 18(2) Cap. 36 makes it clear that the learned Magistrate had power to do this. This ground of appeal also fails.

3. Hassan Sidqi's third ground of appeal is that there was no reasonable evidence to justify the finding of the Court below. He says there were discrepancies in the evidence of certain witnesses and variations between their evidence in Court and the statements which they had made to the Police. I have no doubt that the Court below took all these matters into consideration. The record shows that the evidence was

sufficient in law to justify the conviction of his client This ground of appeal also fails.

4. Mr. Yehuda, who appeared for the other three Appellants, raised a novel point to the effect that the Criminal Code Ordinance of 1936 is *ultra vires*. To understand this argument it is necessary to refer to Article 46 of the Palestine Order-in-Council, 1922. The Order-in-Council came into force on September 1st, 1922, and Article 46 prescribes the law to be administered by the Civil Courts from that date. The relevant part of the Article is as follows:—

> "46. The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on 1st November, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders-in-Council, Ordinances and Regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; .....".

5. Mr. Yehuda says that these words must be interpreted to mean that His Majesty in Council intended that the Ottoman Law in force on November 1st, 1914, was to be a fixed and invariable law for Palestine, subject to alteration, amendment or repeal only by another Order-in-Council. Ordinances and regulations subsequently enacted were to be merely for the purpose of filling in gaps not covered by the Ottoman Law.

6. The Article is undoubtedly open to this interpretation. To support his argument Mr. Yehuda laid stress on the wording of Article 39 and 52. Article 39 refers to the jurisdiction of Magistrates' Courts and says such Courts shall have the jurisdiction assigned to them by the Ottoman Magistrates' Law of 1913, as amended by any subsequent law, ordinance or rules. Mr. Yehuda points to the words "as amended" and says they do not occur in Article 46; the word used there is "and". Article 52 deals with the jurisdiction of the Moslem Religious Courts which is to be exercised in accordance with an Ottoman Law of 1333 (*A. H.*), "as amended by any Ordinance or Rules". It may be freely admitted that the words "as amended" in these Articles, and their absence in Article 46, lend support to Mr. Yehuda's contention. But, as the Solicitor-General points out, the Order-in-Council has to be looked at as a whole and Article 18 gave the legislative authority in Palestine the power to promulgate ordinances for the "peace, order and good government" of Palestine. These words, to quote from the judgment of the Judicial Committee in the case of Riel *v.* The Queen, 12 A. C. 675, "are apt to authorise the utmost discretion of enactment for the attainment of the objects pointed to". There can be no doubt that they empower the legislature in this

case to amend or repeal the Ottoman Law, whenever such a course seems necessary for the peace, order or good Government of Palestine. The Solicitor-General has also drawn our attention to the telling fact that under Article 18 the power to promulgate ordinances is granted subject to certain specified restrictions — but that there is no restriction as to modifying or repealing the Ottoman Law. I agree with the arguments of the Solicitor-General and I think that Mr. Yehuda's interpretation of Article 46 is unreasonable.

7. Mr. Yehuda's second ground was that the information contained a charge for an offence other than that on which the learned Magistrate had committed the Accused and that this vitiated the conviction. He says that this cannot be done without a special order of the Attorney General. In support of his argument he cited a decision of this Court, Mottes *v.* The Attorney General, reported in the Law Reports of Palestine, 1920—33, at p. 740. In that case a Magistrate had committed on a charge of fraud and one of the counts in the information was attempting to incite another to commit a fraud. This Court held that in these circumstances there should have been a special order of committal by the Attorney General and that the count was not properly before the Court of Trial. It based its decision on the wording of Section 28, Sub-Section 5 of Cap. 36 (Laws of Palestine, Vol. I, p. 486). This read as follows:—

> "(5). Where a magistrate has committed or refused to commit an accused person, either for the offence with which he has been charged or for any other offence, the Attorney General may, notwithstanding such committal or refusal:—
>
> (a) within three months thereof, make an order committing the accused person for trial summarily or upon information on any charge arising out of the evidence taken at the proceedings for committal;
>
> (b) at any time within the period for prescription of the offence, make an order that further evidence shall be taken before a magistrate with a view to committal".

The ground upon which the Court proceeded was that the Sub-Section did not originally refer to cases in which the Magistrate had committed for trial but only to cases in which he had refused to commit. An amendment was made in 1929 which includes in the discretion of the Attorney General cases in which the Magistrate had committed as well as cases of refusal to commit. The Court said with regard to this:—

> "The object of this amendment is clear. Where it is intended to over-ride the decision of the Magistrate, the authority of the Attorney General himself is required, and the matter is not to be left to the discretion of a Junior Government Advocate".

6. I have always thought that this case was wrongly decided. The Sub-Section which precedes Sub-Section 5 (Sub-Section 4) reads as follows:—

> "(4) Any offence may be charged in an information which is supported by evidence taken at the preliminary enquiry".

The two sub-sections must be read together. If the Attorney General wishes to include in an information a charge arising out of the evidence different from that on which a Magistrate has committed, he may himself within three months make an order for committal, but he is not compelled to do so. Sub-section 4 allows him to include such a charge in the information, but there might be cases in which the Attorney General considered it more consonant with justice to adopt the more elaborte procedure of Sub-section 5. I do not think that Sub-section 4 is qualified by Sub-section 5, and the ruling of the Court in the Mottes case (*supra*) would render Sub-section 4 superfluous.

9. However this may be, the decision cannot help Mr. Yehuda's clients. He says his clients were committed on Sections 212, 213, and 24 of the Criminal Code, and that they were charged under Sections 212, 213 and 23. Sections 212 and 213 deal with the offence of manslaughter; Section 24 deals with the question of common purpose; Section 23 defines "principal offenders". There was no difference between the offence charged and that for which Appellants were committed *viz.* manslaughter. They cannot complain that they were given more information in the charge than they were entitled to. There are no merits in this ground of appeal.

10. Mr. Yehuda's other grounds of appeal cover the same grounds as the last of Hassan Sidqi Dajani's, that there was no reasonable evidence to justify the findings of the Court below. There was clear and sufficient evidence that Mr. Yehuda's clients were present for the purpose of assisting and ensuring the carrying out of the offence.

11. I do not think the sentences were excessive. In my opinion these appeals should be dismissed and the convictions and sentences affirmed.

Delivered this 16th day of September, 1937.

*Senior Puisne Judge.*

*Greene, J.*: I concur.

*British Puisne Judge.*

*Khaldi, J.*: I concur.

*Puisne Judge.*

HIGH COURT No. 44/36.

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

BEFORE: McDonnell, C. J. and Manning, S. P. J.

IN THE APPLICATION OF:—

George Mikhail El-Qasir. PETITIONER.

v.

1. The Attorney General,
2. District Commissioner, Jaffa. RESPONDENTS.

*"Jaffa Demolition Case" — Practice of High Court, two judgments delivered exceptionally — Demolition under Art. V Defence Regs. — "Pulling down", object of demolition — Compensation under Art. IV — Against whom order may be directed — Costs.*

In discharging an Order issued to the Respondents to show cause why the order served upon Petitioner for the demolishing of his house situated in the old city of Jaffa should not be set aside:—

HELD: No order made to restrain demolition carried out under the Defence Regulations.

FOR PETITIONER: Moghannam.

### ORDER.

*McDonnell, C. J.*: In this case, owing to its seriousness and importance, my learned brother Manning and I have departed from the usual practice by which only one judgment is given as the judgment of the Court in High Court cases, and we have independently prepared separate judgments, which in fact concur in their decisions, and which will be delivered by each of us in turn.

This is a return to a rule *nisi* issued by the High Court on the 27th June, directed to the Attorney General and the District Commissioner, Jaffa District, to appear before the Court, if they so desire, to show cause why they should not refrain from demolishing a house belonging to the Petitioner situated in the old city of Jaffa.

In the first place, there was placed before this Court, on hearing the Petitioner's application, the following Official Communique No. 115/36, dated 16th June, 1936, which was issued by Government to the Press and published on or about that day:—

"The Government is about to initiate a scheme for opening up and

improving the Old City of Jaffa by the construction of two roads, to the benefit both of that quarter and of the town as a whole.

The first steps necessary will be the demolition and clearance of certain existing buildings, which are congested and insanitary, and advantage is being taken of the presence in Palestine of Royal Engineers to begin these operations.

The Government will pay compensation to property owners, individual cases being considered on their merits.

The process of demolition will start shortly, and the inhabitants of buildings that will be affected are being duly warned to evacuate them: they are required in their own interest implicitly to obey this warning.

This preliminary work of demolition will be punctuated by frequent detonations and crashes of falling masonry, and residents of Jaffa, Tel-Aviv, and the neighbourhood should not be surprised, misled, or alarmed when they hear these noises. Householders within the Old City and within a radius of a quarter of a mile of the Old City are advised to keep their windows open in order that the glass may not be broken by the detonations".

In the next place it was admitted that there were distributed in the old city of Jaffa by hand, and, so we were told by the Petitioner, by aeroplane, printed notices bearing no signature or address of which one, namely Ex. A., came into the possession of the Petitioner. The notice is in Arabic and runs as follows:—

"Government intends to proceed with a scheme to open roads and carry out improvements in the old city of Jaffa. This scheme includes the demolishing of several existing houses, for which appropriate compensation will be paid, that is to say each matter will be dealt with on its merits. The Military Forces will carry out the demolishing.

The law-abiding inhabitants of the old city will not be injured, but if any resistance takes place, the Military Forces will use force to carry out the work".

At the foot is the imprint, also in Arabic, which runs "Government Printing Press Jerusalem" which is the only hint this notice bears of its provenance.

Subsequently to his receipt of this printed Notice, the Petitioner was, on June 26th, served with a typewritten notice (Ex. B) which is typed in only two out of the three official languages, namely English and Arabic, and runs as follows:—

"To Hanna Michael Qasir and Bros.

Block 7040, Parcel 132, Jaffa.

In accordance with the scheme for opening up the Old City of Jaffa, your house may be demolished.

You are therefore required to vacate it before 7 *p. m.* on Sunday 28th June, 1936.

No claim for compensation in respect of furniture or effects left in your house after that hour will be considered".

Here again the document bears no signature or address to show from where it originated.

Counsel for the Petitioner stated before us, and it was not disputed by the Respondent, that the words rendered in English in this notice as "the scheme for opening up" the old city of Jaffa, are in the Arabic version "the town planning scheme" of Jaffa.

The Petitioner applied in his petition for an order directed to the Chief Secretary, the Attorney General, the District Commissioner Jaffa, the Inspector General of Police and the Officer Commanding the Royal Engineers Jaffa.

The Order *Nisi* was directed against the District Commissioner of Jaffa and the Attorney General only, inasmuch as both notices, as also the Official Communique, concerned themselves only with the opening of roads, town-planning improvements, and such-like matters which, under the Town Planning Ordinance, are controlled by the Town Planning Commission, of which the District Commissioner is *ex officio* Chairman.

On the return day, Mr. Kantrovitch, the Junior Government Advocate, who appeared on behalf of both the District Commissioner and the Attorney General, produced affidavits from the District Commissioner and also, for some reason, from the Chief Secretary, to the effect that the intended destruction of the Petitioner's building was not to be carried out by them or under their orders or instructions.

He produced, also, an affidavit from the Attorney General to the same intent, with the further allegation that, to the best of his knowledge, information and belief, the destruction of the said building was to be carried out under, and by virtue of the provisions of Art. V(5) of the Palestine (Defence) Order-in-Council, 1931.

Finally, he produced an affidavit from Lieut. Col. F. Keith Simmons, Commander Southern Area, to the effect that the destruction of the building in question was intended to be carried out by military forces under his command by virtue of instructions received by him from His Excellency the High Commissioner for Palestine.

The relevant part of Article V(5) of the Palestine (Defence) Order-in-Council, 1931, which was brought into effect by the High Commissioner's Proclamation of the 19th April, 1936, provides that "The High Commissioner may ..... if he thinks it necessary for the purposes of the defence of Palestine, cause any buildings to be pulled down and removed".

It will be noted that it is only by *pulling* down that such demolition is authorised, and that it is only authorised for purposes of defence and not for carrying out improvements in the city as stated in the Official Communique the printed notice and the typewritten notice respectively.

Article V(10) of the same Order-in-Council provides that "Every person ..... whose property or goods are ..... destroyed by virtue of this Order, shall be entitled to receive by way of compensation, out of the public funds of Palestine, such sum only as may be determined in accordance with Regulations to be made by the High Commissioner"; while Article IV(4)(i) lays it down that the High Commissioner may make Regulations prescribing the manner in which compensation payable under Article V(10) of the Order is to be determined. No such Regulations have in fact ever been made.

I cannot agree with the suggestion of Petitioner's counsel that till such Regulations are made Article V(5) cannot be applied, but I would point out that, in view of the provision of Article V(10) by which there is a right to compensation for the destruction of goods as well as of property, the last paragraph of the typewritten notice Ex. B "No claim for compensation in respect of furniture or effects left in your house after that hour (*viz.* 7 *p. m.* June 28th) will be considered", is clearly one for which, even under the Order-in-Council, there is no legal authority.

The Junior Government Advocate somewhat surprisingly informed us in his argument that he was not aware and had no instructions as to who was responsible for the preparation or issue of either the printed or the typewritten notices, and after having said, as to the latter, that "the District Commissioner was responsible for the distribution thereof" he modified this and said "He may have been".

In the light of the affidavits before us, it seems to me clear that we cannot make the order against the District Commissioner or the Attorney General absolute inasmuch as proceedings under Article V(5) of the Palestine Order-in-Council do not concern either of these officers.

The Petitioner, however, has done a public service in exposing, what I am bound to call, the singularly disingenuous lack of moral courage displayed by the Administration in the whole matter.

I am not surprised, in the circumstances, to find that no responsible officer of the Government would affix his signature to the notices under review. As to their origin, the Junior Government Advocate claims to have been kept in a state of ignorance, which is as remarkable as it is profound; and as to their distribution he declines to say with certainty who is responsible therefor.

It would have been more creditable if the Government, instead of endeavouring to throw dust in people's eyes by professing to be inspired with aesthetic or other quasi-philanthropic motives such as those concerned with town planning or public health, in the demolition which was contemplated, had said frankly and truthfully that it was primarily for defensive purposes which one may assume means enabling the forces of the military or police an easier means of access in the congested quarter of the town in question.

If this had been done, this High Court when presided over by my learned brother, would not have issued a rule *nisi;* and the *bona fides* of the Government, which cannot escape responsibility by hiding behind the anonymity of the notices, would not have suffered.

It would be a negation of justice if, in a glaring case of evasiveness such as that before us, this High Court did not speak its mind freely.

In the exercise of its powers by Government, at any time, frankness is always to be desired. In the exercise of any of the exceptional and drastic emergency powers such as are conferred by the Order-in-Council in question, the absence of such candour is peculiarly to be deprecated.

We are bound, on the grounds which I have stated, to discharge the order *nisi,* but, for the reasons which I have set out, we propose to mark our disapproval by doing so without costs

Delivered ths 3rd day of July, 1936.

*Chief Justice.*

*Manning, S. P. J.*: On the 16th June, 1936, an Official Communique (No. 115 of 1936) was issued in Palestine. It began as follows:—

> "The Government is about to initiate a scheme for opening up and improving the old city of Jaffa by the construction of two roads, to the benefit both of that quarter and of the town as a whole.
> The first steps necessary will be the demolition and clearance of certain existing buildings, which are congested and insanitary, and advantage is being taken of the presence in Palestine of Royal Engineers to begin these operations.
> The Government will pay compensation to property owners, individual cases being considered on their merits".

Then followed warnings to the inhabitants of this part of Jaffa to evacuate their buildings and to take certain other precautions.

During the same month a notice, in Arabic, was circulated among the inhabitants of Jaffa. It purported to emanate from the Government Printing Press, Jerusalem, and it is not denied that the Government was responsible for it. The translation of the notice is as follows:—

> "Government intends to proceed with a scheme to open roads and

> carry out improvements in the old city of Jaffa. This scheme includes the demolishing of several existing houses, for which appropriate compensation will be paid, that is to say, each matter will be dealt with on its merits. The Military Forces will carry out the demolition.
>
> The law-abiding inhabitants of the old city will not be injured, but if any resistance takes place, the Military Forces will use force to carry out the work".

Neither the Official Communique nor this notice contain any suggestion that the scheme was concerned with any purpose for the defence of Palestine. The words convey that the Government proposed to carry out what may be called a town-planning scheme in Jaffa and to utilise the presence of the Royal Engineers for that purpose. It has to be carefully noted that the Royal Engineers were not brought to Palestine for this purpose but advantage is merely taken of their presence to carry it out.

There are local laws with reference to town-planning in Palestine and for the purpose of this case their effect may be briefly stated to be that when land is expropriated for any scheme, compensation has to be paid to the owner after negotiation, and if the negotiations lead to disagreement, the amount of compensation is fixed by a Land Court.

On the 26th June, 1936, the Petitioner in these proceedings was served with a notice in the following terms:—

> "In accordance with the scheme for opening up the old city of Jaffa, your house may be demolished.
>
> You are, therefore, required to vacate it before 7 *p. m.* on Sunday 28th June, 1936.
>
> No claim for compensation in respect of furniture or effects left in your house after that date will be considered".

It is not denied that the Government was responsible for the serving of this notice. It does not contain any intimation that the opening up of the city had any connection with any purposes for the defence of Palestine.

From what has been said, I think the Petitioner was justified in concluding that a town-planning scheme was contemplated by the Government. No compensation having been offered him and there having been no attempt to negotiate, it is not surprising, therefore, that on June 27th, the day after being served with the notice, he applied to the High Court for a rule *nisi*. He named as Respondents, the Chief Secretary; the Attorney General; the District Commissioner, Jaffa; the Inspector General of Police; and the Officer Commanding the Royal Engineers, Jaffa.

The scheme being *prima facie* concerned with town-planning, the

responsible officer was the District Commissioner of Jaffa. The order *nisi* was consequently refused against the Chief Secretary; the Inspector General of Police; and the Officer Commanding the Royal Engineers. It was granted against the District Commissioner, Jaffa; and against the Attorney General, as representing the Government.

On the 1st July, Mr. Kantrovitch appeared on behalf of the Respondents to show cause against the rule. Affidavits were filed showing that the proposed demolition of Petitioner's house had nothing to do with any scheme for opening up and improving the city of Jaffa, and that it was to be carried out, if at all, under instructions of the High Commissioner given under Article V(5) of the Palestine (Defence) Order-in-Council, 1931, which was brought into operation by proclamation on the 19th April, 1936. Neither the Attorney General nor the District Commissioner, Jaffa, were in any way concerned.

Mr. Kantrovitch found himself in an unenviable position. He had to explain certain awkward facts which seemingly could be explained only on the assumption that the Government had entered on a policy of deceit. He artlessly said that the inhabitants of Jaffa would have been misled if they had been told that the demolition of their houses was to be carried out under the provisions of the Order-in-Council. They were therefore to be told that this demolition was in their own interest and for the improvement of the city of Jaffa. In effect he said "we would have misled them by telling them the truth, so we thought it better to tell them a falsehood". I am unable to follow this line of reasoning. I do not see how the inhabitants could have been misled by being told the truth. They might have been mystified if they were told that the destruction of their houses was necessary for the purposes of the defence of Palestine, and perhaps this is what Mr. Kantrovitch really means. But it really turns out that they have been grossly misled; this is only one of a large number of similar applications to the Court, and the present Petitioner and others would have been spared much expense if they had been candidly told that their houses were to be destroyed under the relevant Article of the Order-in-Council. No notice was necessary under this Article, but if any notice was given, it ought to have contained the truth.

The Article empowers the High Commissioner, "if he thinks it necessary for the purposes of the defence of Palestine", to "cause any building to be pulled down". It is clear that the sole discretion is with the High Commissioner, and that if he orders a building to be pulled down, one must assume that he thinks it necessary for the purposes of the defence of Palestine. But having regard to the Official Communique

already set out, the notice circulated in Jaffa, and that served on the Petitioner, there has been created an ugly suspicion that when the scheme was first mooted, there was no idea in the minds of its authors of basing its legality on the Order-in-Council.

In view of the affidavits filed, no useful purpose would be served by making this order absolute. I feel bound to accept the statement of the Government that the proposed demolition was always intended to be carried out under the provisions of the Order-in-Council and that this was concealed from the inhabitants of Jaffa because, not being lawyers, they might not have understood it. This is what Mr. Kantrovitch has said. In this particular instance, I can conceive that the inhabitants affected might be bewildered by being told that the destruction of their houses was necessary for the defence of Palestine and that their houses might be blown up when there was power only to pull them down. At any rate, the Government determined to sugar the pill by telling them that the scheme was merely one for the improvement of Jaffa and thus succeeded in convincing a number of them that their proposed steps were illegal. And to crown all, it now transpires that the Petitioner's house is not included in the scheme of demolition, although he was ordered to evacuate it at such a short notice.

It seems that the destruction of his house was never necessary for the defence of Palestine and the inference is that he was ordered to evacuate as his house might be in danger from falling debris from other houses. This stresses the point that there may be a considerable difference between a power to blow up and a power to pull down.

There is a well known work of fiction which describes a Government Department known as the Circumlocution Office. It specialised in the way how not to do it. Something similar seems to have found its way into Palestine, but its identity has been carefully concealed. Mr. Kantrovitch has no instructions as to who was responsible for the original blunder.

I agree with the President that the rule must be discharged but without costs.

Delivered this 3rd day of July, 1936.

*Senior Puisne Judge.*

CIVIL APPEAL No. 37/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

David Menouchin. APPELLANT.

v.

Prof. E. Bodenheimer and the Joint Liquidators of Phoenix Life Assurance Co., Vienna, in Liquidation. RESPONDENTS.

*Insurance — Winding up of insurance company prior to* 1936 *— Law applicable — Liquidators — Set-off, in re City Life Assurance Co., Lee v. Chapman, C. A.* 99/34 *— Bankruptcy Ord., sec.* 31.

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 12th February, 1937:—

HELD: 1. When appointing liquidators in the winding up of a company the Court should appoint creditors to represent the various classes to which they belong.

2. Right of setting off a loan against the amount of a policy allowed.

REFERRED TO: C. A. 99/34 (2, P. L. R. 292; 9. C. of J. 766); City Life Assurance Co., Ltd., 1926, Ch. 191, 95 L. J. (CH.) 65, 134 L. T. 207, 42 T. L. R. 45; Asphaltic Wood Pavement Co., *in re,* Lee and Chapman's Case, 1885, 30 Ch. D. 216, 54 L. J. (CH.) 460, 53 L. T. 65.

ANNOTATIONS: On set off in bankruptcy under English law see Halsbury, Vol. 2, pp. 281 *et seq.*

FOR APPELLANT: Horowitz.

FOR RESPONDENTS: Kourjansky and Doukhan.

JUDGMENT.

This appeal raises a difficult point of law and one which is by no means free from doubt, because though the English Law on the subject is perfectly clear, this case must be decided on the Law of Palestine, since the winding-up order against the Phoenix Life Assurance Company, Vienna (which I will hereafter refer to as the Company), was made prior to the coming into force of the Bankruptcy Ordinance, 1936, which brings the law of Palestine more or less into line with the English Law of Bankruptcy.

The present dispute is in reality between two different classes of cre-

ditors, both Policy Holders in the Company, namely, those creditors who have obtained loans on the surrender value of their policies from the Company, and those who have not so obtained loans. And, in the first place, I think that the District Court was wrong in not appointing certain creditors to represent their respective classes. In a case of this magnitude it was desirable that this should have been done, and it is the usual practice of English Courts to do so, as it is unfair that the burden of defending the interests of a whole class of creditors should fall upon one individual: and it is also desirable that the rights of the classes of creditors should be settled definitely. The District Court refused to make the appointment, without assigning any reasons for their refusal; in this, as I have said, I think that they were wrong, though I do not think that this refusal would be a sufficient ground for allowing the appeal.

The facts of the case are very clearly set out in detail in the judgment of the District Court and it is not necessary to repeat them. It is sufficient to say that the liquidators of the Company allowed those creditors who had obtained loans on the surrender values of their policies to set off the amounts of those loans against the amounts due on their policies — the District Court reversed this decision holding that there was no set-off in the circumstances of this case, since English Law did not apply. They held that at the date of the winding up there was in effect nothing due under the policies, that the policy contracts had not become operative because the events, on the happening of which the policy monies would become due, had not yet happened, and that any liability thereunder was a future and contingent liability. The District Court adopted the reasoning of Warrington, L. J., in *re* City Life Assurance Co. (1926 Ch. 191) at p. 208 in commenting on Lee *v.* Chapman (30 Ch. D. 216). They further held that the policy holders' claims were in essence claims to damages, and that such a claim was not the subject of set off in accordance with Ottoman Law as interpreted by Ali Haidar and by this Court in Ottoman Bank *v.* Mulki (C. A. 99/34).

We are now asked to say that this decision was wrong and that the liquidators were right in allowing a set-off and that their ruling should be restored.

Since the Bankruptcy Ordinance 1936 was not in force at the date of the winding-up order, there can be no question of any statutory set off under section 31 thereof. If there exist any equity between the parties, then it must arise out of the contract between them. And that contract in this case is to be found in the loan receipt signed by those

policy holders who obtained loans from the Company. The standard form of receipt is in German, and the translation is as follows:—

"Life Assurance Company Phoenix, Vienna,
Branch: Palestine.

LOAN.

The Government fee is paid directly by the Company in accordance with the Decree of 15.9.1915, H. G. Bl. No. 280.

RECEIPT

The Life Assurance Company Phoenix, Vienna, paid to-day to me as the person entitled to dispose of the policy No. 385.005 for £. 2000.— on the life of Mr. Prof. Dr. Andor Fodor, a loan of £. 60.— (sixty English Pounds).

I undertake to pay interest on this loan-debt, until its complete repayment, at the rate of 6 (six)% *p. a.* in quarterly instalments payable in advance which shall be due together with the premiums beginning the 1st September, 1932, otherwise the whole loan-debt shall be due immediately and that part of the assurance the redemption value of which equals the loan together with arrears of interest and collateral fees, if any, shall be deemed to be extinguished by redemption. The loan-debt together with arrears of interest, if any, is to be deducted from any payment upon the Company out of the assurance — (Para. 27, V. V. G.).

As security of the loan-debt together with interest and collateral fees I herewith pledge all demands and claims resulting from the afore-mentioned assurance which pledge has been stated on the policy and in the books of the Life Assurance Company Phoenix, Vienna.

*Jerusalem, April 5th,* 1932.

(—) *Prof. Dr. A. Fodor*
5.4.1932
7 Mils Stamp".

This is an actual receipt form as signed by one of the policy holders on contracting a loan. This form, we are told, is typical of all the others.

It is noticeable that there is no absolute covenant to repay the amount of the loan. On failure to pay the interest or premiums, it is agreed that "that part of the assurance the redemption value of which equals the loan together with arrears of interest and collateral fees, if any, shall be deemed to be extinguished by redemption": and further the loan-debt is to be deducted from any payment due by the Company under the assurance. As security for the loan-debt and interest, if any, the policy-holder pledges all demands and claims arising out of the assurance policy. The only methods for repayment of the loan which are provided in the contract are either by redemption through the sur-

render value (or redemption value, as it is termed in the receipt) of the policy, or by deduction from the amount of the policy moneys when they become due. This seems, in my opinion, to amount to a contract that in all events the only fund to be looked to for payment of the debt should be the policy. See *per* Warrington, L. J., in *re* City Life Assurance Co. (*supra* at p. 220): and Pollock M. R. in the same case at p. 217 said: "Willes, J., in the case of Watson *v.* Mid Wales Railway Co. (1867 — 36 L. J. (C. P.) 285), refers to the difference between the rights which accrue under the Bankruptcy Act and the rights which would give rise to an equity between the parties. He says "It is necessary to show mutual credit: I do not mean in the sense of mutual credit under the statutory provisions of the bankrupt law, but in the sense of there being an agreement or contract made or to be inferred that one debt was to liquidate the other". These words seem to me to fit exactly the present case. In my opinion in this present contract it is a term that the loan debt is to be extinguished by the policy, and by the policy alone. To my mind, it is a case of contractual set-off.

I do not think that the case of Ottoman Bank *v.* Mulki, C. A. 99/34, has any bearing on this case. The Court there was dealing only with the question of statutory set-off, and the present point does not seem to have been referred to.

I think that the appeal should be allowed and the judgment of the District Court should be set aside and the ruling of the liquidators restored: that is, that those creditors who have obtained loans against the surrender value of their policies should be allowed to set-off the amount of those loans against the amount due on their policies. Costs of all parties including LP. 5.— advocate's fees to each to be paid out of the assets of the Company.

Delivered this 11th day of June, 1937.

*British Puisne Judge.*

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LAND APPEAL No. 54/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Salah Hussein Abu Dra'. APPELLANT.

v.

Saleh Mustafa Abu Dra'. RESPONDENT.

*Unregistered dispositions — Prohibition period — Possession of co-heirs, L. S. Ord., sec. 51 — L. A. 56/24 — Proclamation of 1.11.1918 — Question of fact and of law — Evidence Art. 82 — O. C. P. C. — Land Code, Arts. 20, 23.*

In partly allowing an appeal from the judgment of the Land Court of Jaffa, dated the 29th October, 1936:—

HELD: 1. Disposition made between co-heirs during the prohibited period are invalid.

2. Possession by an heir enures in favour of his co-heirs for the purpose of prescription among heirs.

FOLLOWED: L. A. 56/24 (1, P. L. R. 41; 4, C. of J. 1212).

ANNOTATIONS: On possession by co-heirs see C. A. 197/41 (1941, S. C. J. 458) and C. A. 51/43 (1943, A. L. R. 305).

FOR APPELLANT: Rasheed.

FOR RESPONDENT: Eliash.

## JUDGMENT.

*Trusted, C. J.*: This is an appeal from a decision of the Land Court, Jaffa, allowing an appeal from a decision of a Settlement Officer. The parties are a nephew (who was Plaintiff before the Settlement Officer, Appellant before the Land Court and is now Respondent before this Court) and his uncle, who were interested in certain land, the subject of this dispute, as co-heirs — of which land the uncle was at all material times in possession.

The facts are as follows:—

The parties inherited the land from a common ancestor in equal shares prior to 1919.

In 1919, by an unregistered sale, the uncle bought the nephew's share. It should be noted that at the time of this transaction, by reason of a proclamation of 1st November, 1918, owners of immovable property had no power to make dispositons of their property and any disposition made would be invalid.

In 1929 the nephew obtained registration in his name.

The Land Settlement Officer dealt with the question under the provisions of the law which is now section 51 of the Land (Settlement of Title) Ordinance and decided in favour of the uncle by reason of his

possession. The Land Court reversed that decision and the uncle appeals to this Court.

In my opinion the first question for decision is, could a sale of land, invalid by operation of law purporting to be made between co-heirs, affect their relationship as co-heirs of the land? I do not think that it could.

The second question therefore is, what is the true effect of section 51 of the Land (Settlement of Title) Ordinance when the person in whose name the land is registered and the person in possession are co-heirs?

It is clearly established that as between heirs and co-owners time does not run to bar the right of action, possession by one heir or co-owner being possession by all. (See Land Appeal 56/24, P. L. R. p. 41).

The material part of the section is as follows:—

> "Provided that, where the person in whose name the land is registered opposes the application and the settlement officer is satisfied that the person making the application originally obtained possession from the registered owner as tenant or mortgagee, or otherwise than as owner, he shall not be bound to enter the name of the Applicant in the schedule of rights as owner of the land, or he may enter it subject to such conditions as he thinks fit".

In my opinion the words are wide enough to cover the case of the person making application having become entitled as an heir and co-owner where the person in whose name the land is registered is also the heir of a common ancestor and a co-owner.

In my opinion, therefore, this appeal on the main point should be dismissed.

The Land Court proceeded to return the Appellant before it as the owner of certain lands. I do not understand on what basis it did this, and the appeal must be allowed as to so much of the judgment as does so.

Mr. Justice Frumkin agrees with me that in the result the case must go back to the Settlement Officer with an intimation that the present Respondent (the nephew) has not lost his right to his share and that the land must be settled accordingly.

Respondent to have the costs of this appeal. Advocate's fees LP 4.—.

Delivered this 27th day of May, 1937.

*Chief Justice.*

*Frumkin, J.*: The two parties in this case have inherited certain land from a common ancestor in equal shares. The Appellant, who is the

uncle of the Respondent, claimed before the Land Settlement Officer that he is entitled also to the one-half inherited by his nephew (the son of his late sister) which was registered in the nephew's name in 1929, on the ground that in 1919 he purchased the said half from him.

The Land Settlement Officer heard evidence as to the sale in 1919 and found as a fact that such a sale took place. He further holds that since that date the possession of the Appellant was adverse possession and as more than ten years have elapsed since that date he gave judgment for the Respondent.

On appeal to the Land Court the judgment was set aside and judgment given for the Respondent for the reasons given by Mr. Eliash, Counsel for the Respondent, then Appellant which the Court stated to have adopted. In determining this appeal we had therefore to refer to the written grounds of appeal submitted by Mr. Eliash to the Land Court, and we find that among other grounds he has taken the objection to the Land Settlement Officer relying on the sale of 1919

To my mind this appeal depends entirely on this sale. The Land Settlement Officer acted on the principle that there is no adverse possession between co-heirs and disregarded the possession of the Appellant up to 4/2/1919 considering him a co-heir until that date.

But what happened on that date was that the Respondent disposed of his rights by an unofficial contract in favour of the Appellant. The disposition took place in the prohibited period which started for the *Sanjak* of Jerusalem on the 1st December, 1917, and expired in September, 1920, by the promulgation of the Land Transfer Ordinance.

Article 2 of the Proclamation, dated 1st November, 1918, provides that:—

> "All persons concerned are warned that until it is possible to re-establish and re-organise the Land Registry Offices, owners of immovable property have no power to make dispositions of their immovable property, and that any disposition of immovable property which has taken place, or may hereafter take place, in contravention of this Proclamation is invalid".

The Land Settlement Officer was certainly aware of this prohibition and although he has found as a fact that such a disposition took place, he did not confer title on the Appellant on this ground, but on the ground of precription. Yet he took as a starting point for the beginning of prescription the very date of the prohibited and by law invalid disposition.

I fail to see how a disposition in itself invalid could change the status of a person as a co-heir into that of an independent owner, and thus

alter the nature of his possession from that of a co-heir into adverse possession. By law Respondent was entitled to regard the disposition of his uncle as possession on his behalf. On this point alone, the Land Court was right in setting aside the judgment of the Settlement Officer, and the appeal on this point must fail.

The Land Court proceeded to distribute the land inherited from the common ancestor which, on settlement, became ten definite parcels. As the Appellant has disposed of certain parcels and only five parcels remained still registered in his name, the Land Court held that these remaining parcels represented the half of the inherited property and gave judgment for the Respondent for those five parcels.

The Appellant appealed also against this part of the judgment. This is not a point of law, but one of fact, but this fact was not tried by the Land Settlement Officer and the appeal before the Land Court was not heard in open Court, and under the circumstances I think it will be safer to give the parties an opportunity to have the matter of distribution and final allotment between the parties determined by the Land Settlement Officer. The appeal must therefore be allowed on this point alone and the case remitted to the Land Settlement Officer for completion.

Appellant to pay the costs of the appeal to include LP. 4.— advocate's fees.

***Puisne Judge.***

*Khayat, J.*: In this action, the Plaintiff, Salah Hussein Abu Dra', nephew of the Defendant, brought an action before the Settlement Officer, asking him to register half of the area of a certain land in dispute, in his name, in his capacity as heir of his mother.

The Defendant alleged that he bought the land from the Plaintiff's mother in 1919 by a private deed of sale which he had lost.

The Plaintiff registered his share which he inherited in the Land Registry in 1929.

Evidence was tendered before the Settlement Officer and the existence of the sale was established, and the Settlement Officer thereupon dismissed the action on the ground of prescription.

Against the decision of the Settlement Officer an appeal was brought before the Land Court and that Court set aside the Settlement Officer's decision on the following grounds:—

a) That the verbal evidence of a sale not proved by the production of any document cannot defeat the right of inheritance.

b) That the alleged sale, having been made during the prohibited period, the sale was invalid.

c) That the Settlement Officer was not right in holding that the registration of the land by Appellant in his own name and his obtaining *kushans* for it, which entails *Mukhtar's* Certificates, the payment of taxes, fees, *etc.*, was not sufficiently assertive act by Appellant to interrupt prescription against him, if any.

d) That the Settlement Officer was not right in applying to this case section 2 of the Registration of Land Ordinance, 1929, which is now sections 51 *et seq.* of the Land (Settlement of Title) Ordinance.

As regards the first ground, I do not think that this can be considered as verbal evidence. On the contrary, this is considered as documentary evidence as the deed is alleged to have been lost, and in such cases verbal evidence was heard as to its disappearance in accordance with Article 82 of the Civil Procedure Code.

As regards the second ground, I do not see it necessary to go into the question as to whether the sale was a valid sale or not. If the sale was a valid one, then it would not have been necessary to rely on prescription. Accordingly, the validity of the sale does not affect this case.

As regards the third ground, that is, the registration, I do not see it necessary to consider it and it has no effect, as it took place after the period of prescription which is ten years, according to Article 20 of the Land Code.

As regards the fourth ground, section 2 of the Land Registration Ordinance, 1929, which is now section 51 of the Land (Settlement of Title) Ordinance (Drayton Vol. II) contemplates that the person in possession should not be a lessee or be in a position analogous to a lessee, that is, should be an owner or occupier independently.

The rule that no prescription runs between the heirs who inherited land from a common testator is based on the assumption that an implied agency exists between the heirs, and that the heir in possession does not possess the land to the exclusion of the other heirs, as provided in Article 23 of the Land Code in the case of a lessee or borrower.

If the possession on behalf of the other heirs is not established, and it is proved that there was a sale, that is, it is proved that the possession of the Plaintiff for a period more than that of prescription was not as an heir, in other words, was not authorised by the other heirs to be in possession, I see no reason to exclude the rule of prescription.

The Appellant objected that the Land Court did not state the ground in its judgment, but this point is irrelevant.

For these reasons, I am of opinion that the judgment of the Land Court should be set aside and the decision of the Settlement Officer be affirmed.

*Puisne Judge.*

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HIGH COURT No. 74/36.

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

BEFORE: McDonnel, C. J. and Manning, S. P. J.

IN THE APPLICATION OF :—

Hassan Sidky Dajani. PETITIONER.

v.

1. Officer in Charge, Detention Camp, Sarafand,
2. Assistant District Commissioner, Jerusalem,
3. District Commissioner, Jerusalem. RESPONDENTS.

*Emergency Regulations, 15B — Whether ultra vires — Palestine (Defence) O. in C., Art. IV(1)(b) — Ordinances within the meaning of P. O. in C. 17(1)(b)(d) — Emergency (Amend.) Regs. (No. 9), 1936, sec. 4(2).*

In discharging an order *nisi* issued on August 3, 1936, calling upon the Respondents to show cause why a writ of *habeas corpus* should not issue to the first Respondent to have the body of the Petitioner before the Court immediately after receipt of such a writ:—

HELD : 1. The Emergency Regulations were not an Ordinance within the meaning of Art. 17 of the Palestine Order-in-Council.

2. Reg. 15B was *intra vires* Art. IV(1)(b) of the Palestine (Defence) Order-in-Council, 1931.

ANNOTATIONS:

1. On attempts to have any Emergency or Defence Regulation declared *ultra vires* see annotations to CR. A. 14/43 (1943, A. L. R. 371). Reference was made by the Respondent to R. *v.* Halliday and Hudson's Bay Co. *v.* Maclay, both quoted in Halsbury, Vol. 6, p. 533, note (*d*).

2. See, on the meaning of the word "ordinance", CR. A. 121/37 (*ante*, p. 125) and notes thereto, particularly H. C. 46/38 (1938, 1 S. C. J. 423).

3. On the question of how far an irregularity may be cured before the return day see H. C. 51/42 (9, P. L. R. 341; 1942, S. C. J. 279) and note in S. C. J.

4. Note that Reg. 15B is still in force; *cf.* H. C. 69/42 (9, P. L. R. 425; 1942, S. C. J. 575) and H. C. 26/43 (1943, A. L. R. 696).

FOR PETITIONER: Moghannam.

FOR RESPONDENTS: Solicitor General — (Lloyd-Blood)
& J. G. A. — (Kantrovitch).

ORDER.

We are satisfied that section 15B of the Emergency Regulations is *intra vires* Article IV(1)(b) of the Palestine (Defence) Order-in-Council 1931, which, *inter alia*, empowers the High Commissioner to make Regulations with regard to arrest and detention.

There is nothing whatever in the Petitioner's plea that these regulations are an Ordinance as contemplated under Art. 17 of the Palestine Order-in-Council, 1922, and hence should have been published in draft form under Art. 17(1)(d), at least one calendar month before they were promulgated. One need only look at Art. 17(1)(b) to see that the Ordinances therein contemplated by the High Commissioner after consultation with the Advisory Council.

With regard to the point that the order of the Assistant District Commissioner referred to in the petition was improperly made by such officer and not by the District Commissioner as prescribed by sec. 15B of the Emergency Regulations, we need not stop to consider whether such irregularity could be cured by section 4(2) of the Emergency (Amendment) Regulations (No. 9) 1936, which purports retrospectively to make District Commissioner in the principal Regulations import "Assistant District Commissioner", inasmuch as on the 2nd of August the District Commissioner himself made a new order of detention which is now in force.

So too, this new order, which prescribed that the detention of the Petitioner should be in the place known as the "Detention Camp at Sarafand", cured any such error as is alleged in the fourth ground of the Petitioner to the effect that the original order of the Assistant District Commissioner ordered detention, not in such place as specified therein, but in the place of detention prescribed by the Inspector General of Police.

For the above reasons the rule *nisi* is discharged.

Given this 11th day of August, 1936.

*Chief Justice.*

LAND APPEAL No. 10/36.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland and Khayat, JJ.

IN THE APPEAL OF:—

Jamal Abdel Hadi Qasem. — APPELLANT.

v.

Abdel Qader Muhammad El-Mishharawi. — RESPONDENT.

*Land settlement appeals — Sec. 57(2) Land Settlement Ord. — Appeal should reach Court of Appeal on time — L. A. 7/31.*

In dismissing an appeal from the judgment of the Land Court of Nablus, dated the 28th November, 1935:—

HELD : An appeal should, under sec. 57(2), reach the Court of Appeal within the statutory period in order to be accepted.

FOLLOWED: L. A. 7/31 (1, P. L. R. 676; 1, C. of J. 322).

ANNOTATIONS :

1. *Cf.* CR. A. 31/39 (6, P. L. R. 430; 1939, S. C. J. 372) on "lodging" an appeal.

2. Note that appeals from the L. S. O. (by leave) now lie directly to the Supreme Court: Land (S. of T.) (Am.) Ord., 1939, sec. 10.

APPELLANT: Absent — ill

FOR RESPONDENT: Ayoubi.

### J U D G M E N T.

Counsel for Respondent raises the point that the appeal in this case did not reach this Court until after the expiry of the prescribed period. The Land Court, Nablus, sitting as a Court of Appeal from the decisions of the Land Settlement Officer, Tulkarm, delivered its judgment on 31st December, 1935. An appeal against this judgment was submitted through the Land Court, Nablus, on 26th January, 1936, and the fees were not collected until the following day.

It appears from the documents in the case file, however, that the said appeal was not forwarded to this Court until 13th February, 1936, and was not actually received until 15th February, 1936. Both these dates are proved by the forwarding letter of the President of the District Court of Nablus, and the seal of this Court, showing date of receipt, respectively.

This Court has held in L. A. 7/31 that to be in time, an appeal

under section 57(2) of the Land Settlement Ordinance 1928 must actually reach the Supreme Court within the period prescribed therein and that it is not sufficient that the appeal has been lodged in time before any other Court.

In view of that decision, this Court holds that there is no appeal before it, which we therefore dismiss with costs and advocate's fees assessed at LP. 3.—.

Delivered this 1st day of December, 1936.

*British Puisne Judge.*

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CIVIL APPEAL No. 191/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Sheikh Sulieman Taji el Farouqi. APPELLANT.

v.

Michael Habib Raji Ayoub & 3 ors. RESPONDENTS.

*Liquidated damages and penalty — Agreement to transfer land — Breach of contract by failure to pay purchase price and taxes — Ottoman Code of Civil Procedure, Arts.* 111 & 112, *Art.* 46 *P. O. in C., Privy Council decision — Translation of Arts.* 111, 112 — *Art.* 112 *deals with undertakings to pay money — C. A.* 214/26, *C. A.* 97/35, *C. A.* 83/37 — *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 17th day of June, 1937:—

HELD: 1. Difference between penalty and liquidated damages explained.
2. A penalty clause in a contract will not be enforced.

FOLLOWED: C. A. 214/26 (1, P. L. R. 123; 1, C. of J. 313).

REFERRED TO: C. A. 97/35 (7, C. of J. 175); C. A. 83/37 (*ante*, p. 202); Dunlop Pneumatic Tyre Co., Ltd. *v.* New Garage & Motor Co., Ltd., 1915, A. C. 79, 83 L. J. (K. B.) 1574, 111 L. T. 862, 30 T. L. R. 625.

ANNOTATIONS:

1. An appeal from this judgment was dismissed in P. C. 30/39 (1941, S. C. J. 279). See note 1 to that decision for the previous proceedings.

2. As a result of this judgment the remedy of specific performance was introduced in Palestine in C. A. 132/38 (1938, 1 S. C. J. 387).

3. On penalties and liquidated damages see C. A. 148/43 (1943, A. L. R. 366) and note 2; *cf.* C. A. 203/43 (*ibid.*, p. 739).

FOR APPELLANT: B. Joseph.
FOR RESPONDENTS: Eliash.

## JUDGMENT.

*Manning, S. P. J.*: 1. On the 12th November, 1929 the Appellant and the Respondents entered into an agreement under which the Respondents were to sell and transfer certain land to the Appellant. The Appellant was let into possession of the property when the agreement was signed on his paying LP. 200, part of the purchase price. The price was to be calculated according to the quality of the land. By the agreement, as subsequently modified, the property was not to be registered in the name of the Appellant until the 13th February, 1932. The balance of the purchase price was to be paid as follows: LP. 400 at the end of February 1931; one third of the balance on transfer in the registry, and the rest of the price one year after the said transfer. At the date of transfer, in order to secure payment of the balance due, the Appellant was to mortgage the land to the Respondents. Besides stipulations for the payment of the purchase price and the transfer of the land the agreement contained other stipulations with reference to the payment of taxes and tithes by the Appellant and the payment of a surveyor by the Respondents.

2. Clauses 7 and 8 of the agreement were as follows, the Respondents being the first party and the Appellant the second party:—

> "7. The first party shall pay jointly and severally to the second party LP. 2500, in liquidated damages without the necessity for a notification if they breach all or part of their undertakings under clause 2 or any other clause of this contract and shall return also to the second party the advance they received on the signature of the contract whether in cash or in a bill.
>
> 8. The second party shall pay to the first party LP. 2500 in liquidated damages without the necessity for a notice if he commits a breach of all or part of his undertaking under this agreement, and shall not be entitled to reclaim the advance received by the first party".

The Appellant refused to pay the LP. 400 at the end of February 1931, and the Respondents in consequence took action against him in the District Court of Jaffa. They alleged in their statement of claim two breaches of the agreement, failure to pay the LP. 400 and failure to pay taxes, and claimed the LP. 2,500 as liquidated damages. The District Court dismissed the action, but on appeal was reversed by this Court, the Respondent being awarded LP. 2,500 damages.

3. The Appellant appealed to the Judicial Committee of the Privy Council. Their Lordships found that it was impossible to decide the appeal on the material before them and they remitted the action to the District Court of Jaffa. Specific instructions were given as to certain points to be decided. The first was whether Article 112 of the Code of Civil Procedure provides the only remedy where the default is delay in payment of a sum of money. The second was whether Article 111 of the same Code only applies to a case where the non-performance is non-performance of the whole contract or substantially the whole contract. The Court was also asked to bear in mind the provisions of Article 46 of the Palestine Order-in-Council, 1922, and their Lordships said they had no doubt that the jurisdiction of the Courts in Palestine had been enriched by this provision of the Order-in-Council with the well-known legal distinction between a penalty and liquidated damages.

4. The District Court dealt with these issues in a very brief judgment. It did not answer the question with regard to Article 111. It did not make any reference to Article 46 of the Order-in-Council. With regard to Article 112 it laid down the principle that "where the payment of a sum of money or instalments is the essence of the contract and not subsidiary to it, the provisions of Article 111 must be applied". It further held that it is not within the competence of a Court to assess tbe amount of damages where damages are specifically provided for in the contract. No reasons were given except that these rulings were in accordance with principles hitherto adopted by the Courts in Palestine. Judgment was entered for the Respondents for LP. 2,500 damages. The Appellant has again appealed and it has become necessary for this Court to deal somewhat exhaustively with the questions whicb were so summarily disposed of by the District Court.

5. I have had previous occasion to refer to the difficulty occasioned by the fact that a large and important part of the law in Palestine is in the Turkish language — a language which is not one of the three official languages. There are various translations into each of the official languages, but scarcely a case occurs in which some doubt is not thrown on the accuracy of these translations. In the present case I have been fortunate in that both my brethren are acquainted with the Turkish language. They have translated for me the relevant articles of the Turkish Code into Arabic, and the Court interpreter has translated their versions into English. I think these translations set out the law accurately and though as regards Article 111 there is an important variation in the versions, there has been no difficulty in agreeing on its interpretation.

6. The Ottoman Code of Civil Procedure contains in Chapter 5, Article 106 to 112, a short code with reference to damages. The articles with which we are concerned are Articles 111 and 112. My brother Khaldi's translation of Article 111 is as follows:—

> "If it is pointed out and provided in the body of the contract that in the event of failure of any of the parties in the carrying out of what he undertook, he pays to the other party a fixed amount as damages no greater or less should be awarded".

My brother Abdul Hadi's translation is:—

> "In the event where it is pointed out and provided in the contract by the other party that where any of the parties cannot carry out what he undertook, he pays a fixed amount as damages, payment of greater or less than that is not allowed".

I have already referred to what seems to be an important divergence; my brother Khaldi's version being 'failure ..... in the carrying out", and my brother Abdul Hadi's being "cannot carry out". Both agree that "cannot" is the more accurate translation, but they likewise agree that the correct interpretation of the article is that "cannot" does not connote the intervening of any obstacle which prevents performance, but means failure for any reason to carry out an undertaking. They are agreed that the article is not confined to cases where the non-performance is non-performance of the whole contract or substantially the whole contract. Each contract has to be scrutinised to see how far Article 111 applies. If, as in the present case, the Appellant has agreed to pay LP. 2,500 damages if he commits a breach of all or part of his undertaking under the agreement, then the article provides that he is liable for that amount of damages if he fails to carry out any single stipulation.

7. I agree with my brethren in their opinion as to the interpretation of Article 111. Parties are free to enter into such undertakings as they please and if they undertake to pay huge damages for trifling breaches, this Article will not help them. I pass now to the consideration of Article 112, the translations of which are as follows: My brother Khaldi's:—

> "The damages to be awarded for failure to carry out the undertakings which amount to payment of money, is a judgment for the interest at the rate of 1% per month in respect of the capital amount. This interest is awarded without calling on the creditor to show that he suffered damages. If there is no agreement in the document (*sanad*) regarding the interest, and interest is claimed in respect of the debt in the notice, interest is calculated from the date of the notice. If there is no notice, interest is calculated from the date of the statement of claim".

My brother Abdul Hadi's:—

> "Interest at one per cent per month is awarded in respect of the capital amount only as damages for any delay in the carrying out of the undertakings which amount to payment of money. Judgment is entered in respect of this interest without the creditor being bound to prove that he suffered any damage. In the event of no agreement as to interest in a document of debt, and interest is claimed in respect of that claim in the notice, it is necessary that it should be calculated from the date of the notice, otherwise from the date of the filing of the application".

8. My brethren are agreed as to the interpretation of this article and that it applies to contracts in which there is one undertaking only, *viz.*: an undertaking to pay money, and that it cannot be applied to a contract such as the present in which the payments of money are some only among other undertakings. My own interpretation of the translations would not agree with this. "The undertakings which amount to payment of money" seem to me to mean any undertakings in a contract to pay money. If the two articles are read one immediately after the other, it is not a strained interpretation to say that "the undertakings which amount to payment of money" are provided for in Article 112 and are excluded from the provisions of Article 111.

9. The point, however, is not free from authority *viz.*: Lipshitz *v.* Breir, reported on page 123 of the Law Reports of Palestine, 1920—33. In that case Breir undertook to supply Lipshitz with 15 waggons of sand a month and Lipshitz had to pay for these at the end of each month. The agreement was in writing and it was provided by clause 9 that "the party that will not carry out the terms of this contract will pay LP. 100 for damages". Lipshitz made default in paying for the sand and Breir sued him for the amount due, LP. 40.500 and LP. 100 damages; and succeeded in getting judgment for these amounts in the District Court. Lipshitz appealed to this Court and his advocate Mr. Eliash argued that Article 112 of the Code of Civil Procedure applied, and not Article 111. If I may say so with respect, the case was one that called for some analysis of the law applicable, as Lipshitz was being compelled not only to pay for the sand he had bought but an additional sum two and a half times the value of the sand. This Court, however, contented itself with saying that "Article 112 of the Civil Code of Procedure undoubtedly applied solely to the payment of a certain sum of money and therefore does not apply to this case which is governed by Article 111 of the Code of Civil Procedure". The appeal of Lipshitz was dismissed.

10. On the other hand there is the case of Berman *v.* Graus (not

reported) * cited by Mr. Joseph on behalf of the Appellant, the number is Civil Appeal 97 of 1935. Mrs. Graus undertook to transfer to Berman on a future date certain land on which a building was to be erected according to certain specifications. There was a provision in the agreement that rent received by Mrs. Graus from tenants prior to the transfer was to be paid to Berman. There was the usual clause that "the party going back on this undertaking or committing a breach or not complying with one or more of the stipulations hereof shall pay to the party complying therewith the sum of LLP. 2,000 damages". The land and building were transferred to Berman and the price was paid but Mrs. Graus was distinctly informed by Berman that the transfer was not to be taken as a waiver of his rights for any breaches of the agreement committed by her. Berman then sued her in the District Court of Jaffa for LP. 2,000 liquidated damages, specifying various breaches of the agreement, including a failure to pay LP. 56, rent alleged to have been received by Mrs. Graus from tenants. The District Court did not go into the issues involved, one learned judge held that the action was maintainable the other held that it was not, as the property had been transferred; and he held that Berman might institute an action for ordinary damages. As the judges differed Berman's action was dismissed. This Court, on appeal, held that Berman, by accepting transfer of the land, had waived his rights to any claim arising out of minor omissions, that the LP. 56 might be made the subject of a separate action; and that minor omissions were not sufficient ground for allowing damages under the contract. It is difficult to understand how the Court held that Berman waived any of his rights when he distinctly stated when accepting transfer and paying the price that he did not waive them. The case is interesting in showing that this Court shrank from awarding liquidated damages for minor breaches, and from awarding LP. 2,000 damages for failure to pay LP. 56. It had the curious result that, though both Courts agreed that Berman had a cause of action as regards the LP. 56, no relief was granted him apparently on the ground that he claimed liquidated damages and not ordinary damages. Mr. Joseph (for the Appellant) may be excused for reading into the decision a ruling that Article 111 applies only when the breach goes to the root of the contract. The Court, however, did not say this, and the *ratio decidendi* appears to have been that the main object of the agreement, the transfer of the property had been carried out, and that Berman therefore had no further rights under it. I cannot find anything in the decision in conflict with the Lipshitz case (*supra*). That

* 7, C. of J. 175.

case was decided more than ten years ago and professes to lay down what was then, and appears to have been previously, the accepted interpretation of Article 112. I feel that I am not free to express my own opinion in that matter and therefore defer to that of my brethren and to that of the Court in the Lipshitz case. The latter decision answers the question of the Judicial Committee with regard to Article 112 and it is now necessary to consider the effect on Article 111 of Article 46 of the Order-in-Council.

11. A number of authorities were cited by Mr. Eliash to show that in cases of this kind the Courts in Palestine have always applied the provisions of Article 111. There is no necessity to refer to these authorities — it cannot be contested that for some reason the Courts, not only in this, but in other instances, failed to consider certain parts of Article 46 of the Order-in-Council, and it has been necessary for the Judicial Committee of the Privy Council to remind us of those provisions of the Article which "enrich" our jurisdiction with principles of English Law. For the purposes of the present case the Judicial Committee specifically referred to the well-established distinction between a penalty and liquidated damages.

12. Mr. Eliash urged that this specific reference was made by their Lordships because they had been inaccurately informed of the principles of the Ottoman Law on the subject of damages. I do not agree with this and do not propose to consider it in any way. I take it that their Lordships have held that 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. This being so I see no difficulty in fitting the principle into the general scheme of the law. The common law of England strictly enforced penalties — equity came and intervened to give relief against them. The Ottoman Law in Article 111 of the Code of Civil Procedure laid down a strict rule that when the parties have agreed on a definite sum as damages for the breach of any stipulation in a contract, then no more and no less than that sum may be awarded. Just as equity came in England to give relief in a proper case, so has Article 46 of the Order-in-Council come to Palestine. A new article has been as it were introduced into the local law as to damages — which if it took statutory form, would appropriately be numbered as 111A, taking its place between Articles 111 and 112. The new article would modify Article 111 to the extent that in every case where a specified sum had been agreed on as damages, it would be open to the Courts in Palestine to construe the agreement in order to ascertain whether that specified sum was a penalty or liquidated

damages, and if it should be found to be a penalty, to give relief against it by assessing as precisely as possible the damage caused by the breach.

13. Neither advocate has made any point as regards the proviso to Article 46 — it has not been suggested that there is anything in the circumstances of Palestine or its inhabitants to prevent this particular principle of equity from taking effect or to subject it to any qualification. Mr. Eliash, for the Respondents, did say that it would be unfair that we should have this principle of equity when there is no remedy of specific performance in Palestine. I have already in a previous decision of mine in another case indicated my opinion that the English equitable remedy of specific performance forms part of the Law of Palestine, and therefore Mr. Eliash cannot expect from me much sympathy for this line of argument.

14. One of the leading cases on the subject of penalty and liquidated damages is Dunlop Pneumatic Tyre Company Ltd., *v.* New Garage and Motor Company Ltd., 1915 A. C. 79. Lord Dunedin, having said that the question is one 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 as at the time of the breach", went on to formulate certain suggested tests which "may prove helpful, or even conclusive". He said:—

> "(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 (but no more) that it is penalty when a single lump sum is made payable by way of compensation on the occurrence of one or more of all of several events, some of which may occasion serious and others but trifling damage' (Lord Watson in Lord Elphinstone *v.* Monkland Iron and Coal Co., 11 A. C. 332)".

15. In the present case the breaches alleged were failure to pay LP. 400 on the agreed date and failure to pay certain taxes. These sums were much less than the sum stipulated as damages. A presumption that the sum is a penalty is also created by the fact that a single lump sum is made payable on the occurrence of any one of several events, some of which may cause only trifling damage — *e. g. failure* to pay taxes or tithes, or failure to pay the surveyor. I have no doubt that the sum is a penalty and is not liquidated damages.

16. Both advocates agree that there is no previous decision of this Court as to the effect on Article 111 of the provisions of the Order-in-Council. In the case of Nachtigal and another *v.* Totah in the District Court of Jerusalem, where the relevant clause in the agreement provided for LP. 10,000 damages, the Court (Evans and Atalla, JJ.) said:—

> "Perusal of the contract shows that the breaches may vary indefinitely in importance and injury. Under clause 27 alone the possible breaches vary from one causing a few pounds damages to one threatening the property or existence of the business. The amount of the damages is no less than five times the original partnership fund. We have no doubt in finding that this sum is in truth a penalty and not liquidated damages".

Nachtigal's claim for damages was dismissed on other grounds which were agreed with by this Court on appeal (Civil Appeal No. 83 of 1937), so the question of penalty and liquidated damages was not considered. I may say that I agree emphatically with the judgment of the District Court. Mr. Eliash also drew our attention to what was said by Frumkin, J., in a recent case, *viz.*: that the Ottoman Law knows of no such distinction as that between a penalty and liquidated damages. This simply means that this is a case where the Courts may resort to Article 46 of the Order-in-Council which provides for the application of English Common Law and Equity in cases to which the Ottoman Law does not extend or apply.

17. Mr. Eliash lastly urged that LP. 2,500 was not excessive damages as the Appellant's failure to pay the LP. 400 amounted to a repudiation of the whole agreement. Even if the breach by the Appellant amounted to a total repudiation the LP. 2,500 remains a penalty and the damage caused to the Respondents by the breach must be assessed. This is a matter for the Court below.

18. My order would be that the judgment of the District Court should be set aside and that the action should be remitted to it to assess the damage caused to the Respondents by the breaches committed by the Appellant, and that the Appellant should have the costs of this appeal, to include LP. 15 advocates' fees.

Delivered this 25th day of November, 1937.

*Senior Puisne Judge.*

*Khaldi, J.*: 1. In this case the Respondents brought an action in the District Court of Jaffa stating that on the 12th November 1929 they entered into a contract with the Appellant whereby they agreed to sell to him a plot of land on conditions stipulated in that contract. They and the purchaser undertook to carry it out within the period prescribed therein. They further agreed that any one party committing a breach of one or the whole of their obligations will pay LP. 2,500 damages to the other party. The period for the transfer was extended by a letter written by the Appellant wherein he undertook to pay to the Respondents the sum of LP. 400 by the end of February 1931 on account of the

purchase price while the other stipulations of the contract remained in force. They alleged that the Appellant committed two breaches of the contract, firstly that he did not pay the LP. 400 as he undertook in the letter, and secondly he did not pay the taxes which he had to pay under the contract. They asked for a judgment for the sum of LP. 2,500 damages.

2. On the 12th November 1932 the District Court dismissed Respondents' claim on the grounds that it was not proved that the Appellant committed a breach in the non-payment of the taxes and secondly the undertaking for payment of LP. 2,500 damages stipulated in clause 8 of the contract does not include the letter of the Appellant wherein he undertook to pay LP. 400 on account of the purchase price to the Respondents.

3. The Respondents appealed from this judgment to the Supreme Court. This Court on the 5th August, 1933, set aside the judgment of the District Court and was of the opinion that the stipulation in the contract for the payment of LP. 2,500 damages included the letter and awarded against the Appellant the payment of LP. 2,500.

4. The Appellant appealed to the Judicial Committee of the Privy Council. This Committee having dealt with the appeal, remitted the case to the District Court Jaffa for the latter to decide two questions given in that judgment. That judgment further drew the attentian of the Palestine Courts to Article 46 of the Palestine Order-in-Council regarding the powers given to it to apply the substance of the common law, the principles of equity, the powers vested in the Courts of Justice and the Justices of the Peace in England, among other things the well established distinction between a penalty and liquidated damages.

5. The District Court Jaffa re-tried the case and gave judgment against the Appellant to pay LP. 2,500 to the Respondents as damages, under Article 111 of the Code of Civil Procedure as he committed a breach of some of the conditions stipulated without dealing with the contents of the judgment of the Judicial Committee regarding Article 46 of the Palestine Order-in-Council.

6. The Appellant appealed again to this Court which is now before us. The question is as to whether Article 111 or 112 of the Code of Civil Procedure applies to this case. We have to consider these two articles very carefully.

7. Article 111 provides:—

> "If it is pointed out and provided in the body of the contract that in the event of failure of any of the parties in the carrying out of

what he undertook, he pays to the other party a fixed amount as damages, no greater or less should be awarded".

Article 112 provides:—

"The damages to be awarded for failure to carry out the undertakings which amount to payment of money, is a judgment for the interest at the rate of 1% per month in respect of the capital amount. This interest is awarded without calling on the creditor to show that he suffered damage. If there is no agreement in the document (*sanad*) regarding the interest, and interest is claimed in respect of the debt in the notice, interest is calculated from the date of the notice. If there is no notice, interest is calculated from the date of the statement of claim".

8. After careful consideration of these two articles I am of the opinion that it cannot be argued that Article 112 applies to this case, as the damages provided for in this article are in respect of the delay arising out of the payment of money resulting from a document of debt or any other contract. The undertaking for the payment of LP. 400 on account of the purchase price was not included in a document of debt but in a contract containing reciprocal undertakings which should be carried out by the parties. The LP. 400 were not a debt but are an instalment on account of the purchase price of the land which was to be purchased.

9. There is no doubt that Article 111 of the Code of Civil Procedure applies to this case as clause 8 of the contract provided that a breach of any or more of the conditions of the contract makes the party committing the breach liable to pay LP. 2,500 damages to the other party. The Appellant undertook to pay LP. 400 on account of the purchase price to the Respondents and did not carry out his obligation which is one of the obligations mentioned in the contract.

10. What was mentioned in the judgment of the Judicial Committee and the arguments of the Appellant's advocate that Article 111 of the Code of Civil Procedure cannot be applied unless the non-performance is the non-performance of the whole or substantially the whole of the contract cannot be accepted. Article 111 is clear that in case of a breach of the conditions of the contract, the sum stipulated as damages must be awarded. The conditions of the contract include part as it includes the whole of the conditions. Further the contract in this present case is very clear which provided that a breach of the whole or any of the conditions makes the party liable for the payment of the sum. The question as to whether the sum stipulated in the contract as payable in the case of a breach of one or more of the conditions, is liquidated damages or a penalty is a question which is not provided for

in Article 111. The word used in Article 111 as in the other Articles, 106 to 112, is "damages" and no mention is made of a "penalty". What I know is that the Courts in the Turkish Empire and the Courts in Palestine used to award the damages stipulated in the contract even though the word used is "penalty" instead of "damages".

11. In view of the provisions of Article 46 of the Palestine Order-in-Council which vested the Courts in Palestine, subject to the provisions of the Ottoman Law and the Palestine Ordinance, to apply the substance of the English Common Law, principles of equity and to exercise the powers vested in the Courts of Justice and the Justices of the Peace in England, among other things the well established distinction between a penalty and liquidated damages, I hold that such a rule is applicable in Palestine and it is to be regretted that the Palestine Courts have not, so far, taken it into consideration. The provision for the payment of LP. 2,500 for failure to pay LP. 400 on account of the purchase price is, in my opinion, a penalty more than it is liquidated damages.

12. As long as this sum is a penalty and not liquidated damages, the District Court Jaffa should have fallen back on Article 46 of the Palestine Order-in-Council and assessed the loss caused to the Respondents for the failure of the Appellant in carrying out his obligations. I therefore hold that the case should be remitted to the District Court. The Appellant is to have the costs of this appeal to include LP. 15.— advocates fees.

Delivered this 25th day of November, 1937.

The judgment of Abdul Hadi, J., is reported at p. 514. *Puisne Judge.*

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LAND APPEAL No. 58/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Yehia Hamoudeh. APPELLANT.

v.

1. The Hadassah Medical Organization, Jerusalem,
2. The Keren Kayemeth Le-Israel Ltd. RESPONDENTS.

*Expropriation of land — Assessment of value — When appellate Court will interfere with findings of trial Court — Mean figure adjusted.*

In dismissing an appeal from the judgment of the Land Court of Jerusalem, dated the 10th December, 1936:—

HELD: The Court of Appeal will not interfere with a valuation made by the Land Court of compensation payable for expropriation, merely because the Land Court adopted a mean figure from dissenting experts' valuations.

ANNOTATIONS: This case was followed in C. A. 74/37 (*post*); see also C. A. 34/43 (1943, A. L. R. 337).

## JUDGMENT.

The Respondents obtained a certificate from His Excellency the High Commissioner to the effect that the construction of the Rothschild-Hadassah-University Hospital was an undertaking of a public nature within the meaning of the Expropriation of Land Ordinance, which certificate was published in the *Gazette*.

A Notice to Treat was thereafter issued by the promoters and approved by the High Commissioner in respect of the required plot of land on Mount Scopus, Jerusalem, and the notice was duly served on the Appellant.

The Respondents then applied to the Land Court of Jerusalem to fix the amount of compensation payable in respect of the land in question to the owners thereof.

A Committee of experts was appointed who differed in their estimation of the value of the land, and the Court, after hearing certain evidence, decided that the price should be at 450 mils per square metre.

The appeal is against this decision of the lower Court, and the Appellants contended before us that the value of the property was more than the award: and that the judgment of the Land Court was contrary to the evidence.

The three experts differed widely in their estimation of the value of the property, but the Land Court, on the evidence before it, seems to have taken the mean of the three figures advanced by them.

This is a matter for the appreciation of the lower Court upon the facts before it and we do not see our way to interfere with their decision.

The appeal must therefore be dismissed with costs and LP. 3.— advocate's fees.

Delivered this 18th day of May, 1937.

*British Puisne Judge.*

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CIVIL APPEAL No. 89/34.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Corrie, S. P. J., Kbaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Yusef Ahmad Taleb & 2 ors. APPELLANTS.

v.

Simha bint Haron Simon & 2 ors. RESPONDENTS.

*Contracts — Musaqat or lease, Mejelle* 1441, 1069 — *Assignment of rights — Provision against assignment secured by damages clause — Point not raised in lower Court.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 13th May, 1934:—

HELD: If a contract provides that one of the parties should not assign his rights thereunder under pain of paying damages, an assignment of his rights is valid, though he may have to pay damages for the breach of the undertaking.

## JUDGMENT.

The action which gives rise to this appeal was brought in the District Court of Jaffa by the Appellants, Yusef Ahmad and Abdallah Ahmad el Jabali, against the first Respondent, Simha bint Haron Simon, and the second Respondent, Yehia Ibn Ali el Yamani.

The action arose out of a contract dated the 27th October, 1931, entered into by certain persons therein described as the first party and the Respondent, Yehia, as the second party.

There has been some discussion as to the effect of the contract. The contract, which is therein described as a contract of lease, purports to be a lease of a *bayara* * by the parties of the first part to the Respondent Yehia, for a period of three years from January, 1933.

* Grove. (*Ed.*)

The Appellants, Yusef and Abdallah, claimed in their action to be the assignees of the Respondent Yehia's interests under this contract.

The Respondent, Simha bint Haron Simon, who is a judgment-creditor of the Respondent Yehia, contested the validity of the assignment and claimed to have her debt discharged out of the purchase money of the fruit of the *bayara*.

In the District Court, the present Appellant, Murshed Shahin, was admitted as a third party, his claim being that as partner with the Respondent Yehia, he was entitled to one half of the produce of the *bayara*.

The Respondent, Ali Hussein El Sheikh Ali, was also admitted as a third party on his own behalf and as a guardian and representative of certain other persons claiming to be interested as owners of shares in the *bayara* and lessors under the contract dated the 27th October, 1931.

The District Court, in its judgment dated the 13th May, 1934, dismissed the claim of all the Appellants on the ground that the contract dated the 27th October, 1931, created a *Musaqat* partnership under Art. 1441 of the *Mejelle*; and hence that the Respondent Yehia was not entitled to assign his rights without the authority of the other parties to the contract, which has never been given.

On the hearing of this appeal, the Respondent Yehia pleaded that the contract was invalid as all the persons named as parties thereto had not signed it.

In the District Court, however, the Respondent Yehia never put forward this claim; his argument there, and that of all the other parties, being based upon the assumption that the contract was valid. We therefore hold that he is now estopped from denying the validity of the contract.

On the question as to whether or not the Respondent Yehia had power to assign his rights under the contract, we hold that in view of the fact that under Clause 11 "the first party sold to the second party the one share out of one thousand shares in the fruits produced during the three years" which had been reserved to the first party by clause 2 of the contract, the District Court was wrong in holding that the contract was one of partnership. Reading clause 2 and 11 together, it is clear that the persons constituting the first party were not entitled under the contract to any share in the profits of the *bayara*, but were entitled only to the fixed money payments stipulated for in the contract.

We accordingly hold that the contract was one of lease and not of partnership, and hence Art. 1069 of the *Mejelle*, upon which the District Court relied, does not apply.

The contract however contains in clause 11 a provision in the following terms:—

> "He (the second party) shall not release or sublet to others and if he does so he shall be liable to the payment of LP. 500.— by way of penalty for damages and expenses incurred".

On behalf of the Appellant, Morshed Shahin, it has been argued that this does not deprive the lessee of the power to assign his rights under the contract, but merely exposes him to the liability to pay damages in the event of his assigning. We hold that this is the correct view of this provision and hence that the Respondent Yehia had power to assign the whole or part of his rights under the contract.

The judgment of the District Court must therefore be set aside and judgment be entered in favour of the Appellant, Murshed Shahin, in respect of one half of the amount in claim and in favour of the Appellants Yusef Ahmad Taleb and Abdallah Ahmed El Jabali in respect of the remaining part.

The Appellants' costs will be paid by the Respondent, Simha bint Haron Simon and Yehia bin Ali el Yamani. The Respondent, Ali Hussein el Sheikh Ali, does not appear to have had any interest in the question at issue in this action and no order therefore is made with regard to his costs.

Delivered this 25th day of March, 1936.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 74/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Greene, Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

1. The Hebrew University Association,
2. Keren Kayemeth Le-Israel Ltd. APPELLANTS.

v.

Muhsinah bint Aref Dajani. RESPONDENT.

*Expropriation of land — Value as determined by experts — Powers of the Court when experts differ, L. A. 69/36, 59/36.*

In dismissing an appeal from the judgment of the Land Court of Jerusalem, dated the 15th February, 1937: —

HELD : In expropriation proceedings, where experts differ as to the value of the land and the Court adopts an average figure, the Court of appeal will not interfere with the finding.

FOLLOWED: L. A. 58/36 (*ante*, p. 475) ; L. A. 59/36 (not reported).

ANNOTATIONS: See L. A. 58/36 and note.

## JUDGMENT.

This case is not distinguishable from L. A. 59/36 or L. A. 58/36, where it was held by this Court that where in expropriation proceedings experts differ as to the value of the land, this Court will not interfere when the Court of trial accepted an average amount as being the reasonable value of the land.

It was argued on behalf of the Appellant that the relevant date for assessment was the value when the Appellant was entitled to enter upon the land, in this case July 1936. The Court heard evidence as to the value at that date, and we have to take it that it had it in mind in assessing the value.

We find no merits in the argument as regards the costs and for all these reasons the judgment of the Court below must be affirmed and the appeal dismissed with costs to include LP. 3.— advocate's fees

Delivered this 14th day of June, 1937.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 13/36.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Edwards, P. D. C. and Khayat, J.

IN THE APPEAL OF:—

Mahmoud Ahmad Abdul Fattah. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Criminal Procedure — Confessions — Proof of extra-judicial confession — Murder to "facilitate" commission of an offence — Witness called by prosecution without notice to the accused — Insanity and plea —*

*Irregularity causing no prejudice to accused — Young offender — Age of accused matured after conviction — Adjournments — Young Offenders Ord., secs. 4, 18 — Evidence on appeal.*

In dismissing an appeal from the judgment of the Court of Criminal Assize, sitting at Haifa, dated the 8th December, 1936, whereby the Appellant was convicted of murder contrary to Article 174(3) of the Ottoman Penal Code and sentenced to death, but in varying the sentence:—

HELD: 1. An extra judicial confession may be proved by a police officer who was present at the time it was made.

2. Murder committed contemporaneously with theft and in order to retain possession of the stolen article or of destroying evidence, is committed "to facilitate" theft.

3. Evidence of age should, when material, be called after conviction. In this case it was heard by the Appellate Court.

ANNOTATIONS:

1. On the second point *cf.* CR. A. 30/43 (1943, A. L. R. 308) and CR. A. 100/44 (1944, A. L. R. 819).

2. On the third point see Assize No. 54/42 (1943, A. L. R. 45 at p. 56) and *cf.* H. C. 117/44 (1944, A. L. R. 606) and note 1.

FOR APPELLANT: Madi.

FOR RESPONDENT: Junior Government Advocate — (Alami).

## JUDGMENT.

*Manning, S. P. J.*: On the 8th December 1936, the Appellant was convicted by a Court of Criminal Assize sitting at Haifa of having murdered one Julia Koller in order to facilitate the commission of the offence of theft. There are three grounds of appeal. The first is that illegal evidence was admitted, namely, a confession made by the Appellant. The only objection urged against its admission was that the confession was not proved by the police officer who wrote it down. That police officer was dead at the time of the trial, and the prosecution proved the confession by the evidence of another police officer who was present when it was made. There was nothing objectionable in this, and there was clear evidence, which the Court below believed, that the confession was voluntary.

2. The second ground of appeal is as follows. The facts showed that the murder was committed after the theft had been completed, and Mahmoud Eff. Madi, on behalf of the Appellant, has urged that this therefore cannot be murder to facilitate the commission of theft. The facts found by the Court below were that Appellant snatched a handbag from the deceased, and that when she tried to get it back, he beat her with a stick until she fell, and continued to beat her for some time

afterwards. I do not agree with the majority of the Court below that the theft had not been completed before the beating. But an analysis of the meaning of the word "facilitate" shows that an act may be said to facilitate the commission of a theft if it is contemporaneous with the theft and done for the purpose either of retaining possession of the stolen article or of destroying evidence by killing the owner. This was the case here, and this ground of appeal must fail.

3. The third ground of appeal is that a witness named Dr. Ma'louf, who had not given evidence at the preliminary inquiry, was called at the trial without any notice to the Appellant. It is certainly difficult to understand why he was called by the prosecution, or why the Court allowed him to be called without the usual notice, as his testimony was solely as to the age and mental capacity of the Appellant. At the opening of the proceedings on the 3rd November Appellant's counsel had suggested that the Appellant was insane and the Court accordingly remanded him for medical observation. This suggestion of insanity could relate only to the question of whether the Appellant was fit to plead, yet when the trial was resumed more than a month later, the Court took Appellant's plea without hearing any evidence as to his being fit to plead. It was at that stage, and before plea, that Dr. Ma'louf's evidence ought to have been taken. Instead of this, it was interposed in the evidence for the prosecution, but neither this nor the fact that no notice was given prejudiced the Appellant in any way. Dr. Ma'louf's evidence disposed of the suggestion that the Appellant was unfit to plead, and no atempt was made to prove that he was insane at the time he committed the murder. Whatever irregularity there was in the procedure adopted cannot operate to affect the conviction.

4. The conviction must therefore stand, but there is a further appeal against the sentence of death passed on the Appellant. Section 4 of the Young Offenders Ordinance prescribes that the sentence of death shall not be passed on a person who has not completed his eighteenth year. The question of a prisoner's age becomes relevant only when he has been found guilty, and though evidence on the point may be elicited by cross-examination of the witnesses for the prosecution, it is clearly the intention of the section that a prisoner should be allowed to call evidence on this issue after conviction and before sentence. Such evidence is irrelevant as part of the defence, it becomes relevant only after conviction. I do not agree with the Government Advocate that a prisoner should have all his witnesses on this issue ready in expectation of a conviction. It is a serious moment for a prisoner, a matter of life and death, and the Court should, if necessary, adjourn to give him an opportunity of calling evidence.

5. In the present case, however, Mahmoud Eff. Madi, before closing his defence, asked for an adjournment to call Dr. Kleinhaus on the question of age. The Court refused his application on the ground that this witness should have been available. When the *allocutus* stage arrived the Appellant did not raise the question of age except as a recommendation to mercy. At this stage the Court was aware of the fact that Dr. Kleinhaus was of opinion that the Accused was under the age of eighteen; Dr. Ma'louf had said so in his evidence. It was also aware that the Appellant wanted an adjournment to call Dr. Kleinhaus on this issue. I think in those circumstances the Court should have allowed the adjournment at the *allocutus* stage. It had not before it the reasons for the opinion of Dr. Kleinhaus, and could not say whether they might be decisive or not.

6. In determining this question the Court proceeded in accordance with section 18 of the Young Offenders Ordinance which is as follows:—

> "18. Where there is uncertainty as to the age of any young person with reference to whom any proceeding under this Ordinance is pending, the age shall be determined by the Court".

7. The question now is whether there could have been this uncertainty if the Court had heard the reasons on which Dr. Kleinhaus based his opinion. The Appellant may have been gravely prejudiced by the fact that Dr. Kleinhaus was not heard. I do not think in the circumstances it would be fair to adopt the finding of the majority of the Court below on this point. I am not in favour of sending the case back on this issue. I think that the appropriate order to make is that the appeal as to the conviction should be dismissed, but that the Appellant be allowed to produce before this Court evidence on the question of his age and that the Respondent be allowed to call evidence in rebuttal if he wishes, other than the oral evidence of witnesses already heard in the Court below. The decision as to sentence will be meanwhile reserved.

Delivered this 13th day of February, 1937.

*Senior Puisne Judge.*

*Khayat, J.*: I concur.

*Puisne Judge.*

*Edwards, P. D. C.*: This is an appeal against a conviction under Art. 174(3) of the O. P. C. whereby the Appellant was sentenced to death for the offence of murder committed to facilitate the offence of theft.

The first ground of appeal argued before us was that the evidence

regarding the alleged confessions or admissions by the Appellant should be disregarded as not having been made voluntarily. In my view there is nothing in this complaint. I can see no objection to the evidence of Felix Soussa, S/Inspector, who gave evidence as to his having been present when the statement was taken down by Police Officer Ahmed Naif, since deceased. I do not think that there can be any criticism of the evidence of Khalid Hussein, Police Inspector. His evidence was not merely evidence as to a verbal confession or admission. He gave clear testimony as to what the Appellant had volunteered to show him.

The next ground argued before us was that the murder was not committed in order to facilitate the commission of the offence of theft. It was argued by the Appellant's advocate that the majority of the trial Court were not quite sure themselves as to whether Accused should be found guilty of murder to facilitate the commission of theft in view of the words in their judgment commencing "but even assuming that this was not so". I think, however, that there is a clear finding of fact that the theft had not been completed. In my view the trial Court were justified in making this finding as, until the Appellant had managed to get clear away from Mrs. Koller and had managed to elude her attempts to recover her hand-bag, it could not be said that the theft had been successfully consummated. But in any event I also agree with the trial Court that if the Accused's object in killing Mrs. Koller was not to facilitate the theft, the only possible reason he could have had for killing her was to facilitate his flight and the evasion of punishment, and that, of course, as the trial Court pointed out, rendered the Appellant liable to the same penalty under Article 174, para. 3.

The next ground of appeal argued before us was the alleged weakness of mind of the Appellant. For some reason or another, into which it is not necessary to enquire, the M. O. Mental Hospital, Bethlehem, was called as a witness by the prosecution, but it is abundantly clear that there was no evidence before the Court which could have justified any suspicion, let alone a finding, of insanity. As was pointed out by this Court recently, following the law and principles laid down in England in the MacNaughton case, it is for the Accused affirmatively to prove the fact of insanity. There was no evidence of insanity before the trial Court and this ground of appeal must be rejected.

The next and last point argued before us was as to the age of the Accused. It was contended that the Accused had not completed his 18th year. This is important because if this be so he cannot be sentenced to death because of the provisions of section 4 of the Young Offenders Ordinance. What apparently happened at the trial was this:

Dr. Ma'louf, M. O. Mental Hospital, Bethlehem, was for some reason or another called as a witness for the prosecution. In his evidence in chief he estimated the age of Appellant as 19. The Accused's advocate asked for an adjournment in order to cross-examine the doctor. This was granted and on the following day Dr. Ma'louf was recalled for cross-examination and maintained his opinion, and in re-examination he said "I have no doubt that the Accused is over 18". On this the defence applied for an adjournment to enable them to call Dr. Kleinhaus, who had apparently, but not as a witness, estimated the Accused's age to be 17. The trial Court refused an adjournment and noted on the record this: "It is for the defence to prove age and this evidence should have been available by them". It is said that the trial Court was wrong in refusing the grant of an adjournment. I do not think that the trial Court was wrong. After all criminal trials must be completed. It is not suggested that Dr. Kleinhaus was available at the moment. Had Dr. Kleinhaus been in attendance waiting near the Court and could have been brought to Court at a few minutes' notice then I think that an opportunity might have been given to the defence to call Dr. Kleinhaus, but what was the position? The Appellant had known from the very day on which he was served with a copy of the information that he was on trial for his life. He was defended. He must have realised that he was liable to be convicted and even as far back as the 3rd November, 1936, when he was first before the Court of Criminal Assize and a remand was granted, one of the reasons given for that remand was to obtain expert medical opinion on his age. That expert opinion was available at the trial on the 7th December and it may have been unfortunate that that expert opinion, namely, Dr. Ma'louf's evidence, was adverse to the Appellant's contention, but he should have anticipated that this might be so, and, had he wished to call rebutting evidence, he should have made it available on the day of the trial. As it was, the case was adjourned to the 8th December for the cross-examination of Dr. Ma'louf. In my view the trial Court was perfectly justified in refusing the grant of any further adjournments. There must be an end to criminal trials; once they start they must go on to the end. There are no juries in Palestine. Although, of course, I realise that the question of age is a matter for the Judge or Judges and not for a jury, yet in any event the grant of an adjournment might have necessitated an adjournment to the next Criminal Assize sessions. It might have been a long time ahead. This would be unfortunate in a case in which a capital charge was involved, nor would it be reasonable to expect the President of the Criminal Assize Court to stay in Haifa for

a day or two longer merely in order to comply with this very belated request of the Appellant.

The next matter that occurs to one to ask oneself is whether or not after the Accused had been convicted the trial Court should not have again applied their minds to the question raised under section 18 of the Young Offenders Ordinance. In my view there was no necessity for them to do so. I think that the more correct way would be in ordinary cases (in cases of doubt as to the age) for the Court not to deal with this until after conviction. This would be more satisfactory but in this case it was the defence who had cross-examined Dr. Ma'louf through the course of the trial. Now, by the time the Court had convicted the Accused it might be strictly true to say that there was uncertainty as to his age but by then the doubts of the Court had been resolved by the evidence of Dr. Ma'louf, which they had accepted and which they were entitled to accept. The quantity and nature of evidence required by section 18 of the Young Offenders Ordinance is not stated. It is merely stated that the age shall be determined by the Court. In my view it would have been a duplication of work if after conviction the Court had again recalled Dr. Ma'louf and got him to repeat what he had already said. In my view, as the matter stands, the trial Court were justified in treating the Accused as one who had completed his 18th year. They themselves saw him and they had Dr. Ma'louf's evidence. It is idle to speculate and it is too late to speculate as to what effect the evidence of Dr. Kleinhaus might have had upon the trial Court had he been called as a witness before them. It is, of course, open to us under section 71(a) of the Criminal Procedure (trial Upon Information) Ordinance to hear further witnesses, but in my view it is unnecessary to do so. No doubt this question will be considered in any event by His Excellency when His Excellency considers the recommandation of the majority of the trial Court. In my view it is not the function of the Court of Criminal Appeal to make any comment whatsoever upon a recommendation to mercy made by the trial Court. I therefore refrain from commenting on the recommendation made by the majority of the trial Court. It will, of course, be considered by the proper authority, namely His Excellency the High Commissioner.

I would dismiss this appeal and confirm the conviction and sentence of death passed by the trial Court.

Delivered this 13th day of February, 1937.

*President District Court.*

*February 25th*, 1937.

*Emil Moses Kleinhaus.* Sworn:

I am X-ray specialist in Government Hospital, Jerusalem. On 10.11.36 I examined Appellant — under X-ray — to find his age. I concluded he is 17 years of age.

*X. ed.*: — I base my opinion on the progress of the growing centre of the bones. A bone has annual rings and centres for growing. If an individual is young, certain lines of bone structure are closed. In this picture which I have certain lines of growing centre are not closed. It is absoluttly different at what age they close. The closure of the bone is absolutely closed in this country at 19, 19½ or 20 years. In this case some are closed, some are not. From external view I thought Appellant was 19 years. The photograph tells much more than that Appellant is not 19. Certain things in picture tell me he is surely 16, surely 17. But there are certain things not closed which would be closed if he was 18. (Shows photo). This is of wrist and elbow (Marked E. K. 1). I see on picture of right elbow that one epiphasis, *i. e.* growing centre is just not closed. The same thing occurs in certain parts of the hand. The epiphases of wrist are not closed. This examination was done on 9th November. During my absence on leave another photo was taken. From E. K. 1 I can say Appellant is 17, not 18. The age limit in this country for closure in wrist is 18, 18½, 19. In Europe 20. In my opinion there is no doubt that Appellant has not completed his eighteenth year.

*Re ed.*: — *Nil.*

*Khayat, J.*: I have been working 11 years on X-Ray. I was many years specialist in Germany, Munich and Cologne Universities. I am 3½ years in Palestine. There are English and German scientific works — one German scientist is Mayer. I forget name of English one. There is a difference between Europe and Oriental countries of 1¼ year and 1½ years. The difference of age is quite distinct. A specialist could tell nothing definite from E. K. 1 unless he knew the nationality. If he knows it is an Arab, he can have no doubt.

*Manning, J.*: This body of knowledge is obtained by experiment. So far as I know, Arabs have been examined for results in Egypt. I have done a series of experiments myself, where there were birth certificates.

*Mahmud* — calls no other witness.

*Musa Aalami* — calls no witness.

*Court*: We are unanimous in finding that Appellant has not completed his 18th year. The sentence of death cannot stand.

*Allocutus*. Appellant says nothing.

*Mahmud*: Appellant confessed. He repented. There was a recommendation to mercy. Weak mentality.

*Court*: Alters sentence to one of 15 years imprisonment.

*Senior Puisne Judge.*

25.2.37.

We are unanimous in finding that Appellant has not completed his eighteenth year.

We therefore alter the sentence to one of fifteen years imprisonment.

Delivered this 25th day of February, 1937.

*Senior Puisne Judge.*

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LAND APPEAL No. 30/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, A/S. P. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Awad Salem Abu Dlak & an. — APPELLANTS.

v.

The Government Advocate. — RESPONDENT.

*Bona vacantia — Right of Government to lands of holder who dies without issue.*

In dismissing an appeal from the judgment of the Land Court of Jerusalem, dated 25.2.35:—

HELD: The lands of a holder who dies without issue go to Government as *bona vacantia.*

JUDGMENT.

This is an appeal against the judgment of the Land Court sitting at Beersheba, whereby after a protracted hearing Appellants' claim was dismissed.

The lower Court found as a fact, from the evidence led before it, that the owner of the land in dispute had died without issue, and that

the land therefore became *bona vacantia* the property of the Government of Palestine.

There is nothing in the appeal to show that the decision to which the lower Court arrived is wrong, or that it is in any way contrary to the established law.

The appeal is therefore dismissed with costs and advocate's fees assessed at LP. 2.—.

Delivered this 12th day of January, 1937.

*Acting Senior Puisne Judge.*

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LAND APPEAL No. 52/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Abdul Rahim Ibn Sheikh Rashid Danaf on behalf of the estate of his father. APPELLANT.

v.

Abdel Afu Ibn Sheikh Said Danaf as sole heir of his mother Rukieh and his brother Yusuf, & an. RESPONDENTS.

*Land Court — Order of non-interference — Allegations of forgery — Findings of fact.*

In dismissing an appeal from the judgment of the Land Court of Jerusalem, dated 10.10.36:—

HELD: The Land Court may issue orders for non interference of the enjoyment of immovable property.

ANNOTATIONS: See C. A. 48/37 (*post*, p. 491) and cases therein cited.

FOR APPELLANT: Abcarius.

FOR RESPONDENTS: Hawa.

JUDGMENT.

Plaintiffs (Respondents) claimed ownership with Defendant in two houses by way of inheritance from their ancestors, and that after having enjoyed the possession of their shares for many years, the Defendant started to interfere with their possession.

Several documents were produced in the Court below, including *kushans* and *werko* receipts, in support of Plaintiffs' claim, but the Defendant (Applicant) claimed that the *kushans* were forged.

The Land Court stated in its judgment that there was no evidence before it to prove that the *kushans* were forged.

On the evidence and documents produced the Court below was satisfied that the Plaintiffs own shares in the two houses in claim by way of inheritance through their ancestors, and ordered the Defendant to refrain from interfering with the ownership of Plaintiffs.

The Counsel for Appellant argued before us that the Land Court had no jurisdiction to order the non-interference by Defendant (Appellant) in the enjoyment by Respondents of their shares in the houses, but the Court did not see its way to entertain his argument in view of the provisions of the Land Courts Ordinance.

The only other real point raised on appeal was the question of the alleged forgery of the *kushans*. The Court below went into this question in detail and very carefully, and decided on the documents and evidence produced that the forgery of the *kushans* was not established. This is a question of fact and there does not appear to us to be any reason for interfering with the finding of the Court below with regard to this question.

We, therefore, dismiss the appeal with costs and LP. 3.— advocate's fees.

Delivered this 28th day of April, 1937.

*British Puisne Judge.*

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HIGH COURT No. 43/36.

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

BEFORE: Trusted, C. J. and Abdul Hadi, J.

IN THE APPLICATION OF:—

Abdullah Yusef El-Ya'coub. PETITIONER.

V.

1. The Chief Execution Officer, Nablus,
2. Muhammad Abdel Aziz el Hassan. RESPONDENTS.

*Sale of mortgage — Part of the security may not be released by the C. E. O.*

In making absolute an Order issued to the first Respondent, directing him to show cause why his order dated the 30th May, 1936, in File No. 630/33, should not be set aside:—

HELD: The Chief Execution Officer, when dealing with the sale of mortgaged property, has no power to release part of the property from the debt.

ANNOTATIONS: On the powers of the P. D. C. sitting as C. E. O. see H. C. 64/38 (1938, 2 S. C. J. 169) and notes.

## JUDGMENT.

This is a return to a rule *nisi* dated the 2nd day of March, 1937, issued to the Chief Execution Officer, Nablus, directing him to show cause why his Order dated the 30th May, 1936, should not be set aside.

The matter arose out of a mortgage. It is clear that the mortgage was given to secure both principal and interest, and we think, therefore, that the Order which was made, that is an order releasing a certain proportion of the security, interferes unduly with the security. Moreover, it is possible that the interest might exceed the value of the one-third which has not been released and which remains mortgaged to secure the interest that may accrue.

For these reasons, we are of opinion that the rule should be made absolute with costs and advocate's fees assessed at LP. 3.—.

Given this 20th day of March, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 48/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Ihsan Agha Nimer. APPELLANT.

v.

Casem Agha Nimer. RESPONDENT.

*Land Court — Jurisdiction in actions for non-interference — L. A. 73/28; L. A. 51/36; L. A. 52/36 — Order restraining trespass, contrasted.*

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

HELD: The Land Court has jurisdiction to issue orders for non-interference in the enjoyment of a person's possession of land.

DISTINGUISHED: L. A. 73/28 (1, P. L. R. 359; 3, C. of J. 998).

FOLLOWED: L. A. 51/36 (*ante*, p. 172); L. A. 52/36 (*ante*, p. 489).

FOR APPELLANT: Goitein.

FOR RESPONDENT: Eliash.

## JUDGMENT.

This is an appeal from the judgment of the Land Court of Nablus dated the 27th February, 1937, ordering Appellant to refrain from interfering with Respondent's enjoyment of his share of the land in dispute which he alleges to have inherited from his grandfather, and prohibiting Appellant from registering same in his name in the *Tabu*.

The judgment of the Land Court of Nablus contains in detail the grounds upon which the Court based its conclusions, and we agree with the whole judgment of the lower Court for the reasons given by them. We do not, therefore, find it necessary to add anything thereto.

There is, however, one point which should be made clear and that is with regard to the jurisdiction of the Land Court to deal with cases of non-interference. The Appellant argued before us that a Land Court is not empowered to issue orders for non-interference and cited L. A. 73/28 in support thereof. We must observe here that this case deals only with orders issued to restrain a person from trespassing on another person's land.

Two cases were cited to us by Respondent, *viz.*, L. A. 51/36 and 52/36, which are much later in date than that quoted by Appellant, the second of which is quite clear as to the jursdiction of a Land Court to issue orders for non-interference in the enjoyment of a person's possession of his shares.

The appeal must be dismissed with costs and LP. 5.— advocate's fees.

Delivered this 8th day of June, 1937.

*British Puisne Judge.*

CRIMINAL APPEAL No. 96/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Greene and Frumkin, JJ.

IN THE APPEAL OF:—

1. Nechama Zwanger,
2. Guardians of four daughters of late Jacob Zwanger. APPELLANTS.

v.

Reuben Scheinzwit. RESPONDENT.

*Compensation in lieu of diyet — Civil and Religious Courts (Jurisdiction) Ord., sec. 6(2) — Maximum amount which may be awarded.*

In dismissing an appeal from an order of the Court of Criminal Assize, sitting at Jerusalem, (A. Jm. 20/37) dated July 28, 1937, whereby the Appellants were awarded LP. 250 as compensation in lieu of *diyet*:—

HELD: The maximum amount of compensation which can be awarded under sec. 6(2) of the Civil and Religious Courts (Jurisdiction) Ordinance, irrespectively of the number of claimants, is LP. 250.—.

ANNOTATIONS:

1. See the preliminary decision in this appeal, reported *supra*, and note 2 thereto.

2. On compensation in lieu of *diyet* see CR. A. 174/36 (*ante*, p. 65) and annotations. Note that sec. 71 and the Schedule to the Civil Wrongs Ord., 1944, provide for the repeal of sec. 6 of the Civil and Religious Courts (Jurisdiction) Ordinance.

FOR APPELLANTS: Baker.

FOR RESPONDENT: Abcarius.

### JUDGMENT.

*Manning, S. P. J.*: The Respondent in this appeal has been convicted of the manslaughter of a person named Zwanger. After the conviction there was an application to the trial Judge for compensation in lieu of *diyet* under section 6 sub-section (2) of the Civil and Religious Courts (Jurisdiction) Ordinance, Cap. 18. The trial judge made an award of LP. 250. It is said by the Appellants that that award was made on a wrong basis; namely, that the trial judge thought that according to the law he was not entitled to make any award exceeding LP. 250 We shall assume that the award was made on that basis.

2 Mr. Baker, who argued the appeal, laid particular stress on the wording of section 6 subsection (2) which is as follows:—

"A criminal Court may, if it sees fit, in any case in which a prosecution for homicide or injury to a member is brought, and at the request of a person entitled to *diyet*, award any sum not exceeding two hundred and fifty pounds as compensation in lieu of *diyet*, and shall not be bound in making such award by the rules of the *Sharia* law; the amount awarded shall be recoverable as a civil debt: where an order has been made under this provision no further claim for *diyet* shall be brought before a Moslem Religious Court".

3. Mr. Baker points to the words "at the request of a person entitled to *diyet*" and says that those words must mean that each person entitled to *diyet* may make a request and may be awarded a sum not exceeding LP 250. We do not agree with that interpretation. The words following "*diyet*" in the sub-section have to be carefully construed and those are "award any sum not exceeding two hundred and fifty pounds as compensation in lieu of *diyet*". The sub-section does not say "at the request of a person entitled to *diyet*, award any sum not exceeding two hundred and fifty pounds as compensation in lieu of *diyet* to each such person". It is quite clear that the compensation is fixed in general as a lump sum divisible among all persons entitled to *diyet*.

We think that if compensation is to be awarded at all in cases of this kind the limiting of the compensation to a total sum of LP. 250 may work very great hardship in many cases. In the great majority of cases where the deceased was the breadwinner of the family, it is obvious that the sum of LP. 250 is altogether inadequate.

4. The law being as it is, we are unable to increase the amount. The decision of the Chief Justice must be affirmed, and this appeal will be dismissed without costs as Respondent's advocate is not asking for costs.

Delivered this 17th day of September, 1937.

*Senior Puisne Judge.*

*Greene, J.*: I concur with the judgment of the Senior Puisne Judge and have nothing to add: without expressing any opinion as to the adequacy of the compensation awarded.

*British Puisne Judge.*

*Frumkin, J*: I concur and wish to add that I would be happy if the law would allow the Courts to examine the adequacy of the compensation to be awarded in each particular case, according to its merits taking into consideration the position of the deceased, the needs of the Claimants, and the financial liabilities of the convicted person. It is

unfortunate that the Courts are deprived of this power. The law, as it stands at present, fixes the amount which could be awarded at LP. 250, and the Courts are bound by this maximum. The appeal must, therefore, be dismissed.

*Puisne Judge.*

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LAND APPEAL No. 11/35.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: McDonnel, C. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Nabhan Abdel Hafiz & ors. APPELLANTS.

v.

Ahmad Abdel Fattah Hasan Abu Sbeih & ors. RESPONDENTS.

*Prescription — Common ancestor — Retroactivity of sec. 2 Land Law Amendment Ord. — Construction of statutes — Singer v. Hasson — Voluntary improvement of land — Point not raised in lower Court.*

In dismissing an appeal from the judgment of the Land Court of Jaffa, dated the 12th October, 1933:—

HELD: 1. Sec. 2 of the Land Law Amendment Ordinance is not retroactive.
2. No right can be claimed by a person over land on the ground that the value of the improvements exceeds the value of the land, if the improvements were made voluntarily.

FOLLOWED: Singer *v.* Hasson, 1884, 50 L. T. 326.

ANNOTATIONS:

1. The "authorities relied upon by the Land Court" were L. A. 65/27 (3, C. of J. 956) and L. A. 36/30 (1, P. L. R. 630; 3, C. of J. 959).

2. "It is now settled law that (the Land Law (Am.)) Ordinance has no retroactive effect": C. A. 370/43 (1944, A. L. R. 474) and cases therein cited.

FOR APPELLANTS: Goitein.

RESPONDENTS: In person.

## JUDGMENT.

The Respondents have produced nothing to satisfy us of the correctness of the allegation that the appeal was out of time; we must, therefore, assume that it was in time.

On the authorities relied upon by the Land Court in its judgment, we hold that it was right in holding that prescription did not run in-

asmuch as the parties though distantly related from a common ancestor were in fact blood relations.

We are not satisfied that sec. 2 of the Land Law Amendment Ordinance 1933 can, in the absence of express words, be held to be retrospective in its operation: and on the authority of Singer *v.* Hasson (1884) 50 L. T. at p. 327, it is clear that it is only when an enactment deals with procedure only it applies unless the contrary is expressed to all actions whether commenced before or after the passing of the Act.

We see no reason to remit the case in regard to the 4th paragraph of the grounds of appeal, inasmuch as the planting of trees was voluntary and was not done in the belief that there was legal justification.

Finally, the Appellant was unable to satisfy us that the point dealt with in the 5th para. of the grounds of appeal was raised before the Settlement Officer. We cannot therefore be concerned with this.

For these reasons, we dismiss the appeal with costs to include 500 Mils travelling expenses for each Respondent.

Delivered this 11th day of June, 1936.

*Chief Justice.*

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CRIMINAL APPEAL No. 96/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Greene and Frumkin, JJ.

IN THE APPLICATION OF:—

1. Nechama Zwanger,
2. The Guardians of the four daughters of late Jacob Zwanger. APPLICANTS.

v.

Reuben Scheinzwit. RESPONDENT.

*Attachments — Power of Court of Appeal to grant attachments in proper cases — When power will be exercised.*

In refusing an application for provisional attachment:—

HELD: The Court of Appeal has the power to grant provisional attachments, and may exercise that power in proper cases.

ANNOTATIONS:

1. C. A. 155/35 (2, P. L. R. 398; 8, C. of J. 403) is to the same effect; see also C. A. 38/34 (3, P. L. R. 20; 1937, S. C. J. (N. S.) 5) and note 2 in S. C. J.

Note, howeve, that the decision in this case was given before the distinction created by the 1940 Courts Ordinance between the Court of Criminal Appeal and the Court of Civil Appeal.

2. The appeal itself is reported *infra* and for other proceedings see CR. A. 96/37 (*post*, p. 495) and note 1.

FOO APPLICANTS: Baker.

FOR RESPONDENT: Abcarius.

## JUDGMENT.

The Respondent in this case was convicted of the manslaughter of a man named Zwanger. After the conviction there was an application made to the presiding Judge for compensation in lieu of *diyet*. From the application before us, it appears that a sum of LP. 1990.— was asked for as compensation. The presiding Judge made an award of LP. 250.—, and the persons concerned have lodged an appeal against that order on the ground that the compensation should have been larger. That appeal has not yet come on for hearing and we say nothing, at the moment, as regards its merits.

Meanwhile the Applicants have made an application to this Court for provisional attachment of the property of the Respondent as security for the increased damages which they anticipate will be awarded by this Court on the appeal.

We have no doubt that in a proper case coming before us this Court is invested with the power to order provisional attachment. We do not think that the present case is a case in which such an order should be made. The Applicants have only a problematical case with respect to the increase of compensation. No grounds have been urged to show that the compensation awarded was so small that it could not have been awarded by a reasonable Judge. We think that that is the proper way in which to decide the matter. Some arguments should have been urged to show that the compensation which was awarded was unreasonable.

For these reasons the application is refused but without costs, as advocate for the Respondent does not apply for costs.

Delivered this 9th day of September, 1937.

*Senior Puisne Judge.*

CRIMINAL APPEAL No. 96/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Greene and Frumkin, JJ.

IN THE APPEAL OF:—

Reuben Scheinzwit. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Manslaughter — Evidence of motive not essential — CR. A. 43/33 — Eye-witness to crime not required under sec. 6 Evidence Ord.*

In dismissing an appeal from the judgment of the Court of Criminal Assize, sitting at Jerusalem (A. Jm. 20/3) dated July, 27, 1937:—

HELD: 1. Sec. 6 of the Evidence Ord. (before the amendment) does not require eye-witness evidence.

2. The prosecution need not prove motive in a case of homicide.

REFERRED TO: CR. A. 43/33 (P. P. 3.8.33).

ANNOTATIONS:

1. The judgment of the Court of Criminal Assize is reported in P. P. 12, 13 & 15.8.37. For other proceedings in this case see H. C. 33/37 (*ante*, p. 89) and CR. A. 96/37 (*ante*, pp. 493 & 495).

2. On corroboration generally see notes to CR. A. 105/43 (1943, A. L. R. 754).

3. *Cf.* CR. A. 9/44 (1944, A. L. R. 90) and CR. A. 140/43 (10, P. L. R. 605; 1944, A. L. R. 96) and the notes thereto in A. L. R. on the sufficiency of circumstantial evidence in criminal cases.

4. See note 1 in A. L. R. to CR. A. 26/44 (11, P. L. R. 87; 1944, A. L. R. 135) on the question of motive.

FOR APPELLANT: Abcarius.

FOR RESPONDENT: The Solicitor General — (Rose).

## JUDGMENT.

On the 27th July, 1937, before the Chief Justice sitting alone, the Appellant was convicted of the manslaughter of one Jacob Zwanger. The facts as found by the Chief Justice were as follows:—

On the 19th February 1936 the Appellant wrote a letter signed Bidderman inviting Zwanger to meet him near a hotel at Petah Tikva. There was no such person as Bidderman and the Chief Justice came to the conclusion that the Appellant wrote the letter to divert suspicion from himself and cast it upon the non-existent Bidderman, if necessity should arise. On the 8th March, 1937, the Appellant caused a pit to

be dug alongside a water tower at his property at Tel Nof. People living in the immediate vicinity were warned that the water tower had been electrified and to keep away from it. As a matter of fact, the tower had never been electrified. The Appellant took away the keys from the watchman and told him to go away.

2. On the 10th March, 1937, Zwanger met the Appellant by appointment at the Appellant's office at Tel Aviv. The Appellant's secretary was present and was sent out on a message. The Chief Justice found that the Apppellant sent her out in order to get her out of the way. On the 11th March, 1937, it was found that the pit near the water tower had been filled in. The pit was re-opened on the 28th March, 1937, and it was found the dead body of Zwanger. The medical evidence showed that in all probability the cause of death had been strangulation and that other wounds found on the body had been inflicted after death. A towel which had been in the Appellant's office was also found in the pit.

3. From these facts it is clear that the Chief Justice drew the following inferences: Firstly, that sometime prior to the 10th March the Appellant had made up his mind to kill Zwanger; that he made preparations to conceal the body and to prevent any outside persons from being in the vicinity at the time of the killing or the concealment; that he lured Zwanger on some pretext from his office to the water-tower at Tel-Nof on the morning of March 10th and put him to death there; that before leaving the office with Zwanger he took precautions to see that no one was about to see them leave together; and that after killing Zwanger he caused the body to be buried in the pit which had already been prepared for its reception.

4. These were, in my opinion, entirely justifiable inferences. Abcarius Bey, who argued the appeal on behalf of the Appellant, was at great pains to comb through the judgment of the Chief Justice in order to find some mistake in dealing with the evidence. He claims to have found one such mistake, namely, that the Chief Justice said there was evidence that the Appellant had at first denied all knowledge of the Bidderman letter, whereas no such evidence appears in the record. The importance of the Bidderman letter depended on the facts that the Appellant had written it and that there was no such person as Bidderman. Whether the Appellant at first denied or admitted having written it could not disturb the inference which the Chief Justice drew from it.

5. Abcarius Bey further contests the finding that the Appellant caused the pit to be dug alongside the tower. He bases his argument on a

meticulous comparison of times testified to by certain witnesses as to the events of March 8th. He says that this testimony shows that the Appellant could not have been present while the pit was being dug. I do not gather that the Chief Justice made any finding that the Appellant was present during the whole time that the pit was being dug; he found that the Appellant was responsible for its being dug before the 10th March.

6. Abcarius Bey next turned to the question of the *alibi* of the Appellant. The Appellant had called witnesses to prove that it was impossible that he had taken Zwanger to Tel-Nof on the morning of the 10th March. It is clear that the Chief Justice did not believe these witnesses. He analysed their evidence very carefully, and came to the conclusion that the only reliable evidence was that of one Litvinsky. His evidence showed that the Appellant might easily have taken Zwanger to Tel-Nof on the morning of March 10th and having put him to meet Litvinsky at the hour given by him. This ground of appeal is simply a complaint by Abcarius Bey that an *alibi* which was probably carefully prepared failed to deceive the Chief Justice.

7. The next ground of appeal was based on section 6 of the Evidence Ordinance, which reads as follows:—

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

The section is rather unhappily worded; as applied to criminal cases it simply means that no one shall be convicted on the evidence of one witness unless the number of witnesses is more than one. However this may be, Abcarius Bey cannot call it in aid to assist the Appellant. The Appellant has not been convicted on the evidence of one witness, the evidence against him consisted of the testimony of a number of witnesses, the joint effect of which was to lead to a strong presumption of the guilt of the Appellant I am completely against the suggestion of Abcarius Bey that the section means that there must be an eye-witness to the crime in every criminal case.

8. The last ground of appeal is that no motive was proved and Abcarius Bey cited as an authority the case of Joada & an. *v.* The Attorney General, Criminal Appeal No. 43 of 1933. The District Court of Jaffa had convicted two persons of the murder of one Shahin and had found evidence of motive. On appeal this Court held that the evidence did

not show enmity between the Accused and the deceased and held that in the absence of such evidence there was not sufficient evidence to support the conviction. I do not think that this Court meant to lay down the principle that motive must be proved in a case of murder. Any such principle would be bad law and I wish to make it clear in this decision that though evidence of motive may be of considerable weight, the prosecution is not bound to prove it in a case of homicide.

9. I think that this is a frivolous appeal. The Appellant had the advantage of a very careful trial and was given the benefit of every reasonable doubt. In my opinion the appeal should be dismissed and the conviction and sentence affirmed, the sentence to date from the date on which we announced the dismissal of the appeal, September 17th, 1937.

Deliverd this 8th day of October, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 119/35.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: McDonnel, C. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Ismail Khalil el Azzeh. APPELLANT.

v.

Halima bint Yahia Uthman Thalgi. RESPONDENT.

*Notarial notice — Breach of undertaking not to revoke power of attorney — Damages — C. A. 18/35.*

In allowing an appeal from the judgment of the District Court of Jaffa, (C. D. C. Ja. 83/35), dated April 28, 1935:—

HELD: No notarial notice is required as a condition precedent to suing for damages in respect of a breach of contract, when the breach consists in the revocation of a general power of attorney.

FOLLOWED: C. A. 18/35 (7, C. of J. 164).

ANNOTATIONS:

1. The Respondent had entrusted an advocate with a power of attorney to transfer certain lands to the Appellant, pursuant to an agreement to sell. She had undertaken, in the agreement, not to revoke the power of attorney on pain of damages. Notwithstanding the terms of the contract, the Respondent cancelled the power of attorney and the Appellant sued for damages. The Respondent

successfully contended before the District Court that damages could not be claimed as no notarial notice had been sent.

2. On notarial notices and when they may be dispensed with see notes to C. A. 126/42 (1942, S. C. J. 621); see also C. A. 90/43 (1943, A. L. R. 326) and notes.

FOR APPELLANT: Olshan.

RESPONDENT: Absent — served.

JUDGMENT.

On the authority of C. A. 18/35, the appeal is allowed and the judgment of the District Court is set aside and replaced by a judgment giving in addition to the repayment of the amount of £ 30 with interest from 7.2.35, date of action, £ 500 damages with costs to include LP. 2 advocate's fees.

Delivered this 3rd day of June, 1936.

*Chief Justice.*

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CIVIL APPEAL No. 141/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: McDonnel, C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Elazar Kantorovitz & 2 ors. — APPELLANTS.

v.

Shalom Yochanan Mizrahi. — RESPONDENT.

*Fees on appeal — Appeal from judgment on claim and counterclaim — Severability — C. A. 15/30, C. A. 101/34.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 16th June, 1935:—

HELD: The appeal had to be dismissed as the correct fees had not been paid in time. Nor could the appeal be severed so as to accept it as against the judgment on the claim and to dismiss it for non-payment of fees as against the judgment on the counterclaim.

FOLLOWED: C. A. 15/30 (1, P. L. R. 625; 3, C. of J. 910).

DISTINGUISHED: C. A. 101/34 (not reported on the point in issue).

ANNOTATIONS: See C. A. 34/44 (11, P. L. R. 133; 1944, A. L. R. 392).

FOR APPELLANTS: Siev.

FOR RESPONDENT: Mizrahi.

## JUDGMENT.

On the authority of C. A. No. 15/30, P. L. R. p. 625, the correct fees not having been paid within the prescribed time, the appeal must be dismissed. It is not possible to sever this appeal so as to say that while the fee on the appeal against the decision on both claims was not sufficient, nevertheless as there was a sufficient fee to cover an appeal from the decision on the claim, this can be proceeded with though the appeal on the decision on the counterclaim must be dismissed as there was no fee paid thereupon.

The case is on all points with C. A. 101/34 so far as the time of paying fees is concerned, but is distinguished from it as to severance inasmuch as there were two appeals filed at an interval of several days.

The appeal is, therefore, dismissed but inasmuch as the advocate for the Respondents cited no authority for his contention, which he should and could have done, we make no order for costs.

Delivered this 15th day of September, 1936.

*Chief Justice.*

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LAND APPEAL No. 87/34.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Yusef Salman el-Abed. — APPELLANT.

v.

Abd el Qader Yacoub Beidas. — RESPONDENT.

*Land settlement — Powers of L. S. O., L. S. Ord., sec.* 10(1) — *No jurisdiction to entertain claims under Mejelle* 906.

In allowing an appeal from the judgment of the Land Court of Jaffa, dated the 21st July, 1934: —

HELD: A Land Settlement Officer has no jurisdiction to entertain a claim under Art. 906 of the *Mejelle*.

ANNOTATIONS: See C. A. 338/44 (1945, A. L. R. 8) and note.

## JUDGMENT.

This is an appeal against a judgment of the Land Court of Jaffa

dated the 21st July, 1934, confirming a decision dated the 24th May, 1934, of the Settlement Officer, Jaffa Settlement Area.

By that decision, the Settlement Officer, in the first place, decided a boundary dispute in favour of the present Respondent, Abd el Qader Yacoub Beidas, and held that he was entitled to ownership of the land claimed by the present Appellant, Yusef Salman el-Abed.

With this question, this Court is not concerned.

The Settlement Officer, however, further dismissed a claim by the Appellant, presumably based upon Article 906 of the *Mejelle*, to acquire the land in dispute by purchase, on the ground that he had planted it believing in good faith that he was entitled thereto.

Against the confirmation by the Land Court of this portion of the Settlement Officer's decision, the Appellant is now appealing.

The first question arising is one of jurisdiction.

Under section 10(1) of the Land Settlement Ordinance, 1928, the Settlement Officer has power:—

> "To hear and decide any dispute with regard to the ownership or possession of land in a Settlement Area".

This power the Settlement Officer has already exercised in the earlier part of his decision with regard to the land in claim. What is now claimed by the Appellant is not a right of ownership or possession, but a right upon payment of a sum of money to be ascertained, to acquire ownership.

This is not a matter falling within the power conferred upon the Settlement Officer by section 10(1).

It follows that the appeal must be allowed and the judgment of the Land Court, in so far as it confirms the Settlement Officer's decision that the Appellant is not entitled to this right, must be set aside, and judgment entered setting aside the decision of the Settlement Officer in that respect on the ground that the claim was not within the Settlement Officer's jurisdiction.

As the claim was dealt with by the Settlement Officer at the instance of the Appellant, no order is made for payment of costs.

Delivered this 27th day of February, 1936.

*Senior Puisne Judge.*

CIVIL APPEAL No. 58/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: McDonnell, C. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Simon Agrest. APPELLANT.

v.

Abd el Qader Shibel & 2 ors. RESPONDENTS.

*Debt assignment — Debt arising out of a business (sec. 3(1)) — The notice in writing (sec. 2).*

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 31st December, 1934: —

HELD: To be valid, the notice of assignment under sec. 2 of the Debt (Assignment) Ordinance, must be given in writing.

JUDGMENT.

The matter depends upon the provisions of section 2 of the Assignment of Debts Ordinance 1928 inasmuch as this was a debt which arose out of business as contemplated in section 3(1) of that Ordinance.

Section 2(1) of the Ordinance requires express notice in writing of an assignment to be given to a debtor and section 2(2) prescribes that such notice may be served personally or by registered post without the necessity of a Notarial Notice.

In this case Ahmed Tabrizi informed the Appellant and not the debtor of the assignment: the reference relied on by the Appellant in para. 3 of the Respondent's reply to an acknowledgement by Ahmed to his associate which was wholly rejected by the Respondents does not necessarily imply an acknowledgement in writing, and in the absence of any evidence before the District Court of express notice in writing of the assignment having been given to the debtor, the District Court was right in coming to the conclusion to which it did.

The appeal is dismissed with costs to include LP. 2.— advocate's fees.

Delivered this 9th day of April, 1936.

*Chief Justice.*

LAND APPEAL No. 22/35.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Baker, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Batia Hinda Zalaznik & an. — APPELLANTS.

v.

Joseph Levy Hagiz. — RESPONDENT.

*Quasi mulk — Inheritance — Settlement excluding succession — Ratification by minors.*

In dismissing an appeal from a judgment of the Land Court of Jaffa, dated the 21st January, 1935: —

HELD: 1. Inheritance of *quasi mulk* follows the law relating to *mulk*.
2. A settlement made by or on behalf of minors becomes valid if they ratify it when coming of age.
3. A settlement of rights under a will is binding if made in Court and subsequently registered.

ANNOTATIONS:

1. On the first point see C. A. 288/43 (1944, A. L. R. 587) and note 4.
2. On the last point *cf.* H. C. 98/44 (1944, A. L. R. 540) and notes.

### JUDGMENT.

The Appellants (the original Plaintiffs) in this case are the grand-children of one Isaac Hagiz, deceased, and his wife Rebecca, deceased. Their mother, the daughter of the said Isaac and Rebecca, predeceased her parents. The Respondent (the original Defendant) is the son of the same Isaac and Rebecca. The dispute relates to land originally registered in the name of the deceased Isaac Hagiz and transferred into the name of the Respondent, as sole heir, by virtue of a Certificate of Inheritance issued by the *Sharia* Court in 1922. The Appellants claim that, as heirs of the late Isaac Hagiz, they are entitled to half of the property registered in his name and therefore ask that the registration in the name of the Respondent be set aside as regards one half. They further and alternatively rely on a will of their grand-father in which he bequeathed to them six *dunams* of the property in dispute.

The defence in the Court below was twofold:—

(1) that the Appellants, being foreigners, could not under the law then in force inherit immovable property from a person of Ottoman nationality; and

(2) as regards their right under the will, there was a binding settlement under which the Appellants received or were to receive money instead of the land.

The Court below was not satisfied that the Appellants were foreign nationals, but held that the settlement was binding, and consequently dismissed the claim of the Appellants to any share in the property of their grandfather. The Court, however, held that the settlement does not include such part of the property which was inherited by Rebecca upon the death of her husband Isaac and, as heirs of their grand-mother, the Appellants are entitled to a certain share and gave judgment accordingly.

Against this judgment both parties appeal.

On appeal the Respondent — Cross-Appellant — advanced a new line of defence, *i. e.* that the exclusion of the Appellants in the *Sharia* Court Certificate of Inheritance was not due to the fact that they were foreigners, but that under the Moslem Law of Inheritance relating to *mulk* land, applicable at that time to non-Moslems, the Law of representation did not apply and a grand-child could not inherit the estate of a grand-parent though a predeceased parent. As regards the category of land, the defence is that although the land is *miri,* it was prior to 1331 densely planted with trees and is therefore to be regarded as *mulk* land for all purposes of disposition by way of will and inheritance. We hold that the law on this point is clearly in favour of the Respondent and that the fact that the land was prior to 1331 and at the time of the death of the grand-parents an orange grove planted with trees is fully established by sufficient evidence.

The effect of this finding is not only that Appellants have no claim by way of inheritance from their grand-father, but that they have also no such claim from their grandmother who, like her husband, died subsequently to her daughter.

There remains therefore only to consider what rights, if any, the Appellants have under the will. The Court below, on this point, held that the settlement made in 1925 between the father of the Appellants when they were still minors and the Respondent, included a settlement as regards the land, and that this settlement was later ratified by act and deed of Appellants when they became of age. With this finding of fact, duly supported by evidence, we cannot interfere.

It has been argued that a settlement as regards rights to land under a will is not binding if made outside the Land Registry. With this argument, we cannot agree. Rights under a will become effective by

order of a competent Court followed by registration, and there is no reason why a renouncement (waiver) of any right in land under a will made by the beneficiary of such will prior to registration should not be binding on him.

It follows that the appeal must be dismissed, the cross-appeal allowed, and the action of the Plaintiff dismissed with costs here and below.

Delivered this 14th day of May, 1936.

*British Puisne Judge.*

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CIVIL APPEAL No. 193/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J. and Khayat, J.

IN THE APPEAL OF :—

Mahmoud Mustafa El Mamdour. APPELLANT.

v.

Abdullah Mahmoud Abdul Qader Ba'lousheh & an. RESPONDENTS.

*Land Court — Evidence of possession to support claim based on prescription — Effect of C. A. 80/37, Land Code, Art. 78.*

In allowing an appeal from the judgment of the Land Court of Jaffa, dated the 21st day of July, 1937, and in remitting the case to the lower Court:—

HELD: A Land Court should not refuse to hear oral evidence where the claim is not solely based on long possession.

DISTINGUISHED: C. A. 80/37 (*ante*, p. 141).

ANNOTATIONS: See note to C. A. 85/37 (*ante*, p. 132) and *cf.* C. A. 317/44 (1945, A. L. R. 264) and notes.

JUDGMENT.

*Manning, S. P. J.*: The Appellant brought an action in the Land Court of Jaffa claiming certain land from the Respondents. In his statement of claim he alleged that the Respondent Abdullah had sold him the land in 1919, that he paid the price for it, that a memorandum of the sale was drawn up and that he was let into possession. He further alleged that in 1933 the Respondents succeeded in effecting a fraudulent transfer of the land in the Land Registry in the name of the Respondent Abdullah and of an ancestor of the Respondent Hassan, and that on

the strength of the *kushan* thus obtained they got a judgment in the Magistrate's Court at Majdal for possession of the land.

2. In reply the Respondents pleaded a previous judgment of the Land Court establishing their title to the land. They did not specifically deny any of the allegations in the statement of claim.

3. The Land Court heard no evidence and no argument. It simply said "in view of judgment in Civil Appeal No. 80 of 1937 the claim must be dismissed with costs". All that was said by this Court in Civil Appeal No. 80 of 1937 was that there was a practice that the Land Court could not hear oral evidence of the fact of possession by a plaintiff in support of a claim of ownership by prescription. I find some difficulty in understanding this decision, as the only claim of ownership by prescription that can be preferred before a Land Court is under Article 78 of the Ottoman Land Code, and oral evidence of possession and cultivation must usually be the only evidence on which a claimant can rely. However that may be, the Appellant in the present case is not claiming ownership by prescription and the authority relied on by the Land Court cannot be applied to the circumstances of the case. The Appellant claims on the ground of purchase and alleges that the Respondents' *kushan* was obtained by fraud. His possession of the land between 1919 and 1935 is put forward to prove that there actually was a sale to him in 1919. The sale to him may have been invalid under the law as it then stood, but a question may arise as to whether he has any right to ownership in equity. It may be also that the Respondents' contention is correct and that these matters have already been decided in another action in the Land Court. None of the issues, however, have been dealt with by the Land Court in the present action and on the record as it stands they cannot be determined by this Court. The duty of the Land Court is "to hear the case and give a judgment". This case has not been heard, the Land Court misdirected itself in holding that, in view of the authority cited, the Appellant had not a cause of action. In my opinion the appeal should be allowed, the judgment of the Land Court should be set aside and there shrould be a new trial. The costs of this appeal will abide the event.

Delivered this 15th day of December, 1937.

*Senior Puisne Judge.*

*Khayat, J.*: I concur.

*Puisne Judge.*

LAND APPEAL No. 74/34.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Corrie, S. P. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Ali Khalil Jadallah Zaytoun. APPELLANT.

v.

Ibrahim Said El-Husseini & an. RESPONDENTS.

*Waqfs — Character of waqfs — S. T. 2/26 — Registrable interest in accretions on waqf lands — Omar Hilmi* § 276.

In allowing an appeal from the judgment of the Land Court of Jerusalem, dated the 2nd July, 1934, and in remitting the case to the Court below:—

HELD: The owner of *mulk* accretions on *Muqata'a waqf* has a registrable right in such accretions.

FOLLOWED: S. T. 2/26 (not reported).

ANNOTATIONS: *Cf.* 112/41 (1941, S. C. J. 515).

### JUDGMENT.

The Land Court has found that the land in suit forms part of the lands of the *Ikta'* of Tamim ed Dari.

Special Tribunal No. 2/26 decides that such lands are to be regarded as *waqf*, but does not determine the character of the *waqf*.

The question whether or not the Appellant has a registrable interest in the land depends on the category to which the *waqf* belongs.

It is laid down in Article 276 of Omar Hilmi Effendi's Laws of *Awqaf* that:—

> "The land of *Awqaf* let at *Muqata'a* rent is *waqf*, but the buildings on them or trees or vines are the pure *mulk* property of the person possessing them".

If such be the category of the land in suit, it is clear that the person possessing buildings, trees, or vines thereon has a registrable interest therein.

The evidence before the Court is not sufficient to enable it to determine the character of the *waqf*.

The judgment is, therefore, set aside and the case is remitted to the Land Court, to determine, after hearing the parties' evidence, the category to which the *waqf* belongs.

Delivered this 9th day of March, 1936.

*Senior Puisne Judge.*

CIVIL APPEAL No. 195/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Salameh Hammad Abu Khusah & 11 ors. APPELLANTS.

v.

Salameh Ahmad Abu Sweireh & 4 ors. RESPONDENTS.

*Title to land — Magistrates' Law, Art. 27 — Party disposed applying to Land Court to prove title — Oral evidence of possession — C. A. 80/37, Land Code, Arts. 20 & 78, Land Settlement Ord., sec. 51, L. A. 76/25, L. A. 13/34, L. A. 25/32, L. A. 56/35.*

In allowing an appeal from the judgment of the Land Court of Jaffa, dated July 21st, 1937, and in remitting the case to the Land Court:—

HELD: When neither party has a registered title and the Plaintiff does not rely on prescription, oral evidence of possession is admissible as part of the Plaintiff's case.

FOLLOWED: L. A. 13/34 (2, P. L. R. 352; 9, C. of J. 836).

REFERRED TO: L. A. 76/25 (1, P. L. R. 87; 4, C. of J. 1472); L. A. 25/32 (1, P. L. R. 766; 3, C. of J. 1097); L. A. 56/35 (not reported).

DISTINGUISHED: C. A. 80/37 (*ante*, p. 141).

ANNOTATIONS:

1. This case was followed, *e. g.*, in C. A. 238/37 (1938, 1 S. C. J. 32). See annotations to that case and *vide* the note to C. A. 85/37 (*ante*, p. 132).

2. Prescription valid as a defence only: See note 1 to C. A. 390/43 (1944, A. L. R. 415).

## JUDGMENT.

*Manning, S. P. J.*: This appeal arises out of a dispute as to the ownership of land. It began more than ten years ago when the Appellants were dispossessed by a judgment of the Magistrate's Court of Majdal. Article 27 of the Magistrates' Law reads as follows:—

> "A decision given in favour of the Plaintiff in an action for the recovery of possession does not imply that he is the owner. Consequently if the party who has been ordered to give up possession claims to be the owner of the immovable property in dispute the question will be decided as a separate action in accordance with the law by the competent Court".

In accordance with this Article the Appellants brought an action in the Land Court of Jaffa to establish their claim to ownership. Neither they nor the Respondents had a registered title or title deed. The Land Court heard evidence and inspected the land and gave judgment in favour of the Appellants. On appeal to this Court the Respondents succeeded in getting this judgment set aside and in having the case remitted to the Land Court on the ground that the evidence of certain witnesses for the Respondents had not been heard. In view of what I shall have to say hereafter it is of importance to note that one of the grounds of appeal was that oral evidence of possession could not be relied upon to prove ownership. It is clear that this Court did not regard this ground of appeal as having any weight; if it had, it would have allowed the appeal at once instead of remitting the action for further evidence.

2. The judgment of this Court was given in 1931. For some reason the Land Court did not deal with the remitted action until 1937. The Court then asked the Appellants what proofs they had to produce in support of their claim. They replied that they had proof of their possession and that the only documentary evidence was receipts for the payment of taxes. The Court apparently decided that it would be a waste of time to go into the merits of the dispute or hear any evidence. Relying on a recent decision of this Court, Lahhan *v.* Hamed and others, Civil Appeal No. 80 of 1937, the Land Court dismissed the Appellants' claim.

3. All that this Court said in the Lahhan case (*supra*) was that there was a "practice that the Court could not hear oral evidence of the fact of possession by a plaintiff in support of a claim of ownership by prescription". This did not apply to the facts of the present case. The Appellants were not claiming ownership by prescription. Under local law there are only two cases in which a person may claim ownership and registration on the ground of possession for a definite period, *viz.*: Article 78 of the Ottoman Land Code and section 51 of the Land (Settlement of Title) Ordinance. The Appellants were not relying on either of these provisions. Their case was: "We claim ownership of this land. To show that we own it we propose to prove that we, and only we, have always possessed it and cultivated it without deriving our right to do so from any other party, and that we have paid the taxes on it". They did not say that their possession gave them any right to the land; they adduced their possession merely as part of the evidence in support of their claim. That they were entitled to do so is clear from the previous decisions of this Court.

4. The authority most frequently cited in cases of this kind is a passage from the judgment of Corrie, Acting Chief Justice, in Inkeiri and another *v.* Zaider (Law Reports of Palestine, 1920—33, page 87). The Acting Chief Justice said:—

> "I hold that while it may be that, after ascertaining all the facts of the case, including those of possession, the Court may declare that a person who has had long undisturbed possession is entitled to registration as owner, there is no rule which entitles a plaintiff to judgment on proof of ten years' undisturbed possession. The provisions of Article 20 of the Land Code are only valid as a defence".

Article 20 of the Land Code provides for a period of limitation of ten years in actions for the recovery of *miri* land and of course is only available to a defendant in an action. Of itself it confers no title; the person in possession relies on the inability of others to eject him. But the Acting Chief Justice in the earlier part of the judgment said that possession is an element in the evidence Plaintiff may adduce. He makes the distinction quite clear between the fact that possession cannot create any title (apart from the provisions of the law to which I have already referred) and the fact that a plaintiff should be allowed to lead evidence of possession in support of his claim.

5. I have already said that in the present case neither party has a registered title or any document of title and therefore the case which ought to have been followed by the Court below is Issa and others *v.* Shehadeh and another (Land Appeal No. 13 of 1934). 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".

6. A case frequently referred to is Da'ibes *v.* Da'ibes and another (Law Reports of Palestine, p. 766). It is merely an authority for the obvious proposition that Article 20 of the Land Code does not create any prescriptive right to ownership of land. In this the Court professed to follow the Inkeiri case (*supra*) but took no notice of what Corrie, Acting Chief Justice, said as to evidence of possession being one of the matters to be considered by a Land Court in determining questions of ownership. The case cannot be cited, as it sometimes is, to justify the exclusion of evidence of possession in disputes as to the ownership of land.

7. My decision in the present appeal is based on the particular facts of the case, but I wish to refer to a passage from the judgment of this

Court in the case of Hajla and others *v.* Sayegh and others (Land Appeal No. 56 of 1935):—

> "In deciding an issue as to the title of a claimant to land a Court is bound to consider all relevant evidence placed before it, whether that evidence be oral or documentary. If oral evidence is admissible as to possession and boundaries, then such evidence has to be weighed in conjunction with the documentary evidence. A Court is at liberty to refuse to rely on it, but if it regards it as convincing it is not entitled to disregard it merely because it is oral".

8. In my 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 the Respondents may adduce in rebuttal, and to decide the dispute in accordance with the law. Costs of this appeal to include LP. 3. advocates' fees to abide the event.

Delivered this 15th day of December, 1937.

*Senior Puisne Judge.*

*Khaldi, J.*: I concur.

*Puisne Judge.*

*Abdul Hadi, J.*: I concur.

*Puisne Judge.*

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CIVIL APPEAL No. 191/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Sheikh Suleiman Taji Farouqi. APPELLANT.

v.

Michael Habib Raji Ayoub & 3 ors. RESPONDENTS.

FOR APPELLANT: B. Joseph.

FOR RESPONDENTS: Eliash.

JUDGMENT.

— — — — — — — — — —*

— — — — — — — — — — —

*Abdul Hadi, J.*: (*Translation*) 1. This appeal arose from the judg-

* The judgments delivered by Their Lordships Manning, S. P. J. and Khaldi, J., are reported *ante*, p. 464.

ment of the District Court of Jaffa given on the 7th June, 1937, whereby the Appellant was adjudged to pay to the Respondents the sum of LP. 2500 damages. The Respondents brought an action against the Appellant which is briefly as follows: That they on 12th November 1929 entered into a contract with the Appellant whereby they undertook to sell to him a plot of land on certain stipulated conditions. Each party undertook to carry out his obligations. It was also agreed that each party committing a breach of the whole or any of these undertakings will pay to the other party the sum of LP. 2500 damages. The Appellant, subsequent to the contract and on the 6th August 1930, wrote a letter to the Respondents whereby he agreed to the alteration of the date of transfer stipulated in the contract, and undertook to pay them up to the end of February, 1931, LP. 400 on account of the purchase price, and the other conditions of the contract remained in force. The Appellant committed two breaches, firstly, he did not pay the taxes which he had to pay, and secondly he did not pay the sum of LP. 400 which he undertook to pay in the letter and therefore he is liable to pay the sum of LP. 2500 which he undertook to pay in Clause 8 of the contract.

2. The District Court, Jaffa, on the 12th November, 1932, dismissed Respondents' action on the ground that there was no breach regarding the non-payment of taxes and that the undertaking contained in Clause 8 of the contract for the payment of damages in case of a breach of the provisions of the contract did not apply to the Appellant's undertaking contained in the letter for the payment of LP. 400.

3. The Respondents appealed from the judgment of the District Court dismissing their claim to the Court of Appeal. This Court on the 5th August, 1933, set aside the judgment of the District Court and gave judgment against the Appellant for the sum of LP. 2500 on the ground that the words of the letter "with the understanding that the remaining stipulations of the contract remained in force" meant that failure to fulfil his obligations under the letter was to render him liable to pay the sum of LP. 2500 claimed under Clause 8 of the contract.

4. The Appellant then appealed from the judgment of the Court of appeal to the Judicial Committee of the Privy Council. The Judicial Committee, having dealt fully with the facts and disputes, remitted the case to the District Court to determine two specified points to make it possible for a decision to be arrived at. Their Lordships also stated: that the Courts in Palestine having been given by the Palestine Order-in-Council a wide jurisdiction in the laws, procedure and different remedies available in England under the Common Law and Principles of

Equity, when dealing with this case will no doubt bear in mind the powers which are vested in them under Article 46 of the Palestine Order-in-Council subject to the provisions of the Ottoman Law, the Palestine Order-in-Council, the Ordinances in force; to exercise their jurisdiction in conformity with the substance of the common law, and the doctrines of equity and with the powers vested in the Courts of Justice and the Justices of the Peace in England, among other things the well-established distinction between a penalty and liquidated damages.

5. The District Court of Jaffa dealt with the case again. On the 17th June, 1937, it gave judgment against the Defendant, the present Appellant, for the sum of LP. 2500 provided for by the parties in Clause 8 of the contract.

6. The judgment debtor then appealed to this Court from this last judgment of the District Court of Jaffa which is the present appeal with which we are concerned.

7. To facilitate dealing with this appeal, I think it convenient to quote here the provisions of Articles 111 and 112 of the Ottoman Code of Civil Procedure as translated by me into Arabic from the Turkish original bearing in mind the words used:—

> "111. In the event where it is pointed out and provided in the contract by the other party that where any of the parties cannot carry out what he undertook, he pays a fixed amount as damages, payment of greater or less than that is not allowed.
>
> 112. Interest at one per cent per month is awarded in respect of the capital amount only as damages for any delay in the carrying out of the undertakings which amount to payment of money. Judgment is entered in respect of this interest without the creditor being bound to prove that he suffered any damage. In the event of no agreement as to interest in a document of debt, and interest is claimed in respect of that claim in the notice, it is necessary that it should be calculated from the date of the notice, otherwise from the date of the filing of the application.

8. After considering Article 112 I believe that it does not apply to this case and I am of the opinion that it is restricted to the damages payable for the delay in payment of a sum of money arising out of a document of debt or any contract or other transaction where payment of money is due on an ordinary debt. It does not apply to the payment of a certain sum of money which is one of the provisions of a bilateral contract containing reciprocal undertakings to carry out a specified object as the contract in this case by virtue of which no claim could be made for the payment of LP. 400 which he undertook to pay on account of the purchase price. This view is strengthened by the words "capital amount, document of debt, claim" in this Article.

9. There is a further point which was discussed and referred to by

the Judicial Committee, namely that Article 111 of the Code of Civil Procedure does not apply except where the non-performance is non-performance of the whole of the contract or substantially the whole contract. I do not agree with this construction which cannot be justified by the provisions of the Article. I am of the opinion that no strict and general rule could be laid as to the question as to whether or not Article 111 applies to a case of a non-performance of one or more of the undertakings of a contract, as it varies according to the terms of the contract itself and the intention of the parties. In this particular case the Appellant undertook in Clause 8 of the contract to pay the sum of LP. 2500 in case of a breach of any or all his undertakings. This undertaking makes him, as a result of the non-payment of LP. 400 on account of the purchase price, liable as this undertaking is part of his undertakings and is connected with the subject matter of the contract, namely the sale.

10. Article 111 and the Articles preceding it in Chapter V of the Code of Civil Procedure, which are all the provisions of that code regarding what results from non-performance of contracts, only deal with "damages" and do not deal with "penalties".

11. The absence in these Articles (106 to 112) of any provision regarding penalties, and there being no other law allowing the Courts to award penalties in case of a breach, gives power to the Courts to consider it and differentiate it from liquidated damages in conformity with the principles of English law in accordance with the power given by Article 46 of the Palestine Order-in-Council as long as these principles do not conflict with the said Articles of the Code of Civil Procedure nor with any other law now in force in Palestine. Article 111 provides that the Court should not award more or less than the damages. I see no circumstances which do not allow the application of this principle in Palestine.

12. The Courts in Palestine, in the past, awarded the amount of damages stipulated in case of a breach of contract, no matter what the amount was. That was done under Article 111 without differentiating between it and a penalty. This does not, however, prohibit the Courts from applying this principle in this case as long as Article 46 of the Palestine Order-in-Council allows it.

13. When we compare the amount of the LP. 400 which the Appellant undertook to pay on account of the purchase price with the sum of LP. 2500 which he undertook to pay if he commits a breach of the whole or part of his obligations, we find that, in accordance with the principles of English law as stated in the judgment of my learned

brother the Senior Puisne Judge, the sum of LP. 2500 is a penalty and not liquidated damages as termed by the parties.

14. As long as the sum of LP. 2500 stipulated is a penalty and not liquidated damages, the District Court erred in awarding it. In the circumstances it is necessary to ascertain the actual loss caused to the Respondents by the breach of the Appellant. As the question of assessing the actual loss is a question for the Court of trial, I am of the opinion that the judgment should be set aside and the case remitted to the said Court. The Respondents are to pay the costs of this appeal with LP. 15 advocate's fees.

Delivered this 25th day of November, 1937.

*Puisne Judge.*

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CIVIL APPEAL No. 204/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Greene and Khayat, JJ.

IN THE APPEAL OF:—

Abraham Gudal. APPELLANT.

v.

Giza Bernfeld. RESPONDENT.

*Prescription — Computation of time, C. A. 112/31, Lunar and calendar years, Mejelle, Art. 1660 — Land Law (Amend.) Ord., sec. 7 — Delivery — Admissions — Expense for administering oath abroad — Joint liability, Mejelle 1113.*

In partly allowing an appeal from the judgment of the District Court of Jerusalem:—

HELD: 1. In determining the period of limitation in an action on a document, lunar or calendar years are taken into account depending on the mode in which the date was expressed between the parties on the document.

2. In the absence of any provisions (in the Ottoman Procedure Code) as to who should bear the expense of hearing a person's evidence abroad, the party applying for that evidence should bear the expense.

3. In the absence of a specific undertaking to be jointly and severally liable, joint purchasers are proportionately liable under Art. 1113 of the *Mejelle*.

FOLLOWED: C. A. 112/31 (1, P. L. R. 674; 1, C. of J. 281).

ANNOTATIONS:

1. C. A. 112/31 (*supra*) and this case have been followed in H. C. 2/41 (1941, S. C. J. 112); see also C. A. 23/39 (1939, S. C. J. 171), followed in C. A. 119/42 (1942, S. C. J. 755).

2. On the second point *cf.* C. A. 190/44 (1945, A. L. R. 250).

FOR APPELLANT: A. Levin.

FOR RESPONDENT: King.

## JUDGMENT.

*Manning, S. P. J.*: 1. On May 21st, 1937, the District Court of Jerusalem gave judgment against the Appellant for LE. 1800, the price of a garage, motor cars *etc.* sold to him on July 1st, 1921. The Appellant has appealed and the first ground of appeal put forward by Mr. Levin on his behalf is that the action was barred by limitation. The action was instituted on the 21st June 1936, and the period of limitation is 15 years. If years are reckoned according to the Gregorian calendar the action is in time, if the period is reckoned in lunar years, it comes to 15 years 4 months. In the translation of the memorandum of sale which was before the Court below and to which no objection was taken by the Appellant, the agreement is dated 1st July, 1921. In the case of Sabbagh *v.* Strahilevitz, reported on page 674 of the Law Reports of Palestine, 1920—33, this Court held that where a document bears a date according to the Gregorian calendar, the period of limitation must be calculated in Gregorian and not in lunar years. Mr. Levin has urged us to hold that this case was wrongly decided as its correctness would lead to the curious position that the period of limitation of actions is a fluctuating one depending on the mode in which a date is expressed in a document, whenever an action is founded on an instrument in writing. The position is certainly a curious one, but I am informed by my brethren of the Supreme Court who were here before the Occupation that the same position existed in Turkish times as regards actions other than these relating to immovable property. They say that "years" in Article 1660 of the *Mejelle* might mean either lunar years or Gregorian years — if the action was founded on a document and that document bore a Gregorian date, then years in the Article must be interpreted to mean Gregorian years. This being so, it cannot be urged that the Sabbagh case was incorrectly decided.

2. Mr. Levin made another attempt to convince us that he was right by referring to section 7 of Cap. 78 (Vol. II, Laws of Palestine, page 850) which is as follows:—

> "In every provision of the Ottoman Land Code and any other Ottoman law concerning immovable property in Palestine fixing the period within which any action may be heard or any right may be exercised, the terms 'month' and 'year' shall be deemed to refer to a calendar month or year respectively according to the Gregorian calendar".

Mr. Levin's argument is that the section shows that "year" in Palestinian Law must have always meant "lunar year"; and that the section has altered this, but only with regard to immovable property. This argument ignores the distinction to which I have referred between actions relating to immovable property and other actions; in the former year always meant lunar year, but in the latter either a lunar or a calendar year. Section 7 of Cap. 78 was enacted to change the law with respect to immovable property, but it left the previous law untouched as regards other actions, and that law is as I have already set out. The first ground of appeal must fail.

3. Mr. Levin's second ground of appeal was that the Appellant denied having received the property sold and that the Respondent should have been called on to prove delivery. The memorandum of sale shows that the property passed into the possession of the Appellant and one Tauber on July 1st, 1921, and the Appellant admitted in Court that the property was left in the hands of Tauber. The sale having been to the Appellant and Tauber, a receipt by either of them of the property was sufficient to constitute a delivery. This ground of appeal must fail.

4. The third ground of appeal relates to the procedure adopted by the Court. The Court was satisfied that there had been an admission by the Appellant as to the receipt of the property sold. The Appellant then asked that the Respondent should be required to take the oath. The Respondent happened to be in Vienna so the Court ordered that the Defendant should deposit LP. 5.— to cover expenses, and adjourned the hearing *sine die*. This was on the 19th March, 1937. The next hearing was on the 21st May, 1937. The Appellant then said he had not been able to get LP. 5, he suggested that he had got an advocate to appear for him and asked for an adjournment. The Court refused to grant any further adjournment and proceeded to give judgment for the Respondent.

5. Mr. Levin says the Appellant should not have been asked to pay the expenses of administering the oath and refers to Article 42 of the Addendum to the Code of Civil Procedure, which makes no provision as to payment of such expenses by either party. My opinion is that, no provision having been made, the expenses should be paid by the

party who made the application, that is the Appellant. Mr. Levin said the Court could have given judgment for the Respondent, dependent on her taking the oath. This may be so, but the Appellant did not apply for this to be done. This ground of appeal fails.

6. Mr. Levin's last ground of appeal is that there was nothing to show that the Appellant and Tauber were jointly and severally liable and that therefore judgment should have been given against the Appellant for half the amount only. He relies on Article 1113 of the *Mejelle* which reads as follows:—

> "If someone sell a property to two persons, he claims his share separately from each of them, so far as the buyers are not sureties the one for the other, he cannot claim the debt of the one from the other".

There is nothing in the memorandum of sale to indicate that the Appellant and Tauber were sureties for each other and therefore I think that Mr. Levin is right.

7. The judgment of the District Court must be set aside and a judgment be substituted for the Respondent for LE. 900 (nine hundred Egyptian pounds) and costs as allowed in the Court below, with interest at 9% from date of action. Each party will pay his and her own costs of this appeal.

Delivered this 19th day of November, 1937.

*Senior Puisne Judge.*

*Greene, J.*: I concur.

*Khayat, J.*: I concur.

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CIVIL APPEAL No. 141/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Jamal Abdul Hadi El Kasem. APPELLANT.

v.

Subhi El Ayyoubi. RESPONDENT.

*Land registers — Rectification — L. S. Ord., sec. 66 — Omission of right in register.*

In allowing an appeal from the judgment of the Land Court of Nablus:—

HELD: A purchaser cannot invoke sec. 66 of the Land (Settlement of Title) Ord. and apply for rectification of the register in respect of an entry made in Settlement and of which he had notice at the time of purchase.

ANNOTATIONS: On sec. 66 of the Land (S. of T.) Ordinance see note 3 to C. A. 106/43 (1943, A. L. R. 188); *cf.* also C. A. 409/43 (1944, A. L. R. 700).

APPELLANT: In person.

FOR RESPONDENT: Goitein.

## JUDGMENT.

*Trusted, C. J.*: This appeal involves the consideration of section 66 of the Land (Settlement of Title) Ordinance, Cap. 80, and raises a point of considerable importance.

The object of that ordinance is to provide for the settlement of title to land and the registration of title, and Settlement Officers are given express powers.

The method provided is shortly that a schedule of claims is prepared, which after investigation is followed by a schedule of rights, which may be revised by the Settlement Officer, and provisions are made for appeals from the decisions of Settlement Officers.

Section 66 provides:—

> "After the completion of the settlement, rectification of the register may be ordered by the Land Court, subject to the law as to limitation of actions, either by annulling the registration, or in such other manner as the Court thinks fit, where the Court is satisfied that the registration of any person in respect of any right to land has been obtained by fraud or that a right recorded in the existing registers has been omitted or incorrectly set out in the register:—
>
> Provided that, where a person has since the settlement acquired land in good faith and for value from a registered owner, the Court shall not order a rectification of the register".

We are concerned only with the latter part of the first paragraph, *i. e.* "that a right recorded in the existing registers has been omitted or incorrectly set out in the register". I do not think that this provision has any application when the right recorded in the existing register has been varied by the Settlement Officers or the Courts on appeal from a Settlement Officer, under the provision of the Ordinance.

In order to prevent the complications which might arise, while settlement is in progress no voluntary transfer can be effected without the authority of the Settlement Officer. Where such a transfer is authorised the transferee, as from the date of the transfer, must stand in the shoes of the transferor. If the transfer take place in time for him to do so he may object to the schedule of rights, if the transfer take place

when it is too late to object, he must take the land as it appears in the schedule of rights.

From the judgment in this case it seems that on 22.6.34 the schedule of rights showed the land in question as disputed and subject to a right of way, and that the Plaintiff in the action (now Respondent) bought the land on 7.11.35.

It is clear, therefore, that the Plaintiff in the Court below (now Respondent) bought after the publication of the schedule of rights and when presumably there was an incumbrance on the register.

The Plaintiff (Respondent) sought to invoke the provision of section 66 to which I have referred, but I do not think that in the circumstances it applies.

In my opinion the action was misconceived, and this appeal should be allowed, and the judgment of the Land Court set aside with costs.

Delivered this 25th day of October, 1937.

*Chief Justice.*

*Abdul Hadi, J.*: I concur.

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LAND APPEAL No. 37/36.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFRE: Manning, S. P. J., Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Sol Gorfinkel & an. — APPELLANTS.

v.

Eliezer Feinstein & 3 ors. — RESPONDENTS.

*Land Courts — Highways — L. S. Ord., sec. 66, O. C. C. P., Arts. 23, 113.*

In dismissing an appeal from the judgment of the Land Court of Jaffa:—

HELD: A claim for the assertion of a public right over a highway is within the jurisdiction of the Land Court.

ANNOTATIONS: *Cf.* L. A. 52/36 (*ante*, p. 489) and C. A. 48/37 (*ante*, p. 491). See also note 3 to C. A. 279/42 (1943, A. L. R. 89).

FOR APPELLANTS: Ben Shemesh.

FOR RESPONDENTS: Turtledove.

JUDGMENT.

The facts in this action are that there was a decision of a Land Settlement Officer declaring certain land to be a public highway. The Appellants disregarded this declaration and the Respondents took this action in a Land Court to assert the public right. The Appellants object that there was a dispute as to rights in or over the land and that the Land Court had jurisdiction.

The Appellants had a second ground of appeal. They had applied under sec. 66 of the Land Settlement Ordinance for rectification of the Register and they now urge that the present action should not have been decided till that application had been dealt with. They call in aid Articles 23 and 113 of the Code of Civil Procedure, but we do not think either of them apply to the facts.

The appeal is dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 26th day of April, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 132/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Khayat, JJ.

IN THE APPEAL OF:—

Shlomo Cohen-Zedek. APPELLANT.

v.

David Belozerkovsky. RESPONDENT.

*Damages — Building contract — Daily penalty — Waiver of breach by occupation.*

In dismissing an appeal and cross appeal from the judgment of the District Court of Jaffa, sitting at Tel-Aviv:—

HELD: The Appellant having entered into occupation of the building was held to have waived damages for delay in completion.

ANNOTATIONS: *Cf.* C. A. 22/37 (*ante*, p. 168) and C. A. 88/43 (1943, A. L. R. 343).

FOR APPELLANT: Wittkowski.

FOR RESPONDENT: L. Hofmann.

## JUDGMENT.

This is an appeal which comes to this Court from the District Court of Jaffa, sitting at Tel-Aviv, arising out of a building contract; the material clause with which we are primarily concerned is found in an additional contract entered into whereby it was agreed as follows:—

> "Mr. Belozerkovsky hereby undertakes to complete the building not later than on the 1st March, 1936, (apart from small usual repairs) and in the event that he shall fail to complete the building within the time fixed, Mr. Belozerkovsky shall pay to Mr. Cohen-Zedek the sum of LP. 5 in respect of each day of delay as agreed and liquidated damages ....."

It seems that the building was not completed within the stipulated time and the matter went on that point and others before the District Court. The Court found as a fact that the contractor did not finish the building on the 1st of March, 1936. It seems also, although the building was not entirely completed, the owner entered into occupation after a certain number of days' delay, and the Court below held that by doing so he waived his right to damages. It must be a matter of common sense that if a contract such as this provides for damages at so much a day, the owner cannot both occupy the building and have the damages. The District Court was perfectly justified in drawing the inference that by taking delivery the Appellant waived his right to damages.

The Respondent contends that no damages should be paid at all because it was the fault of the owner. Presumably these matters were before the District Court which drew the inference that the Respondent is liable for a certain number of days delay in damages. With this finding we do not interfere.

As to the question of figures, this also was a matter for the District Court.

The result will be that the appeal and cross-appeal will both be dismissed, with no costs to either side.

Delivered this 21st day of October, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 104/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Copland and Frumkin, JJ.

IN THE APPEAL OF:—

Faivel Landmann & an. APPELLANTS.

v.

Pinchas Kivilis. RESPONDENT.

*Breach of contract — Material non disclosure — Waiver by occupation.*

In dismissing an appeal from the judgment of the District Court of Jaffa sitting at Tel-Aviv, dated the 14th April, 1937:—

1. A purchaser is entitled to refuse to complete upon learning that the property is subject to a demolition order.

2. Occupation until disclaimer need not constitute waiver of the breach.

ANNOTATIONS:

1. On the first point see C. A. 95/39 (1939, S. C. J. 531).
2. See, on the second point, C. A. 132/37 (*ante*, p. 524) and note thereto.

JUDGMENT.

The Appellants agreed to sell certain property to the Respondent but at the time of the agreement they failed to disclose that part of the property was subject to a demolition order. The Respondent declined, and, in our opinion, with justification, to complete, and sued for damages for breach. The District Court gave judgment in his favour.

On Appeal, the only important point urged was that the Respondent had availed himself of a certain provision in the agreement which allowed him to occupy rent-free part of the property. He continued this occupation after action brought and the Appellants argued that this was a waiver of the breach. We do not agree. The Respondent's conduct all through showed that he did not waive the breach.

The appeal is dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 22nd day of July, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 107/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Hamid Ya'coub. APPELLANT.

v.

Labibeh Daoud Himmu. RESPONDENT.

*Breach of contract — Failure to comply in absence of request.*

In dismissing an appeal from the judgment of the District Court of Jaffa dated 22nd April, 1937.

HELD : In the absence of a request by the purchaser, the vendor's failure to comply with certain undertakings held not to constitute breach of contract

## JUDGMENT.

1. This is an appeal from the judgment of the District Court of Jaffa. The points in this appeal are as follows:—

2. First that Respondent failed to certify the map filed in the Land Registry.

3. Secondly that Respondent failed to pay the taxes due on the land.

4. Thirdly that Respondent's attorney refused to submit his power of attorney in the Land Registry.

5. The Appellant never called upon the Respondent formally to remedy the defects of which he now complains. The failure to effect transfer is therefore due entirely to his own negligence.

6. In our opinion the judgment of the District Court is correct and we adopt it. The appeal must be dismissed with costs to include LP. 3 advocate's fees.

Delivered this 19th day of July, 1937.

*British Puisne Judge.*

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CIVIL APPEAL No. 117/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Greene and Frumkin, JJ.

IN THE APPEAL OF:—

Itzchak Yosef Rottermund. APPELLANT.

v.

Efraim Safrai. RESPONDENT.

*Injunction — Right of way — Jurisdiction of Courts.*

In allowing an appeal from the judgment of the District Court of Jaffa:—

HELD : In the absence of a dispute as to the evry right, the District Court has jurisdiction to grant an injunction restraining interference with a right of way.

ANNOTATIONS: *Cf.* L. A. 37/36 (*ante*, p. 523) and cases quoted in the note thereto; see also C. A. 217/45 (1946, A. L. R. 40).

FOR APPELLANT: Brevdo.

RESPONDENT: In person.

## JUDGMENT.

The Appellant brought an action in the District Court of Jaffa for an injunction to restrain the Respondent from interfering with a right of way. The District Court held that it had no jurisdiction because there was a dispute as to the existence of a right of way and its extent.

We think the District Court was wrong. It has been freely admitted here by the Respondent that there is no dispute as to the existence of a right of way. As far as the extent is concerned, the documents disclose a right of way on foot, and it was within the jurisdiction of the District Court to decide whether the right was being interfered with so as to justify the issue of an injunction.

In the circumstances we see no necessity to remit the case. The dispute can be settled by an order declaring that the extent of the right of way in width is to be one metre and a further order prohibiting the Respondent or his servants or agents from interfering with the said right of way.

The judgment of the District Court is set aside and for it an order substituted as above.

Each party will pay his own costs.

Delivered this 15th day of July, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 111/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Muhammad Suleiman Miqdad. APPELLANT.

v.

Hassan Suleiman Miqdad. RESPONDENT.

*Land Settlement — L. S. Ord. sec. 66 — Fraud not specifically alleged.*

In allowing an appeal from the judgment of the Land Court of Jaffa, dated the 3rd May, 1937:—

HELD: Appellant held entitled to establish fraud as that point was substantially, though not specifically alleged.

ANNOTATIONS:

1. *Cf.* C. A. 321/43 (1944, A. L. R. 489) and note 1 thereto.

2. On sec. 66 of the Land (S. of T.) Ord. see C. A. 141/37 (*ante*, p. 521) and note.

## JUDGMENT.

In this case the Land Court at Jaffa dismissed the Appellant's case on the ground that fraud not having been alleged, the registration ordered by a Land Settlement Officer could not be set aside.

We are of opinion that what the Appellant alleged was substantially a case of fraud. We, therefore, set aside the order of the Land Court and remit the case to it for a new trial in accordance with the provisions of Section 66 of the Land (Settlement of Title) Ordinance.

Costs to abide the event.

Delivered this 21st day of July, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 114/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Hassan Abdullah Abu Dheisheh. APPELLANT.

v.

Abdulla Yousef Abdullah Abu Dheisheh. RESPONDENT.

*Land Settlement — L. S. Ord. sec. 66 — Fraud not specifically alleged.*

ANNOTATIONS: See C. A. 111/37 (*supra*) and notes.

JUDGMENT.

The Appellant sought in the Land Court of Jaffa, to have the registration of certain land rectified under Section 66 of the Land (Settlement of Title) Ordinance. He alleged that the land was the joint property of himself and his brother and that when he went away he entrusted his share to his brother. The brother died, and sometime afterwards his son, the present Respondent, had the whole land registered in his name.

We consider that this was an allegation of fraud and that it was not necessary to mention the word "fraud" expressly in the Statement of Claim.

We think the Land Court erred in holding that fraud was not alleged in the Statement of Claim.

For these reasons we order that the judgment of the Land Court be set aside and that the case be remitted to it for a new trial.

Costs to abide the event.

Delivered this 26th day of July, 1937.

*Senior Puisne Judge.*

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HIGH COURT No. 64/35.

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

BEFORE: Corrie, S. P .J. and Khayat, J.

IN THE APPLICATION OF :—

Eliasha Levin. PETITIONER.

v.

Local Council of Rishon-le-Zion & 2 ors. RESPONDENTS.

*Election petition — Local Councils — Delay, H. C. 57/32 — Reasons for objection to names on the list, Schedule to Local Council (Rishon-Le-Zion) Order, sec. 4(2) — Poll-tax, secs. 5(d) and 7, construction, approval by District Commissioner — Tax "due" before approval of budget, sec. 1(c) of Schedule.*

In making absolute an order *nisi* calling upon Respondents 1 & 2 to show cause why the names of ten specified persons should not be excluded from the Register of Voters for the election of the Local Council of Rishon Le Zion and that Respondent 3 be ordered to delay the elections until final order of the Court:—

HELD: 1. (Distinguishing H. C. 57/32). An election petition will not be rejected on the ground of delay when a previous order restraining the Returning Officer has already been made.

2. The grounds of objection to the inclusion or certain names on the list of voters need not be communicated to the Committee.

3. There was nothing in the budget to suggest that poll-tax could be levied on non-voters.

4. The consent of the District Commissioner under sec. 7 of the Order should be express.

5. A payment of rates and taxes made before the approval of the budget is not due to the Council within the meaning of sec. 1(e) of the Schedule of Regulations as the Council could not legally recover such rates and taxes. The payment cannot therefore be taken into account in determining the qualifications of electors.

FOLLOWED: H. C. 23/35 (2, P. L. R. 280).

DISTINGUISHED: H. C. 57/32 (3, C. of J. 1000).

ANNOTATIONS:

1. For authorities on election petitions see note 2 to H. C. 116/44 (1944, A. L. R. 768).

2. On local council rates *cf.* C. A. 106/42 (1942, S. C. J. 458) and note 2; see also C. A. 49/44 ( 1945, A. L. R. 79).

FOR PETITIONER: Goitein.

FOR RESPONDENTS: Krongold.

## JUDGMENT.

This is a return to an order made by this Court on the 28th June, 1935, calling upon the Respondent, the Electoral Committee of Rishon-le-Zion, to show cause why the names of Yehuda Goldberg and nine other persons therein named should not be excluded from the Register of voters for the forthcoming election of members of the Local Council of Rishon-le-Zion: and ordering the Respondent, the Returning Officer, not to proceed with the elections pending the hearing of this petition.

The first point taken by the Electoral Committee in reply is that the Petitioner is too late in presenting his petition.

In raising this objection, the Committee rely upon the judgment of this Court in H. C. 57/32, *ex parte* Hassid, which was in the following terms:—

> "The application is on a matter of fact which it is possible might have been listened to by us if the Petitioner had taken the necessary steps within a reasonable time. He applied to the Electoral Committee on June 30th, the last possible day. They replied on the 3rd July and the Petitioner lodged his affidavit on July 15th and he comes within two days of the election day and asks for an in-

> junction. A rule *nisi* without an injunction would be worthless to Petitioner. In the circumstances of the Petitioner's delays we decline to grant an injunction and for this reason we must dismiss the petition".

We do not think, however, that the decision in that case is applicable to the present petition. In *ex parte* Hassid no injunction had been made and the Court was not prepared, having regard to all the circumstances, to grant an injunction. In the present case, an order restraining the Returning Officer from proceeding has already been made.

Such being the fact, a consideration by this Court of the merits of the petition does not involve any additional delay in the procedure of election of the new Local Council: and this objection fails.

The Respondent Committee further argue that the Petitioner's grounds of objection to the inclusion of these ten names in the list of voters were not sufficiently disclosed in his application to the Committee.

The matter is governed by sec. 4(2) of the Schedule to the Order published on the 1ts December, 1930, in Palestine *Gazette* No. 272, page 943: that subsection, while requiring that the objection shall be lodged in writing, does not require that the ground of objection shall also be communicated in writing: and we see no reason for so holding.

The next point taken by the Respondent Committee relates to the poll-tax.

The Committee argue that the poll-tax due is not levied under sec. 5(d) of the order of the 2nd June, 1922, but is levied under sec. 7 of that order: the approval of the District Commissioner being signified by the fact that he approved of the budget in which this item was included.

We are disposed to think that the approval of the District Commissioner under sec. 7 must be express: as, if the Committee's interpretation of sec. 7 is the right one, sec. 5 appears to be surplusage. But, however that may be, we are satisfied that the District Commissioner never did in fact approve of the levying of a poll-tax otherwise than under sec. 5(d). The budget submitted to him contains only the words "Poll-tax": and "do. arrears": there is nothing to suggest that it is to be levied upon persons other than those who are otherwise entitled to vote: and the smallness of the yield for the year 1932—33, LP. 79, and the estimated yield for 1933—34, LP. 300, would seem inconsistent with an intention to levy the tax upon every inhabitant.

We hold, therefore, that no approval has ever been given by the District Commissioner of the imposition of any poll-tax other than under sec. 5(d) of the order: and so far as that tax is concerned, the

petition is governed by the judgment of this Court in H. C. 23/35, *ex parte* Brandstetter.

The next question arising is in relation to payments made since the commencement of the current financial year on 1st April, and before the 17th April, the date of the appointment of the Electoral Committee.

It is admitted by the Respondent Committee that the budget for the current year, which was framed after the 17th April, has not yet received the approval of the District Commissioner. Such being the case, it is clear that rates and taxes for the current year are not legally recoverable: that is to say, that a payment already made in respect of the current year by any person is not a payment of a sum "due from him to the Council", as required by sec. 1(e) of the Schedule of regulations for conducting elections.

It follows that such payments cannot be taken into account in determining the amount paid by such person during the twelve months preceding the appointment of the Electoral Committee.

The Respondent Committee has also raised a question with regard to the Education Rate. It is admitted, however, that the amount of such rate is insufficient to affect the judgment of this Court in the present case: and we therefore give no decision on the question raised.

The Petitioner, therefore, succeeds.

It is ordered that the names of:

Yehuda Goldberg, Shraga Ernik, Sima Glosman, Zvi Goldhand, Sara Glezer, Rachel Goland, Bilha Bronstein, Hita Elgiser, Elke Braun, and Homa Belgloi be excluded from the register of voters for the forthcoming election of members of the Local Council of Rishon-le-Zion.

The costs of this petition, including LP. 5.— advocate's fees, are to be paid by the Electoral Committee.

Given this 3rd day of January, 1936.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 150/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Nimer Jum'a el Bursan & an. APPELLANTS.

v.

Mohammad Abu Jreiban & an. on their own behalf and on behalf of the Sa'adneh el Shol'aleh el Jibarat Tribe. RESPONDENTS.

*Evidence on Commission — Rule 5 — Opportunity to cross-examine — Record.*

In allowing an appeal from the judgment of the Land Court of Beersheba, dated the 21th day of July, 1937:—

HELD: The parties should be given an opportunity to cross-examine an expert appointed under R. 5 of the Evidence on Commission Rules, save for special reasons to be recorded by the Court in a special ruling.

ANNOTATIONS: *Cf.* C. A. 35/37 (*ante*, p. 356), C. A. 166/43 (1944, A. L. R. 141), C .A. 393/43 (*ibid.*, p. 529) and C. A. 217/45 (1946, A. L. R. 40).

Note that the Evidence on Commission Rules have been repealed by the Civil Procedure Rules, 1938.

FOR APPELLANTS: Haddad.

FOR RESPONDENTS: Shawwa.

JUDGMENT.

This case has dragged on for a long time, and I am afraid it may drag on for a further time. It was before this Court on the 10th February, 1936, and it was sent by this Court to the Court below to decide whether the Appellants had proved immemorial right to water, and that Court heard evidence as to that question in compliance with the directions of the Court of Appeal.

An expert was appointed by the Court to assist it and it is clear that the Court to some extent relies upon the evidence of that expert.

Now it is stated by the Appellant, and it is admitted by Counsel for Respondents, that Counsel for Appellants applied to cross-examine the expert and that he did so by virtue of the Evidence on Commission Rules, Rule 5(3), which provides as follows:—

> "A report of the proceedings and the opinion of the persons appointed to inspect shall be drawn up by the person directed by the Court so to do and may be read in Court as part of the evidence but, if either party or the Court so requires, one or more of the persons who have inspected shall be called into Court to give evidence".

Most unfortunately, the request to be allowed to cross-examine does not appear to have been recorded upon the English record but it does appear on the Arabic record, and as I said before, both advocates agree that it was made. I think that where such an application is made to a Court, particularly when it is made by virtue of a statutory provision, the Court itself should record the application and, if necessary, record its ruling upon it in order that this Court may know its decision and the reason therefor in respect of that application. The Appellants who desired to cross-examine and asked to cross-examine should have an opportunity of cross-examining.

We therefore remit the case back to the Land Court in order that the Appellants should be given an opportunity to cross-examine this witness, the expert, and that the Court may re-consider its judgment in the light of that cross-examination, should it consider it necessary to do so.

Costs to abide the final event.

Delivered this 27th day of September, 1937.

*Chief Justice.*

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CIVIL APPEAL No. 205/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Ismail Mustafa Shehadeh & an. — APPELLANTS.

v.

Othman Abed Siam & an. — RESPONDENT.

*Evidence on Commission, Rule 5 — Inspectors appointed to inspect the Land in dispute — Evidence may be led — Functions of experts.*

In allowing an appeal from the judgment of the Land Court of Jerusalem dated the 26th day of September, 1937:—

HELD: The testimony of inspectors appointed under the Evidence of Commission Rules is only part of the evidence and the parties may lead other evidence.

ANNOTATIONS:

1. *Cf.* C. A. 150/37 (*ante*, p. 533) and annotations.
2. For a similar ruling see C. A. 65 & 76/40 (1940, S. C. J. 168).

FOR APPELLANTS: Abcarius.

FOR RESPONDENT: O. Saleh.

## JUDGMENT.

1. This appeal arises out of a dispute as to the boundaries of certain land. When the action came before the Land Court, Jerusalem, an inspection was ordered by the Court under Rule 5 of the Evidence on Commission Rules, Vol. III, Laws of Palestine, page 2330. The parties did not agree as to the inspectors and in consequence three inspectors were appointed, one for each side and one by the Court.

2. The report of the proceedings was drawn up and the opinion of each inspector was given and the evidence of the two inspectors was heard by the Court.

3. There was an application by the Appellants to call witnesses to support their claim and the Court held that in view of the inspectors' report it could serve no useful purpose to allow oral evidence to be admitted on the very point which has been cleared up by the inspection. The failure of the Court to allow oral evidence has been the main ground of appeal argued by Abcarius Bey on behalf of the Appellants, and we think that the Court erred in refusing to hear such evidence. The report and the opinions of the inspectors are only part of the evidence in the case, and in an action in the Land Court, a plaintiff is entitled to call further evidence if he so desires. The Court should not arrive at a decision on the mere report and opinion of the inspectors and judgment should not be delivered until the whole case, at least the Plaintiff's has been heard.

4. A further ground of appeal by Abcarius Bey is that the inspector appointed by the Court misconceived the nature of his duty and seemed to think he was clothed with the function of a judge. There seems to be a good deal in this contention, but we have no doubt that the Court below took that into consideration.

5. The first ground of appeal succeeds and we order that the judgment of the Land Court be set aside and that the case be remitted to it with directions to hear such witnesses as the Appellants may desire to call in support of their claim and, if necessary, any witnesses whom Respondents may desire to call and to give judgment according to law. Costs of this appeal, to include LP. 5.— advocates fees, to abide the event.

Delivered this 16th day of November, 1937.

*Senior Puisne Judge.*

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MISDEMEANOUR APPEAL No. 2/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: McDonell, C. J., Baker, A/J. and Frumkin, J.

IN THE APPEAL OF:—

Abdallah Hassan Diab. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Criminal Appeals — By leave or as of right — Fine of LP. 10.— or 2 months' imprisonment, M. A. 9/35 — Jurisdiction of Magistrates — Trespass.*

In dismissing an appeal from the judgment of the District Court of Haifa, sitting in its appellate capacity:—

HELD: 1. In deciding a case of trespass, a Magistrate may deal with questions relating to boundaries.

2. When a fine of LP. 10.— or 2 months' imprisonment are imposed, an appeal lies as of right.

FOLLOWED: M. A. 9/35 (2, P. L. R. 380; 7, C. of J. 240).

ANNOTATIONS:

1. Appellant was convicted in the Magistrate's Court of trespassing on the lands of others and was fined LP. 10.— or two months' imprisonment. His appeal to the District Court was dismissed on the ground that he had not obtained leave to appeal, but he was granted leave to appeal to the Supreme Court on the two grounds dealt with in the judgment.

2. On the second point *cf.* CR. A. 17/44 (1944, A. L. R. 102).

JUDGMENT.

In answer to the first question the Chief Magistrate has jurisdiction to deal with questions relating to boundaries. He did not in this case deal with questions relating to the ownership of immovable property, the matter does not therefore arise as to whether he was entitled to do so or not.

As to the second point, on the authority of Muhammad Salim El-Hindi *v.* A. G., Misdemeanour Appeal No. 9/35, the Chief Magistrate having imposed in this case a sentence of two months imprisonment or a fine of LP. 10, the judgment was appealable as of right.

The appeal before us is dismissed and the conviction and sentence are affirmed.

Delivered this 26th May, 1936.

*Chief Justice.*

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CRIMINAL APPEAL No. 104/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Khayat, JJ.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Diab Mohammad Abu Zarad & 4 ors. RESPONDENTS.

*Appeal against discharge — T. U. I. Ord., sec. 67 — Amendment of information — Changing venue from Assize to District Court.*

In dismissing an appeal from the judgment of the District Court of Haifa:—

HELD: The Attorney General cannot appeal an order discharging the Accused for failure to commit, the committal having been to the Assize Court and the information subsequently amended.

ANNOTATIONS:

1. Respondents were committed for trial to the Court of Criminal Assize but the Attorney General, after staying the proceedings in that Court, filed an information in the District Court. The latter Court struck out the information on the ground that Respondents had never been committed for trial before them.

2. See now sec. 28 of the T. U. I. Ordinance as enacted in the 1944 Amendment Ordinance.

3. *Cf.* CR. A. 16/44 (1944, A. L. R. 125) and note.

FOR APPELLANT: Assistant Government Advocate — (Ghussein).

FOR RESPONDENTS: Koussa.

JUDGMENT.

We agree that this appeal does not fall within section 67 of the Criminal Procedure (Trial Upon Information) Ordinance which gives a limited right to the Attorney General. The result is unfortunate, for in cases such as this an appeal might be useful. It may be a question for the proper authority to consider whether that section should be extended in its scope.

With regard to the main point, we feel that there may be doubt if the District Court was right in the judgment it gave. It is certainly inconvenient, not least to the accused persons, that when a charge is made before the Court of Criminal Assize and that charge be changed that it should not be possible for it to be disposed of immediately by the District Court, and it has been the practice not infrequently, when the Attorney General has varied the information, for a District Court then and there to be constituted to dispose of the case. If the practice is wrong the accused person may be remanded to prison for some time before he can be tried, which is an unfortunate result. This again is a matter which the proper authority may wish to consider.

We do not decide the main point because we hold that this appeal does not fall under section 67.

The appeal will therefore be dismissed.

Delivered this 30th day of September, 1937.

*Chief Justice.*

CIVIL APPEAL No. 125/37.

# IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF:—

Noah Havkin. APPELLANT.

v.

Dr. H. Lachmann & an. RESPONDENTS.

*Building contract — Authority for making payment — Stamping — Documentary Evidence for payment of amounts exceeding LP.* 10.

In allowing an appeal from the judgment of the District Court of Jaffa sitting at Tel-Aviv, dated the 20th day of May, 1937:—

HELD: 1. A written authority to pay on behalf of the signatory need not constitute an equitable assignment or an agreement, in which case it does not require stamping.

2. The payments made under that authority must be within the terms of the document, and be proved by documentary evidence.

ANNOTATIONS: *Cf.* C. A. 481/44 (1945, A. L. R. 300) and note 1 thereto.

## JUDGMENT.

1. This is an appeal from the judgment of the District Court of Jaffa sitting at Tel-Aviv whereby Appellant's action for the balance of the cost of constructing a house was dismissed on the ground that Respondent had expended by authority of Appellant an amount equal to the amount of the claim.

2. The first point on appeal is that the Court below received in evidence a letter (Exh. A) written by a person called Wolberg and that this letter should not have been admitted since it is not stamped as either an equitable assignment or as an agreement. We are of the opinion that it is neither an equitable assignment nor an agreement and that it did not need stamping.

3. The second point is whether Exhibit A was a sufficient authority to the Respondent to expend money on behalf of the Appellant. Exhibit A is in these terms:—

> "I hereby agree that the part payment in respect of the carpentry works to Givat-Brenner and the part payments for the flagstones to the firm Fleishman should be made direct by you, namely by Dr. Lachman and Dr. Moses through the office of Habersham".

4. In the circumstances of this case we are satisfied that it was sufficient authority. Mr. Wolberg was employed by the Appellant to supervise the construction of this house, he was in general charge of the building operations, and he himself signed the specification. We think that the District Court was right in holding that it was authority to the Respondents to expend money on behalf of the Appellant.

5. But the authority is limited to its specific terms which must not be exceeded. All it authorises are part payments to Givat-Brenner for carpentry works, and to the firm of Fleishman for supplying paving stones and nothing else. And such payments by Respondent, before they can be set off against the amount of the Appellant's claim, must be properly vouched and supported by receipts when over LP. 10 in amount.

6. To take the first item — for carpentry work LP. 340.100 mils — in support of this, the Respondent produces a receipt for LP. 500, which he says includes this item. But this receipt was never produced in the Court below, and there is nothing on its face to show that the item claimed for is included in it. This must admitted as set off.

7. The second item is for paving and paving stones. Since the Appellant has admitted that he did not supply the paving stones himself, their cost can be rightly charged against him by the Respondent. But the Respondent had no authority to pay for the labour involved in laying the paving stones, and such an amount as represents the costs of such laying must be deducted from the amount of LP. 218.250 mils. The third and fourth items, "painting LP. 61.500 mils" and "Tin work LP. 5.150 mils" must also be deducted since they are not included in the authority to pay given by Mr. Wolberg to the Respondent.

8. The appeal must, therefore, be allowed and the case remitted to the District Court for the following things to be done:—

First, proof of the receipt for LP. 500, and proof whether the sum of LP. 340.100 mils is included therein.

Secondly, to ascertain the cost of the paving stones.

9. When this has been done, such amounts as are properly proved to have been paid by the Respondent acting within the limits of the authority given to him by the Appellant should be deducted from the amounts proved to be due by the Respondent to the Appellant, and judgment given accordingly. Costs will await the result of the re-trial.

Delivered this 29th day of July, 1937.

*British Puisne Judge.*

CIVIL APPEAL No. 115/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Greene and Frumkin, JJ.

IN THE APPEAL OF:—

Ya'coub Fahmi Abu El-Huda. APPELLANT.

v.

Deeb El-Hinnawi. RESPONDENT.

*Partition — "Appurtenances" — Right of way — Equitable right of way by necessity.*

In allowing an appeal from the judgment of the Land Court of Jaffa dated the 18th May 1937:—

HELD: 1. "Appurtenances" includes a right of way.

2. Necessity of access creates, in partition, an equitable right of way.

ANNOTATIONS:

1. "The word "Appurtenances" includes incorporeal hereditaments, such as rights of way ....."; Lister *v.* Pickford, quoted in Stroud's Judicial Dictionary, 2nd ed., Vol. 1, p. 109.

2. For Palestinian authorities on rights of way see note to C. A. 167/43 (1943, A. L. R. 682).

APPELLANT: In person.

RESPONDENT: In person.

### JUDGMENT.

This appeal arises out of a partition order made by the Magistrate's Court of Jaffa in 1923. Under the order a yard and its appurtenances remained *musha'a*. In the Court below it was found as a fact that the Appellant had no access to this *musha'a* except through an entrance which is the property of the Respondent. The Court below held that, the Appellant's predecessor having made no provision for access, it could not give him a right of a way now.

It seems to us that the Court below erred in interpreting the order for partition. We think that the word "appurtenances" included a right of access and that, even if this were not so, the Appellant had an equitable right of way of necessity.

In our opinion the judgment of the Court below should be set aside and judgment should be entered for the Appellant declaring his owner-

ship of 3½ *qirats* out of 24 of the gate of the orange grove and its corridor, to enable him to pass to his *musha'a* share in the yard.

The Appellant will have his costs here and below, such costs assessed in this Court at LP. 1.—.

Delivered this 15th day of July, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 113/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Hassan Saleh Ibrahim Banhan, on behalf of the estate of Saleh Hassan Ibrahim Banhan. APPELLANT.

v.

Hamideh Muhammad Eid Ihleivah. RESPONDENT.

*Evidence in Land Court — Title to mortgage — Onus of proof.*

In allowing an appeal from the judgment of the Land Court of Jaffa dated the 3rd May, 1937:—

HELD: Case sent back to the Land Court which had dismissed Appellant's claim for the redemption of a mortgage, on the ground that the mortgage document had not been produced. The Appellant's father had been proved to have been the registered owner.

ANNOTATIONS: *Cf.* C. A. 317/44 (1945, A. L. R. 264) and notes, and C. A. 26/45 (*ibid.*, p. 330).

JUDGMENT.

The Appellant sought the redemption of a mortgage in the Land Court of Jaffa. The Court dismissed the action on the ground that the mortgage document was not produced. It did not go into any other aspects of the case.

There were, however, other matters which affected the merits of the Appellant's case. The Appellant had proof that his father was the registered owner of the land. The Respondent was in possession and,

in our view, it was incumbent on him to satisfy the Court that he was rightfully in possession or that he had a defence by prescription. Then the Appellant would have to rebut the Respondent's case.

The Appellant's father being the registered owner, we think the rights of the parties were not sufficiently investigated in the Court below.

We therefore order that the judgment of the Land Court be set aside and the case remitted to it for a new trial.

Costs to abide the event.

Delivered this 28th day of July, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 1/35.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Corrie, S. P. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Leah Hanokh & an. — APPELLANTS.

v.

Yehuda Hanokh Levy. — RESPONDENT.

*Lost documents — Arts. 80—82 O. C. C. P. — P/A, L. A. 2/35.*

In allowing an appeal from the judgment of the District Court of Jerusalem in C. A. 266/31 and in remitting the case for completion:—

HELD: Art. 82 of the Code of Civil Procedure is governed by Art. 80. A power of attorney does not come under Art. 80 and consequently the provisions of Art. 82 did not apply to it.

Upon proof that a power of attorney was formerly in existence and has been lost, secondary evidence thereof may be given.

FOLLOWED: L. A. 2/35 (2, P. L. R. 417; 7, C. of J. 373).

ANNOTATIONS:

1. Art. 82(3) of the Ottoman C. P. C. speaks of documents lost by "the creditors" and the appeal to the Supreme Court was on the following point of law: "Whether a power of attorney alleged to have been lost can be proved by witnesses in accordance with Article 82(3) of the Ottoman Code of Civil Procedure or whether it is restricted only to acknowledgment of debt".

2. On proof of lost documents see C. A. 191/42 (1942, S. C. J. 1000) and note 1.

FOR APPELLANTS: No. 1 — S. Mizrahi.
No. 2 — In person.

FOR RESPONDENT: Friedenberg.

JUDGMENT.

In accordance with the judgment of this Court in Fuad Abdel Ghani El-Khaldi *v.* Raiseh Muhi Ed-Din El-Khaldi, L. A. 2/35, we hold that as the provisions of Art. 80 of the Civil Procedure Code govern those of Art. 82, the latter Article applies only to the transactions and documents enumerated in the former Article.

These do not include the execution of a power of attorney, and this document therefore does not fall within Art. 82, but is governed by the general rule as to lost documents: namely, that upon proof that the document was formerly in existence and has been lost, secondary evidence, either oral or written, may be given of the contents of the document.

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

The costs of this appeal will follow the event.

Delivered this 17th day of January, 1936.

*Senior Puisne Judge.*

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MISDEMEANOUR APPEAL No. 13/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Plunkett, P. D. C. and Khayat, J.

IN THE APPEAL OF :—

Ali Abdel Aziz Sheikh Mustafa & an. APPELLANTS.

v.

The Attorney General. RESPONDENT.

*Criminal appeals — Appeals from Magistrates Courts — Whether may be entered by J. G. A. — M. C. J. O., sec. 5(2) — Law of Procedure (Amend.) Ord., sec. 2, "representative of A. G.".*

In dismissing an appeal from the District Court of Haifa:—

HELD: The J. G. A. may enter an appeal from a judgment of the Magistrate's Court, without reference to the A. G.

ANNOTATIONS: *Cf.* CR. A. 24/44 (1944, A. L. R. 361) and CR. A. 125/45 (1945, A. L. R. 769) and notes.

FOR APPELLANTS: Hawa.

FOR RESPONDENT: Assistant Government Advocate — (Ghussein).

ORDER.

The District Court, Haifa, granted Appellants leave to appeal on the point whether a criminal appeal from a Magistrate's Court may be entered in the name of the Junior Government Advocate and signed by him.

Section 5(2) of the Magistrates' Courts Jurisdiction Ordinance enacts that "the Attorney General or his representative shall have the right to appeal from any judgment of a Magistrate's Court in a criminal case to the District Court".

Section 2 of Ordinance 21 of 1934 enacts that the Junior Government Advocate is a representative of the Attorney General.

This disposes of the point.

We hold that the Junior Government Advocate had the right to appeal and to sign the appeal without any reference to the Attorney General.

Delivered this 26th day of October, 1936.

*Senior Puisne Judge.*

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HIGH COURT No. 76/36.

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

BEFORE: Manning, S. P. J. and Frumkin, J.

IN THE APPLICATION OF :—

Josef Babayoff. PETITIONER.

v.

Chief Execution Officer, Jerusalem & an. RESPONDENTS.

*Religious Courts — Execution of judgments — P. O. in C., Arts. 43, 56 — H. C. 67/28, H. C. 29/30.*

In issuing an order *nisi* to the first Respondent:—

HELD: The High Court will restrain the C. E. O. from executing a judgment of a Religious Court if that Court had no jurisdiction in the matter.

REFERRED TO: H. C. 67/28 (not reported); H. C. 29/30 (1, P. L. R. 462; 5, C. of J. 1610).

ANNOTATIONS:

1. The order *nisi* was afterwards discharged; see 4 P. L. R. 19 and 9 C. of J. 748.

2. *Cf.* H. C. 103/42 (1942, S. C. J. 582) and note 2; see also Ex. D. C. Jm. 127/44 (1945, S. C. D. C. 170) and notes.

FOR PETITIONER: Levanon.

## ORDER.

*Frumkin, J.*: The judgments of the Religious Courts are, under the authority of Article 56 of the Palestine Order-in-Council, executed by the process and offices of the Civil Courts. It was, however, hitherto, the practice of this Court to direct the Chief Execution Officer to refrain from executing judgments of a Religious Court if it is proved that such Court had no jurisdiction to issue such a judgment.

This practice which has its origin in Article 43 of the Palestine Order-in-Council, has, *inter alia*, been upheld in High Court case No. 67 of 1928 — Marie Philacdopoulos *v.* the Chief Execution Officer, Jerusalem and Michael Cubec, and in High Court case No. 29 of 1930 — Shimon Deutsch *v.* the Chief Execution Officer and Marie Esther Deutsch.

In the first case the Orthodox Ecclesiastical Court issued a decree declaring the dissolution of the marriage of the Petitioner and ordering the husband to pay alimony to his wife. The judgment was with some alteration as to the amount of alimony payable confirmed by the Orthodox Court of Appeal. The Chief Execution Officer refused to execute that judgment on the ground that the Respondent was a foreigner within the meaning of the Palestine Order-in-Council, 1922, and hence that the Ecclesiastical Court had no jurisdiction to make a decree against him. An application was made to the High Court to have the order of the Chief Execution Officer set aside, meaning by that to direct the Chief Execution Officer to proceed with the execution. This application was refused, the Court holding that as regards dissolution of marriage, the Courts of the Religious Communities, other than the Moslem *Sharia* Courts have no power to grant a decree of dissolution of marriage to a foreign subject (Palestine Order-in-Council, Article 65): and that as regards payment of alimony the order was dependent upon and subsidiary to the decree of dissolution of the marriage, and hence that the consent of the parties to the jurisdiction of the Court was of no avail.

We are not now concerned with the causes of non-jurisdiction but with the mere fact that when the Chief Execution Officer is satisfied that a Religious Court had no jurisdiction to issue a judgment, he is justified to refuse an order for its execution.

In the second case cited the position was the other way round. This was a case where the Rabbinical Court would have jurisdiction only

by consent of the parties. There was a document purporting to be a consent upon which the Religious Court issued a judgment and the Chief Execution Officer ordered its execution. This Court held that the document did not amount to a consent and as there was no consent ordered to set aside the order of the Chief Execution Officer to execute the judgment, which in effect directed the Chief Execution Officer to refrain from executing a judgment issued by a religious Court without jurisdiction.

We are now asked to issue a similar order.

We are not unaware of the difficulties in imposing upon an Execution Officer to decide on the jurisdiction of a Court whose judgment he merely has to carry into execution. But there is no tribunal provided for in our legislation to deal with such disputes when they arise. Under Article 43 of the Palestine Order-in-Council, the Supreme Court sitting as a High Court has jurisdiction to hear and determine such matters as are not causes or trials, but petitions or applications not within the jurisdiction of any other Court and necessary to be decided for the administration of justice. We can see, therefore, no reason to vary our previous practice to direct an Execution Officer to refrain from executing a judgment of a Religious Court, if we are satisfied that it was not within its jurisdiction to issue such judgment.

The Petitioner has submitted a *prima facie* case sufficient to indicate that the Religious Court has no jurisdiction to issue the judgment against him and he is therefore entitled to an order *nisi*.

An order will therefore be issued against the first Respondent to appear before this Court, if he so desires, to show cause why he should not refrain from executing the judgment of the Rabbinical Court dated 25th *Nissan* 5695, with notice to be given to the second Respondent.

Given this 30th day of October, 1936.

*Puisne Judge.*

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PRIVY COUNCIL APPEAL No. 80/35.

IN THE PRIVY COUNCIL SITTING AS A COURT OF APPEAL FROM THE SUPREME COURT OF PALESTINE.

BEFORE: Lord Atkin, Lord Thankerton and Lord Roche.

IN THE APPEAL OF:—

Dimitri N. Tadros. — APPELLANT.

v.

Hashem Abou Khadra. — RESPONDENT.

*Contracts — Time of the essence — Failure to comply — Mutual obligations — Construction of contracts.*

In allowing an appeal from the judgment of the Supreme Court of Palestine:—

HELD: In the case of mutual obligations, and where time is of the essence of the contract, failure to comply by one party discharges the obligation of the other.

ANNOTATIONS: On time being of the essence of the contract see C. A. 228/44 (1945, A. L. R. 134) and note 1.

## JUDGMENT.

*Lord Thankerton*: This is an appeal from a judgment of the Supreme Court of Palestine, sitting as a Court of Appeal, dated the 16th April, 1934, which confirmed a judgment of the District Court of Jaffa, dated the 20th December, 1932, whereby the Appellant, as defender of the suit, was held liable to the Respondent as Plaintiff in the sum of LP. 2,000 in respect of an undertaking given by the Appellant to the Respondent by a letter dated the 14th April, 1930.

The claim arises out of a series of transactions in which the Appellant on the one side and the Respondent, his mother and his seven brothers on the other side, were concerned. On the 5th November, 1929, the Appellant obtained judgment against the Respondent, his mother and his seven brothers, as the heirs of Ramadan Abou Khadra, for the sum of LP. 15,000. The parties negotiated as to some settlement of this debt, and an arrangement was come to between all these parties, which was embodied in a notarial declaration dated the 14th April, 1930, which is in the following terms:—

> "As we are indebted to Mr. Dimitri Tadros for the sum of fifteen thousand Palestine Pounds by virtue of a deed of sale signed by one of us Hashem on behalf of himself and on behalf of the rest of us for the orange grove called '*Rafoulieh*' for the above mentioned sum and this sale has not been duly registered to him and he has made legal proceedings against us in the District Court of Jaffa demanding the return of the above-mentioned debt and the fulfilment of the conditions contained in the deed and there was a judgment in his favour against the majority of us in our presence and Hashem and Fouzi by default on the 5.11.1929 Register 395/1929 and 450/1929 for the refund to him of the said debt of 15 000 Palestine Pounds with interest from the date of the said deed dated 14/4/1929 up to the full payment of the said debt with costs and we have submtited to this judgment and now we have come to an agreement with Mr. D. N. Tadros to accept from us LP. 11,000 as a compromise for the said amount of 15,000 pounds and interest and cost and we undertake to give him as security for this amount a mortgage on all our shares as herein mentioned.
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> "We the undersigned Hanon the daughter of Suleiman Aboukhadra

the widow of Ramadan Aboukhadra and her children Hashem, Fouzi, Musbah, Husni, Zakieh, Husson, Ra'aisseh, and Akfeh children of Ramadan Aboukhadra land proprietors and residents of Jaffa have appointed on our behalf Mr. Benjamin John Maxwell Nimmo, British Subject and Abdelatif the son of Ibrahim Aboukhadra both residents of Jaffa, jointly and singly to admit on our behalf before the Land Registrar of Gaza and all official, Civil and Judicial Departments that we have mortgaged to Mr. Dimitri Tadros all our shares in all the lands of the village of Barka in the District of Gaza which we inherited from Ramadan Aboukhadra for one year from the date of the transfer in the Registry Office for the amount of 12,000 pounds of which LP. 11,000 agreed upon as a compromise and one thousand pounds to be paid to us and then added to the mortgage to enable us to pay any accumulated taxes for tithes, *werko* and any expenses on making the necessary formalities. Should the period elapse and we do not repay him the twelve thousand pounds he is entitled to put up the shares in the above-mentioned land and sell it by auction and if the proceeds do not realise the amount due he has the right to demand any balance from our other properties without procuring a judgment from a Court and the interest to be accounted for on the amount due or on what remains from the date of its due until full payment, without making any objection for the sale of our other properties in the event of our not paying, and we have given them power to sign on our behalf all necessary documents and receipts for the completion of all formalities for the registry of the mortgage and to admit in the Registry Office on our behalf that we have received the above amount and to register in the name of our creditor Mr. D. N. Tadros or in the name of whoever Mr. D. N. Tadros wishes to either individuals or companies and it will not be lawful for us to dismiss both our attorneys or one of them before the full payment of the debt of 12,000 pounds during the time specified below and we hereby guarantee to remove at our expense all seizures mortgages and any obstacles made by a third party which may hinder registration and we give permission to Mr. D. N. Tadros to pay on our behalf the sum of 1,000 pounds above-mentioned in different payments for registrations, *etc.*, according to need to Abdel Latif or Mahmoud Aboukhadra as if it was paid to us. We bind ourselves to prepare all formalities to be ready to be registered in the Land Registry within three months maximum from this date and if this period elapses without the mortgage being registered we undertake to refund him the said 12,000 pounds and to pay over and above 3,000 Palestine pounds as an indemnity agreed upon between us from now without necessity for Notarial Notice and we have given permission to any of the two attorneys to give power of attorney to a third party for the fulfilment of the aforesaid formalities or part of them".

On the same day, the 14th April, 1930, the Appellant gave to the Respondent alone a letter in the following terms:—

"As you are indebted to the Banco di Roma for an amount over

LP. 4,000 under my guarantee and the guarantee of Mr. Alfred Rock and Mohamed Abdel Rahim, and there was a judgment against you for this amount and a judgment against Mr. Alfred Rock your guarantor for the sum of LP. 2,000 due to Joseph Abdelnour, and as you, your mother, and your brothers are indebted to me for LP. 15,000 with interest and expenses, and there was a judgment against you to me for this amount, and as we have compromised on the said LP. 15,000 and interest and the expenses for the amount of LP. 11,000 against which you have guaranteed to mortgage to me the lands of Barqua as security and I have agreed to pay you LP. 1,000 over and above according to a Notarial Agreement dated 14th April, 1930, therefore I have accepted that the amount which I paid to the Banco di Roma for you and the amount of Abdelnour that they be included in this compromise, so that you will be freed from any liability in respect of the amount of LP. 2,000 odd owing to the Banco di Roma and from the LP. 2,000 due to Yusef Abdelnour in consideration of the compromise which has been effected between us in accordance with the terms and conditions of the above mentioned Notarial Declaration.

Yours faithfully,
"(Signed) *D. N. Tadros*

*P. S.* — The said compromise will include all debts to me besides these debts which may appear before the date of this letter, excepting the LP. 11,000 above mentioned".

The claim in the present suit is based on the undertaking given in that letter.

Prior to the date of these documents, the Banco di Roma had recovered judgment on the 5th December, 1929, for LP. 4,723 against the Respondent and his three guarantors, the Appellant, Alfred Rock and Abdel Rahim, and on the 1st February, 1930, the Appellant had paid LP. 2,000 under the judgment to the Bank and had obtained release as a guarantor. Abdel Rahim had also obtained judgment for LP. 2,000 against the Respondent and Rock as his guarantor.

It is clear from the terms of the letter of the 14th April, 1930, that, in any question between the Appellant and the Respondent, it formed part of the settlement contained in the notarial declaration and falls to be read along with it. The Appellant duly provided the LP. 1,000 referred to in the declaration, but before the other parties had executed the mortgage for LP. 12,000 and before the expiry of the three months limited for its execution, the Respondent was declared bankrupt on the 15th June, 1930.

On the 18th June, 1930, Barclays Bank intimated that they had a seizure on all the Aboukhadra lands for LP. 5,000. On the 14th July, 1930, the Appellant filed with the Syndic of the Respondent's bank-

ruptcy a claim for the recovery of the LP. 2,000 paid by him to the Banco di Roma.

It appears that the New York *Achooza Aleph* Incorporated of New York, a foreign company registered in Palestine, were prospective purchasers of the Barka lands, which were to have been the subject of the mortgage under the notarial declaration, and that negotiations took place between the Appellant, the Khadra family other than the Respondent and the New York company, who were ready to purchase the interests of the Khadra family other than the Respondent in the Barka lands, the price to be used in the first place for discharge of the claim of Barclays Bank. In result, an agreement was made on the 4th August, 1930, between these parties; the Respondent was not a party thereto nor was the Syndic of his bankruptcy a party thereto. The material provisions of this agreement are as follows:—

> "THIS AGREEMENT is made the fourth day of August 1930 BETWEEN Hanon daughter of Suleiman Aboukhadra, widow of Ramadan Aboukhadra and her children Fouzi, Musbah, Husni, Zakieh, Husson, Ra'aisseh and Akfeh children of Ramadan Aboukhadra, Landed Proprietors and residents of Jaffa (hereinafter called the vendors which expression shall include their heirs and assigns) of the one part Dimitri Nicolas Tadros, Landed Proprietor of Jaffa (hereinafter called the Mortgagee) of the second part and New York *Achooza Aleph* Incorporated of New York a foreign Company registered in Palestine *vide* Official *Gazette* No. 56 dated 1st December 1921 (hereinafter called the purchasers) of the third part.
>
> WHEREAS by a written declaration dated the fourteenth day of April 1930 made before the Notary Public of Jaffa the vendors together with one Hashem Aboukhadra declared that they were indebted to the mortgagee in the sum of fifteen thousand pounds Palestine (LP. 15,000) plus interest and costs as therein stated.
>
> AND WHEREAS the said Hashem Eff. Aboukhadra (signatory of the said declaration) has now become bankrupt and the Mortgagee has agreed to release him from his liability thereunder subject to the joint and several guarantee of the remainder of the signatories of the said declaration that a minimum quantity of four thousand six hundred (4,600) *dunums* of land at least shall be made available for the security and the sale hereinafter mentioned.
>
> AND WHEREAS the Mortgagee has agreed to reduce the said total debt to the sum of twelve thousand pounds Palestine (LP. 12,000) on condition that the Vendors, as security for the said reduced sum, should execute in favour of the Mortgagee a mortgage upon all their respective shares *'musha'* in all the lands of and about the village of Barka in the district of Gaza as more particularly described in the Schedule hereto annexed (and hereinafter referred to as the property) believed to contain four thousand six hundred (4,600) *dunums* more or less the actual area whereof is to be determined on survey.

AND WHEREAS the vendors have undertaken within two months from the date hereof to execute the aforesaid mortgage free from incumbrances in favour of the Mortgagee in consideration of the reduction of the debt before referred to.

AND WHEREAS the purchasers are desirous of purchasing (immediately after execution of the said mortgage and subject thereto) all the said property of the vendors as aforesaid on the terms hereinafter contained.

NOW THEREFORE IT IS AGREED between the parties as follows:—

(1) The vendors shall at their own cost within two months from the date hereof mortgage the property free from incumbrances to the Mortgagee in form approved by him for the sum of twelve thousand pounds Palestine (LP. 12,000) at 7% (seven *per centum*) *per annum*. The said interest shall commence to run from the date of the said mortgage. In the event of any failure whatsoever on the part of the vendors or any of them (no matter from what cause or excuse) to complete the said mortgage within the said period of two months the vendors shall be jointly and severally liable to pay to the Mortgagee on demand as liquidated damages the sum of LP. 3,000 (three thousand pounds Palestine) in addition to the sum of LP. 12,000 (twelve thousand pounds Palestine) before mentioned.

(2) The vendors undertake to sell and the purchasers to buy the aforesaid property (subject to the said mortgage) as determined by the survey for the price of three pounds Palestine five hundred mils (LP. 3.500 mils) per metric *dunum mafrous* payable as follows:—

(a) On signature of these presents two thousand pounds Palestine (LP. 2,000) shall be paid by the purchasers on deposit to Barclay's Bank (Dominion Colonial and Overseas) Jaffa and two thousand pounds Palestine (LP. 2,000) in bills payable: One bill for LP. 1,000 (One thousand pounds Palestine) payable six months from date of this contract and another for a similar sum payable in one year from date of this contract, and the said cash and bills shall be held by the Bank until the transfer (*musha*) in the Land Registry to the purchasers upon which event the said sum and bills shall become the property of the said Bank to be applied by it in reduction of certain indebtedness existing as a result of a judgment obtained by the said Bank against the vendors and deposited in the Execution Office at Jaffa between the Bank and the vendors and the said Hashem Aboukhadra. The said transfer shall be executed simultaneously with (but subject to) the said mortgage.

(b) The balance in equal instalments shall be paid to the Mortgagee within thirty (30) months of the date of the transfer '*Musha*' to the purchasers and shall be applied in discharge of the mortgage, the first of which instalments shall become payable upon completion of the legal partition (*mafrous*) of the property and the balance at three months intervals thereafter. In the event of any dispute at any time arising as to whether in fact the legal partition of the property as contemplated in this contract by the vendors has been effected or not or as to upon what date such partition was

effected the same shall be submitted to and finally determined by Mr. C. F. Reading or if he is unable to act by some person appointed by him.

(c) In the event of the actual purchase price (as and when ascertained by measurement of the property) being less than sufficient (after deduction of the LP. 4,000 (four thousand pounds Palestine) paid to the said Bank) to satisfy the principal sum of twelve thousand pounds Palestine (LP. 12,000) due to the Mortgagee under the said mortgage then the vendors shall be jointly and severally liable to repay forthwith such balance remaining unsecured and due to the Mortgagee thereunder. Once the *mafrous* of the property has been completed as contemplated by sub-clause (b) above no claim on the part of the purchasers against the vendors or otherwise shall effect the right of the Mortgagee to receive from them punctual payment of the balance of the purchase price.

(3) The Mortgagee undertakes to consent to the said sale (subject to his mortgage) and agrees likewise to give his consent to any re-transfer of the property to the vendors (subject to the said mortgage) in the event of the exercise of the option mentioned in Clause 8 below provided always that the purchasers shall remain liable on the said mortgagee (as they hereby agree to do) until the actual re-transfer is effected in the Land Registry whereupon the mortgage shall immediately become payable in full by the vendors notwithstanding anything to the contrary herein contained.

(4) The purchasers agree after purchase by them *'Musha'* as aforesaid to pay the interest at seven *per centum* (7%) on the said mortgage annually in arrear with effect from the date of the said mortgage and punctually to pay the Mortgagee all interests and instalments becoming payable in respect thereof.

(5) Notwithstanding anything to the contrary herein contained in the event of the purchasers failing to pay to the mortgagee any interest or any instalments on due date the mortgage shall become immediately due and the mortgagee shall have full right after giving sixty days notice by registered letter to the purchasers to exercise all legal rights and remedies of a mortgagee whose mortgage debt has become due.

(6) The area shall be determined forthwith by a duly licensed surveyor appointed and paid by the vendors.

(7) The property is at present *musha* with the exception of an area believed to be about one thousand (1,000) metric *dunums* (more or less) within the blocks at present known as Wadie el Assal and Tel el Ramal which is *'mafrous Khasousi'* as this area shall be included within the total area of four thousand six hundred (4,600) *dunums* as roughly delineated for identification on the plan attached which shall be so partitioned as to constitute a single block of four thousand six hundred (4,600) *dunums*. The purchasers shall be at liberty to enter upon the *Mafrous Khasousi* parcel at any time after the *'musha'* transfer in the Land Registry and shall be entitled to sink a well, cultivate and plant thereon. Any such well and trees planted and any constructions thereon shall form part of the security of the mortgagee.

(8) The transfer of the vendors shares in the property shall be effected *'musha'* (subject to the said mortgage) within two calendar months from the date of this contract and the legal partition *'mafrous'* shall be fully completed by the vendors at their own expense within one year from the date of transfer *'musha'* and in the event of the vendors failing so to partition within the said period the purchasers shall have the option to be exercised by registered letters addressed to the vendors with copy to the mortgagee (such option only to be exercised not later than the fifteenth month after the said transfer *'musha'*) requiring a refund from the vendors of all sums paid to them in respect of the purchase price with interest at 7% plus a sum of three thousand pounds Palestine (LP. 3,000) as agreed and liquidated damages and upon payment thereof the vendors may require all the property to be re-transferred back to them subject to the said mortgage and the vendors shall in such event be liable to refund to the purchasers any money expended by the latter according to their official books upon improvements to the land.

(9) The fact that the area of the property is found to be in excess or less than the 4,600 *dunums* shall not affect this contract except so far as it operates to vary the purchase price. In the event of the purchase price exceeding the sum required to pay the bank plus the mortgage and costs, the balance shall be paid to the vendors.

(10) Transfer fees in respect of the said transfer to the purchasers in the Land Registry shall be paid by the purchasers but all other expenses and taxes shall be paid by the vendors, who shall deliver the property, except for the mortgage aforesaid, free of all charges and claims whatsoever including claims (if any) for compensation of cultivators.

(11) The vendors undertake to keep open the present direct road leading from the property to the main road known as Jaffa-Gaza Road.

(12) The mortgagee shall discharge from time to time such portion of the land comprised in his mortgage as he (after consultation with purchasers) shall deem fit having regard to the repayments made to him by the purchasers and the preservation of his security.

(13) The commission of any breach hereof by or any failure on the part of any party hereto shall itself be deemed notice thereof as contemplated by Article 107 of the Code of Civil Procedure and no Notarial Notice shall be deemed necessary upon any matter arising out of this contract. Any notice required to be given shall be by ordinary registerd letter to the following address which shall also be the address for service respectively in the event of any litigation and proof of posting of such registered letter or delivery of any process at such address shall be deemed sufficient proof of service.

(14) Until after the execution of the mortgage before referred to nothing contained in this agreement shall prejudice the rights

> and remedies of the mortgagee existing or arising by virtue of the before recited declaration of 14th April 1930".

The vendors failed to execute the mortgage before the expiry of the two months prescribed on the 4th October, 1930, and the Appellant gave them notarial notice and obtained provisional seizure. On the 9th February, 1931, the vendors executed the mortgage in the Appellant's favour of their shares in the Barka lands and executed a transfer of these shares to the New York Company, who paid off Barclays Bank.

On the 24th June, 1931, the Respondent's bankruptcy was rescinded, and on the 20th September, 1931, the Respondent, though not asked to do so by the Appellant, made a transfer of his share of the Barka lands to the New York company. Even with this addition, the area of these lands ultimately proved to be short of the 4,600 *dunums* guaranteed in the agreement of 4th August, 1930, and, on the 23rd November, 1933, the Appellant obtained judgment against the Khadra family other than the Respondent for the resulting deficit of LP. 2,085.703 mils on the amount due under the mortgage of 9th February, 1931.

After a notarial notice given on the 24th January, 1932, the Respondent brought the present suit against the Appellant, claiming the sum of LP. 6,000 to be due to him upon the undertaking in the Appellant's letter of the 14th April, 1930, to free him of liability in respect of LP. 4,000 due to the Banco di Roma and LP. 2,000 due to Abdel Nur. The claim was reduced to LP. 2,000 on the Appellant objecting that the former debt had been discharged.

The District Court gave judgment in the Respondent's favour for LP. 2,000, holding that the Appellant's letter of the 14th April, 1930, was a part of, and had effect together with, the second agreement of the 4th August, 1930. They stated in their judgment:—

> "The Defendant got the security, though not quite the same, which he would have got under the first agreement. It was the best which he could get under the existing circumstances. We must remember that when the Plaintiff's bankruptcy was annulled, he himself threw his share into the mortgage, though not asked to do so, thereby increasing the Defendant's security".

This judgment was affirmed on appeal by the Supreme Court, on the ground that the second agreement of the 4th August, 1930, was a mere modification of the first agreement of the 14th April, 1930, rendered necessary, as its second recital indicates, by the Respondent's bankruptcy, and that, this being so, the second agreement did not annul the letter of the 14th April, 1930, which must in consequence be read in conjunction with the second agreement.

Their Lordships regret that they are unable to agree with these grounds of judgment, as, in their opinion, the terms of the obligation by the Respondent and the other Khadra heirs in the notarial declaration of the 14th April, 1930, to execute and register the mortgage over the Barka lands within the period and under the indemnity specified make clear that time was of the essence of the contract, and that, on the expiry of the three months on the 14th July, 1930, without the execution of any mortgage, the Respondent and the other heirs became liable in an unsecured debt to the Appellant of LP. 12,000 and LP. 3,000 of indemnity, making LP. 15,000 in all. The other provisions of the agreement disappeared. In the second place, in their Lordships' opinion, the terms of the letter of the 14th April, 1930, make clear that the obligations undertaken by the Appellant were conditional on the execution of the mortgage in terms of the agreement of even date, and, in consequence, the failure to execute the mortgage within the time prescribed, rendered these obligations by the Appellant nugatory. This was the position rightly taken up by the Appellant in his reply, dated the 30th January, 1932, to the Respondent's notary notice of the 24th January, 1932.

Their Lordships are also of opinion that the second agreement of the 4th August, 1930, was not a modification of the earlier agreement, but was a new agreement with different parties and under different conditions. As already stated, the first agreement had disappeared, leaving the Khadra heirs liable for an unsecured debt of LP. 15,000. Obviously the Appellant was anxious to get payment or security; it was useless to approach the Respondent, in view of his bankruptcy, and accordingly negotiations were confined to the other debtors.

Accordingly, their Lordships are of opinion that the Respondent has no ground of action against the Appellant, and they will humbly advise His Majesty that the appeal should be allowed, that the judgments of the District Court and of the Supreme Court should be set aside and that the suit should be dismissed. The Appellant will have his costs in the appeal and in the Courts below.

Given this 26th day of April, 1937.

LAND APPEAL No. 56/35.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Ahmad Muhammad Amin Abu Hajla & 2 ors. APPELLANTS.

v.

Mas'ad Es Sayegh & 3 ors. RESPONDENTS.

*Oral evidence — Evidence in rebuttal of registered title — L. A. 137/23 — L. S. Ord., sec. 51.*

In allowing an appeal from the Land Court of Jaffa:—

HELD: In determining a dispute as to title to land, where the registered title is challenged, the Land Court is not confined to hearing written evidence.

NOT FOLLOWED: L. A. 137/23 (1, P. L. R. 13; 2, C. of J. 764).

ANNOTATIONS: *Cf.* C. A. 85/37 (*ante*, p. 132), C. A. 193/37 (*ante*, p. 508) and C. A. 317/44 (1945, A. L. R. 264) and notes.

FOR APPELLANTS: Abdul Hadi.

FOR RESPONDENTS: No. 4 — Olshan.
Rest — In person.

## JUDGMENT.

1. This appeal arises out of a dispute as to the western boundary of land belonging to the Appellants. The Land Settlement Officer decided in favour of the Respondents on the ground that they were the registered owners of the land they claimed. He relied on a decision of this Court in Land Appeal No. 137 of 1923 (1 P. L. R. 13) in which it was said:—

> "There is no written evidence to contradict the registered title which carries a presumption of ownership; the evidence of witnesses, the possession of the parties, however convincing, are not sufficient to over-ride the general rule that has been established in this Court that a registered title will not be set aside except by some evidence in writing sufficient to support an adverse title or to corroborate evidence in support of such adverse title".

2. The Appellants were granted leave to appeal to the Land Court, Jaffa. The Land Court decided the appeal in chambers without hearing the parties. In its judgment it made no reference to the facts of the case or to their bearing on the justice of the Appellants' claim, it

contented itself with relying on the passage cited above from the judgment of this Court in Land Appeal No. 137 of 1923.

3. This passage certainly seems to lay down a general rule as to evidence in actions with respect to land. So far as it purports to be such a rule it does not meet with our acceptance. In deciding an issue as to the title of a claimant to land a Court is bound to consider all relevant evidence placed before it, whether that evidence be oral or documentary. If oral evidence is admissible as to possession and boundaries, then such evidence has to be weighed in conjunction with the documentary evidence. A Court is at liberty to refuse to rely on it, but if it regards it as convincing it is not entitled to disregard it merely because it is oral.

4. To apply any such rule in the present case would be to beg the question at issue, for the substance of the Appellants' claim is that the Respondents succeeded in registering a larger area than that to which they were entitled. A perusal of the Land (Settlement of Title) Ordinance and especially of section 51 shows that oral evidence of possession may be considered by a Settlement Officer and that such evidence may decide an issue as to the ownership of land in opposition to a registered title.

5. In the circumstances we have no option but to set aside the decisions of the Land Settlement Officer and the Land Court and to remit the dispute to the Settlement Officer with directions to take all relevant evidence into consideration whether it is in writing or not, and to decide the dispute in accordance with law. Costs of this appeal will abide the event.

Delivered this 28th day of April, 1937.

*Senior Puisne Judge.*

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CRIMINAL APPEAL No. 24/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Shaw, P. D. C. and Khayat, J.

IN THE APPEAL OF:—

Muheeb Kana'an. APPELLANT.

v.

Attorney General. RESPONDENT.

*Corroboration — Evidence of accomplice — Acquittal of co-accused — Trial Upon Information of offence triable summarily — Special treatment.*

In dismissing (Khayat, J., *dissentiente*) an appeal from the judgment of the District Court of Jaffa:—

HELD: 1. It is necessary for the Court of Trial to be aware of the danger of convicting on the uncorroborated evidence of accomplices.

2. There is no injustice if an offence triable summarily is tried on information.

ANNOTATIONS:

1. On the first point see CR. A. 152/37 (*ante*, p. 289) and note 2.

2. As to the differentiation between several accused on identical evidence *cf.* CR. A. 126/37 (*ante*, p. 300) and note 1.

3. On the second point *vide* CR. A. 16/44 (1944, A. L. R. 125).

FOR APPELLANT: Abcarius & Moghannam.

FOR RESPONDENT: Government Advocate — (Alami).

## JUDGMENT.

*Manning, S. P. J.*: On the 4th February, 1937, the Appellant was convicted before the District Court, Jaffa, of an attempt to commit murder with premeditation. He was convicted on the evidence of two witnesses, one of whom was definitely found by the Court to be an accomplice. The President of the District Court, who tried the case sitting alone, gives no indication in his judgment that he directed his mind to the question of whether the other witness was an accomplice. The Government Advocate, however, in replying to Appellant's argument on the appeal, said that in his opinion both the witnesses were accomplices.

If both witnesses were accomplices then it was dangerous to convict the Appellant on their evidence alone without some further corroboration. But the learned President did direct his mind to the question of one witness, and I think the question of whether the other witness was an accomplice or not must have been present to his mind. There was obviously material in the evidence on which he could discriminate between the two witnesses, one of them had taken an active part in the transaction; the other had refused to take any part. I think it was, therefore, implicit in the judgment that the learned President found that the witness Hassan was not an accomplice, and I do not think that what the Government Advocate has said in Court can affect this implicit finding. The learned President was therefore justified in considering that the evidence of the accomplice was corroborated, and not by another accomplice.

Abcarius Bey, who argued the appeal on behalf of the Appellant, urged very strongly that the Court below had behaved illogically in finding the Appellant guilty, while finding another person charged together with him not guilty. He says there was the same evidence against both. I cannot see that this is a ground of appeal. What we have to determine is whether any good reason is advanced for disturbing the conviction of the Appellant. It is not such a reason that the Court seems to have given the benefit of the doubt to some other person accused at the same time, even if the evidence was the same.

Another ground of appeal was that under the provisions of Ordinance 47 of 1936 this case should have been tried summarily, whereas there had been a preliminary investigation before a Magistrate. The fact that there had been such an investigation was all in favour of the Appellant, and I see no merits in this ground of appeal. The intention of the Ordinance is that preliminary investigations may be dispensed with, but if they are not, an accused person has no ground of complaint.

It has been also urged that the sentence is too severe. I do not agree; the facts disclose a dastardly attempt to cause death and serious injury to many persons.

In my opinion the appeal should be dismissed, and the conviction and sentence affirmed.

*Abcarius* — asks special treatment and sentence to commence from judgment of District Court.

*COURT*: — Order of special treatment is not within our power.

We order sentence to commence from date of conviction of District Court.

*Senior Puisne Judge.*

*Shaw, P. D. C.*: I Concur.

*Khayat, J.*: I am of the opinion that section 6 of the Law of Evidence Amendment Ordinance 1924 does not allow the evidence of a witness, where there is doubt as to the truth of his evidence, such as an accomplice, to be accepted with corroboration, especially if the witness corroborating the evidence of the doubtful witness is considered by the Prosecution to be an accomplice too. I therefore hold that there is no admissible evidence in law upon which the conviction could be based, the conviction and sentence should be quashed and the Appellant acquitted.

Delivered this 20th day of March, 1937.

*Puisne Judge.*

CIVIL APPEAL No. 190/35.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Baker, A/J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Esther Banin. APPELLANT.

v.

Moshe Banin. RESPONDENT.

*Jewish marriage — Kidushin (marriage by sanctification) — Alimony, custody and maintenance of children — C. A. 22/34, national law — Cohabitation with two wives.*

In allowing an appeal from the judgment of the District Court of Haifa and in remitting the case:—

HELD: 1. *Quaere* whether marriage by sanctification will be recognised.
2. A husband cannot force his first wife to co-habit with his second wife.

REFERRED TO: C. A. 22/34 (2, P. L. R. 365; 8, C. of J. 588).

ANNOTATIONS: On the first point *cf.* C. D. C. T. A. 302/43 (1945, S. C. D. C. 431) and cases therein cited.

APPELLANT: In person.

FOR RESPONDENT: Levitzky.

### JUDGMENT.

*Frumkin, J.*: This is an appeal against the judgment of the District Court of Haifa confirming a previous order of the same Court directing the Respondent to pay LP. 1 per month alimony to his wife, the Appellant, and dismissing the claim of the Appellant for the custody of her children and maintenance for them.

The parties in this case are of Jewish confession, originally of Aden, and although they claim to be British subjects, they both agree that Jewish law is applicable. The Appellant is the legitimate wife of Respondent and there is issue of this marriage three daughters. Respondent now lives with another woman whom he maintains to be his second wife by legitimate marriage.

Being a Sephardic Jew, he may marry more than one wife.

Much stress has been laid on the point whether under Jewish law and custom as applied in Aden where the first marriage took place, the consent of the first wife is necessary to a second marriage. To

our mind, this point is of no relevance in this case. We personally feel some doubt as to the validity in law of the second marriage. According to the evidence of the woman, who is supposed to be the second wife of the Respondent, she was not married to Respondent by marriage contract, but by sanctification (*kidushin*) in the presence of two witnesses. In the case of Hefzi-Bah *v.* Ibrahim Mizrahi, the Rabbinical Court of Appeal of Palestine has declared invalid *Kidushin* not effected before a representative of the Rabbinate and not in presence of a congregation of ten, and not accompanied by a deed in writing. The present case might be distinguishable from the case cited in which the *Kidushin* were made without the consent of the woman. But even supposing that the second marriage is valid, and supposing further that the consent of the first wife to the second marriage is not necessary, the Respondent failed to prove that under Jewish law he can, in the case of a second marriage, force his first wife to live with him under the same roof with the second wife. It is worth mentioning in passing that the Respondent and the three girls of the first marriage, the woman he alleges to be his second wife and a child she gave birth to and another child that this woman had by a previous marriage, all occupy a single room. His only prospects for providing an abode for his first wife are his hopes that he might get two rooms allocated to him from communal charity.

In the absence of such evidence, and under Volkenberg *v.* Volkenberg (C. A. 22/34), the onus rests on the party relying on the provisions of a national law, we must hold that the Appellant is not bound to live with her husband and is thus entitled to alimony.

There was evidence before the lower Court that under Jewish law, in case of separation, the wife is entitled to the custody of her female children under the age of twelve years.

The judgment of the District Court must, therefore, be set aside and the case remitted for a fresh judgment to be given for Appellant for alimony and custody of the girls below the age of twelve and maintenance for them.

The Respondent to pay the costs of this appeal.

Delivered this 25th day of March, 1936.

*Puisne Judge.*

CRIMINAL APPEAL No. 54/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Khayat, JJ.

IN THE APPEAL OF:—

Shmuel Olstein. APPELLANT.

v.

Erich Baum. RESPONDENT.

*Appeal from Magistrate — Appeal by leave to Supreme Court — To be granted by presiding Judge — M. C. J. O.,* (1935) *sec.* 6.

In dismissing an appeal from the judgment of the District Court of Jaffa:—

HELD: Leave to appeal from the District Court in its appellate capacity should be granted by the presiding judge who heard the appeal, not by the President of the District Court.

ANNOTATIONS: *Cf.* C. A. 99/37 (*ante*, p. 235) and note.

FOR APPELLANT: J. Hermann.

FOR RESPONDENT: L. Rabinowitch.

### JUDGMENT.

The Appellant was convicted by the Chief Magistrate, Jaffa, of an offence against Art. 241 of the Ottoman Penal Code and sentenced to the payment of a fine. He appealed to the District Court, Jaffa.

His appeal was dismissed on the ground that no legal point had been raised which would allow of the judgment being set aside or amended. The presiding judge who signed this judgment was His Honour Copland, J.

The Appellant obtained leave to appeal to this Court by an order signed by his Honour Judge Shaw, Acting President of the District Court, Jaffa, dated 4th January, 1937.

The apparent delay is explained by the fact that the Appellant's application to this Court was filed on 29th April, 1937.

In these circumstances the question arises whether the appeal has been properly brought and can be heard by this Court.

The material provision of the law is section 6 of the Magistrates' Courts Jurisdiction Ordinance, No. 16 of 1935, which provides that an appeal from a Magistrate's Court to the District Court shall be final but that the presiding Judge of the Court may grant leave to appeal to this Court. Mr. Hermann for the Appellant contends that

this means the President of the District Court and not the Judge who presided at the appeal in the District Court. We do not agree with that contention and in our opinion the words "the presiding Judge of the Court" mean the Judge who presided at the appeal in the District Court.

It is clear that this, which we consider the true interpretation, was the intention of the legislature as the old provision of the law, which this section replaces, — and which is found in the Magistrates' Courts (Jurisdiction) Ordinance, Chapter 87, section 5 — provides that "the President of the Court may" *etc.* which might have been open to the construction for which Mr. Hermann contends.

The appeal was not properly brought to this Court and is therefore dismissed.

Delivered this 28th day of May, 1937.

*Chief Justice.*

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CRIMINAL APPEAL No. 34/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Greene and Khayat, JJ.

IN THE APPEAL OF:—

Naim Ibrahim Abu Sham & an. — APPELLANTS.

v.

Attorney General. — RESPONDENT.

*Perjury — Method of proving — Materiality — Proof that accused was sworn — Unsigned record — Best evidence.*

In allowing an appeal from the judgment of the District Court of Haifa in Crime No. 210/36:—

HELD: 1. The allegation that the false statement was material should appear in an information for perjury.

2. The evidence should establish that the Accused was sworn and made the statement.

ANNOTATIONS:

1. On the first point *cf.* CR. A. D. C. T. A. 73/44 (1945, S. C. D. C. 120) and note 2.

2. On the second point *vide* CR. D. C. Ha. 146/45 (1945, S. C. D. C. 499).

FOR APPELLANTS: No. 1 — Abcarius.
No. 2 — Moghannam & El Madi.

FOR RESPONDENT: Junior Government Advocate — (Wa'ari).

## JUDGMENT.

*Manning, S. P. J.*: On January 5th, 1937, the Appellants were convicted by the District Court of Haifa of perjury. Abcarius Bey, who argued the appeal for Naim Ibrahim Abu Sham, laid a great deal of stress on his opinion that the Appellants had been unfairly prosecuted. This was irrelevant to any issue involved — if the prosecution succeeded in proving the offence according to law, then the conviction could not be interfered with.

2. The principal ground of appeal was that the information was defective in that there was no allegation of materiality. This allegation should, of course, have appeared in the information.

3. There was, however, another irregularity in the proceedings which was of graver import. In a case of perjury it is necessary for the prosecution to prove that the Accused has been sworn and that his sworn evidence included the statement which was the subject-matter of the charge. In the present case the Court accepted as proof of these facts evidence which was entirely inadmissible. The evidence was that of a witness who was not present at the trial at which the statements were made. Yet he stated that the Appellant Naim Ibrahim Abu Sham gave evidence on oath. He stated that the Appellant Subhi Abu Sham gave evidence, but did not say if it was on oath. To prove the statements he produced a record made by a clerk and not signed by the Magistrate. It should be unnecessary to say that all this evidence was inadmissible. Apart from it there was nothing else in the evidence for the prosecution to show that the Appellants had ever made the statements attributed to them. The District Court should have rejected the evidence tendered — this must have resulted in the acquittal of the Appellants. In the circumstances the acceptance of the inadmissible evidence led to a miscarriage of justice.

4. In my opinion the appeals should be allowed and the convictions and sentences quashed.

Delivered this 22nd day of June, 1937.

*Senior Puisne Judge.*

*Greene, J.*: I concur.

*Khayat, J.*: I concur.

CRIMINAL APPEAL No. 114/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Abdul Fattah Deifallah Abu Hussein. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Firearms — Firearms Ord., sec. 36(2)(a) — Evidence that firearm of military value — Effect on sentence — T. U. I. Ord., sec. 72, alteration of charge.*

In partly allowing an appeal from the judgment of the District Court of Jerusalem:—

HELD: Judgment of trial Court amended, there having been no evidence that the firearm was of military value.

ANNOTATIONS: The weapon should be produced in Court: CR. A. 117/37 (*ante*, p. 247).

FOR APPELLANT: Sha'ar.

FOR RESPONDENT: Junior Government Advocate — (Wa'ri).

JUDGMENT.

This is an appeal from a conviction by the District Court convicting the Accused of being in possession of a rifle and a revolver.

It is clear that upon the trial by the District Court certain irregularities occurred, but we are satisfied from the record that the Accused was unquestionably in possession, without a licence, of the firearms in question, and we are satisfied that he should be convicted under the Firearms Ordinance, section 36(2)(a).

That section provides various prohibitions in connection with the Ordinance and it concludes with the punishments which follow for infringements of these prohibitions. The maximum punishment in the ordinary case is six months, and there is a proviso that if the firearm was of military value the penalty may be increased to three years.

It would appear in this case that the firearms were of military value, but there is no evidence as to this and it does not appear from the record that the Accused pleaded guilty to being in possession of firearms of military value, although he pleaded guilty to the original charge. In our view there should undoubtedly be evidence that the firearm is

of military value in order to bring the offence within the proviso to section 36 of the Firearms Ordinance.

This Court has, by virtue of section 72 of the Criminal Procedure (Trial Upon Information) Ordinance, power to amend the judgment of the District Court. To make it quite clear, we convict the Accused of being in possession of firearms contrary to section 36(2)(a) of the Firearms Ordinance, but in the absence of any plea as to the firearms being of military value and in the absence of any evidence to that effect, we reduce the sentence to one of six months' imprisonment to run from the date of the conviction, that is 20th September, 1937.

Delivered this 9th day of October, 1937.

*Chief Justice.*

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HIGH COURT No. 39/37.

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

BEFORE: Manning, S. P. J. and Abdul Hadi, J.

IN THE CASE OF:—

Musa Es-Sayegh & an. — PETITIONERS.

v.

Municipal Council of Jaffa. — RESPONDENT.

*Licensing — Hotel licence — Function of police authorities.*

In discharging an order *nisi* issued to the Respondents:—

HELD: In giving their views in connection with the licensing of a hotel, the police may base their disapproval on strong grounds of suspicion, even if no actual evidence is available.

ANNOTATIONS: On the discretion of licensing authorities see H. C. 3/42 (1942, S. C. J. 71) and note 1; *cf.* H. C. 110/43 (1943, A. L. R. 791), H. C. 46/44 (1944, A. L. R. 404), H. C. 51/44 (*ibid.*, p. 457) and H. C. 68/45 (1945, A. L. R. 824) and notes to these cases.

FOR PETITIONERS: Hazou.

FOR RESPONDENT: A. Akel.

### ORDER.

This is an application for an order to the Municipal Council, Jaffa, to issue a hotel licence to the first Petitioner. The Council refused the licence on the ground that a petition by certain prominent re-

sidents represented that the proposed hotel was being conducted and had been conducted in an immoral manner.

The Petitioner had, in accordance with the law, obtained the approval of the Police. This Court, having certain doubts as to the significance of this approval, called Mr. Miller, a Deputy Superintendent of Police, as a witness. His evidence supported the action of the Municipal Council in refusing the licence. He said that the Police had to give their approval as the Petitioner had no criminal record. My brother and I think that in adopting this course, the Police were taking a narrow view of their responsibilities.

It is not necessary that the Police should have available sufficient evidence to constitute a *prima facie* case in a criminal charge — in a case like this, we think they may base their disapproval on strong grounds of suspicion.

We think that the Council might have conducted their inquiry in a more judicial manner, but we are convinced that their decision to refuse the licence was right.

The rule will be discharged with costs, to include LP. 10.— advocate's fees.

Given this 31st day of July, 1937.

*Senior Puisne Judge.*

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CRIMINAL APPEAL No. 76/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Frumkin, JJ.

**IN THE APPEAL OF:—**

Attorney General. — APPELLANT.

v.

Mousa Elias Abboud. — RESPONDENT.

*Town Planning — Sec. 35(4)(8) — "Order".*

In dismissing an appeal from the judgment of the District Court of Haifa, in its appellate capacity:—

HELD: The word "order" in sec. 35(8) of the Town Planning Ordinance includes punishment by fine or imprisonment which is thus appealable.

**ANNOTATIONS:**

1. The decision in this case has been disapproved in CR. A. 105/41 (1941, S. C. J. 433).

2. See also CR. A. 128/37 (*ante*, p. 305) and CR. A. D. C. Ha. 134/45 (1945, S. C. D. C. 555) and cases therein cited.

FOR APPELLANT: Assistant Government Advocate — (Salant).

FOR RESPONDENT: Maman.

## JUDGMENT.

This is an appeal which is brought before us by the Attorney-General from the judgment of the District Court of Haifa in its appellate capacity dated the 26th April, 1937, in which the Government desires to have an opinion as to the proper interpretation of the law. A number of technical points were raised before us on both sides, but we do not propose to deal with them. The matter to be interpreted is the provision of sub-section 8 of section 35 of the Town Planning Ordinance, 1936, which provides as follows:—

> "Any person aggrieved by any order of a Magistrate's Court or Municipal Court under this section, or by any refusal or failure to make such order, may appeal against such order, or against such refusal or failure, as the case may be, to the District Court and the District Court may allow or reject the appeal, or may return the case to the Court from which the appeal was made, or may make any order that such Court could have made under the provisions of this section. For the purposes of this section the District Court shall consist of a President or Relieving President, and one Judge".

This section is a long and rather complicated section, and it is quite clear why it came into existence.

Offences against Town Planning are peculiar and in very many cases cannot be adequately dealt with by penalty. This section was presumably passed by the legislature to give power to the Courts, which before its passing they did not fully possess, to order persons to do certain things. The powers are vested in Magistrates' Courts. Sub-section 35 expressly lays down these powers as follows:—

> "Notwithstanding anything contained in the Magistrates' Courts Jurisdiction Ordinance, 1935, or the Municipal Courts Ordinance, 1928, Magistrates' Courts and Municipal Courts shall respectively exercise jurisdiction in cases under this section, and such Courts shall have all the powers set out in this section, save in the case of an appeal as provided for in sub-section (7) (*sic*) hereof".

It seems to us that the real point in this case and a point which is desirable in the public interest should be decided is: "Does sub-section 8, when it speaks of an 'order', include a fine or imprisonment which may be imposed under this section?" The section gives the Magistrate power to impose a fine, and in certain questions imprisonment, and also to make orders for certain things to be done. If the word "order"

does not include these penalties it might be that a penalty might be imposed and an order for, say, demolition made upon the same facts — the order for demolition being appealable, the penalty not appealable,

It does not seem to us that the legislature intended this anomalous position and it seems to us that it is the meaning and intention of the Ordinance that "order" should include any penalty imposed.

The appeal will therefore be dismissed.

Delivered this 28th day of July, 1937.

*Chief Justice.*

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HIGH COURT No. 40/37.

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

BEFORE: Copland and Frumkin, JJ.

IN THE APPEAL OF:—

George Gerson. PETITIONER.

v.

Chief Execution Officer, Jerusalem & 4 ors. RESPONDENTS.

*Privileged debts — Rent — Attachment — Goods in leased premises — Art. 127 Execution Law.*

In making absolute a rule *nisi* issued to the first Respondent:—

HELD: A claim for rent is preferred in respect of goods found in the leased premises.

ANNOTATIONS: For another authority on Art. 127 of the Execution Law see C. A. 78/39 (1939, S. C. J. 463).

FOR PETITIONER: Krongold.

FOR RESPONDENTS: Nos. 2—5 — Rakove.

JUDGMENT.

1. The facts giving rise to this application are as follows: The Petitioner and the Respondents, other than the first Respondent, are judgment creditors of a certain lady by name of Mrs. Bertha Friedman. Petitioner obtained a judgment from the Magistrate's Court, Jerusalem, for house rent against the said judgment debtor and obtained an attachment on certain goods which were found in the house which was leased by Petitioner to the said judgment debtor. The Respondents also obtained judgments against the same judgment debtor and also

attached certain goods which were found in some other place. The Chief Execution Officer ordered that the proceeds of the sale of the attached goods be distributed in proportion to the claims of all the judgment creditors.

2. Petitioner applied to this Court for an order to issue to the first Respondent ordering him to pay the proceeds of the sale of the attached goods which were found in the house which was leased by Petitioner to the judgment-debtor contending that he has a special privilege in respect of the goods of the tenant kept in the leased premises.

3. The second part of Article 127 of the Ottoman Execution Law provides that the rent has special preference over the proceeds of the sale of the goods kept in the leased property: but it only applies to goods which were in the leased premises — it cannot apply to property found in any other house leased by the judgment debtor.

4. For the above reason, the rule must be made absolute with costs to include LP. 3.— advocate's fees.

Delivered this 23rd day of July, 1937.

*British Puisne Judge.*

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CIVIL APPEAL No. 127/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF :—

Haj Ismail Najjar. APPELLANT.

v.

David Amos. RESPONDENT.

*Documentary evidence — Bailee, Mejelle, Art.* 1774, *O. C. C. P. Arts.* 54, 80.

HELD : A trustee who has given written acknowledgement of a deposit cannot prove discharge of the bailment by his oath, but should adduce documentary evidence.

ANNOTATIONS: *Cf.* C. A. 72/31 (1, P. L. R. 648; 2, C. of J. 795); see also C. D. C. T. A. 357/42 (1945, S. C. D. C. 571).

FOR APPELLANT: Kehaty.

FOR RESPONDENT: Yehuda.

JUDGMENT.

This case raises an interesting but simple point. The Appellant some years ago accepted LP. 100 from the Respondent as a deposit and gave a receipt in which it was stated that the money was held on trust. Later the Respondent sued for the return of the LP. 100, and the Appellant alleged that he had already repaid it, and claimed that by Article 1774 of the *Mejelle* he was discharged by his oath.

The District Court held on appeal that since the Appellant had given a written acknowledgement of the amount any repayment thereof must be proved in writing, and that the oath was insufficient to disprove a written document. The Appellant has appealed by leave to this Court.

It has been argued that by Article 54 of the Civil Procedure Code and Article 1774 of the *Mejelle* the oath of a trustee is sufficient even when the deposit on trust is proved by means of a written receipt. We do not agree. The Civil Procedure Code must be read as a whole, and there is nothing in this case to take it out of the provisions of Article 80 of the Civil Procedure Code. Where a trustee gives a written acknowledgement of the amount deposited with him repayment must be proved in writing; his oath is insufficient.

The appeal is dismissed with costs and LP. 5 advocate's fee.

Delivered this 30th day of July, 1937.

***British Puisne Judge.***

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CIVIL APPEAL No. 118/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Greene and Frumkin, JJ.

IN THE APPEAL OF:—

Rabbi Mordechai Aharon Fischmann & 2 ors. — APPELLANTS.

v.

Bishop Methodios, in his capacity as supervising guardian of minor heirs of the late Salim Salfity & an. — RESPONDENTS.

*Breach of contract — Notice to complete — Legal holiday — Willingness to complete — Damages.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, in Civil Case 45/36:—

HELD: On the conduct of the parties in this case it was held that the Appellants had not been ready to complete.

ANNOTATIONS: On readiness and willingness to complete see C. A. 115/33 (*ante*, p. 397) and note 2 thereto.

FOR APPELLANTS: Schmetterling.

FOR RESPONDENTS: H. Atalla.

## JUDGMENT.

In this case there was an agreement between the parties, under which the Respondents agreed to transfer certain land to the Appellants. The date of the agreement was August 9th, 1935, and it was provided that the transaction should be completed within six months. The last day for completion was therefore February 9th, 1936. This day happened to be a Sunday. As the 8th February was a Saturday and a day of rest for the Appellants, the Respondents sent a notice to the Appellants fixing Friday, February 7th, as the date for the completion of the transaction in the Land Registry. The Appellants received this notice, but made no reply to it, and failed to meet the Respondents at the Land Registry on February 7th.

The Appellants, without giving to the Respondents the slightest intimation of their intention, turned up at the Land Registry on February 10th, but of course the Respondents were not there.

From the facts that the Appellants made no reply to the notice of the Respondents and that the Appellants gave no notice to the Respondents of their intention to be present at the Registry on February 10th, we infer that the Appellants were not willing to complete. We are in agreement with the Court below, but for somewhat different reasons, that the Appellants committed a breach of contract.

No question was raised in the Court below as to damages and no ground has been urged here that the damages awarded were excessive.

The appeal is dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 20th day of July, 1937.

*Senior Puisne Judge.*

HIGH COURT No. 47/37.

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

BEFORE: Copland and Greene, JJ.

IN THE APPLICATION OF:—

David Fishlin. PETITIONER.

v.

Chief Execution Officer, Jaffa & an. RESPONDENTS.

*Landlords and tenants — Landlords & Tenants Ord.*, 1935, *sec.* 10(1) — *Application of Ordinance to judgments in execution — Jurisdiction of High Court.*

In making absolute an Order issued to the first Respondent, directing him to show cause why his order dated the 29th July, 1937, refusing to stay the execution of the judgment of the Land Court ordering the eviction of the Petitioner from the premises occupied by him should not be set aside:—

HELD: 1. Upon the application of the Ordinance to any area, the Chief Execution Officer can no longer execute a judgment of eviction given prior to the application.

2. The High Court should be approached for a remedy only after all other remedies are exhausted.

ANNOTATIONS: *Cf.* H. C. 114/43 (1943, A. L. R. 820), H. C. 41/44 (1944, A. L. R. 554), H. C. 105/44 (*ibid.*, p. 556) and C. A. 78/44 (*ibid.*, p. 623).

FOR PETITIONER: B. Joseph.

FOR RESPONDENTS: No. 2 — S. Felman.

## JUDGMENT.

1. This case raises an interesting point. The Land Court sitting as a Court of Appeal gave judgment on the 4th of June, 1937. On the 13th of June the President of the Land Court dismissed an application for leave to appeal. On the 3rd of June, 1937 an order by the High Commissioner in Council was promulgated extending the provisions of part II of the Landlords and Tenants (Ejection and Rent Restrictions) (Extension) Ordinance, 1935 to the Municipal Area of Tel-Aviv as from the 8th of March. 1937.

2. It is likely that this Order was not known to the Court at the time it delivered its judgment. Under section 10(1) of the Landlords and Tenants (Ejection and Rent Restrictions) (Extension) Ordinance, 1935 the Chief Execution Officer is bound to refuse the execution of the said judgment of the Land Court. It seems that the Legislator has

given to the Chief Execution Officer an extraordinary power by enabling him to decline to execute judgments of a Court. But the words are clear and cannot admit of any other interpretation.

3. We regret to say that the Chief Execution Officer is bound to order stay of the execution of the judgment of the Land Court and the Rule *nisi* must be made absolute.

4. I would like to make one further remark. In our opinion, the observations of the Chief Execution Officer in his final order refusing to stay eviction on the conduct of the Petitioner, were quite unjustified. The course adopted by the Petitioner was entirely correct, because if he had applied straight to the High Court, without first applying to the President Land Court for leave to appeal, his application would certainly have been dismissed, because it has been held by this Court on many occasions that whenever an applicant has any other remedy then an application to this Court is bound to fail if he has not first attempted to use the other remedy.

5. Therefore the Rule *nisi* given by this Court on the 3rd day of August, 1937 is made absolute with costs and LP. 5 advocate's fees.

Given this 10th day of August, 1937.

*British Puisne Judge.*

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MISDEMEANOUR APPEAL No. 1/36.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: McDonnel, C. J., Manning, S. P. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Attorney General. — APPELLANT.

v.

Hassan Saleh El Dahnus & an. — RESPONDENTS.

*Criminal appeals — T. U. I. Ord., secs. 68—9 — Appeal from acquittal where Court evenly divided — Remittal a nullity — Effect on subsequent proceedings — Morgan v. Cullen.*

In dismissing an appeal from the judgment of the District Court of Jaffa:—

HELD: There is no power to remit a case for trial where an accused person has been acquitted by reason of the Court being divided. An order of remittal is, in such cases, a nullity.

FOLLOWED: Morgan *v.* Cullen, 1936, 2 K. B. 324; 1936, 2 All E. R. 147.

ANNOTATIONS:

1. The previous judgment is M. A. 4/35 (2, P. L. R. 351).

2. Note that section 68(1)(c) of the T. U. I. Ord. (now sec. 72(1)(c)) has been amended by the T. U. I. (Am.) Ord., 1939, so as to give power to remit in such cases. *Cf.* also CR. A. 109/40 (1940, S. C. J. 423).

FOR APPELLANT: Assistant Government Advocate — (Ghussein).

FOR RESPONDENTS: Moghannam.

## JUDGMENT.

*Manning, S. P. J.*: On 4th December, 1934, the Respondents were charged before the District Court, Jaffa, with an offence against section 67(1) of the Land Settlement Ordinance, 1928. The District Court was composed of two Judges and on the 6th December, 1934, they delivered separate judgments; one being for conviction, the other for acquittal. The result was that the Respondents were acquitted.

The Attorney General appealed, and on the 29th June, 1935, the Court of Appeal made an order setting aside the judgment of the Court below and remitting the case for trial.

It is necessary to consider the jurisdiction of the Court of Appeal when dealing with an appeal by the Attorney General against an acquittal. Sections 68 and 69 of the Trial Upon Information Ordinance, 1924, are as follows:—

> "68. If the Court of Appeal requires further evidence before deciding the appeal, it may:—
> (a) Hear any witnesses whom it may see fit to call or require the production of any document; or
> (b) Require the Court of Criminal Assize or District Court to hear such evidence and decide such issue or issues of fact as may be necessary for the better determination of the case.
> 69(1) In determining an appeal the Court of Appeal may:—
> (a) Affirm the judgment of the Court of Criminal Assize or District Court and dismiss the appeal; or
> (b) Amend the judgment of the Court of Criminal Assize or District Court, either as to the description of the offence proved or the article or articles of the law applicable, and may increase or reduce the punishment and in general give such judgment as in its opinion ought to have been given by the Court below on the information and evidence before it; or
> (c) Quash the conviction or remit the case to the Court below for a new trial with such directions as may be necessary. In that case the Court of Criminal Assize or District Court shall not be bound to hear again the evidence already taken, but may use the notes of the former trial and hear such further evidence as may be necessary unless otherwise directed by the Court of Appeal; or
> (d) Allow the appeal and quash the conviction; or
> (e) Allow the appeal and set aside the judgment of the Court

> below acquitting the Accused and convict and sentence him on the ground that the facts found by the Court, if justified by the evidence, constitute an offence of which he should have been convicted.
>
> (2) Unless the Court otherwise orders, a sentence of imprisonment or penal servitude shall be deemed to commence from the date of the decision on the appeal".

It is quite clear that the order made by the Court of Appeal was not made under section 68. There was no intimation that it required to hear further evidence before deciding the appeal, and in view of the provisions of section 69 it is doubtful if any Court of Appeal would avail itself of the provisions of section 68 when the appeal is against an acquittal. If the evidence below has been insufficient to convict, it would be contrary to the principles of law to give the Attorney General a further opportunity to remedy any omissions that had been made by the prosecution.

An examination of section 69 shows that in a case of acquittal the Court of Appeal has no jurisdiction to set a judgment aside and remit a case for trial. The only power of remission is given under section 69(c) and it is clear from the wording that this applies only where there has been a conviction. In the case of an acquittal, the Court of Appeal may proceed under either (a), (b), or (c), that is, it may dismiss the appeal, amend the judgment or sentence, or convict and sentence the Respondent. If it sets aside the judgment of the Court below, it can do so only on the ground that the facts found by the Court below constitute an offence of which the Respondent ought to have been convicted.

In the case of Morgan *v.* Cullen, 1936, 2 K. B., 324, Scott, L .J., said at p. 329:—

> "This is a case of general importance. The learned County Court Judge referred the whole of two actions to the registrar for inquiry and report without the consent of the parties under the County Courts Act, 1919, section 6. I agree that under the County Courts (Amendment) Act, 1934, section 20, he had no jurisdiction to refer the whole action in this way. The result is that everything that has been done is a nullity, including the hearing before the Judge".

The President (Sir Boyd Merriman) also agreed that the order was a nullity and said, at p. 328:—

> "The question therefore is, as Lindley, L. J., said in Fry *v.* Moore, 1889, 23 Q. B. D., 395, 'whether the order ..... was a nullity, rendering all that was done afterwards void, or whether it was only an irregularity'. He there said that he would not attempt to draw the exact line between an irregularity and a nullity, but that in general one could easily see on which side of the line the particular case fell. I have no difficulty in seeing on which side this case falls".

Later he said, p. 329:—

> "This case shows how necessary it is to observe the statutory limits of the jurisdiction to refer".

That case is very similar to the present one — and the remarks of the President and Lord Justice Scott apply with greater weight when the case is a criminal one. The order made by the Court of Appeal was a nullity, and all that was afterwards done was void.

What was done afterwards was that, the case having been remitted, the two District Court Judges heard further argument and then wrote fresh judgments. Each adhered to his original opinion, with the result that the Respondents were again acquitted. The Attorney General again appealed.

The further proceedings before the District Court were a nullity and as a consequence there is no appeal properly before this Court. In accordance with local procedure the matter may be treated as a mere application which should, on the grounds stated above, be dismissed.

Delivered this 24th day of September, 1936.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 106/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Greene, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :—

The Municipal Corporation of Jerusalem. APPELLANT.

v.

Muhammad Abed Sharaf, Jerusalem & 6 ors. RESPONDENTS.

*Expropriation of Land — Land (Expropriation) Ord., sec. 10(1) — Value of building and Land.*

In dismissing an appeal from the judgment of the Land Court of Jerusalem, dated 24.5.37, in Land Case No. 15/37:—

> When a building is expropriated, the owner is entitled to ask for the value of the land in addition to that of the building.

ANNOTATIONS:

1. On expropriation cases see note to C. A. 34/43 (1943, A. L..R. 337).

2. Sec. 12(b) of the Land (Acquisition for Public Purposes) Ordinance 1943, is *totidem verbis* as the section relied upon in the judgment.

FOR APPELLANT: S. Said.

FOR RESPONDENTS: No. 1 — No appearance.
Nos. 2—7 — Eliash.

JUDGMENT.

This is an appeal from an order of the Land Court of Jerusalem whereby the Court ordered the Municipal Corporation of Jerusalem to pay LP. 3,032.800 mils for the building as agreed upon by the parties.

2. As regards the land, area 600 metres, upon which the buildings stood, the value of the land for which the Court considered the Municipal Corporation must pay, is at LP. 4.500 mils per square metre — LP. 2700.

3. As regards the remainder of the land which is less than 25% of the total area of the land and which was required for widening the road, Respondents are not entitled to compensation.

4. Section 10 of the Land (Expropriation) Ordinance is clear on the point. In awarding compensation the Court shall act with the following rules :

> "(b) the value of the land shall, subject as hereinafter provided, be taken to be the amount which the land, if sold in the open market by a willing seller, might be expected to realise."

5. In our opinion the Court was right in assessing the value of the building and the value of the land, and Respondents are entitled to compensation in respect of the land on which the building stood.

6. We see no reason to interfere with the judgment of the Court below and this appeal will be dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 9th day of November, 1937.

*British Puisne Judge.*

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CIVIL APPEAL No. 122/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Said Awad El Khoury. APPELLANT.

v.

Salim Raji Farah. RESPONDENT.

*Promissory notes — Note under the Ottoman Commercial Code — Prescription, Art. 146 — B/E Ord., sec. 96 — C. A. 177/23, Roussos v. Theophanides, Imperial Ottoman Bank v. Limbouri — Conditional note.*

In dismissing an appeal from the judgment of the District Court of Nablus in its appellate capacity:—

HELD: 1. The Ottoman Commercial Code applies, as regards prescription, to notes made prior to the enactment of the Bills of Exchange Ord.
2. A note is not conditional under the Code if it defines the rights of the holder upon dishonour.

DISTINGUISHED: C. A. 177/23 (not reported); Roussos *v.* Theophanides, 4 Cyprus L. R. 12; Imperial Ottoman Bank *v.* Limbouri & an., 4 Cyprus L. R. 48.

ANNOTATIONS:

1. On the first point *cf.* C. A. 36/42 (1942, S. C. J. 600) and cases therein cited.

2. On the second point *vide* C. A. 89/33 (2, P. L. R. 191; 3, C. of J. 820) and C. A. 67/41 (1941, S. C. J. 186).

FOR APPELLANT: Goitein.

FOR RESPONDENT: Atalla.

JUDGMENT.

*Manning, S. P. J.:* The Appellant sued the Respondent in the Magistrate's Court of Nazareth for LP. 33.846, due on a promissory note. The terms of the note were as follows:—

> "LE. 33 (Thirty-three Pounds Egyptian only).
> After the elapse of thirty days from the date hereunder I will pay to the order of Mr. Is'eed (*sic*) Awwaad el Khoury the above mentioned sum, namely thirty-three Pounds Egyptian only, value received by me by continuing and in cash, and, if I make default of payment on maturity or thereafter, I shall be liable for every damage and loss together with the costs and the legal interest, without requiring him to send an official notice.
>
> (Sgd.) *Salim R. Farah*
> (in English and Arabic)
>
> Date: 20th January, 1923".

2. The date of the note was January 20th, 1923, and the action was commenced on the 1st July, 1936. The Defendant pleaded that the action was barred under Article 146 of the Ottoman Commercial Code the relevant part of which runs as follows:—

> "All actions relating to bills of exchange, and to promissory notes signed by traders, merchants and bankers or made for commercial purposes, are barred after five years from the date of the protest or from the last judicial proceeding, if judgment has not been

obtained or the debt has not been acknowledged by a separate document".

3. The learned Magistrate rejected this plea, holding that the document was not a promissory note as, besides the essentials required for a promissory note, it contained an undertaking to pay damage, loss, costs and interest. He held, therefore, that the ordinary period of limitation, *viz.* 15 years, applied; and that the action was not barred. He found that the Respondent had failed to prove that the amount had been paid, and as he refused to tender the oath to the Appellant, he gave judgment for the Appellant for the amount claimed with interest from the date of maturity and costs.

4. The Respondent appealed to the District Court of Nablus. There the learned Judges held that the additional words did not prevent the the document from taking effect as a promissory note, and they referred the case back to the learned Magistrate for a re-trial.

5. Against this decision the Appellant has appealed. I think it convenient to deal at once with a point raised by Hanna Eff. Atalla, advocate for the Respondent. He argued that Article 146 of the Ottoman Commercial Code was repealed by the Bills of Exchange Ordinance (Cap. 10) and that the relevant provision with respect to limitation is new section 96 of that Ordinance. This section fixes the period of limitation, in the case of the maker of a promissory note, at five years, and differs only from Article 146 as regards the period from which time begins to run. I do not see how this argument can affect the issue which we have to decide, which is, whether the document is a promissory note. As, however, the point has been raised, and as it might be convenient to decide what law is applicable, I will say that I am against the contention of Hanna Eff. Atalla. He based his argument on the ground that all procedural laws are retrospective in effect. But the Bills of Exchange Ordinance, when originally promulgated in 1929, contained a section (then section 96) which expressly saved any remedy in respect of any right acquired before the coming into force of the ordinance. If the Appellant had a remedy by action in 1929, before the Ordinance took effect, he did not lose it when the Ordinance came into force.

6. Mr. Goitein, who argued the case for the Appellant, relied on three authorities — one from Palestine and two from Cyprus. The Palestine case is Daher *v.* Kudha, Civil Appeal No. 177 of 1923, unreported. I have been through the record in that case, and I find that this Court held that a certain note for 568 *piastres* was not a negotiable instrument, because it contained a condition — but the judgment is silent as to what the condition was, and the proceedings do not disclose

it or that there was any argument on the point. I cannot see how this case helps the Appellant.

7. The first Cyprus case is Roussos *v.* Theophanides, Vol. IV, Cyprus Law Reports, page 12. There the note, in addition to the obligation to pay a certain sum, contained an agreement to pay the costs of any litigation arising out of the note and also the amount of any fees paid by the payee to advocates. One ground of defence was that the action was prescribed under Art. 146 of the Commercial Code. The Court rejected this plea on the ground that the insertion of words importing an obligation to pay costs and advocates' fees took the note out of the category of promissory notes as defined in Article 145 of the Commercial Code, and that it was impossible to say that the obligation to pay costs and advocates' fees could be passed by indorsement.

8. The second Cyprus case is also reported in Vol. IV of the Reports, at page 48, Imperial Ottoman Bank *v.* Limbouri and another. There the note, in addition to the obligation to pay a sum certain, contained a declaration of a mortgage as security, and an undertaking to pay interest and all costs in case of legal proceedings. The Court held that the document was not a promissory note within the meaning of the Commercial Code, as it contained an agreement to mortgage immovable property and to pay costs.

9. I think these two Cyprus cases can be distinguished from the present case. In the Roussos case there was an undertaking not only to pay the costs of litigation arising out of the note, but also to pay any fees which might be paid to advocates by the payee. In the Ottoman Bank case the document contained a declaration of mortgage. In the present case the wording of the document has to be carefully considered and also the nature of a promissory note. Article 145 of the Commercial Code is as follows:—

> "A promissory note shall be dated. It shall specify the amount to be paid, the name of the person whose order it is payable, the time when it must be paid, and whether the value thereof has been received in cash, in goods, in account, or by the transfer of a debt".

10. It will be seen that the document in this case, up to the word "cash", fulfils all the requisites laid down. If the document had ended there and if the maker had failed to pay at maturity, the holder might bring an action for damages, and the measure of these damages would be the amount of the note, together with any interest due and any expenses incurred for protest. The question of costs would be one for the Court, but in the vast majority of cases they would be awarded to the holder. The result in this case is that you have a promissory note with certain words added which do not alter the obligations in-

curred by the note. I am in complete agreement with the following passage in the judgment of the District Court:—

> "The nature of a document of this kind is not affected by words elucidating or defining, but not conflicting with, the terms of the law governing the document".

11. In my opinion the appeal should be dismissed and the order of the District Court should be affirmed. The Respondent to have the costs of this appeal to include LP. 10 advocate's fees.

Delivered this 16th day of September, 1937.

*Senior Puisne Judge.*

*Khaldi, J.*: I concur.

*Abdul Hadi, J.*: I concur.

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CIVIL APPEAL No. 139/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Jacob Aboulafia. APPELLANT.

v.

A. Felman & an. as liquidators of the Jedda Textile Works Ltd. RESPONDENTS.

*Burden of proof — Procedure — Hearing of witnesses after case closed — Adjournments.*

In allowing an appeal from the judgment of the District Court of Haifa in its appellate capacity:—

HELD: Taken in conjunction with a failure to adjourn at the Appellant's request (on suitable grounds), the fact that the Magistrate allowed the Respondent to call additional evidence after he had closed his case, amounted to an irregularity which prejudiced the Appellant.

ANNOTATIONS: *Cf.* C. A. 307/43 (1944, A. L. R. 411) and C. A. 6/45 (1945, A. L. R. 335).

FOR APPELLANT: Maman.

FOR RESPONDENTS: Bar Rav Hay.

### J U D G M E N T.

*Manning, S. P. J.*: 1. This is an appeal on leave granted by the presiding judge of the District Court of Haifa. The Respondent had

sued the Appellant before a Magistrate for the price of goods supplied. There had been a denial of certain items by the Appellant and in respect of them the Respondent called witnesses. The learned Magistrate reserved his decision, but on the day which he had fixed for its delivery he decided to give the Respondent an opportunity of calling further witnesses to prove an item of LP. 34.638. The witnesses were called, the learned Magistrate was satisfied as to the item and gave judgment for the Respondent for LP. 89.638. In deciding an appeal by the Appellant the District Court held "that the hearing of further evidence was not an irregularity of procedure of such a nature as to prejudice the proper determinations of the case".

2. There were other circumstances to which it is necessary to draw attention. It is admitted that at the hearing when the further evidence was being called the Appellant's advocate was ill and that another advocate, to whom he had given a delegation but who knew nothing about the case, asked for an adjournment but the learned Magistrate decided that the case must go on. It was said that the reason for his so deciding was that the case had already taken a considerable time and he was anxious to finish it. The result, however, was that there was no proper opportunity to cross-examine the additional witnesses and to call evidence in rebuttal. The learned Magistrate had apparently forgotten the well known maxim that justice delayed is better than injustice accelerated.

3. With regard to the general question, when issues are joined in a civil case the burden of proof lies on one party or the other. If the party on whom the burden lies fails to satisfy the Court, then he must fail on the particular issue. In the present case the learned Magistrate had decided that the burden of proving the item of LP. 34.638 lay on the Respondent. The Respondent's advocate led such evidence as he had at his disposal and closed his case. It is clear that he failed to satisfy the learned Magistrate. If the learned Magistrate had given his decision on the day in which he decided to do so, he must have found for the Appellant in this issue. But he chose instead to say in effect to the Respondent, "You have not proved this item, but I shall adjourn to give you a further opportunity of proving it". In my opinion such a course of action is open to the suggestion that the learned Magistrate was anxious that the Respondent should succeed, and it was an irregularity which gravely prejudiced the Appellant, as, if it had not been done, the Appellant must have succeeded in this issue. Taken in conjunction with the refusal to adjourn and the consequent detriment to the Appellant, the latter was certainly justified in urging before us that he had not had a fair trial as regards this item

of LP. 34.638. I think that the proper course to take is to set aside the judgments of the District Court and the learned Magistrate and to substitute a judgment for the Respondent for LP. 55.— only. The Appellant should have his costs here and in the District Court, such costs have to include an advocate's fee of LP. 5.—.

Delivered this 22nd day of September, 1937.

*Senior Puisne Judge.*

*Frumkin, J.*: I concur.

*Abdul Hadi, J.*: I concur.

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CIVIL APPEAL No. 107/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Banco di Roma. APPELLANT.

and

The Palestine Zinc Products Company "Dlee" & 2 ors. RESPONDENTS.

*Bankruptcy of partnership — Bankruptcy prior to enactment of the Ordinance — Partnership Ord., secs.* 2(2), 19, 69, 76(2) — *O. C. C. Arts.* 10—19, 24, 26, 30, 32, 35, 52.

In allowing an appeal from the District Court of Jaffa sitting at Tel-Aviv:—

HELD: A partnership could be declared bankrupt in the partnership name under the Ottoman Commercial Code.

FOR APPELLANT: Gorodissky.

FOR RESPONDENTS: No appearance.

JUDGMENT.

The Banco di Roma as the holders of a judgment proceeded against certain persons in the District Court of Jaffa asking *inter alia* for a declaration of bankruptcy.

The Court made an order against some of the Defendants, but in a preliminary ruling held that they did not consider that they could declare bankrupt a partnership in the partnership's name, and in con-

sequence refused to declare bankrupt the first Defendants — a partnership described as *"Dlee"*.

In our view this was not a satisfactory way of dealing with the matter; it would have been better had the material facts been found by the Court and the points raised disposed of in the judgment.

In this Court the appeal against the second and third Respondents was withdrawn, and Mr. Gorodissky who appeared for the Appellants proceeded only against the first Respondents "The Palestine Zinc Products Co. *'Dlee'*" — the partnership which the District Court had refused to declare bankrupt. This party was not represented, but we are satisfied that they were properly served (with a notice of appeal).

As we have indicated, the facts were not adequately found by the Court below, but it appears from the Palestine *Gazette* of 22nd February, 1934, p. 150, that a partnership known as *"Dlee"* was registered to manufacture pails, bath stoves and other metal objects.

The proceedings in the District Court took place before the promulgation of the Bankruptcy Ordinance, 1936, which came into operation on the 15th August, 1936.

The question therefore is, if prior to the commencement of the Bankruptcy Ordinance, 1936, the provisions of the Ottoman Commercial Code as to bankruptcy, which clearly contemplated the bankruptcy of a partnership, applied to a partnership registered under the Partnership Ordinance (Drayton, Cap. 103).

Section 76(2) of the Partnership Ordinance, 1930, which was omitted from the Revised Edition of the Laws as having had its effect, provided that the provisions of Articles 10 to 19, 24, 26, 30, 32, 35 and 52 inclusive of the Ottoman Commercial Code should cease to have effect in Palestine. Section 69 of the Partnership Ordinance provides that the provisions of that Ordinance shall apply to every partnership registered under it to the exclusion of any provisions of the Ottoman Civil Code.

Section 19 of the Ordinance clearly contemplates the bankruptcy of a partnership.

It may be noticed that section 2(2) of the Partnership Ordinance provides:—

> "This Ordinance shall be interpreted by reference to the law of England relating to partnerships, and the English rules of equity and common law applicable to partnership shall apply in Palestine. save so far as they are inconsistent with the express provisions of this Ordinance".

In England a partnership cannot be declared bankrupt in the partnership name, but there is no provision in the English Law similar to section 19 of the Ordinance. Moreover, unlike a partnership under

English Law, by section 61 a partnership under the Ordinance is a legal person and may sue and be sued in the name of the firm.

We are of opinion, therefore, that the District Court was wrong in holding that, in so far as Respondent No. 1 was concerned, it could not declare bankrupt a partnership in the partnership name.

The ruling of the Court below as regards the 1st Respondent is therefore set aside and the case remitted to the Court below to deal with the application for the declaration of the bankruptcy of the Respondent firm.

The judgment declaring the bankruptcy of the second Respondent will stand.

Respondent to pay costs to include LP. 3.— advocate's fees.

Delivered this 26th day of February, 1937.

*Chief Justice*

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CIVIL APPEAL No. 212/37.

## IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Copland and Khayat, JJ.

IN THE APPEAL OF:—

David Kinsbrunner, administrator of Berl Kinsbrunner's estate. APPELLANT.

v.

Berl Kolb. RESPONDENT.

*Foreign administrators — May not sue in Palestine.*

In dismissing an appeal from the judgment of the District Court of Jerusalem:—

HELD: An administrator appointed by a foreign Court will not be recognised in Palestine before obtaining local letters of administration.

ANNOTATIONS: *Vide* C. A. 85/40 (1940, S. C. J. 475) regarding the different position of a foreign syndic in bankruptcy.

FOR APPELLANT: Fleisher.

FOR RESPONDENT: Amdur.

## JUDGMENT.

1. In this case the Appellant sued the Respondent in the District Court of Jerusalem for a debt which was alleged to have been due to

one Berl Kinsbrunner. The debt had been contracted in Austria and Berl Kinsbrunner died in 1934.

2. The Appellant was suing as administrator of the deceased's estate, he having been appointed by the Magistrate's Court, Vienna, as administrator of the estate of the deceased.

3. The District Court of Jerusalem gave judgment for the Respondent on the ground that the Appellant had no right to sue in Palestine as he had not obtained letters of administration in Palestine.

4. We are in agreement with the judgment of the District Court. In Cheshire Private International Law, page 408, the following passage occurs:—

> "The rule is absolute that the status of an administrator appointed by a foreign Court is not recognised in England. His title relates only to property that lies within the jurisdiction of the country whence he derives his authority, and therefore he has no right to take or to recover property in England without a grant from the English Court".

5. We are in agreement with that statement of English Private International Law and in the circumstances that rule is the only rule which can be applied in Palestine. The appeal is therefore dismissed with costs to include LP. 5 advocate's fees.

Delivered this 3rd say of December, 1937.

*Senior Puisne Judge.*

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HIGH COURT No. 57/37.

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

BEFORE: Greene and Abdul Hadi, JJ.

IN THE APPLICATION OF:—

Hussein Khalil Daoudi. PETITIONER.

v.

Chief Execution Officer, Jerusalem & an. RESPONDENTS.

*C. E. O. — May order payment of debt in instalments — Discretion.*

In discharging an order *nisi* issued to the first Respondent:—

HELD: The C. E. O., has a discretion, after satisfying himself as to the debtor's means, in ordering the instalments which the debtor should pay.

ANNOTATIONS: *Cf.* H. C. 96/40 (1940, S. C. J. 429) and cases therein cited; see also H. C. 50/41 (1941, S. C. J. 473).

PETITIONER: In person.

FOR RESPONDENTS: No. 2 — In person.

ORDER.

1. This is an application for an order to issue to the Chief Execution Officer, Jerusalem, directing him to show cause why he should not order the second Respondent to pay a higher instalment. Petitioner is also asking this Court to order the first Respondent to proceed with the attachment of the properties of the second Respondent.

2. As regards the question of the instalments: the Chief Execution Officer having satisfied himself as to the amount which the second Respondent is able to pay, and this being a question within the discretion of the Chief Execution Officer, this Court cannot interfere with.

3. As regards the question of the attachment, the Petitioner has not produced to us the order of the first Respondent ordering the attachment nor his order postponing the carrying out of the attachment.

4. The rule *nisi* granted on the 25th October last should be set aside and the application dismissed.

Given this 4th day of December, 1937.

*British Puisne Judge.*

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HIGH COURT No. 68/37.

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

BEFORE: Manning, S. P. J. and Copland, J.

IN THE APPLICATION OF:—

Muhammad Mansour O'Jely. PETITIONER.

v.

Chief Execution Officer, Jaffa & 2 ors. RESPONDENTS.

*Execution Law, Art. 90 — Debtor's dwelling — When application should be made — Art. 115.*

In dismissing an application for an order *nisi* to issue to the first Respondent:—

HELD: An application to the C. E. O. under Art. 90 of the Law of Execution should be made before final sale is ordered.

ANNOTATIONS: For authorities on Art. 90 of the Execution Law see annotations to H. C. 12/37 (*ante*, p. 230).

PETITIONER: In person.

ORDER.

1. The Petitioner is asking this Court to issue an order to the Chief Execution Officer of Jaffa to rescind his order ordering the sale of Petitioner's house in view of the provisions of Article 90 of the Execution Law.

2. It is clear from the Chief Execution Officer's order that Petitioner's application under Article 90 was made after final sale was ordered. This being the case, in view of the provisions of Article 115 of the same law, the application is dismissed.

Given this 6th day of December, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 216/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Greene and Khayat, JJ.

IN THE APPEAL OF:—

Municipal Council, Jerusalem. APPELLANT.

v.

Joseph Weinberg. RESPONDENT.

*Rating — Municipal Corporations Ord., sec. 107 — Duty to publish assessment list — Procedure.*

In allowing an appeal from the judgment of the District Court of Jerusalem in its appellate capacity:—

HELD: Sec. 107 of the Municipal Corporations Ordinance does not relieve the Assessing Committee from the duty of publishing each year a list with regard to any person the rateable value of whose property has already been assessed under the Urban Property Tax Ordinance.

ANNOTATIONS: Sec. 107 of the Municipal Corporations Ordinance has meanwhile been repealed and substituted in the Amendment Ordinance No. 3 of 1940. *Cf.* C. A. 199/45 (1945, A. L. R. 801) and note thereto.

FOR APPELLANT: Said.

FOR RESPONDENT: Scharf (by permission of the Court).

JUDGMENT.

1. In this case the Respondent was ordered by the Magistrate's Court of Jerusalem to pay to the Municipal Council of Jerusalem the sum of LP. 2.960 mils for rates.

2. Both parties appealed to the District Court, Jerusalem. On behalf of the Municipal Council it was argued that section 107 of the Municipal Corporations Ordinance relieved the Assessment Committee from publishing each year a list with regard to any person the rateable value of whose property had already been assessed under the Urban Property Tax Ordinance. The District Court rejected this argument and under the impression that the name of the present Respondent had not been published in accordance with the law it reversed the decision of the learned Magistrate.

3. We are fully in agreement with the judgment of the District Court with regard to the construction of section 107.

4. A second point has, however, been raised by the Appellant and that is that there was a definite finding by the Magistrate that the Respondent had failed to prove that the law has not been complied with with regard to the publication of the assessment list. This is quite so, but against this the Respondent now says that in the Magistrate's Court he wished to call two witnesses on these points and that the learned Magistrate refused to hear them. This had been made a ground of appeal before the District Court, but the District Court did not deal with it in its judgment.

5. In the circumstances we think that the proper order to make is that the judgments of the District Court and the Magistrate's Court should be set aside, and the case be remitted to the Magistrate with directions to hear the two witnesses whom the Respondent wished to call and to deliver a fresh judgment in the matter. Costs of this appeal to abide the event.

Delivered this 13th day of December, 1937.

*Senior Puisne Judge.*

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CIVIL APPEAL No. 213/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Manning, S. P. J., Greene and Khayat, JJ.

IN THE APPEAL OF:—

Mahmoud Es-Salameh of Beit Leed. APPELLANT.

v.

Hafez Ahmad El-Hamdallah in his capacity as a guardian on the minors of Fuad El-Hamadallah of Anabta. RESPONDENT.

*Judgment ultra petita — Plaintiff awarded more than claimed in S/C — Finding of Sharia Court as regards insanity — Adjournments — Directions to apply.*

In partly allowing an appeal against the judgment of the Land Court of Nablus dated 6.10.37 in Land Case No. 108/34:—

HELD: Judgment set aside *pro tanto* the Plaintiff having been awarded more than claimed in the statement of claim.

ANNOTATIONS: *Cf.* C. A. 140/41 (1941, S. C. J. 554) and note 3.

FOR APPELLANT: Eliash.

FOR RESPONDENT: Zueiter.

## JUDGMENT.

This appeal arises out of a land dispute before the Land Court of Nablus. The Respondent sued the Appellant claiming the ownership of certain land and the Court gave judgment in his favour. The Appellant has appealed to this Court.

His first ground of appeal is that the Court below erred in proceeding in his absence at the hearing on 6th October, 1937. On that date the Appellant failed to appear and a medical certificate was produced to the effect that he was ill and unable to attend the Court. The only question which the Court below had to decide was whether this certificate satisfied it that the facts stated therein were correct. The Court below for reasons given came to the conclusion that the certificate was unsatisfactory and proceeded with the hearing in the absence of the Appellant. We are of opinion that this was a matter entirely within the discretion of the Court below, and we do not propose to interfere with their decision in this respect. If any prejudice was caused to the Appellant it was entirely his own fault.

The second ground of appeal relates to an issue which was raised before the Court below. The Appellant alleged that the land was sold to him in 1925 by Fuad El Hamadallah, an ancestor of the Respondent. Against this the Respondent alleged that at the time when he transferred the land to the Appellant, Fuad El Hamadallah was *non compos mentis* and therefore, under Article 50 of the Land Code, incompetent to transfer his land. The Court below heard a large amount of evidence on this point and decided in favour of the contention of the Respondent.

Before the Court below certain proceedings of the *Sharia* Court of Tulkarm had been produced. The *Sharia* Court had had before it in 1925 an application to interdict Fuad El Hamadallah as a prodigal. In the course of the proceedings another application was made to the *Sharia* Court to declare Fuad El-Hamadallah an imbecile and consequently incapable of transferring property. The *Sharia* Court decided that Fuad El-Hamadallah was sane and quite capable of entering into transactions with regard to land or otherwise, but it found that he was a prodigal and therefore interdicted him from any such transactions.

There was an appeal to the *Sharia* Court of Appeal, which decided that the question of Fuad El Hamadallah's sanity or otherwise was not in issue before the Court below and it confined its decision to affirming the decision of the Court below that Fuad El-Hamadallah was a prodigal. We regard the decision of the *Sharia* Court of Appeal as annulling any decision of the Court below on the question of Fuad El-Hamadallah's sanity. This disposes of the point raised by Mr. Eliash that there is in existence a decision of the *Sharia* Court declaring Fuad El Hamadallah to be sane in 1925, and we are in full agreement with the finding of the Court below on this issue.

The third point raised by Mr. Eliash was that the Court exceeded the prayer of the Respondent in his statement of claim, and it is quite clear that it is so. The Respondent was claiming an area of about 80 *dunums* only, and the judgment of the Land Court assigned to him an area of about 350 *dunums*. Adel Eff. Zueiter, for the Respondent admits that only 80 *dunums* are claimed.

For these reasons our order will be that the decisions of the Court below, with regard to proceeding in the absence of Appellant and as to the effect of the judgment of the *Sharia* Court, were right, but that the judgment of the Court below must be set aside and a judgment substituted therefor for the Respondent in terms of the statement of claim.

If the parties do not agree as to the situation of the land in dispute, either of them may submit an application to this Court for directions.

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

Delivered this 16th day of December, 1937.

*Senior Puisne Judge.*

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PRIVY COUNCIL APPEAL No. 2/36.

IN THE PRIVY COUNCIL SITTING AS A COURT OF APPEAL FROM THE SUPREME COURT OF PALESTINE.

BEFORE: Lord Russell of Killowen, Lord Romer and Sir George Rankin.

IN THE APPEAL OF:—

Sa'adat Kamel Hanum. APPELLANT.

v.

The Attorney General of Palestine. RESPONDENT.

*Prescription for waqf — Claim by mutawalli and beneficiary — Mejelle* 1661, 1667, *scope construction — Time from which prescription runs — Waqf "from generation to generation" — Muzaffer Bey v. W. Collet, Vidya Varuthi v. Balusami — Nature of mutawallis rights,*

In dismissing an appeal from the judgment of the Supreme Court of Palestine, dated the 30th of November, 1933:—

HELD: The period of 36 years prescription provided by the *Mejelle* in cases of actions by *mutawallis* or beneficiaries of *waqfs* does not begin to run afresh with every change of *mutawalli* or beneficiary.

REFERRED TO: Muzaffer Bey *v.* W. Collet, 1904, 6 Cyprus L. R. 108; Vidya Varuthi *v.* Balusami, 1921, L. R. 48 I. A. 302.

ANNOTATIONS:

1. The judgment under appeal is L. A. 70/32 (1, P. L. R. 866; 5, C. of J. 1860).

2. On the nature and value of the examples to certain articles of the *Mejelle* see note 1 in A. L. R. to C. A. 384/43 (11, P. L. R. 283; 1944, A. L. R. 569).

FOR APPELLANT: John M. Gover K. C. & Wilfrid M. Hunt.

FOR RESPONDENT: The Attorney General — (Sir Donald Somervell K. C.) and Kenelm Preedy.

JUDGMENT.

*Sir George Rankin*: In this case the Appellant's suit has been dismissed as barred by limitation and the sole question is whether the dismissal is justified upon a true construction of the relevant provisions of the *Mejelle*.

By a deed of *wakf* (*wakfieh*) dated 11th *Muharram*, 1228 *A. H.* (1812 *A. D.*), Emir Ali Pasha made *wakf* of a number of properties directing that the income should be applied in the first place to the upkeep of a certain mosque and fountain. As regards the balance of

income, he directed that it should be paid or distributed to himself for his life and after his death to his three children, Abdulla, Miriam and Hanifeh, and their children.

> "Then after them it shall be for their children, then to their grand-children and then to their great-grand-children *etc., etc.,* and and so on, males and females according to the *Sharia* distribution *viz.* the share of a male shall be twice as much as that of a female and for their descendants after them as long as they live and continually as they generate, provided that any one of them who dies leaving after him a child, or a grand-child or a great-grand-child his share shall pass down to his child or grand-child or great-grand-child. When one of them dies leaving after him no child, or grand-child or great-grand-child, then his share shall pass down to those who are of his category. The upper category (ascendants) shall enjoy it before the lower category (descendants) and the parents shall enjoy it before the children but not before the children of other beneficiaries. When one of them dies leaving after him a child, or grand-child or a great-grand-child, before becoming a beneficiary to anything in the *Waqf*, then his child, or grand-child, or great-grand-child shall become beneficiaries to the share of their father, as if he were alive. One of them may enjoy it independently in the event if he alone remains alive."

In case of failure of all descendants there was a provision that the money was to be expended for the benefit of two named mosques, and that if this should not be feasible, it should be spent on the poor.

The provision as to the office of *mutawalli* was as follows:—

> "The second condition is that the *Mutawallishiip* shall be vested in His honoured son Abdallah Bey Salhashoor Khassa, and then after him it will devolve on the most prudent amongst the male children (descendants) of the dedicator, then after them it shall devolve on the most prudent amongst the female children and then it shall devolve on the most prudent amongst their grand-children and great-grand-children, *etc., etc.,* and so on. If they (*Waqf* properties) revert to both honoured Harams (Mosques), then the Management shall be vested in the Nazir (manager of both of them)."

The Appellant, Sa'adat Kamel Hanum, claims to be descended from Ali Pasha through his daughter Miriam in the manner disclosed by the pedigree table hereunder:—

Emir Ali Pasha

Hanifi Khanum d. s. p. — Miriam Khanum d. — Emir Abdallah d. s. p.

Ahmed Hassan d.

Mohammed Safwal Pasha d. 1890

Ameeni = Kemal Pasha

d. before Mahammed Safwal

| | | |
|---|---|---|
| Abdalla Lami Bey | Said Pasha | Mahmoud Bey |
| Youssef Bey | Baland Bey | Sa'adat Hanum (Plaintiff-Appellant) |

In 1915 the Appellant's uncle, Abdulla Lami Bey, was appointed to be *mutawalli*, and by an order of the *Sharia* Court at Acre, dated 10th January, 1926, the Appellant was found to be more prudent than either Baland Bey or Youssef Bey and was appointed *mutawalli*. This order does not expressly mention that Abdulla Lami Bey or the Appellant's father, Said Pasha, had died, nor do the dates of their deaths appear from any other of the documents on the record.

On the 26th October, 1931, the Appellant as *mutawalli* and beneficiary of the *wakf* of Ali Pasha, brought in the Land Court, Haifa, the suit out of which the present appeal arises. She sued the Attorney General on behalf of the Government of Palestine to recover for the *wakf* two properties in or near Acre as being properties comprised in the deed of 1812. The two properties are known as Kishleh and Dubaya: they have long been in the possession of the Palestine Government, the former being now used as a prison and the latter as a depot and stables.

At the trial the only matter of defence which was dealt with by the Land Court was the question of limitation though the learned President considered that the Appellant's claim to the Dubaya must in any event fail on another ground. It does not appear that any evidence was taken upon the question of limitation. It was admitted by the Appellant that for a period exceeding 36 years prior to the suit the properties claimed had been in the possession of the Government. On the other hand it was conceded that she did not become *mutawalli* until 1926. The Appellant further contended that neither she nor any of her generation had become entitled beneficially in possession until within the said period of 36 years: this appears to have been assumed (provisionally at least) by the Courts below, and must be taken to be true for the purposes of this appeal.

The provisions of the *Mejelle* (Ottoman Civil Code) upon Limitation are Articles 1660 to 1675, which form the second portion or chapter of Book XIV which is entitled "Actions". The Courts in Palestine do not appear to be provided with any official or authoritative English version of this Code, the original of which is in the Turkish language. Several translations have been brought to the notice of their Lordships and have been found to differ as regards the exact meaning which they attribute to important phrases in Articles 1660 and 1667. In the translation of Mr. C. A. Hooper (Jerusalem 1933) Articles 1660, 1661 and 1667 are as follows:—

> Article 1660. — Actions relating to a debt, or property deposited for safe-keeping, or real property held in absolute ownership, or inheritance, or actions not relating to the fundamental constitution

of a pious foundation, such as actions relating to real property dedicated to pious purposes leased for a single or double rent, or to pious foundations with a condition as to the appointment of a trustee, or the revenue of a pious foundation, or actions not relating to the public, shall not be heard after the expiration of a period of fifteen years since action was last taken in connection therewith.

Article 1661. — Actions brought by a trustee of a pious foundation relating to the fundamental constitution thereof or by persons maintained by such foundation may be heard up to a period of thirty-six years. They shall not be heard in any event, however, after the period of thirty-six years has expired.

Example:—

A has held a piece of real property in absolute ownership for a period of thirty-six years. The trustee of a pious foundation thereupon brings an action claiming that the piece of real property in question is part of the land belonging to his pious foundation. The action will not be heard.

Article 1667. — The period of limitation begins to run as from the date at which the Plaintiff had the right to bring an action in respect to the subject matter of his claim. Consequently, in an action in respect to a debt repayable at some future definite date, the period of limitation only begins to run as from the date on which the debt fell due for payment, since the Plaintiff has no right to bring an action in respect to the debt before the due date has arrived.

Examples:—

(1) A begins an action against B claiming from him the price of a thing sold to him fifteen years ago, subject to a period of three years for payment of the price. The action may be heard, since only twelve years have passed since the date of payment arrived.

(2) An action is brought in regard to property dedicated to pious purposes limited to children from generation to generation. The period for limitation in respect to an action brought by the children of the second generation begins to run as from the date of the extinction of the children of the first generation, since the children of the second generation have no right to bring an action while the children of the first generation are alive.

(3) In actions relating to a marriage portion payable at a future date, the period of limitation begins to run from the date of the divorce or death of one of the spouses, since a marriage portion payable at a future date only falls due for payment on divorce or death.

The contention of the Appellant is that while her suit would doubtless fall within the terms of Article 1661 if this be considered by itself, the Article has to be considered as one of a series of articles in a Code which necessarily introduces different considerations one by one; thus, while the period of limitation applicable to this particular type of case is prescribed by Article 1661, the exceptions for minority and lunacy and the provisions as to the *terminus a quo* of the period of

limitation are to be gathered from other articles in the chapter, and are to be taken into account before the terms of Article 1661 are applied to the facts of a particular case. Accordingly she contends that Article 1667 controls or affects the application of Article 1661; that her case is within the principle of Article 1667 and in particular is within the exact terms of the second of the three examples mentioned thereunder.

The Land Court dismissed the Appellant's suit as a result of a difference of opinion between the President and Azziz, J. The learned President considered that Articles 1661 and 1667 were irreconcilable and applied the former. Aziz, J., held, under Article 1667, that "no prescription runs against cases where generation after generation has been conditioned." On appeal to the Supreme Court, three learned Judges held that the *wakf* in this case was not "from generation to generation" within the meaning of Article 1667 and on this ground, applying Article 1661, dismissed the appeal. Their view was: "There is no inconsistency between the two articles. Article 1661 fixes the period of limitation in respect of all *wakfs* at 36 years. Article 1667 does not deal with the length of the period of limitation, but with the date from which such period begins to run, in the case of a *wakf* of a particular nature". To this reasoning, learned counsel for the Appellant objects not only that on a true construction of its provisions Ali Pasha's *wakf* and the Appellant's interest thereunder is within the exact terms of the example, but also that the case cannot be excluded from the Article on the mere ground that it is not covered by an example.

It is clear that the meaning and effect of the second example to Article 1667 has been a matter of doubt and difficulty in the present and in other cases. In the translation by Dr. W. E. Grigsby (London 1895) the example appears in the following form:—

> "In the same way if the instrument which consecrates a thing to pious uses say that the descendants of the man who consecrates it shall have the management from generation to generation, in an action which the second generation begins, prescription only begins from the day of the total failure of the first generation, because while the first generation exists those belonging to the second generation cannot bring an action."

In the French version by George Young (Corps de Droit Ottoman, Vol. VI (Oxford 1906), the example is given thus:—

> "Dans les actions relatives aux vakoufs stipulés avec substitution aux enfants de génération en génération la prescription ne court pour les descendants de la seconde génération qu'à parti du moment où il n'existe plus aucun descendant de la première génération, car jusque-là les descendants de la seconde génération n'ont pas droit d'action."

In Omer Helmi Effendi's "Treatise on the Laws of *Evqaf*" (translated by Tyser and Demetriades) (Nicosia 1899), p. III, the learned author gives in para. 436 two examples of the effect of the condition "from generation to generation". One shows the period of 15 years as not applicable until the first generation has become extinct to an action claiming the office of *mutawalli* by children of the second generation against a stranger. The other is:—

> "If a property of which the Mutawalliship and the income is dedicated in favour of the children of the dedicator from generation to generation, is sold by a child of the first generation and delivered to another, and the purchaser receive and possess it for 35 years, and afterwards when the first generation is wholly extinct, the children of the second generation are appointed Mutevelis, and after the lapse of a year they bring an action against the purchaser, alleging that the property is *wakf*, this action is heard."

The President of the Land Court has referred in his judgment to Ali Hadar Effendi as being generally considered the most authoritative commentator in the *Mejelle*. He states as the view of this learned author that a *mutawalli's* action is only barred under Article 1661 if brought by the *mutawalli* who was the cause of the failure to sue and not if brought by a successor in the office. Now the principle of limitation may be regarded rather as grafted upon the Muslim law than as an integral part thereof originally, and the Commission which drafted the *Mejelle* may well have felt special difficulty in making drastic provisions which would deprive *wakfs* of their property. Even so, their Lordships are not able to attribute to Article 1661 an effect so slight as that which is thus suggested. That the result of a delay for so long a period as 36 years should last only for the balance of the time during which the same *mutawalli* should be in office is not in their Lordships' view a reasonable interpretation of this Code. No one of the learned Judges in either of the Courts in Palestine proceeded on that view of the law in the present case. Aziz, J., as well as the members of the Supreme Court, considered that the case must turn upon a principle or rule special to the case of *wakfs* when the limitation is "from generation to generation".

The general effect of the Code's provision of periods of limitation as regards *wakf* property was broadly stated in Muzaffer Bey *v.* W. Collet, 1904, 6 Cyprus Law Reports, 108, 109, by the Chief Justice of the Supreme Court of Cyprus:—

> "The answer to the first question ... depends on sections 1660 and 1661 of the *Mejelle*, which enact that actions for the *'tassaruf'* (*i. e.*, possession), by *ijaretein* or *muqata'a* in respect of immovable *wakf* property are not heard after 15 years; and that actions of the *Mutawalli*, or of the people who receive salary and food from

> the *wakf*, in respect of the corpus of *wakf* property, are heard up to 36 years. That is, where a man claims the possession of property which both he and the other party admit to be *wakf*, his action is heard up to 15 years; but where he claims *wakf* property as trustee (*Mutawalli*) or as beneficiary from a person who denies that it is *wakf*, his action is heard up to 36 years."

Their Lordships think this to be a useful and succinct statement of the effect of these Articles, though the word *mutawalli* is not properly translated by the word "trustee" and for important purposes it is necessary to bear in mind that *wakf* property is not vested in the *mutawalli*. (Vidya Varuthi *v.* Balusami, 1921, L. R. 48 I. A. 302).

The principle of Article 1667 has to be considered in relation to Article 1661. It is clear, if only from Article 1661, that in some circumstances a beneficiary may sue to recover property for the *wakf* from someone holding adversely to the *wakf*. *Wakfs* are made of very different kinds of property and the beneficial interests may be infinitely various. It is therefore possible for one or more beneficiaries in some circumstances to sue tenants or others directly to recover monies as income of the *wakf* payable to them. And it is, of course, open to a beneficiary to put in suit against the *mutawalli* or other persons interested in the *wakf* his own immediate claim to benefit thereunder. The example given in Article 1667 does not specify the nature of the action envisaged thereby and the question arises whether it can safely be extended to cover every kind of action which a beneficiary may bring. Dr. Grigsby's translation does not seem to be warranted in so far as it interprets the example as specially concerned with the rights of a *mutawalli* to bring an action. It is dealing with beneficiaries and beneficial interests.

Does the wording of the example require it to be supposed that the action by children of the second generation therein contemplated is an action brought to recover for the *wakf* property held adversely to it? Such an action can be brought by a beneficiary; but it would seem that it is only in special circumstances that a beneficiary and not the *mutawalli* is the proper Plaintiff: by whomsoever brought the right asserted by such a suit is the right of the *wakf* itself, and it is asserted on behalf of all interests therein, whether present or future, absolute or contingent. The assumption that what is given as an example of the principle enunciated by the opening words of Article 1667 is or includes a case of this special character is attended with difficulty. If the last surviving member of the first generation is *mutawalli* and is alienating or wasting the *wakf* property, is it a clear and obvious truth that the children of the second generation would have no right

to bring an action? If not, the case does not appear to be the case given by way of example. From the mere fact that it is given by way of illustration, there is every presumption that the case put is conceived as a plain case of an action to enforce the immediate right newly accrued upon the extinction of the previous generation. *Prima facie* this does not necessarily cover the whole ground if the beneficiary, to enforce his new-found right, has first to bring a suit on behalf of all interests in the *wakf*.

Aziz, J., and the Supreme Court appear to have considered that the example makes a special rule applicable where the limitation is qualified by the condition "from generation to generation". This phrase appears in authoritative works on Mahomedan law in its Arabic form (*butnun ba'ad butn*) as having the intention and effect of preventing nearer and more remote descendants from being treated alike. The following passage from the *Fatawai Alamgiri* explains it:—

> "And if he should say, 'upon my child and child of my child, and child of the child of my child', mentioning three generations the produce is to be expended upon his children for ever, so long as there are any descendants, and is not to be applied to the poor; while one remains, the *wakf* is to them, and the lowest among them: the nearer and more remote being alike unless the appropriator say in making the *wakf*, 'the nearer is nearer', or say, 'on my child, then after them on the child of my child', or say, 'generation after generation' (*butnun ba'ad butn*) when a beginning must be made with them with whom the appropriator has begun."

(Baillie, Digest of Moohammadun Law, 2nd ed., Vol. I, p. 580. Ameer Ali, Mahommedan Law, 4th ed., Vol. I, p. 353. See also Macnaghten's Moohummudan Law, 1897, p. 341, Case VIII).

With great respect to those learned Judges who seem to have thought that the example given in Article 1667 imports a special rule applicable to cases where the phrase is employed to qualify the order of succession laid down by the *wakf*, their Lordships think that it is outside the proper scope of an illustration or example to convey special legislation for a particular type of case. Its function, on the contrary, is to show how the principle already enunciated is to be applied, or how the particular facts of the case supposed come under the principle. The natural approach to the example is that the case is only put as an illustration of a right which has not accrued before a certain date, and without the intention of conveying any implication that the case supposed is necessarily different in principle from many other cases.

A *wakf* is not governed by rules against perpetuity, and successive future life interests in favour of unborn persons are valid by the Mahomedan law of *wakf*. The special rule "from generation to generation"

has no exceptional effect to make the particular descendant whose interest accrues thereunder take by purchase and not by limitation. The effect is to make A take instead of B, or to make A take a different share than he would otherwise have taken. The particular example given may be one in which all the beneficial interests happen to arise at one and the same time. It looks as if the draftsman had in contemplation a case where descendants were to take *per capita* subject to the condition, though the condition may be applied equally well to qualify a stirpital order of succession (*cf.* Macnaghten, *op. cit.*, p. 342, Wilson's Anglo-Muhammadan Law, 6th ed., section 324, p. 363) so that (as the present *wakfieh* puts it) parents enjoy before children but not before children of other beneficiaries. But this special feature of the example given is not the point of the example. The right of A to a share of the income may arise according to any order of succession appointed by the *wakf*. It may arise on his birth, on the death of his father or on the complete extinction of the previous generation. For purposes of putting it in suit it is a new right when it accrues. As the first of the three examples given under Article 1667 is that of a sale, with a stipulation for payment of the price in future and not at once; so the second is that of a beneficial interest which arises when the previous generation becomes extinct and not before; and the third is a case, not of prompt, but deferred dower. These may well be intended as familiar types of case under Article 1660.

The assumption that the action referred to by the example is an action brought on behalf of all persons interested in the *wakf* to recover property held adversely to the *wakf* had led to the further assumption that the example lays down a special rule of limitation in the case of a particular kind of *wakf*. Their Lordships think, however, for the reasons above stated, that a more correct construction of this Code is reached without either assumption. What is required is to relate the principle laid down in Article 1667 to such a suit as the present, which comes within Article 1661. For this, it is necessary to consider with exactness what is the right asserted and in whom is the right. That the right is not the right of a mere manager, such as is the *mutawalli*, is plain upon principles of Mohamedan law. Nor is a claim to recover for the *wakf* property held adversely to it a claim made on behalf of a particular beneficiary (though such a one may be the Plaintiff), or even on behalf of all those whose beneficial interests have accrued to them at the date of suit. It is a claim made on behalf of the *wakf* in a sense which includes all interests therein present and future. The principle that limitation will not begin to run until the individual

who is nominally and formally the Plaintiff in the suit came to be in a position to sue on behalf of the *wakf*, would render limitation to all intents and purposes inapplicable to this subject matter; and as the office of *mutawalli*, though only a managership, provides continuous representation of the *wakf* and of all interests therein, it is not necessary to suppose that limitation is intended to be so controlled. Apart from the question whether there is any special exception provided for cases where "generation to generation" has been stipulated, their Lordships gather that the Courts in Palestine are agreed in regarding such a principle as inapplicable to such a case as the present. Cases in which there is no dispute as to the property in suit being property of the *wakf* give rise to different considerations — under the *Mejelle* to very different considerations; but the present case is under Article 1661 and within the very terms of the example given thereunder. It is difficult to interpret that example as implying no more than that at the end of 36 years an inquiry is to be made as to changes in the office of *mutawalli* or in the personnel of the beneficiaries, and that A must have held possession not for 36 years but for 36 years after the last change of this kind took place. Their Lordships do not consider that in such a case it is intended by the Code that time should begin to run afresh by reason either that the office of *mutawalli* has passed to a new incumbent or that an interest has accrued to a new beneficiary. In their Lordships' opinion in the case of an action such as the present which is an action to recover property of the *waqf* for the benefit of all persons now interested or hereafter to become interested therein, and which falls directly under Article 1661 and its example, the period of 36 years begins to run from the time the right of recovery could first have been asserted by any one on behalf of those interested therein *in praesenti* or *in futuro*. Such an action is neither within the principle of Article 1667 nor within its second example.

They will humbly advise His Majesty that this appeal should be dismissed. The Appellant will pay the Respondents' costs of the appeal.

[23rd day of May, 1939. Solicitors: Stoneham & Sons for Appellant and Burchells for Respondent.]

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PREPARED BY DR. D. SCHLOSSBERG, ADVOCATE.

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[1] Repealed by the Civil Procedure Ord., 1939, No. 53 of 1939, which has, however, not yet been brought into force.

## ORDINANCES



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[1] Now replaced by the Advocates Ord., No. 32 of 1938.

[2] Now amended by the Bills of Exchange (Am.) Ordinance, No. 10 of 1945.

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1 Repealed by the Civil Wrongs Ordinance, No. 36 of 1944, not yet in force.

2 Replaced by the Courts Ordinance, No. 31 of 1940.

3 Repealed by the Criminal Code Ordinance, No. 74 of 1936.

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1 Substituted by the Criminal Procedure (T. U. I.) (Am.) Ordinance, No. 22 of 1946.

2 Amended by the Criminal Procedure (T. U. I.) (Am.) Ordinance, No. 44 of 1939.

3 Substituted by the Criminal Procedure (T. U. I.) (Am.) Ordinance, No. 44 of 1939.

4 Substituted by the Criminal Procedure (T. U. I.) (Am.) Ordinance, No. 31 of 1944.

5 Repealed by the Release on Bail Ordinance, No. 28 of 1944.

6 Amended by the Criminal Procedure (T. U. I.)) (Am.) Ordinance, No. 44 of 1939.

7 Now replaced by the Immigration Ordinance, No. 5 of 1941.

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1 Now replaced by the Interpretation Ordinance No. 9 of 1945.
2 Amended by the Land Courts (Am.) Ordinance, No. 46 of 1939.
3 Substituted by the Land Transfer (Am.) Ordinance, No. 16 of 1938.
4 Amended by the Law of Procedure (Am.) Ordinance, No. 15 of 1945.

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[1] Replaced by the Magistrates' Courts Jurisdiction Ordinance, No. 45 of 1939.

[2] Substituted by Municipal Corporations (Am.) Ordinance, No. 3 of 1940.

[3] Repealed by the Government Railways Ordinance, No. 29 of 1936.

[4] Substituted by the Registrars (Am.) Ordinance, No. 20 of 1943.

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1 Substituted by the Town Planning (Am.) Ordinance, No. 30 of 1941.
2 Repealed by the Juvenile Offenders Ordinance, No. 2 of 1937.
3 As amended by the Emergency (Am.) Regulations (No. 5) 1936, P. G. 1936, No. 605.

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[1] Repealed by the Civil Procedure Rules, 1938, P. *G.* 1938, No. 755.
[2] Substituted by the Palestine Citizenship (Am.) Order, 1939, P. *G.* No. 917.

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3 Substituted by the Palestine (Am.) Order in Council, 1939, P. *G.* No. 898.

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