LAND APPEAL No. 57/1936

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :—The Senior Puisne Judge, Greene, J., and Abdul Hadi J.

In the appeal of :

Keren Kayemth Leisrael Ltd. — Appellants

v.

1. Omar Ahmad Hilal
2. Nimmer Said Abu Mama'a
3. Ali Abdallah — Respondents.

Party to Criminal proceedings.— Tresspass.— Conclusive evidence.— Appeal.— Preliminary objections.

1. Person at whose instance criminal proceedings for tresspass are intsituted in name of Attorney General must be regarded as party to these proceedings.

2. Conviction in criminal case is conclusive broof of facts on which conviction was based; findings in such case are binding on same parties in ensuing civil proceedings.

3. If mistake not appellant's but that of judge and point not taken by Respondent, latter will be regarded as having waived it; Court will not raise it of its own motion. [Edit. Note: See Ct. L.R. Vol. II. Report 3].

Levin for Appellants

Sanders for Respondents

Appeal from the Judgment of the Land Court of Haifa dated the 22nd day of June, 1936.

JUDGEMENT.

Senior Puisne Judge.

1. The facts giving rise to this appeal are as follows : Prior to the year 1934 the appellant company (hereinafter referred to as the company) were in possession of certain land in Acre sub-district with a registered title thereto. In that year the respondents took possession of a part of the land and the company instituted criminal proceedings against them in the Magistrate's Court at Acre. These proceedings were nominally in the name of the Attorney General but the virtual complainant was the company, and in view what has to be said later,

the company must be regarded as having been a party to these proceedings. The learned Chief Magistrate acquitted the respondents apparently on the ground that they might possibly have some defence on the ground of prescription.—

2. The company appealed to the District Court, but without success. It obtained leave to appeal to this Court, and this Court decided that the decision of the learned Chief Magistrate was wrong, and that on the facts as found by him he ought to have convicted. It sent the case back to him with directions to convict and to impose a penalty. The Chief Magistrate bound over the respondents.

3. In spite of having been convicted of tresspass on the land the respondents refused to vacate the portion they had tresspassed on, and they forced the company to take civil proceedings for possession in the Magistrates' Court at Acre. The learned Magistrate ordered a stay of proceedings on the ground that the action involved a decision as to the ownership of immovable property. On appeal the District Court confirmed the decision of the Magistrate, but granted leave to appeal to this Court.

4. I am of opinion that the decision of the learned Magistrate cannot be supported. The company was admittedly in possession of a title deed to land which included the land in dispute. In the remarks column of this deed there was a note as follows :—

> "Any plots within this area which may be comprised in kushans in the names of others than the vendors are excluded from the sale".

There has never been any suggestion that the respondents or any one else had a kushan covering any part of the land in dispute. The learned Magistrate was of opinion that this note in the remarks column made the title-deed defective. I do not agree. The note was in reality superfluous, and was evidently merely inserted out of abundant caution on the part of the vendors.

5. Before the learned Magistrate it was admitted by the company that the findings of fact in the criminal case of tresspass were binding on the parties. The learned Magistrate did not agree. In this I think he was wrong. These criminal proceedings were, as I have already indicated, between the same parties, and were therefore conclusive evidence not only of the conviction of the respondents for tresspass but also of the facts on which the conviction was based.

The provision under which the respondents were charged was the addendum to article 252 of the Ottoman Penal Code, the relevant part of which is as follows:

> "The person who seizes the immovable properties found in the possession of another by interfering with or encroaching upon them without authority without being the holder of an Imperial title-deed setting forth his ownership thereof, or with the object of deriving profit from the said properties varies or alters the boundaries thereof is imprisoned for from one month to six months..."

The conviction of the respondents was conclusive proof that they had interferred with or encroached on the land of the company without authority.

6. The learned Magistrate, however, admitted the record of the criminal proceedings as evidence in the case. He analysed the evidence in these proceedings and based his conclusions largely thereon. In taking this course he was dealing with a mere written record and not with the testimony of witnesses delivered in his presence. The learned Chief Magistrate, who had the witnesses before him, deduced certain findings of fact from that evidence, and this Court held that these findings of fact justified a conviction of the respondets for tresspass. It was not open to the learned Magistrate, in trying the civil case, to wrest from the evidence in the criminal case any findings of fact different from those found by the learned Chief Magistrate, or to reach any different conclusion than was arrived at by this Court. This was what the learned Magistrate actually did, and it renders untenable his conclusion that there was before him genuine dispute as to the ownership of immovable property, depriving him of jurisdiction.

7. The learned Magistrate was wrong also in the two other matters referred to, namely, the efficacy of the kushan, and the binding nature of the judgment in the criminal proceedings. Had the right views been taken he would undoubtedly have entered judgment for the company.

8. I have read the dissenting judgment of my brother Abdul Hadi in which he holds that there was no appeal properly before this Court because leave to appeal was not granted by the judge who presided in the Land Court, but by a judge who was acting for him during a temporary absence. This would have been a good point had it been taken by the respondents' advocate. He did not urge it be-

fore us and he must be taken to have waived it and to have consented to the appeal being decided on its merits. I do not think it is a point which this Court ought to raise of its own motion, because the mistake was not the appellant's, but that of the judge who considered he was authorised to give leave to appeal.

9. In my opinion the judgments of the Magistrate's and District Courts should be set aside, and judgment for possession of the relevant land should be entered for the company with costs here and in both Courts below, costs here to include advocate's fees of LP.10.

Delivered this 12th day of July, 1937.

Senior Puisne Judge.

I Concur

British Puisne Judge.

CIVIL APPEAL No. 83/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— The Senior Puisne Judge, Copland, J., and Frumkin, J.

In the appeal of :

1. Zvi Nachtigal
2. Hayim Goldberg — Appellants.

v.

Ishaq Ibrahim Totah in his personal capacity and as heir representing all the heirs of Ibrahim Totah, deceased — Respondent.

Breach of Contract.— Liability of Heirs. — Damages.—

Heirs not bound to carry out deceased's obligation under contract to do a certain act.

Goitein for Appellants.

Moghannam for Respondent.

Appeal from the Judgment of the District Court of Jerusalem, dated 23rd day of April, 1937.

JUDGMENT.

Senior Puisne Judge.

1. 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 undertaking 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 £P.1950.

2. 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 £P.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 appellants' 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.

3. As regards the remaining two-thirds of the £P.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.

4. With regard to the breach of contract the appellants alleged breaches of clause 18 and 23 of the agreement. Cluase 18 required the respondent's father on the demand of the appllants, 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 ommission of his.

5. 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.

6. 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.

7. 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.

8. 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 cost 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.

R.J. Manning

Senior Puisne Judge.

CIVIL APPEAL No. 99/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— Copland, J., Greene, J., and Frumkin, J.

In the appeal of :

Bertha Shlang-Shapira — Appellant

v.

Miriam Kashi

Joseph Kashi Respondents.

Leave to appeal.— Magistrates' Courts Jurisdiction Ordinance.—

Leave to appeal under Magistrate's Courts (Jurisdiction) Ordinance can only be granted by Judge who presided when dealing with appeal.

Appellant in person.

Respondent absent.

Appeal from the judgment of the District Court of Jaffa, sitting at Tel-Aviv, dated the 28th, September, 1936.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jaffa sitting in its appellate capacity.

2. 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.

3. 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".

4. For the above reasons and following several decisions of this Court, the application should be dismissed.

Delivered this 6th day of July, 1937.

R. Copland

British Puisne Judge.

CIVIL APPEAL No. 110/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— Copland, J., Green, J., and Frumkin, J.

In the appeal of :

Abraham Gottlieb Appellant

v.

Moshe Haimovitz Respondent.

Contracts.— Breach of contract.— Equivalent of cash payment.—

Cheque made by wellknown Bank of long standing can be tenderd in payment of purchase price of land. —

Gratch for Appellants

Fellman, Goldman for Respondent

Appeal from the District Court of Jaffa sitting at Tel-Aviv, dated the 25th March, 1937.

JUDGMENT.

1. The Respondent sued the Appellant in the Chief Magistrate's Court, Tel-Aviv, for the payment of the sum of £P.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 the law :—

> a) Was the cheque legal tender, and was the Respondent in this case ready and willing to perform his obligation 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 £P.4.- advocate's fees.

Delivered this 15th day of July, 1937.

R. Copland

British Punisne Judge.

CIVIL APPEAL No. 26/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— Copland, J., Khaldi, J., and Abdul Hadi, J.

In the case of :—

1. Butras Salem Wahhab
2. Na'im George Tawil — Appellants

v.

Ali Saleh Ala ed-Din — Respondent.

Contract of Sale.— Parties' Duties.— Breach of Contract.— Expenses, Taxes etc., who to pay.—

General rule that it is for vendor to arrange for and complete transaction of sale applies even if contract provides that buyer must pay all expenses and fees etc., that may fall due after date of contract. Vendor firstly to pay expenses etc. and only after having prepared transaction may ask for reimbursement.

Moghannam for Appellants.

Subhi El Ayoubi for Respondent.

Appeal from Judgment of District Court, Jaffa, dated 12.2.1936.

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 D. C. claiming the sum of £P.120.- which they have paid in advance plus the sum of £P.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 £P.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 latter's duty to tender the money beforehand.

As a matter of fact, however, the Respondent failed to prepare the transaction or even 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 D.C. with costs and advocate's fees assessed at LP.3.-

Delivered this twenty-fourth day of March, 1937.

British Puisne Judge.

CIVIL APPEAL No. 30/36

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before : Copland, J., Khaldi, J., and Abdul Hadi, J.

In the case of :—

Shlomo Fried — Appellant

v.

Chaya Esther Wolansky — Respondent

Rate of interest.

If rate of interest agreed upon between parties it continues even after maturity of bill.

Dr. Frank for Appellant.

Goitein for Respondent.

Appeal from Judgment of District Court, Jerusalem, dated.2.3.1936

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 £P.3.- advocate's fees.

Delivered this 24th day of March, 1937.

British Puisne Judge.

CIVIL APPEAL No. 89/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— The Senior Puisne Judge, Frumkin, J., and Khayat, J.

In the case of :

Isaac Reym — Appellant

v.

"Botmol" Taicher & Co.,
Moses Bros. and Lukatz. — Respondents.

Appeal. Right to call evidence.

If party desires to call evidence Court cannot give judgment without dealing with this application.

Goitein for Appellant.
Margolin for Respondent.
Appeal from Judgment of District Court, Haifa, dated 2.4.1935.

JUDGMENT.

In this case it appears from the notes that Appellant desired to call evidence at the close of the plaintiff's case. There is nothing in the record to indicate how the Court below dealt with this application, but no further evidence was called and after hearing counsel for the plaintiff (present Respondent), the Court proceeded to judgment.

In view of this, we order that the case be remitted to the Court below to hear such witnesses as the Appellant may wish to call.

The present judgment will be set aside and after hearing the Appellant's witnesses, the Court below will give a fresh judgment.

Costs to follow the event.

Delivered this 29th day of October, 1936.

Senior Puisne Judge.

CIVIL APPEAL No.32/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— The Senior Puisne Judge, Frumkin, J., and Khayat, J.

In the case of :—

Thurayya Najib el-Haj,
on behalf of the heirs
of her late father. Appellant

v.

Nassib el-Haj Respondent.

Admission.— Disposition of Land.—

Written admission that land had been transferred many years ago by way of security only is not a disposition of land.

Said Zein ed-Din for Appellant.

Cattan for Respondent.

Appeal from Judgment of Land Court, Jaffa, dated 14.1.1937.

JUDGMENT.

The Appellant in this appeal from the Land Court of Jaffa has urged that the 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 disposition 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.

CIVIL APPEAL No. 15/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— Copland, J., and Khaldi, J.

In the case of :—

Shehadeh Isleman — Appellant

v.

Michael Bor — Respondent.

Appeal. — Arbitration.— Leave to Appeal.—

Appeal to Supreme Court against any judgment, including one given on review, in a matter of arbitration cannot be made without leave to appeal under Arbitration Ordinance.

Shapiro for Appellant.

Tovbin for Respondent.

Appeal from Judgment of District Court, Haifa, dated 8.11.1936.

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 had even 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 must therefore be dismissed on this preliminary objection.

The Appellant must pay the costs and £P.4.- advocate's fees.

Delivered this 25th day of May, 1937.

British Puisne Judge.

CIVIL APPEAL o. 129/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— the A/Senior Puisne Judge and Khayat, J.

In the case of :—

Shakib Nashashibi — Appellant

v.

Zulfa Aref Nashashibi — Respondent.

Appeal.— Finding of Fact.—

Court of Appeal cannot interfere with finding of Court of Trial unless there was no evidence on which a Court would reasonably arrive at such finding.

Suleiman Saleh for Appellant.

Khader Aweidah for Respondent.

Appeal from Judgment of District Court, Jerusalem, dated 31.3.1935.

JUDGMENT.

This is an appeal against the judgment of the District Court, Jerusalem, dated 31st March, 1935, whereby, having heard the evidence of Plaintiff, his claim was dismissed, presumably because his witnesses were not believed.

The Appellant is really asking us to reverse a finding of fact, for his appeal disclosed no other valid ground. It is a well known principle that a Court of Appeal cannot interfere with the finding of the Court of Trial, unless it appears that there was no evidence on which a Court would reasonably arrive at such a finding, which is not the case here.

The appeal is therefore a frivolous one, and must be dismissed with costs.

Delivered this 19th day of January, 1937.

Acting Senior Puisne Judge.

CIVIL APPEAL No. 183/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— The Senior Puisne Judge, Frumkin, J. and Khayat, J.

In the Case of :—

Khalil Malass & Co. — Appellants

v.

Valor Société de Vente d'Aciers Lorrains, Paris. — Respondents.

Arbitration.— Appointment of Arbitrator by Court.—

Court cannot make order appointing arbitrator or umpire without procedure laid down in sec. 6 of Arbitration Ordinance being followed.

Ben-Israel for Appellants.

Weinshall for Respondents.

Appeal from Judgment of District Court, Haifa, dated 23.6.1935.

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 £P.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.

LAND APPEAL No. 33/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— The British Puisne Judge and Abdul Hadi, J.

In the Case of :—

Awad Salman el Tawil — Appellant

v.

1. Jum'a Salem Abu Rokob
2. Faraj Salem Abu Rokob — Respondents.

Appeal.— Rebutting evidence regarding sale of Land.—

Contention that transfer of land was by way of mortgage and not final sale must be supported by written evidence.

Parties in Person.

Appeal from Judgment of Land Court, Jerusalem, dated 20.3.35.

JUDGMENT.

This appeal must be dismissed for two reasons:—

1. The Appellant has not filed the guarantee required by law, securing Respondents against costs, in the event of his appeal failing.

2. There is nothing in the grounds of appeal to justify the setting aside of the judgment of the Lower Court, further the appellant has got no written evidence whatsoever to support his contention that the transfer of his land was by way of mortgage and not as final sale.

For these reasons the appeal must be dismissed with costs.

Delivered this 12 day of January 1937.

Acting Senior Puisne Judge.

CIVIL APPEAL No. 104/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before: Greene, J., and Frumkin, J.
In the case of :—

Zwi Lebel — Appellant

v.

Johanan Mattias — Respondent

Bill. — Promissory note. — Aval. — Evidence to prove alteration.— Sec. 56-57 of Bills of Exch. Ord.

Evidence admissible in proof of alteration, although not apparent, in a bill, if alteration makes a difference in defendant's liability.

Lebel for Appelant.
Gorodissky for Respondent.

Appeal from Judgment of District Court, Jaffa dated 31.7.1936.

JUDGMENT.

Frumkin J.

1. The Appellant in this case was sued under a promissory note payable on demand signed by him at the bottom right hand corner of the note. Above his signature there is an inscription in handwriting "pour Aval maker," and somewhat below the signature appears the impression of a seel worded "Bon pour Aval for maker (s) of note."

2. The Appellant does not deny his signature, but alleges that he signed the note in blank and that the inscription both above and underneath his signature were added later without his knowledge and consent. He is therefore, according to his allegation not to be regarded as a guarantor by an aval under Section 57 of the Bills of Exchange Ordinance but as an endorser under Section 56..

3. On this basis he advanced a series of defences which were all overruled by the Court below where judgment was given against him on the bill as a signatory by aval. From this judgment he now appeals.

4. The principal ground of appeal is that the Court erred in disallowing the Appellant to prove that the Bill was altered. I pro-

pose to deal with this point first, as on that may depend the fate of this appeal.

5. The Court seems to have concentrated upon the question whether the alteration, if any, was apparent or not, and having found as a fact that it was not apparent, decided against the Appellant on all the other points.

6. I agree that a finding to the effect that the bill was not altered at all would dispose of the matter, because all he other defences in the Court below and the grounds of appeal would have no foundation if the bill was never altered. The Appellant would have been in the position of a guarantor by aval and as such he failed to submit any valid excuse.

7. But there was no such finding; the Court below appears to have attached too much importance to the fact that the alteration was not apparent.

8. It is the general rule that where a bill is materially altered the bill is avoided. By the proviso to Section 64 (1) of the Bills of Exchange Ordinance the law however grants a concession to a holder in due course where the alteration is not apparent in that the bill is not avoided, but such holder may avail himself of the bill as if it had not been altered and enforce payment of it according to its original tenor.

9. It follows that when the liability of a defendant in the case of a bill alleged to be altered would be different when taken in its apparent form and in its unaltered form according to its original tenor, an opportunity must be given to such a defendant to prove the alleged alteration although not apparent.

10. Furthermore, the concession referred to above is only given to a holder in due course, and it was one of the defences on the Appellant in the Court below that the Respondent was not a holder in due course. The Court therefore erred in refusing to hear the evidence tendered by the Appellant.

11. The appeal must therefore be allowed and the judgment of the District Court set aside and the case remitted for the Court below to determine by hearing the evidence tendered by the parties whether or not the bill was altered. And if it comes to the conclusion that it was altered, to determine the effect of such alteration on the liabilities of the Appellant.

Costs to follow the event.

Delivered this 21st day of May, 1937.

British Puisne Judge. Puisne Judge.

CIVIL APPEAL No. 87 of 1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before: — The Chief Justice (Trusted), Greene, J., and Frumkin, J.

In the case of :—

1. Israel Blumenfeld
2. Moshe Blumenfeld — Appellants.

v.

Imperial Chemical Industries (Levant) Ltd. — Respondent.

Leave to appeal — Oral evidence against document. — Art. 80, Code of Civil Procedure. — Evidence of persons with joint and several liability.

1. Presiding judge if satisfied that Case involves a point of law of sufficient novelty or complexity to warant an appeal shall grant leave to appeal without stating legal points, and Court of Appeal will deal with rights of parties. (Edit. Note: See Ct. L.R. Vol. I R. 19 and R. 33).

2. Parol evidence of parties and any other witnesses is admissible as to circumstances in which document relied upon came into existence, such as fraud or duress. — Whether a note expresses that value has been given or not, extrinsic parol evidence admissible between immediate parties and those in privity with them to impeach consideration and show its absence, failure or illegality or that bill was negotiated in breach of faith.

3. Persons who are jointly and severally liable are as individuals separate witnesses.

Seligman for Appellants,
Pevsner, Levin for Respondent.

Appeal from Judgment of District Court, Jaffa (sitting at Tel Aviv), dated 25.3.1937, setting aside the judgment of Chief Magistrate, Tel Aviv, dated 8.12.1936.

JUDGMENT.

This case was argued before us at considerable length and it raises 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 were 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 Plantiffs 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 credited 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 notes. 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 challanged.

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 Defendant apparently offered further evidence, but we do not know of what nature, as the Court held it was not necessary.

The Plaintiffs' 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 promisees 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 Bullent & Leake's 9th Edition, P. 1616.—

> "Absence of consideration is a good defence to an action on the bill between immediate parties, and also between remotë 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) 5E, 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 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 appellants' 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 appealant."

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 the 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 register."

(and see Chapter III, paragraph (3) — "Matters which must be evidenced by writing" of his Law of Civil Procedure for Iraq and Palestine 9. 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 - Awal 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 partnership, farming out, and loans which exceed PS. 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.

and a further translation which I have had prepared is as follows:-

All claims redating 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 e'crit et les demandes relatives a une association, entreprise ou emprunt, doivent être prouvées par titres, lorsque le chiffre depasse Ps. 5,000. Toute pretention opposée a un titre concernant ces sortes de demandes doit être établie soit par titre soit par l'aveu, soit par la presentation de livres du defendeur, lors même qu'il s'agirait d'une réclamation enferiere à Ps. 5,000 (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. 84/22 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 any 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 77/1932 the Court held-

> "The Law of Evidence"... (E. N. See Law Reports of Palestine, P. 739).

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 a 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 had 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 his 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. Those decisions seem to

go to the "contradiction" of a document, but it is not altogether clear what was meant by contradiction.

C. A. No. 82/25 would appear to be on 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 Mr. Frumkin J. held.-

> "This is an action"... (E. N. See Current Law Reports Vol. I R. 7).

In this case it seems clear that the Court held that the parties and their witnesses may give oral evidence as to the corcumstances 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, and 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 O.C.C.P. as set out above, must be evidenced by writing. Where a contract of these classes — even if the value does not exceed P.T. 1,000 — 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, — per 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 Mejelleh 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 ection 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 evidece 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 — c. f. Abbot v. Hendriks (1840), 133 E. R. 551 and Chalmers bill 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 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 Plainaiffs 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 (c.f. 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 opinions I have expressed.

Costs to abide the event. Advocate's fee LP. 5.

Delivered this 19th day of uly, 1937.

Chief Justice.

I concur: British Puisne Judge.

CIVIL APPEAL No. 115/37

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— The Senior Puisne Judge (Manning), Greene, J. and Frumkin. J.

In the Case of :—

Ya'acoub Fahmi Abu El-Huda — Appellant

v.

Deeb El-Hinnawi — Respondent

Partition.—Appurtenances.— Registrable Right of Access.—

1. "Appurtenances" includes right of access.
2. If upon partition of land ex-partner has no access to his share, he has an equitable right of way by necessity and may ask registration thereof.

Appeal from judgment of Land Court, Jaffa, dated 18.5.1937

Parties 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 given him a right of way now.

It seems to us that the Court below erred in inter preting 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 ownership 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.

CIVIL APPEAL No. 118/37.
IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— The Senior Puisne Judge (Manning), Greene, J. and Frumkin. J.

In the case of :

1. Rabbi Mordechai Aharon Fishmann.
2. Rabbi Dawid Weingarten.
3. Itzchak Rechmann. Appellants.

v.

1. His Grace Bishop Methodious, in his capacity as supervising guardian of Merguerite, Alice, Almaza and Lelia minor heirs of the late Salim Salfity.
2. Foumiyah, widow of Salim Salfity. Respondents.

Contract.— Breach of Contract.— Date of Completion.

Failure to reply to other party's notice as to date for completion of transaction earlier than that provided in agreement (which happened to be a day of rest) and failure to inform that other party of intention to perform agreement at a later date shows unwilligness to complete and amounts to breach of contract.—

Dr. Shmetterling for Appellants..
Hanna Attalla for Respondents.

Appeal from judgment of the District Court, Jerusalem, dated 14.5.1937.

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, we infer that the Appellant were not willing to)

From the facts that the Appellants made no reply to the notice of the Respondents an dthat 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.

CIVIL APPEAL 60/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— The Senior Puisne Judge (Manning), Frumkin, J. and Khayat, J.

In the Appeal of :—

1. "Hanahag" Cooperative Society Ltd.
2. Michael Schwartz — Appellants.

v.

Lloyds Underwriters — Respondents.

Insurance.— Limitation of action.— Representations.— Estoppel.

1.— Where Insurance Policy provides that upon rejection of claim action must be commenced within certain period after arbitrators' award as to amount of damage, and both parties have came to agreement as to amount, period begins to run from date of agreement.

2.— If A makes such representations to B that it is reasonable for B to act on them and his position is altered by them for the worse, A is estopped from availing himself of B's altered position.

Dr. Smoira for Appellants.
Seligman for Respondents.

Appeal from Judgment of District Court, Jaffa (sitting at Tel Aviv) dated 9.3.37.

JUDGMENT.

Senior Puisne Judge.

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 appellants 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 arbitation."

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 expiration 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 the 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 20 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 proceedings 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. 11.3.37.

It must be remebered 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 on 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 this 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 months 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 appelants 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 occurence 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 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 agreements ; 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 od Lloyd's Underwriters or the General Insurance Office. Clause 9 on 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 Generale 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 the 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. These 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, 1939, 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 off."

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 clauses 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 General Insurance Office represented the rspondents in Palstine 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 event.

Delivered this 25th day of June, 1937.

Senior Puisne Judge.

CIVIL APPEAL No. 118/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— Copland, J. Khaldi, J. and Abdul Hadi, J.

In the case of :—

Sa'adia Paz — Appellant.

v.

1. Salim Mustafa El Zeidan.
2. Hassan Mustafa El Zeidan.
3. Kamel Suleiman Hajir.
4. Ahmad Suleiman Hajir.
5. Raja Suleiman Hajir.
6. Jouma Mahmud Hajir.

All of the Tireh village, Haifa. — Respondents.

Breach of contract.— Payment after date fixed in contract.— Extension of time.—

Payment after date fixed for transfer in contract does not constitute extension of time, if made only to a few out of several persons who are party to contract.—

Feiglin for Appellant.

Koussa for Respondents.

Appeal from judgment of District Court, Haifa, dated 29.7.1936.

JUDGMENT.

The Defendants (Respondents) entered into an agreement dated 22nd April, 1934, to transfer to Plaintiff (Appellant), within five months from the date of the contract, a certain plot of land situated in the village of Tireh, Haifa District. The contract provided for the payment of LP.300, as liquidated damages, by the party committing a breach thereof, without necessity of a Notarial Notice.

The Defendants failed to effect the transfer within the period stipulated in the contract, and the Plaintiff sued them in the District Court of Haifa for the payment of LP.300 as liquidated damages, and for the refund of the sums paid by him on account of the purchase price.

As the Judges constituting the District Court disagreed, Plaintiff's action was dismissed; Judge Izzat Bey holding that as certain sums were paid to Defendants after the termination of the period fixed in the contract for the transfer, the Plaintiff should be considered to have agreed with the Defendants to extend the time for the transfer, and that he cannot bring an action for breach of contract before serving upon the Defendants a Notarial Notice. Judge Shems was, however, of opinion that the action should be entertained.

Several interesting points were raised by Counsel for the Appellant in his appeal before us, and we observed that the two payments made after the termination of the time fixed in the contract were to two of the six Defendans.

We consider that, even if payment of money to two of the Defendants might be held to constitute an extension of time, yet it cannot do so in this case, since the two Defendants had no power to extend the time of the contract, when they were two only out of six persons concerned.

Holding this view, it is not necessary to deal with the other points raised.

We therefore allow the appeal and set aside the judgment of the District Court.

The case must, therefore, be sent to the District Court for retrial.

Costs to follow the result.

Delivered this 19th day of May, 1937.

British Puisne Judge.

CIVIL APPEAL No. 42/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— Copland, J. Frumkin, J. and Khayat, J.

In the case of :—

1. Philip Mattar.
2. Na'im Mattar.
3. Kamal Mattar. — Appellants.

v.

Zahid Khoury widow of the late Badih Mattar. — Respondent.

Personal status.— Law applicable in Court of Melkite Community.— Evidence as to law applied in Ecclesiastical Court.—

1.—Law applying to members of Greek Catholic Melkite Community in matters of personal status is Moslem Sharia Law.
2.—President of Ecclesiastical Court, most competent witness to prove a law which he applies in Court of his community.

Hanna Atalla for Appellants.

Sahyoun for Respondent.

Appeal from judgment of District Court, Haifa, dated 13.5.1937.

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 :—

(1) 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 which should be applicable to them is the law of the Religious Community, and not the Sharia Law.

(2) 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.

(3) 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.

(4) That the amount alloted 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 Eccesiastical 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 the 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 shoud not be entitled to such a claim.

We also agree that the amount alloted by the District Court is, in our opinion, rather too much, and we order that the following amounts 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 it 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.

CRIMINAL APPEAL No. 76/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:— The Chief Justice (Trusted), Green, J. and Frumkin, J.

In the Case of :—

The Attorney General Appellant.

v.

Mousa Elias Abboud — Respondent.

Town Planning.— Appeal from Order of Magistrate's Court.— Sub-sec. 8 of sec. 35 of Town Planning Ordinance.

"Order" in Sub-sec. 8 of sec. 35 of Town Planning Ordinance includes any penalty which may be imposed under this section.

Salant for Appellant.

Maman for Respondent.

Appeal from the judgment of the District Court of Haifa, in its appellate capacity dated 26th April, 1937, whereby the judgment of the Magistrate's Court, convicting the Respondent under section 35 of the Town Planning Ordinance was set aside, and conviction quashed.

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 4 of Section 35, expressly lays down these powers as follows :—

> "Notwithstanding anything contained in the Magistrate's 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 power 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 desireable 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.

LAND APPEAL No. 44/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:— The Senior Puisne Judge (Manning), Frumkin, J. and Khayat, J.

In the case of :—

1. Ameereh el Khaldi — Appellant.

v.

1. Director of Lands, representing the Palestine Government.
2. Saad ed Din Khalili, in his capacity as Mutawalli of Sheikh Mohammad el Khalili's Wakf, Jerusalem. — Respondents.

1. Barclays Bank, Jerusalem.
2. The Quadi, Jerusalem.
3. The Wakf Administration, Jerusalem. — Third Parties.

ii. The Jerusalem Wakf Administration. — Appellant.

v.

1. Saad ed Din Khalili, in his capacity as Mutawalli of Sheikh Mohammad el Khalili's wakf, Jerusalem.
2. Ameereh el Khaldi — Respondents.

Wakf, Khalili, Khanika Salahieh.— Old Deed of Sale.— True and untrue Wakf.—

Deed of sale duly registered in Sharia Court showing that land was with consent of Quadi purchased from certain person who bought it from another — sufficient proof that land was not a true Wakf.

First Appeal: *Eliash* for Appellant.
Salant for Respondent.
R. Muhtadi for 2nd Respondent.
J. Kazimi for 3rd Third Party.

Second Appeal: *J. Kazimi* for Appellant.
R. Muhtadi for 1st Respondent.

Appeal from judgment of Land Court, Jerusalem, dated 3.8.1936.

Frumkin, J.

JUDGMENT.

1. This appeal arises out of expropriation proceedings before the Land Court. Government expropriated certain land and applied to the Land Court to fix its price and cited as Defendant the Mutawalli of Sheikh Mohammad Khalili's Wakf, considering the expropriated land to belong to the said Wakf.

2. The Land Court fixed the price at LP.5612.283 mils and ordered the Director of Lands, as representing the Government of Palestine, to pay the said sum to the Mutawalli of the Wakf to be sued by him for the Wakf under the control of the Quadi of Jerusalem.

3. Two oppositions were lodged against the said judgment of the Land Court, the one by Mrs. Ameereh el Khaldi, a descendant of Sheikh Mohammad el Khalili, the dedicator of the Khalili Wakf which, for the purposes of this appeal will hereinafter be referred to as the first Appellant and the other opposition by the Wakf Administration who will hereinafter be referred to as the second Appellant.

4. The opposition of the first Appellant is based on the ground that the expropriation proceeds do not belong to the Khalili Wakf but to the heirs of Sheikh Mohammad Khalili including herself for one eighth of the amount.

5. The second Appellant also contested the right of the Khalili Wakf to the expropriation proceeds and claims it in respect of the Khanika Salahieh Wakf.

6. Both the Appellants failed in their respective oppositions and hence this appeal.

7. In order to determine this case it is necessary to refer to the history of the Khalili Wakf which takes us back to over two centuries when the Head of the Khalili family in 1139 Hejira created the Wakf which bears his name, by virtue of a Wakfieh deed duly registered before the Sharia Court of Jerusalem. Under the said Wakfieh he dedicated certain properties in Jerusalem, including the property expropriated, for pious purposes and for the benefit of his descendants.

8. The relevant portion of the Wakfieh deed relating to the property in question reads as follows:—

> ". . . . . and the entire grove situated in Bakaa; bounded on the South by the piece of land known as 'Souanet Anabes'

and part of the garden of Emir Ibrahim, known now as 'Karm el Aimeh'; on the East, the main road; on the North Karm el Sahib separated by big rocks; on the West a garden known as 'Midanieh', the Barara and 'Karm el Hafi'; and all that he grove contains of fig and olive trees and walls, and the castle therein which is built of stones and lime and consists of a ground and upper floors, and rooms and halls and other accessories, comprising its stones and all that retains to it and the cistern which is inside he house for the collection of the rain water and the goat-shed which is near the door and all that pertains to it and known by it and its accessories, the karar (tenure of title) of which grove belongs to the 'Khanika Salahieh Wakf', the fees (Idad) of which are payable from the revenue of this Wakf to the Wakf of the Khanika, amounting to 7 addi piastres every year, as laid down in the book of the Wakf and Wakf deed, in the hands of the declarer of the said Wakf".

9. It is clear that we have to concern ourselves with two Wakfs, one created by Sheikh Khalili in 1139, which for the purposes of this appeal will be called the Khalili Wakf and the Wakf referred to in the said Wakf, namely the Khanika Salahieh Wakf, which will be referred to in this appeal as the Salahieh Wakf.

10. There are three conflicting interests in this case:

(a) The Mutawalli of the Khalili Wakf claims all the proceeds of the expropriation for the Khalili Wakf which he represents, arguing that the expropriated land was the property of His Wakf until its expropriation.

(b) The first Appellant claims the proceeds for the legal heirs of the late Sheikh Khalili, maintaining that what the latter originally dedicated was not the land expropriated but the buildings and trees on the land, and although the land was then subject to the trees and buildings, those trees and buildings having extinguished by length of time, the land reverted to its original state. The land originally was Miri land and therefore belongs to the legal heirs of Sheikh Mohammad Khalili, of which she is one.

(c) The second Appellant supported the allegation that the Khalili Wakf related only to the trees and buildings and not to the land, and also supported the principle that upon the disappearance of the trees and buildings the land reverted to its origin. But here the second Appellant differs from the first in that he claims that the origin of the land was not Miri land but a true Wakf in favour of the Salahieh Wakf, and all proceeds must therefore go to the Wakf he represents.

11. I might at this stage mention that the Mutawalli of the Khalili Wakf does not seriously oppose the stand point of the two

Appellants that the Khalili Wakf related to the trees and buildings, and that those do not exist any more, nor does he oppose the principle of reversion, but he says that there was no evidence before the Court below that the cistern referred to in the Wakfieh disappeared.

12. This matter could be disposed of at once. The cistern was one of the accessories to the constructions dedicated, and subject to it. With the disappearance of the house, the cistern, even if it existed could not confer any rights independent of the house. This being so, the conflict remains concentrated as between the two Appellants.

13. Although the dispute is with regard to a certain amount of money, this appeal cannot be decided without first deciding the nature of the land expropriated at the time it, or the trees and building upon it, were dedicated in 1139 Hejira.

14. For this purpose we will have to refer to the Ottoman Land Law of 1278, Articles 2 to 5 which classify the various categories of land in the Ottoman Empire. Although this law is much later in the date from that of the dedication of the Khalili Wakf, this law does not create new classes of land, but only states classes previously existing.

15. One of the characteristic distinctions between a true and untrue Wakf is that a true Wakf cannot be subject matter of sale or transfer or other dispositions; further, a true Wakf can only be made of mulk land. An untrue Wakf on the other hand relates only to Miri land and unless the right of disposition is also dedicated by the Sultan it is subject to transfer, the dedication amounting merely to the tithes and taxes payable on such land, which, instead of going to the Treasury go to the Wakf.

16. The Khalili Wakf is undisputably a true Wakf. What we have now to consider is whether the Salahieh Wakf was a true or untrue Wakf.

17. The first Appellant was in the fortunate position to be able to produce to the Court a certified copy of the deed of sale under which the dedicator of the Khalili Wakf purchased the land which is the subject matter of this dispute. It is dated some 16 years prior to the dedication and shows that Sheikh Mohammad Khalili had purchased the same land from one Shurbaji. The deed was duly affirmed by the Qadi and registered in the Sharia Court of Jerusalem. The vendor, Shurbaji, in the same deed states that he had purchased the said land from his uncle.

18. Now, if the Salahieh Wakf, referred to in the Khalili Wakf, were a true Wakf, how could Shurbaji have bought the land, how

could he have sold it to Sheikh Mohammad Khalili and how could the Qadi give his consent to such a sale? It is therefore obvious that whatever was the nature of the Salahieh Wakf, it was not a true Wakf.

19. Furthermore, the second Appellant failed to produce any evidence that the Salahieh Wakf was a true Wakf. The document produced, on its behalf, is not the exact Wakfieh deed made by the dedicator but it contains a list of land belonging to the Wakf including the land in dispute. This does not, however, prove the nature of the Wakf.

20. Some importance was attached in the Court below to the argument that "Hikr" is not payable except on a true Wakf. But there is no mention of the term "Hikr" in the Khalili Wakf. The term is "Idad", a word deriving from "add" or "addad" (literally number or figure) which technically could mean anything in the nature of a fee or contribution or tax payable to any Wakf, whether true or untrue.

21. It follows, therefore, that the second Appellant failed to establish his claim to the satisfaction of the Court below that the Salahieh Wakf was a true Wakf, and the appeal must be dismissed.

22. On the other hand all the evidence before the Court below rather went to show that the nature of the land prior to its dedication by Sheikh Mohammad Khalili was an untrue Wakf, which for all intents and purposes is governed by the same rules governing Miri land, The Sheikh acquired the land subject to an annual fee payable to the Salahieh Wakf in whom the tenure of the land was vested. This being the case,it follows that Sheikh Khalili could not dedicate the land but the trees and buildings thereon.

23. When such buildings and trees disppear, the land reverts to its origin — in our case an untrue Wakf of the Miri category and it now belongs to the estate of the late Sheikh Mohammad Khalili the dedicator of the Khalili Wakf.

24. The second Appellant made not alternative claim in case the land is found to be an untrue Wakf. It is admitted that for time immemorial the Iddad was not paid to the Salahieh Wakf, and whether they have still a right to claim this annuity is a matter which we are not called upon to decide in this appeal.

25. The first Appellant claims to be one of the heirs of the dedicator Sheikh Mohammad Khalili and as such entitled to one eighth of the expropriation proceeds and has produced a Certificate of Inheritance to this effect. The Land Court having decided against

her did not go into this matter. The case, must therefore, be remitted to the Court below with instructions to give judgment for the first Appellant for such a share in the proceeds of the expropriation as she will be able to prove that she is entitled to as heir of Sheikh Mohammad Khalili, taking into consideration that the land expropriated is to be regarded as Miri Mewkufe land.

26. The result of this judgment will be that the second appeal of the Wakf Administration is dismissed; and with regard to the first appeal by Ameereh el Khaldi, the appeal is allowed, the judgment is set aside and the case remitted as above.

Costs against Saad ed Din Khalili to include LP.10. — advocate's fees.

Delivered this 27th day of May, 1937.

Puisne Judge.

I concur: Senior Puisne Judge.

CIVIL APPEAL No. 114/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— Copland, J. Frumkin, J. and Khayat, J.

In the Case of :—

1. Antoine Selim de Chedid
2. Antoine Farah. Appellants.

v.

1. Dali Ahmad Said, widow of Haj Jefeileh, Nazareth.
2. Naif, son of Haj Jefeileh, Nazareth.
3. Fatmeh daughter of Haj Jefeileh, wife of Abd er Rahman Abu Zamel, Haifa.
4. Asneh Salah Abood, Nazareth. Respondents.

Attorney.— Principal's Liability.— Breach of Contract.— Damages.— Interest.—

1. Appointment of attorney does not release principal from liability under contract, he remains liable for negligence or failure of attorney.

2. Where damages allowed for breach of contract, no interest payable on sums received on account of purchase price, even if contract provides for payment of such interest.

Levin for Appellants.
Respondents in person.
Appeal from judgment of District Court, Haifa, dated 7.6.1936.

JUDGMENT.

On the 3rd December, 1928, Defendants (Respondents) gave a power of attorney to second Plaintiff (Second Appellant) to transfer five plots of land to first Plaintiff (First Appellant) for the sum of LP.511.959 mils, which amount they acknowledged to have received in the power of attorney. The Defendants also undertook jointly and severally to pay the sum of LP.500 as liquidated damages and to refund the price of the land which they received, with legal interest, should they fail to transfer the land or if they undertake to sell it to another person.

Five years passed thereafter without anything being done to effect the transfer. When, however, at the end of 1933 the Plaintiffs came to claim the land they found an application by three of the Defendants to sell to a third person their shares in the said land and that a series of attachments have been laid upon these shares by the Defendants' creditors.

On 27th December, 1933, the Plaintiffs served a notarial notice upon the Defendants requesting them to arrange within three days for the removal of the seizure upon the lands and the cancellation of the application for the sale of the land to the third person.

This the Defendants failed to do and hence an action was raised by the Plaintiffs in the Court below claiming the liquidated damages, stipulated in the power of attorney and the refund of the price of the land.

The District Court orderd that the amount received by the defendants as the price of the land should be paid back to Plaintiffs with legal interest from date of lodging of action, but dismissed the claim for the liquidated damages on the following grounds :—

(1) That it had not been established that all of the Defendants undertook to sell the lands in question to the third person;

(2) that Plaintiffs failed to prove that the Defendants declined to transfer the plots of land — there having been appointed by them an attorney to effect the transfer on their behalf;

(3) that the Plaintiff failed to establish that he was ready himself to accept the transfer.

With regard to the first ground on which the District Court based its judgment, we consider that it was the duty of the vendors (Defendants) to remove all obstacles in the way of the transfer such as seizures or undertakings made to third persons regarding the land. This it is clear the vendors did not do in spite of the notarial notice served upon them.

As to the second ground, we hold that the appointment of an attorney by the vendors to transfer their land to the purchaser does not raise the liability laid upon them by their undertaking to sell the land to the purchaser, and they must be held liable for the negligence or failure of their attorney.

We cannot entertain the third point mentioned in the District Court's judgment that the Plaintiff failed to establish that he was ready to accept the transfer. What better proof could there be of his readiness to accept the transfer than his having paid the full price of the lands. He further produced evidence to show that he requested the Defendants to complete the transfer on several occasions until he found it necessary to send them a notarial notice.

We therefore allow the appeal and set aside that part of the judgment of the District Court dismissing the claim for damages and that part awarding interest on the money advanced. We enter judgment for the Appellant for LP.500 damages, without interest, with costs and LP.3.— advocate's fees.

Delivered this 18th day of May, 1937.

British Puisne Judge.

CIVIL APPEAL No. 44/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— The Chief Justice (Trusted), Khayat, J. and Abdul Hadi, J.

In the case of :—

General Motors Acceptance Corporation Appellant.

v.

Kamel Wafa el-Dajani Respondent.

Hire purchase agreement.— Ownership of Goods.— Option.— Leave to Appeal.— Sec. 6 of Magistrate's Courts (Jurisdiction) Ordinance.—

1. Where hire purchase agreement only contains option but not binding obligation upon hirer to purchase, ownership of goods does not pass to hirer until he has exercised option in accordance with provisions of agreement.

2. Section 6 of Magistrate's Courts (Jurisdiction) Ordinance also applicable to judgments of District (or Land) Courts sending case back to Magistrate's Court.

3. On application for leave to appeal under said section Presiding judge must consider if judgment involves point of law justifying for its novelty or complexity an appeal to Supreme Court but when granting leave he is not to formulate questions for Supreme Court to answer. (E.N. see Ct. L.R. Vol. II p. 19).

Philip Joseph for Appellant.

Rashed Haddad for Respondent.

Appeal from judgmen of District Court, Jerusalem, dated 30.3.1936.

JUDGMENT.

This case arises out of an agreement of hire purchase dated 30th June, 1934, whereunder Muhammad Amin Ja'bari (described in the agreement as the Hirer) hired a motor truck from Tannous Brothers (described as the Lessor).

The agreement contained a guarantee whereby Naser Eddin guaranteed its due performance by the hirer and it also contained an assignment and guarantee whereunder Tannous Brothers assigned their rights upon the terms and conditions therein set out to the General Motors Acceptance Corporation.

In the course of certain execution proceedings Kamel Wafa el-Dajani obtained an order of attachment against the movable and immovable property of Muhammad Amin Ja'bari and the Execution Officer attached the motor truck, the subject of the above mentioned hire purchase agreement, which was then in the garage of Tannous Brothers. In consequence the G.M.A. Corp. commenced these proceedings on the ground that Muhammad Amin Ja'bari had no right of ownership in the said truck.

In these circumstances the Magistrate should have addressed his mind to two questions :—

a) was the truck the property of Muhammad Amin Ja'bari?

b) was the truck the property of the Plaintiffs, the G.M.A. Corp. ?

In order to answer these questions it is necessary to consider the hire purchase agreement to which I have referred. It is a long and

involved document which provides shortly that the hirer is to pay an advance rental for the first month's use of the car and thereafter monthly rentals for he hire of he car, and that the rentals are to be evidenced by promissory notes to be given by the hirer.

The agreement further provides :—

> "1o. If during the continuance of this contract hirer shall duly perform and observe all the stipulations and conditions in this contract contained, he shall be entitled to purchase car by paying to Lessor all outstanding monthly rentals for hire together with all or any other sums payable by him hereunder and abandoning all rights to the repayment to the said deposit which shall then be treated as part of the purchase price, but, until all such payments as aforesaid have been made the car shall remain the exclusive property of the Lessor. If hirer shall not elect to buy car, he shall redeliver same to Lessor in good and complete order and repair immediately upon the expiration or sooner termination of the hiring by Lessor; and hirer shall thereupon subject always to his having paid all the monthly rentals for hire specified in the schedule hereto and having duly performed all other obligatoins under this contract, be paid or credited with the deposit and shall be entitled to the return of the Promissory Notes hereunder given as evicence of indebtedness but shall not in any event be entitled to repayment, credit or allowance in respect of any other payments made or to be made by hirer under the contract. And the Lessor hereby expressly undertakes to do and perform all things and acts that may be necessary to obtain for and to give unto the hirer or eventual purchaser, should hirer so become, a complete and valid title to the said car."

Agreements of this kind frequently give rise to disputes, particularly when, as in this case, third parties who are creditors of the hirer are concerned. Such disputes most frequently turning upon the question: Is the contract one of sale whereby the property has passed to the Hirer, or is it a contract of hire whereunder the property is still vested in the Lessor?

The test is whether or not there is a binding obligation upon the Hirer to buy. Where the agreement upon its true construction is an agreement to hire, with an option to purchase, the property in the goods does not pass to the Hirer until he has exercised the option in accordance with the provisions of the agreement.

We are satisfied that under the contract with which we are concerned there is no sale, but only a hire until the hirer has exercised his option in the manner provided in the clause to which I have referred.

The first point for the decision of the Magistrate was therefore: Had the property passed under that clause to the Hirer?

It appears from the learned Magistrate's judgment that he took the view that the property had not passed on the ground that it had been established that Defendant No. 2 (Muhammad Amin Ja'bari) had committed a breach of the agreement, but it does not appear to us that this was necessarily conclusive.

Before the learned Magistrate the first Defendant Kamel Wafa el-Dajani wished to call evidence to prove that certain instalments which had not been paid by the hirer had in fact been paid before the due date by Tannous Brothers (the Lessor) to the G.M.A. Corp. as parties to the bills, but the learned Magistrate refused to hear such evidence.

The Defendant therefore appealed to the District Court. It would appear that the District Court ignored the fundamental question whether the property had passed to the Hirer and failed to consider the effect of clause 5 of the Assignment and Guarantee given to the G.M.A. Corp. which provides :—

> "5. The foregoing guarantee is given to the assignee on the express condition that even though the guarantor is jointly and severally liable with the hirer the benefit of this guarantee cannot be claimed by the hirer or any other guarantor and on condition that upon fulfilling his/its guarantee hereunder the guarantor shall be entitled to be subrogated to the rights of the assignee existing at the time".

In the course of argument before us, Dr. Joseph stated that that clause of the Assignment and Guarantee had not become operative. Tannous Brothers would appear to have become the owners and not the hirer of the truck. Whether or not it had become operative depends upon the facts which are not sufficiently found to enable us to express an opinion, but the facts and the application of this clause to them may affect the second question to which I referred at the beginning of this judgment.

We agree with the District Court that this case should go back to the Magistrate, but we are of opinion that it should do so in order that he may find the facts and consider the case in the light of the observation in this judgment.

It was argued by Rashed Eff. that no appeal was to this Court from judgment given by the District Court. The provision of the law applicable is section 6 of the Magistrates Courts (Jurisdiction) Ordinance 1935, which provides that the decision of a District or Land Court in an appeal from a Magistrate's Court shall be final but the Presiding Judge of the Court may grant leave to appeal to the Supreme Court on a point of Law, and we are of opinion that where the decision of the District Court involves a point of law leave to

appeal may properly be given.

We do not think that the decision in the Palestine Jewish Colonization Association and another v. the Village Settlement Committee, Arab Infiat, P.C.L.A. No. 4/35, is an authority, as that case deals with appeals to the Privy Council and Article 3(b) of the Palestine (Appeal to Privy Council) Order-in-Council 1924 expressly refers to final judgments.—

The President of the District Court in giving leave to appeal set out some proved facts, some allegations and arguments and concluded by formulating two questions of law upon which leave to appeal was granted.

Neither the learned Magistrate nor the District Court appear to have given any express decision upon the first of these questions, and the second, which is based on the first, involves the decision of the District Court to which I have referred.

In my opinion the correct procedure where leave to appeal is sought under the section to which I have referred is for the President of the District Court to consider if the judgment in question involves a point of law and, if it does, if that point of law is such a point that by reason of its novelty or complexity an appeal to this Court is justified.

If he is of opinion that it is a point of law which justifies an appeal, he should grant leave to appeal against the judgment in so far as it involves a decision of law, as distinct from findings of fact.

I do not think that the President of the District Court should formulate such propositions as may appear to him to be involved. The inconvenience of his so doing is well exemplified in the present case. The District Court has remitted the case to the Magistrate with an expression of its views. If this Court answers the questions formulated by "yes" or "no", as their form invites, presumably the judgment of this Court would not affect the judgment of the District Court although it might be clear from the answers given that this Court did not agree with the judgment of the District Court.

In the result the appeal will be dismissed and the case remitted to the Magistrate for his further consideration as I have already indicated

Costs to abide the final event. Advocate's fees LP.3.

Delivered this 24th Day of March 1937.

Chief Justice.

CRIMINAL APPEAL No. 81/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:— The Senior Puisne Judge (Manning), Copland, J. and Frumkin, J.

In the case of :—

Ahmad Aref Faddah — Appellant.

v.

The Attorney General. — Respondent.

Evidence.— Corroboration.—

Unsworn evidence of a child cannot be accepted as corroboration.

Nasri Nasr for Appellant.

Tawzi Ghussein for Appellant.

Appeal from the judgment of the District Court of Nablus, dated the 26th June, 1937, whereby the Appellant was convicted under Section 152(c) of the Criminal Code Ordinance 1936, and sentenced to two years imprisonment.

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.

CRIMINAL APPEAL No. 42/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— The Senior Puisne Judge (Manning), Greene, J. and Khayat, J.

In the appeal of:—

Rajab Abdul Mu'ti El Aloul — Appellant.

v.

The Attorney General Respondent.

Written threats.— Experts in handwriting.— Competence of Court.—

Members of trial Court — judges of fact as well as of law, hence entitled to examine documents and draw conclusions.—

George Salah for Appellant.

Fawzi Ghusein for Respondent.

Appeal from the judgment of the District Court of Jerusalem dated 13th April 1937, whereby the appellant was convicted of an offence under Section 290 of the Criminal Code Ordinance 1936 and sentenced to two years inprisonment.

JUDGMENT.

Senior Puisne Judge.

1. On April 13th, 1937, the appellant was convicted by the District Court of Jerusalem of the offence of demanding property by written threats and was sentenced to two years' imprisonment. In the Court below after the threatened person had given evidence as to the receipt of the letter, the prosecution called two witnesses who said they were experts in handwriting. They had compared the letter with other writing admitted to have been written by the appellant. The witness Albina said that even if there was a difference in the formation of the characters yet he concluded that the letter and the other writing were written by the same person. In cross-examination he modified this somewhat by saying "One can only say most probably writing same". The witness Kepelner said he had no doubt that the letter and the other writing were written by the same person. The characters are Arabic, and this witness said that he was acquainted with Arabic writing but did not know how to write it.

2. The Appellant gave evidence denying all knowledge of the threatening letter. He called two experts in handwriting. Both of them said that they compared specimens of appellant's handwriting with the writing in the letter and that they were not written by the same person.

3. The Court then examined and compared the various exhibits and came to the conclusion that the threatening letter had been written by the appellant, George Eff. Salah, who appeared for the appellant, urged as one ground of appeal that the Court should not have relied

on its own conclusions formed from a comparison of the exhibits. I do not agree. The members of the Court were judges of fact as well as of law and were entitled to examine the documents and to draw conclusions therefrom.

4. The second ground of appeal was that the evidence was insufficient. With this I agree. The only evidence against the appellant was the opinions of two witnesses that the handwriting in the threatening letter was his. One of these witnesses said his conclusion was based on a high degree of probability only, the other was unable to write the language in which the letter was written. It would be dangerous to convict on such evidence as this, and with such a slender basis before it I do not think any Court should convict on its own conclusions drawn from a perusal of the exhibits.

5. In my opinion the appeal should be allowed and the conviction and sentence quashed.

Delivered this 15th day of May, 1937.

Senior Puisne Judge.

CRIMINAL APPEAL No. 78/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— The Senior Puisne Judge (Manning), Copland, J. and Frumkin, J.

In the Appeal of :—

Ali Said el Wawi — Appellant

v.

Attorney General — Respondent

Evidence.— Single witness.— Corroboration.— Sec. 5,6 of Evidence Ordinance.—

Mere repetition by witnesses of statements made to them by another witness is not material evidence sufficient for corroboration.

Sanders for Appellant.

Fawzi Ghussein for Respondent.

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 (c) of the Criminal code ordinance 1936, and sentenced to two years imprisonment.

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 (c) 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. Muhamad Sheikh Mustafa Abu Salah, Muhamad Ali Ahmad, and Nissa Hussein 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, Muhamad 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. 64.)

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 will 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 provisions of Section 50 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 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 Transport 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 Daoudi 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 Assise 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 the 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. Christis (L.R. 1914 A.C. 595). It is true that the principal point in this case was of 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 he Children Act of 1903. This is of course wholly erroneous. If the boy himself had been examined, either in chief or on 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 his 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 50 of the Children Act 1908 (8 Edw. 7,c.67), Christis 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 erroroneous in as much as it treated the statements 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.

I Concur

Puisne Judge Senior Puisne Judge

CIVIL APPEAL No. 114/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:— The Senior Puisne Judge (Manning), Khaldi, J. and Abdul Hadi, J.

In the case of :—

Hassan Abdullah Abu Dheisheh Appellant.

v.

Abdullah Yousef Abdullah Abu Dheisheh Respondent.

Land settlement.— Allegation of fraud.— Sec. 66 of Land (Settlement of Title) Ord.—

> If allegation in Statement of Claim under sec. 66 of Land (Settlement of Title) Ordinance is such as to be considered an allegation of fraud, Land Court must hear case; not necessary to mention word "fraud" in Statement of Claim.

Appeal from judgment of Land Court, Jaffa, dated 3.5.1937.

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.

CIVIL APPEAL No. 127/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:— Copland, J. Greene, J. and Frumkin, J.

In the case of :—

Haj' Ismail el-Najar — Appellant.

v.

David Amos — Respondent.

Proof of payment.— Art. 54 of Code of Civil Procedure.— Art. 1774 of Mejelle.— Art. 80 of O.C.C.P.

Where a trustee gives a written acknowledgment of amount deposited with him repayment must be proved in writing; his oath is insufficient.

Kehaty for Appellant.

Jahuda for Respondent.

Appeal from judgment of District Court, Jerusalem, sitting as a Court of Appeal, dated 29.4.1937.

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 Art. 1774 of the Mejelle he was discharged by his oath.

The District Court held on appeal that since the appellant had given a written acknowledgment 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 Art. 54 of the Civil Procedure Code

and Art. 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 Art. 80 of the Civil Procedure Code. Where a trustee gives a written acknowledgment 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 fees.

Delivered this 30th day of July, 1937.

British Puisne Judge.

CIVIL APPEAL No. 18/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— Copland, J. Khaldi, J. and Abdul Hadi, J.

In the case of:—

The Palestine Land Development Co. Appellant.

v

Salem Samaan Respondent.

Agreement.— Breach of contract.— Agent.— Damages.—

1.— If breach committed by agent of both parties is due to one party's fault, that party alone responsible for damages.

2.— Where agreement provides for interest to be paid on moneys advanced as from date of payment, interest is payable accordingly.

Olshan for Appellant.

George Salah for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 4.2.1936.

JUDGMENT.

The Respondent in these proceedings entered on the 24th August, 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 Tabu in order to accept the transfer of the said plots within the limited time, after first 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 signature in the Tabu. Both parties agreed that First Party should appoint Shehadi Ahmad El-Mustafa Barakat 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 Shehadeh 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.

CIVIL APPEAL No. 2/1936.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— Copland, J. Khaldi, J. and Abdul Hadi, J.

In the case of:—

1. Saleh Zacharia.
2. Jalil Hanna Dawid — Appellants.

v

1. Azizeh widow of the late Anton Hanna Dawid, on behalf of his estate,
2. Jirius Hanna Dawid — Respondents.

Leave to appeal.— Time for filing Grounds of Appeal.—

Period for filing Grounds of Appeal in case of leave to appeal — 30 days from date of judgment appealed against, but deducting period between date of application for leave and date of notification of order granting such leave.

Cattan for Respondents.

Eliash for Appellants.

Appeal from judgment of District Court, Jerusalem, dated 30.10.1935.

JUDGMENT.

This is an appeal by way of leave granted on 4th December, 1935, against a judgment of the District Court, delivered on the 31st day of October, 1935, whereby an application under Section 15 (2) of the Arbitration Ordinance 1926, was dismissed.

It has already been decided by this Court, in C.A. 126/34, following C.A. 18/33, that the period in such appeals, from the date of the judgment appealed against until the time the grounds of appeal are filed, but deducting the period between the date the application for leave to appeal is submitted and the date of the notification of the Order granting such leave, must not exceed thirty days.

In a later judgment of this Court, C.A. 33/36, it was held that it would be unfair to apply art. 181 of the Code of Civil Procedure in such cases where leave to appeal is required, and that the only question to be considered is whether the Appellant showed due diligence in prosecuting his appeal, once leave to appeal was granted.

The present appeal fails on the authority of either of the above

precedents, for judgment in this case as stated above was delivered on 31.10.1935 and application for leave to appeal was filed on 5.11.35; leave was notified on 13.12.35, and the appeal itself was not submitted until the 10th of January, 1936.

Thus, according to the first precedent it is three days out of time; and we hold that in waiting for twenty-eight days before he put in his grounds of appeal, the Appellant did not in fact display such diligence as is required by the second precedent, alluded to above.

For these reasons, the appeal is dismissed with costs and advocate's fees assessed at LP.2.—

Delivered this 8th day of March, 1937.

British Puisne Judge.

LAND APPEAL No. 54/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— The Chief Justice (Trusted), Frumkin, J. and Khayat, J.

In the case of:—

Salah Hussein Abu Dra' — Appellant.

v.

Saleh Mustafa Abu Dra' — Respondent.

Land Settlement.— Limitation of action.— Possession.— Heirs and Co-owners.— Section 51 *of Land (Settlement of Title) Ordinance.—*

1.— As between heirs and co-owners time does not run to bar right of action, possession by one heir or co-owner being possession by all.

2.— Section 51 para 2 of Land (Settement of Title) Ordinance also covers cases where person being entitled as heir and co-owner applies for registration under said Ordinance and person in whose name land is registered is also heir of common ancestor and a co-owner.

Mustafa Rasheed for Appellant.

Eliash for Respondent.

Appeal from judgment of Land Court, Jaffa, dated 29.10.1936.

JUDGMENT.

This is an appeal from a decision of the Land Court Jaffa, allowing an apeal 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 lst November, 1918, owners of immovable property had no power to make dispositions 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 Sec. 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. (Section 51.— 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.

Advocte's fees LP.4.

Delivered this 27th May, 1937.

Chief Justice.

LAND APPEAL No. 86/34.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:— Copland, J. Khaldi, J. and Abdul Hadi, J.

In the Case of :—

1. Hilweh Issa Zeidan Akele, on behalf of her late husband's estate.
2. Michael Jarad.
3. Saliba Isa Jiryes Nour. — Appellants.

v.

1. The heirs of Isa Najjar.
2. Hanna Ayoub Akeleh.
3. Hilweh Issa Zeidan. — Respondents.

Appeal.— Judgment without reasons.—

Appeal will be allowed and case remitted to Court of trial, if judgment contains no findings or reasons and it is impossible to determine such reasons from record.

Appeal from judgment of Land Court Jerusalem, dated 10.10.1934.

JUDGMENT.

When this case first came on appeal from the judgment of the Land Court of Jerusalem dated the 20th December, 1928, this Court set aside the judgment and remitted it to the lower Court to consider the deed of partition and to hear the third party claim.

The lower Court instead of giving a full and reasoned judgment, contended itself with the following decision:—

> "The plaintiff has failed to prove her case and her claim is therefore dismissed with costs and LP.1 advocate's fees. The third party's claim is prescribed and dismissed."

It is impossible from such a judgment to know what the findings of the Court were. This is a case in which it is essential that reasons should be given for the statement that the plaintiff has failed to prove her case, because from reading the record it is impossible to determine what those reasons were.

The judgment of the Land Court of Jerusalem dated the 10th October, 1934, must therefore be quashed as regards First Appellant and case remitted to the lower Court to give their reasons in detail as to why they say that First Appellant failed to prove her case, and in particular to state their views on the effect, if any, of the partition deed of 1886 which was remitted for their consideration in the first judgment of this Court.

The judgment as regards second and third Appellants is also quashed, and case remitted to District Court to determine whether possession of First Appellant, Hilweh, was on behalf of or independently of the interests of second and third Appellants, Michael Jarad and Saliba Issa Jiryes Nour, in order to facilitate the determination of the question whether there is or is not prescription.

Costs to await result of re-trial.

Delivered this 7th day of June, 1937.

British Puisne Judge.

HIGH COURT No. 40/1937.

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

Before:— Copland, J. and Frumkin, J.

In the Application of:—

Dr. Georg Gerson — Petitioner.

v.

The Chief Execution Officer, Jerusalem.
Mordechai Beresovsky.
Mordechai Vilensky.
Hein Racov. Respondents.

Execution.— Special preference.— Goods in leased property.— Art. 127 Execution Law.

Special preference of rent under art. 127 of Execution Law only applies to goods kept in leased property; but not to goods found in any other house leased by judgment debtor.

Krongold for Petitioner.
Racov for Respondents.

Application for an order to issue to the first Respondent directing him to amend the orders made by him on 17.5.1937, and the 15.6.1937, to the effect that the proceeds of the sales of the goods kept in the Ben Yahuda house be paid to the Petitioner in preference to Respondents 2, 3 and 4.

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 claim 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 the 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.

P.C.L.A. No. 5/1936.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— The Chief Justice (Trusted), Khaldi, J. and Khayat, J.

In the application of:—

1. Sheikh Abdul Hafeez,
2. Husein Haj Hassan Ez-Zuhd,
3. Salim Haj Hassan Zuhd,
4. Muhammad Haj Hassan Zuhd. Applicants.

v.

Ahmad Ibn Mahmud Snobar Respondent.

Power of Attorney.— Sec. 20, *Advocates Ord.— Party's name, wrong, incomplete description.— Art.* 16 *and* 186 *of O.C.C.P.*

1.— Power of Attorney to appear and defend "up to last degree of trial" wide enough to cover appeal to Privy Council.

2.— Certification of principal's signature on Power of Attorney by one of two advocates appointed jointly and severally sufficient within meaning of section 20, Advocates Ordinance.

3.— Wrong description of party's name, if due to clerical error and no steps by other party to put it right, no ground for refusing appeal.

4.— Incomplete description of party's name, if fully described in earlier stages, not adequate ground for refusing leave to appeal.

Awni Abdul Hadi for Applicants.

Abdel Latif Salah for Respondent.

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 day of April, 1936, in Civil Appeal No. 78/35.

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.2050.—, 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 to 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 an appeal to this Court. When they were originally started this party was described as Ahmad Haj Hassan Zuhd, his proper name. The matter came then 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 the 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 Privy Council it will be open to the Respondent to take all or any of these points, should he 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 are prescribed.

Delivered this 15th day of February, 1937.

Chief Justice.

CIVIL APPEAL No. 138/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— The Senior Puisne Judge, (Manning), Greene, J. and Frumkin, J.

In the case of:—

"Palwoodma" (Palestine Woodwork Machinery Trading and Manufacturing Company), Haifa. Appellant.

v.

Tewfic Majdalani. Respondent.

Contract of lease, right to rescind.— Defect.— Mejelle, art. 478, 513, 515, 518.—

Ceasing of benefit of a thing hired entitling lessee to rescind contract must be due to defect in thing itself or to absence of something without which that thing loses its character and is no longer available for purpose for which it was hired.

Geiger for Appellant.

Sanders for Respondent.

Appeal from judgment of District Court, Haifa, dated 21.5.1937.

JUDGMENT.

Senior Puisne Judge.

1. 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 terms 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 the 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 the 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 the 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 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 where 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.70.— 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 fir 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 Kneseth 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 these in this case, that in such circumstances the provisions of the Mejelle apply and the tenant is relieved of his obligation 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 annuled.

And in the same way, if a man who is suffering from toothache, make a contract with a dentist to put it out for so many piastres, and afterwards the pain goes away, the hiring is annuled.

Likewise by the death of the person, who seeks for a wet nurse, the hiring is not annuled, but by the death of the child or of the milk mother, the hiring is annuled.

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 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 out, 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.

Artcile 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 setting 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 to 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 housé 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 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 fulfillment of the contract. The case of the toothache 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 principal 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 cease 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 the matter within the contemplation of the parties when they made the agreemnet 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 fulfillment 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 can arise unless the water continued to run. The examples given also illustrate a usefull 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 the 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 a 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 occurence of a stagnation in the business for selling and buying, and that the shop remained closed, cannot refuse to pay rent for this time."

The company alleges that it was impossible to do business. The stagnation was not due to ordinary causes such as 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 tenent must bear the loss.

24. References have been made to English Law and there is a 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 disable 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 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. The 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 contened 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 Mattey 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 the 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.

CRIMINAL APPEAL No. 88/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— The Senior Puisne Judge (Manning), Greene, J., and Khaldi, J.

In the case of:—

1. Shobash Yousef Ahmad.
2. 'Aqel Ibrahim Khalil.
3. 'Aqleh Ibrahim Khalil.
4. Mu'eiqel Ibrahim Khalil. Appellants.

v.

The Attorney General Respondent.

Criminal Procedure.— Information.— Committal.— Sec. 28(1) (4) *and* (5) *of Trial upon Information Ord.— Legislative power.— Art.* 18 *of Pal. Order-in-Council.—*

1.— Information filed by authorised person on behalf of Attorney General is good, although signed "for Government Advocate".

2.— Article 18 of Palestine Order-in-Council 1922 (Sub-art. (1)(a) of Art. 17 of Pal. Order-in-Council 1922 as amended) empowers legislature to amend or repeal Ottoman Law, whenever necessary for peace, order or good Government in Palestine.

3.— Information may be on a charge other than that of committal, if supported by evidence taken at preliminary investigation; no special order of committal by Attorney General necessary.

Hassan Sidqi Dajani for Appellant 1.

Salomon Yehuda for 2. 3. 4. Appellants.

Solicitor General (*Rose*), *Omar Wa'ri* for Respondent.

Appeal from the judgment of the District Court, Jerusalem, dated 13.7.1937, 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.

JUDGMENT.

1. 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 (sic) 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 investitation had before him a charge of murder, whereas he committed on a charge of manslaughter. Section 18(2) of 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 his 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 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 purposes 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 Articles 39 and 52. Article 39 refers to the jurisdiction of Magistrates' Courts and says such Courts shall have 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 Commitee in the case of Riel v. The Queen, 12 App. Cases 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 reads 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 included 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."

8. 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 any 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 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 elaborate 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 Section 212, 213, and 23. Sections 212 and 213 deal with the offence of the 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 there 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 ground 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

CIVIL APPEAL No. 196/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:— The Senior Puisne Judge (Manning), Copland, J., and Frumkin, J.

In the case of:—

Henry Cattan — Appellant.

v.

Jamilleh Y. Laana — Respondent.

Advocate.— Sec. 21 of Advocates Ordinance.—

Agreement with advocate regarding litigation in an Ecclesiastical Court not an agreement in meaning of Sec. 21 of Advocates Ordinance.

Abcarius for Appellant.

Amon for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 7.11.1935.

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 in the meaning of Section 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 full LP.90.—

Costs to abide event.

Delivered this 4th day of February, 1937.

Senior Puisne Judge.

CIVIL APPEAL No. 129/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— The Senior Puisne Judge, (Manning, J.), Frumkin, J., and Abdul Hadi, J.

In the Appeal of:—

Awkaf Officer, Jerusalem. Appellant.

v.

Father Superior of the Terra Santa Convent Franciscans Fathers, Jerusalem. Respondent.

Appeal.— Certified copy of judgment.— Bond.—

1.— Court will not dismiss appeal because of technical objection that copy of judgment served was not certified; it will grant adjournment to put matters in order.

(E.N. Compare Ct. L.R. Vol. I. R.31, R.32, R.48.)

2.— Appeal must fail, if bond accompanying notice of appeal not duly authenticated or in form prescribed.

Kazimi for Appellant.

Bodeiri for Respondent.

Appeal from judgment of Land Court, Jerusalem, dated 3.6.1937.

JUDGMENT.

1. Hassan Eff. Budeiri, who appeared for the respondent, raised two preliminary points. The first is that the copy of the judgment served on him was not certified. This appears to be correct, but the objection is of such a technical nature that we are not inclined to dismiss the appeal because of it — we would grant an adjournment to have the matter put in order.

2. The second point is, however, fatal to the prosecution of this appeal. The bond accompanying the notice of appeal was not duly authenticated or in the form prescribed. There were no witnesses. We are not disposed to grant an adjournment to have this put right. Advocates should understand that rules of procedure are meant to be complied with.

3. The appeal is consequently dismissed with costs to include LP.2.— advocate's fees.

Delivered this 14th day of September, 1937.

Senior Puisne Judge.

CIVIL APPEAL 51/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— Copland, J. Khaldi, J. and Abdul Hadi, J.

In the case of :—

Aharon Solowy — Appellant.

v

Chaim Wisfeld — Respondent.

Agreement.— Breach of contract.— Agent.—

If agent of both parties fails to carry out his duties, neither party liable for breach of contract.— (E.N. See C.A. 18/36., Ct. L.R. Vol. II. p. 63.)

Fellman for Appellant.

Silberg for Respondent.

Appeal from judgment of District Court, Jaffa, dated 26.2.1936.

JUDGMENT.

The parties to this appeal have entered into a contract of sale of land. The Appellant undertook in clause 4 of the contract to transfer to the purchaser a plot of land free from any debt and taxes either due to Government or the Council of the Colony. The parties have in Clause 7 entrusted the question of the parcellation and transfer to a certain advocate by the name of Mr. Aizen.

2. We do not think that there is any contradiction in clause 4 and 7. The whole of the contract must be read together.

3. We hold that Mr. Aizen was the agent of both parties under clause 7 of the contract. It is clear, and in fact not even alleged, that there is no act on the part of either party which prevented Mr. Aizen from carrying out his duties under clause 7 of the contract, and therefore neither party is to blame.

4. For the above reasons we hold that the judgment of the lower Court must be set aside and the Respondent's claim dismissed with costs here and below to include LP.5.— advocate's fees.

Delivered this 8th day of April, 1937.

British Puisne Judge.

CIVIL APPEAL No. 206/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— The Senior Puisne Judge (Manning, J.), Frumkin, J., and Khayat, J.

In the Case of :—

Joseph Albina — Appellant.

v.

Caroline Batarseh — Respondent.

Action.— Res judicata.—

No res judicata if action is brought after previous one was dismissed because in wrong form.

Amon, S. Mizrahi for Appellant.

G. Salah for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 21.11.1935.

JUDGMENT.

In this case we are of opinion that the decision of this Court delivered on the 14th October, 1931, was simply a decision that the Appellant had brought his action in the wrong form and that he was still at liberty to sue for his alleged rights under the agreement in another form. He consequently brought a new action. The District Court, without going into the merits, dismissed the action on the ground that it was res judicata.

In view what we have said above, we do not agree with this and we, therefore, set aside the judgment of the Court below and order the action to be remitted to it to go into the merits and deal with it according to law.

Costs to abide event.

Delivered this 8th day of February, 1937.

Senior Puisne Judge.

CIVIL APPEAL No. 65/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— B. Puisne Judge, Khaldi, J. and Abdul Hadi, J.

In the Case of :—

Abed Yousef — Appellant.

v.

Abdul Shouman — Respondent.

Enforcement of foreign judgments.— Foreign judgments Rules.— Sec. 21(20) *of Courts Ordinance* 1924.—

Foreign judgments Rules valid although Section 21 (now 20) of Courts Ordinance 1924 under which they have been made does not specifically mention foreign judgments.

King for Appellant.

Ouni Abdul Hadi for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 3.3.1935.

JUDGMENT.

We see no reason, after hearing Counsel for Appellant, to interfere with the judgment of the lower Court which must be affirmed and the appeal dismissed with costs and advocate's fees assessed at LP. 2.—

Delivered this 2nd day of April 1936.

Puisne Judge.

CIVIL CASE No. 309/33.

IN THE DISTRICT COURT OF JERUSALEM.

Before:— The President (Plunkett, J.) and Said Bey, J.

In the case of :—

Abdul Hamid Shouman — Plaintiff.

vs.

Abed Yousef of Beit Hanina — Defendant.

JUDGMENT.

The Court under Section 3 Rules of Court 1928 order the judgment of the 23.5.28 of the Supreme Court of New York for $ 399.37 with costs: $ 79.69 =Total $ 479.69 and judgment Supreme Court of New-York 20.5.28 for Total $ 709.15 interest from date of this action 27.10.33 to date of payment at 9% upon $ 675,30 and $ 399.75 to be executed.

Costs.

5.3.35.

President.

Reasons.

The Plaintiff asks that the judgment of the Supreme Court of New-York should be enforced by the District Court of Jerusalem and

that unless there is an objection under Art. 7 of Rules of Court 1928, which he submits there is not, this should be done.

On the other hand the Defendant submits that both judgments were by default and go back to 1928 and since they have not been executed within six months they have became null and void. There is no agreement as to the reciprocal enforcement of judgments with New-York State and further that New-York State will not grant an Exequatur of a judgment on a Court in Palestine and asks that the application be dismissed.

Plaintiff further submits that there is nothing in these judgments as to show that they were given by default and that even if there were restrictions as to time such restrictions apply to Palestinian judgments only and not to judgments of foreign Courts; that Defendant is estopped from raising this defence now having pleaded that no case can be raised here and that Plaintiff should enforce here such judgments as he may obtain from the Courts in the State of New-York.

Defendant points out that the Rules of Court purport to be made under Section 21. Courts Ord. 1924 and that the Section is silent as regards to power to make rules regarding foreign judgments.

The Court holds that there is jurisdiction to enforce any foreign judgment in accordance with Section 3 Rules of Court 1928, although these rules purport to be made under Section 21 of the Ordinance of 1924 which does not specifically mention foreign judgments.

Further, the Applicant has previously been prevented by the High Court in Palestine from taking action in this country as there was at the time an action pending in the New-York Courts but was directed that he could when he obtained judgment apply to have same enforced under Rule 3 of the Rules of Court, 1928.

Judgment for the Plaintiff was therefore entered on 5.3.35 for 709.15 dollars; interest from the date of this action 27.10.35 to date of payment at 9% upon 673.30 dollars and 399.75 dollars to be executed with costs.

President.

CIVIL APPEAL No. 166/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— Greene, J. Frumkin, J., and Abdul Hadi, J.

In the case of:—

Hanna Khayat. Appellant.

v.

1. Joseph Klein.
2. Y. Shaffer. Respondents.

Brokerage.— Agreement.—

Brokerage only due if parties to agreement in respect of which it is claimed are legally competent to perform and to suffer consequences in case of breach.

Goitein for Appellant.
Felman for Respondents.
Appeal from judgment of District Court, Jaffa, dated 10.4.1935.

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. 150/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— The Chief Justice (Trusted, C. J.) Greene, J., and Abdul Hadi, J.

In the case of:—

1. Nimer Jum'a el Bursan.
2. Salem 'Odeh Issa.
   on their own behalf and on behalf of the Sa'adneh el Kabaleh Tribe. Appellants.

v.

1. Mohammad Abu Jreiban.
2. Saleem Nweiri
   on their own behalf and on behalf of the Sa'adneh el Sho'aleh el Jibarat Tribe. Respondents.

Application to Court.— Cross-examination of expert.—

1.— Where application is made to Court, particularly if based on statutory provision, Court must record application and if necessary also ruling and reason therefor.

2.— Case to be remitted back to court of trial, if latter failed to give opportunity to party, who asked it, to cross-examine expert.

Rashed Hadad for Appellants.

Rushdi Shawa for Respondents.

Appeal from judgment of Land Court, Beersheba, dated 21.7.37.

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 relied 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 records, 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 therefore 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 final event.

Delivered this 27th day of September, 1937.

Chief Justice.

CIVIL APPEAL No. 152/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— The Chief Justice (Trusted, C. J.) Greene, J., and Abdul Hadi, J.

In the case of:—

1. Halimeh Hassan el Mashi.
2. Almazeh el Haj Taher.
3. Fatmeh Atallah Abu Ibeid. — Appellants.

v.

1. Husn Ighrayeb Ahmed el Mousa.
2. Chadijeh Ighrayeb Ahmed el Mousa — Respondents.

Possession of land.— Claim of ownership.—

Plaintiff cannot base claim of ownership of land on possession only, although Defendant may, in certain circumstances, rely on possession as a defence.

S. Abu Ghazaleh for Appellants.

S. Hashem el Shawa for Respondents.

Appeal from judgment of Land Court, Jaffa, dated 21.6.1937.

JUDGMENT.

This is an appeal from judgment of the Land Court of Jaffa in a case in which the Plaintiff, the present Appellant, claimed ownership of a certain land by virtue of possession of that land.

It had been decided that a Plaintiff cannot base a claim on possession only, although Defendant may rely, in certain circumstances, as a defence, on possession.

That being so, the Land Court was right in the decision to which it came and the appeal will be dismissed with costs and advocate's fees at LP.4.—

Delivered this 27th day of September, 1937.

Chief Justice.

CRIMINAL APPEAL No. 97/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— The Senior Puisne Judge (Manning, J.) Greene, J., and Khaldi, J.

In the case of:—

Ijbara Abdel Aziz el Fakhoury — Appellant.

v.

The Attorney General — Respondent.

Criminal Procedure.— Judgment by President sitting alone.— Emergency Regulations 1936.—

1.—If President sitting alone sentences accused while having no jurisdiction to sit alone, conviction and sentence will be quashed, case will not go back for retrial.

2.—Emergency Regulations 1936 apply not only to offences arising out of disturbances, riots or similar events.

Appellant in person.

Fawzi Ghussein for Respondent.

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 sec. 36 (2) (a) of the Firearms Ordinance, and sentenced to two years imprisonment.

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 reason 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 perferred 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.

CIVIL APPEAL NO. 139/37.

Before:—The Senior Puisne Judge (Manning, J.,) Frumkin, J. and Abdul Hadi, J.

In the appeal of:

Jacob Aboulafia — Appellant.

v.

1. A. Felman
2. A. Livay

as liquidators of the Jedda Textile Works Ltd. (in liquidation) — Respondents.

Civil procedure. — Production of evidence after closing case. — Application for adjournment.

1. After adducing evidence and closing case party not to be allowed to adduce further evidence.

2. If one party, on showing good cause, asks for adjournment, to which other party agrees, Court should grant it.

Maman for Appellant.

Bar-Rav-Hay for Respondent.

Appeal from judgment of the District Court, Haifa, dated 23.3.1937.

JUDGMENT.

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 hearing when the further evidence was being called the appellant's advocate was ill and another advocate, to whom he had given a delegation but who knew nothing about the case, asked for an adjournment on this ground. The respondent's advocate agreed to 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 repondent. 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, and if it has 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 justfied in urging before us that he had not had a fair trial as regards this item 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. 4.—

Delivered this 22nd day of September, 1937.

Senior Puisne Judge.

CIVIL APPEAL NO. 157/34.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C.J.) The Senior Puisne Judge (Manning, J.) and Abdul Hadi, J.

In the case of:

1. Joseph Klein
2. Israel Shaffer

Appellants.

v.

1. Henry Rock
2. Labibeh Rock
3. Edward Rock
4. Arthur Rock
5. Evelin Rock
6. Adelaide Khayat, nee Rock Respondents.

Construction of contract. — Obligations of parties to contract. — Ejusdem generis rule. — Liquidated damages.

Ejusdem generis rule not aplicable where general words are joined with particular words by expressions like "such as" or "as".

Horowitz for Appellants

Eliash for Respondents

Appeal from judgment of District Court, Jaffa, dated 5.6.1934.

JUDGMENT.

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

Clause 5 of the contract provides:

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

and Clause 6 provided:

> "In order to enable Second Party to prepare the transaction in the Land Registry, First Party undertakes to produce to Second Party all the necessary documents connected with the said transfer as Certificate of Mukhtar, the plan of the said orange grove signed by the Mukhtar and the adjoining neighbours, Werko and Titho receipts, and all other documents ne-

> cessary for the said transfer as required by Second Party and to sign upon the request of Second Party all the documents connected with the said transfer."

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

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

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

The contract was not carried out and Klein and Shaffer (the Second Party) as Plaintiffs brought an action in the District Court of Jaffa against the First Party claiming damages on the ground that the Defendants had failed in their obligation to supply certain documents, and on the ground that the Defendants could not comply with their obligations as they had no title in, or title deed in respect of, the land, and because one Zaki Rock was at material times insane and there was no person duly authorised to transfer his share of the property.

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

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

The District Court carefully considered the question and in its judgment discussed it at length. It applied the *ejusdem generis* rule to the expression "all other documents necessary for the said transfer", and came to the conclusion that a kushan or extract was not of the same nature as the documents set out earlier in the clause and went on to hold "I am of opinion, therefore, that, on the true construction of these clauses, it was the duty of the Plaintiffs (Second Party) to search for and obtain the necessary proof of title. It was not impossible for them to do so — anyone, on shewing that he is interested in

certain property, such as a prospective purchaser by agreement, can search the Registers. On these grounds I hold that the frustration of this sale was due to the default of the purchasers, since the vendors were under no obligation to furnish any documents which were not in their possession, and that the fact that, already held by this Court, the vendors were unable to complete was immaterial. Both sides were in default, and neither is therefore entitled to damages. The claim for damages by the Plaintiffs fails."

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

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

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

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

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

The words which we have to construe in Clause 6 of the contract are "In order to enable Second Party to prepare the transaction in the Land Registry . . .

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

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

The Second Party asked for an extract and the First did not supply it.

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

In my judgment, therefore, the District Court was wrong and this appeal should be allowed and the case remitted to the District Court to consider the other matters which have arised. As there is another case between the same parties arising out of th same contract, it would be convenient that they should be tried together.

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

Delivered this 21 day of April, 1937.

Chief Justice.

CRIMINAL APPEAL NO. 104/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice, (Trusted, C. J.) Greene, J., and Khayat, J.

In the case of:

The Attorney General — Appellant.

v

1. Diab Mohammad Abu Zarad
2. Hammad Abu Bakr Hindawi
3. Mohammad Abdel Rahmad Saleh
4. Shehade Mohammad Hindawi
5. Hassan Abdel Rahman Abu Hindawi — Respondents.

Criminal Procedure. — Appeal by Attorney General. — Grounds of Appeal. — Sec. 67 of Crim. Proc. (Trial Upon Information) Ordinance.

Right of Attorney General to appeal restricted to grounds enumerated in section 67 of Criminal Procedure (Trial Upon Information) Ordinance; appeal by Attorney General not falling under that section must be dismissed.

Ghussein for Appellant.

Koussa for Respondents.

Appeal from judgment of District Court, Haifa, dated 5.7.1937, whereby the Respondents were discharged as there was no committal order either by the Attorney General or by the Magistrate committing them to be tried by the District Court, although there was an order committing them to be tried by the Court of Criminal Assize.

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 me 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. 135/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted C.J.) Greene, J., and Frumkin, J.

In the case of:

Moshe Schwarz — Appellant.

v.

Egged Cooperative Society Ltd. — Respondent.

Abitration. — Submission containing wide provision as to powers of arbitrators. — Grounds to set aside award.

1. Fact that arbitrators found one of parties guilty of an act amounting to criminal offence no ground to set aside award, if no criminal charge could at that time be brought against that party and no "public rights involved".

2. Wide provision in submission as to powers of arbitrators even such as "not to be bound by law" no ground to set aside award, unless arbitrators misconducted themselves.

Marein for Appellant.

Iszajewicz for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 20.5.1937.

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 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.

CIVIL APPEAL NO. 131/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge, (Manning, J.) Frumkin J., and Abdul Hadi J.

In the case of:—

1. Husein Es Sha'our
2. Suleiman Ez Zacharneh — Appellants.

v

1. Mustafa El Aneed
2. Ayesh El Aneed
   on behalf of the other inhabitants of Semou' Village.
3. Waqf administration, Hebron
   (Third Party) — Respondents.

Appeal. — Constitution of Court. — Trial of case after appeal.

If after appeal lower Court differently constituted, case must be tried de novo.

Z. *Ousta* for Appellants.
Sh. Dajani for Respondents.

Appeal from the judgment of the Land Court of Jerusalem, dated the fifth day of June, 1937.

JUDGMENT.

This is an appeal from the Land Court of Jerusalem. It came before the Land Court for the first time as long ago as 1921. The judges of the Court at that time were Judge Ongley and Judge Abdullah Dajani. They dismissed the case of the appellants. The appellants then appealed to this Court; the judgment was set aside, and the case was remitted to the Land Court with directions that there should be an inspection of the land and verification of the deed with the boundaries, and the drawing up of a map to make clear the situation of the land. For some reason the case never reached the Land Court again until 1935 and the Court was then constituted of Judge Plunkett and Judge Ali Hasna. Zaki Eff. Ousta, who appeared for the plaintiffs, argued that the case should be tried from the beginning as the Court was differently constituted. The Land Court disagreed with this argument. In this we think the Land Court was wrong and therefore the appeal must be allowed. We do not think it necessary to come to any decision on the other grounds raised by Zaki Eff. Ousta. Case must be remitted to the Land Court with directions for trial de novo and costs to abide the event.

Delivered this 14th day of September, 1937.

Senior Puisne Judge.

CIVIL APPEAL NO. 149/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the case of:—

Shlomo Kronhauz — Appellant.

v.

Baruch Heiman — Respondent.

Arbitration — Disagreement between two arbitrators — Appoint-

ment of third arbitrator by Court — Arbitr. Ord. Section 6(1)(c).

Section 6(1) (c) of Arbitration Ordinance also applies where two arbitrators disagree as to necessity of appointing additional arbitrator.

Tovbin for Appellant.

Respondent in person.

Appeal from judgment of District Court, Haifa, dated 30.5.1937.

JUDGMENT.

It appears to us that this is an application to the District Court within the meaning of Secion 6(1) (c) of he Arbitration Ordinance. The District Court took the view, apparently, that that provision did not apply and refused to appoint 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 25th day of September, 1937.

Chief Justice.

CIVIL CASE NO. 47/37.

IN THE DISTRICT COURT OF HAIFA.

Before:—Shems, J. and Izzat, J.

In the case of:—

Shlomo Kronhauz — Plaintiff.

v.

Baruch Heiman — Defendant.

JUDGMENT.

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 jurisdicton, 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 to produce all his legal documents.

Judgment in the presence given on 30/5/37.

CRIMINAL APPEAL NO. 96/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge, (Manning, J.) Greene, J. and Frumkin, J.

In the case of:—

Reuben Scheinzwit — Appellant.

v.

Attorney General — Respondent.

Criminal Procedure — Corroboration — Evidence — Motive in cases of homicide — Evidence Ordinance, sec. 6.

1.—Section 6 of Evidence Ordinance means:

A person can only be convicted on evidence of more than one witness, it does not mean that an eye-witness to crime necessary in every criminal case.

2.—Prosecution not bound to prove motive in a case of homicide.

Abcarius for Appellant.

Alan E. Rose (The Solicitor General) for Respondent.

JUDGMENT.

1. 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, 1937, the Appellant wrote a letter signed Bidderman inviting Zwanger to meet him near a hotel at Petah Tiqvah. 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 Appellant 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 in it was found the dead body of Zwanger. The medical evidence show-

ed 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 Apellant 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 Apellant. 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 death returned to Tel Aviv 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 crminal 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 eyewitness 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 and Anor 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 many 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.

Delivered this 8th day of October, 1937.

Senior Puisne Judge.

CIVIL APPEAL No. 146/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The British Puisne Judge (Greene, J.) and Frumkin, J.
In the case of:

1. Mahmoud es-Salameh
2. Mohammad es-Salameh — Appellants.

v.

1. Mohammad Hamed es Salameh
2. Ibrahim Ahmad el Hamed
3. Yousef ibn Ahmad el Hamed
4. Muleh es-Salameh
5. Ahmad Abu Houma'
6. Ismail Abou Jou'a
7. Salan Ibu Hassab es-Salem
8. Abdullah Ahmad Abu Jouma'
9. Abdel Majid el Haj Ibrahim
10. Sheikh Asa'd Mohammad Arallah — Respondents.

Appeal. — Service of papers on Respondents. — Failure to pay proper fees for service.

Appeal must fail, if, without good cause shown, judgment and/or notice of appeal not served on Respondent, because no proper fees for service paid.

Hamburger for Appellant.
Adel Zueiter for Respondent.

Appeal from judgment of Land Court, Nablus, dated 29.5.1937.

JUDGMENT.

One of the conditions precedent to the hearing of the appeal, namely service of judgment and notice of the appeal to the Respondents was not fulfilled, for the simple reason that no proper fees for the service have been paid.

As no good cause for the defect was shown the appeal must be dismissed with costs to include LP. 3.— advocate' fees.

Delivered this 10th day of September, 1937.

British Puisne Judge.

HIGH COURT NO. 49/1937.

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

Before:—The Chief Justice (Trusted, C. J.) and Frumkin, J.
In the application of:—
Pinchas Bresler — Petitioner.

v.

1. Chief Execution Officer, Haifa
2. Perl Lea Bresler — Respondents.

Palestine-Order-in-Council Art. 56 — Execution of judgment of Rabbinical Court — Allegation of improper constitution of Religious Court — Burden of proof.

Party opposing execution of judgment of Religious Court under allegation that Court was improperly constituted must prove it.

Application for an Order to issue to the First Respondent, directing him to show cause why his order dated the 1st July, 1937, in Execution File No. 422/37, given under Article 56 of the Palestine-Order-in-Council, 1922-35, for payment of alimony in favour of the Second Respondent, should not be set aside.

Yehuda for Petitioner.
Tovbin for 2nd Respondent.

ORDER.

This is an application which comes to us as High Court of Justice, for an order directed to an Execution Officer, the whole point really being whether or not a judgment given by a religious court, in this case the Rabbinical Court, was given by a properly constituted Court.

In an application such as this, it is for the Applicant to satisfy us that the court was improperly constituted, and this he has failed to do.

The rule nisi will therefore be discharged, with costs and LP. 3.— advocate's fees.

Given this 28th day of September, 1937.

Chief Justice.

CIVIL APPEAL NO. 161/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Khayat, J.

In the case of:—

The Palestine Building Syndicate, Ltd. Appellants.

v.

1. K. Hoffman and Sons
2. Kevuzat Ihud Leavodot Matekhet
3. A. Bergi Respondents.

Appointment of Arbitrator — Agreement for submission to arbitration — Party to agreement — Leave to appeal under Arbitration Ordinance, Sec. 15(3) *— Court competent to grant leave.*

1. Application for leave to appeal under Sec. 15(3) of Arbitration Ordinance may be made to either Court.

2. Party to an agreement cannot invoke Sec. 7(6) of Arbitration Ordinance unless all its constituent persons have joined in appointment of its arbitrator.

Rosenbluth for Appellants.

Hamburger for Respondents.

Appeal from judgment of District Court, Jaffa, sitting at Tel-Aviv, dated 23.6.1937.

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 he 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 disputes 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 in the merits of the case. This 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 from 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 as to the nomination of the third arbitrator, 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) I 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 submission as aforesaid, within 15 days after the other party, having appointed his arbitrator, has been 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: 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, he decision of the District Court will be reversed with costs and LP 3.— advocate's fees.

Delivered this 6th lay of October, 1937.

Chief Justice.

CIVIL APPEAL NO. 163/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.) and Abdul Hadi, J.

In the appeal of:—

Meshek Gesher, Kvutzath Poalim.
Lehityashvut Shetufit, Beeravon Mugbal — Appellants.

v.

The General Manager, Palestine Railways, Haifa — Respondent.

Railway — Damages by fire — Negligence — Railway Byelaws, Byelaw 25.

Railway administration may be liable for damages caused by fire if fire arises owing to negligence of Railway or its servants.

Krongold for Appellants.
Salant for Respondent.

Appeal from judgment of District Court, Haifa, dated 4.7.1937.

JUDGMENT.

1. In the 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 appellants 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 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. 189/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—The Senior Puisne Judge (Manning, J.), Khayat, J. and Abdul Hadi, J.

In the appeal of:—

Wardesi Khalil El Najjar — Appellant.

v.

Yacoub Khalil El Najjar — Respondent.

Preliminary objection to appeal — Bond accompanying notice of appeal — Civil Procedure Rules, 1936, *Rule* 93(b), *Form* 19.

1.—Appeal fails if without good cause shown bond filed by Appellant not in form prescribed.

2.—Bond not making property liable for costs etc. not in form prescribed.

Koussa for Appellant.

Abcarius for Respondent.

Appeal from judgment of Land Court, Haifa, dated 1.5.1937.

JUDGMENT.

1. In this appeal Abcarius Bey for the Respondent has raised a preliminary abjection that Rule 93(b) of the Civil Procedure 1936 has not been complied with by the appellant. That rule requires that the notice of appeal shall be accompanied by a duly authenticated bond which shall be in the form 19 set out in schedule 1 to these rules. The form contains the words:—

> "... I, of my own free will, stand security for the costs of the appeal and any damages or loss caused by the appeal for which the respondent may me legally entitled to claim in case the appeal fails, mortgaging the properties specified in the schedule hereunto annexed..."

2. The surety then goes on to declare that he will not transfer the said properties or any part thereof and that any amount payable shall be realised from the said properties.

3. It is clear to us that the whole foundation of the security is that property of the surety must be declared to be liable for costs, damage or loss, and that a form which does not make property liable noes not comply with the terms of the law. The relevant rule says:—

> "a duly authenticated bond which shall be in form 19 in schedule 1, with such variation as the circumstances may require..."

but that does not mean that the appellant may choose any other form of security except the mortgaging of property.

4. The bond filed by the appellant is not in the form prescribed, and Mr. Koussa, on behalf of the appellant, has not shown any good cause for failing to comply with the law.

5. We are all agreed that a bond in the form prescribed may, in many cases, impose unnecessary hardship on an appellant and we think that another simple form of bond might be devised which could adequately provide for the security for costs, damage, and loss.

6. We hold that the preliminary objection of Abcarius Bey must be given effect to, that the appeal be dismissed with costs to include LP. 4.— advocate's fees.

Delivered this 19th day of October, 1937.

Senior Puisne Judge.

CIVIL APPEAL NO. 181/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.) Khayat, J. and Abdul Hadi, J.

In the appeal of:—

Khalil Malas and Co., Haifa — Appelants.

v.

Bucowina Society — Respondents.

Contract for sale of goods — Breach of contract — Measure of recoverable damages.

> Measure of damages in case of breach of contract for sale of goods not restricted to difference between agreed price and market price at time of breach; other damages following directly from breach also recoverable.

Khader Aweida for Appellants.

Margolin for Respondents.

Appeal from judgment of District Court, Haifa, dated 25.5.1937.

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 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. 256.332 mils damages. The first ground of appeal is that the respondent company was not entitled to sue in Palestine. Khader Eff. Aweida who argued the appeal, cited Civil Appeal No. 140/1926, 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 Bancruptcy 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. Aweida 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.— advocte's fees.

Delivered this 13th day of October, 1937.

Senior Puisne Judge.

CIVIL APPEAL NO. 185/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.) Khayat, J. and Abdul Hadi, J.

In the appeal of:—

George Yousef El Khoury — Appellant.

v.

Ne'kmeh El Khoury — Respondent.

Promissory note — Endorsement for collection.

Bill Passed to Bank for collection need not be endorsed by Bank returning the bill.

G. Elia for Appellant.

Y. Sahyoun for Respondent.

Appeal from judgment of District Court, Haifa, dated 28.6.1937.

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 Nammar 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 Nammar 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 fee.

Delivered this 13th day of October, 1937.

Senior Puisne Judge.

CIVIL APPEAL NO. 132/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Khayat, J.

In the case of:—

Shlomo Cohen-Zedek — Appellant. (Respondent).

v.

David Belozerkowsky — Respondent. (Appellant).

Building Contract — Liquidated damages — Taking delivery — Inference of waiver.

If building contract provides for liquidated damages for each day's delay in completing building, contractor liable for such delay, but liability ceases as owner enters into occupation of incompleted building; occupation admitting of inference that he waived right to damages.

Wittkovsky for Appellant.
Hoffman for Respondent.

Appeal from judgment of District Court, Jaffa, sitting at Tel-Aviv, dated 4.6.1937.

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 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 matters 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 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 rights 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 be-

cause 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.

CIVIL APPEAL NO. 170/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.) Khayat, J. and Abdul Hadi, J.

In the case of:—

Shimon Yacoub Shimon — Appellant.

v.

Ezra Koukia — Respondent.

Execution — Money wrongly paid by Chief Execution Officer — Mortgage deed — Agreement by parties that figure not correct — Burden of proof.

If money paid by Chief Execution Officer and person sues payee for its refund asserting that it was wrongly paid burden of proof on person suing.

Levanon for Appellant.

Aboulafia for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 22.6. 1937.

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 1000.— only.

4. Mr. Levanon, who argued the case for the appellant, cited as an authority High Court case No. 47/1934 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.

CIVIL APPEAL NO. 168/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—The Senior Puisne Judge (Manning, J.) Greene , J. and Khayat, J.

In the case of:—

1. Muhammad Nasr Ed Din Bashiti
2. Yusra Hussein Bashiti
3. Nafiseh, widow of Hussein Bashiti,

in her personal capacity and as guardian of her minor daughters, Widad, Shahrah, and Houter, and on behalf of the estate of Hussein Omar Bashiti

Appellants.

v.

Olaf Lind Respondent.

Promissory note — Agreement — Burden of proof — Basis of claim..

If document sued on held by Court not to be a promissory note, it may be treated as agreement and for Plaintiff to prove that money due under it.

Rashed Haddad for Appellants.
Olshan for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 8.7.1937.

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.

Senior Puisne Judge.

CIVIL CASE NO. 29/37.

IN THE DISTRICT COURT OF JERUSALEM.

Before:—His Honour Judge W. Clive Curry, President.

In the case of:—

1. Muhammad Nasr Ed Din Bashiti
2. Yusra Hussein Bashiti
3. Nafiseh, widow of Hussein Bashiti,
   in her personal capacity as a guardian of her minor daughters, Widad, Shahrah and Houter, and on behalf of the estate of Hussein Omar Bashiti.

Plaintiffs.

v.

Olaf Lind Defendant.

Nature of claim: LP. 205.128 mils, costs and advocate's fees and legal interest.

JUDGMENT.

Plaintiff is suing for LE. 200. on a bill or P/N for LP. 200. According to the wording of that document Defendant undertook

to pay LE 200. to the order of Hussein Omar Abu Naser against receipt of the title deed, upon the institution of the Land Registry, in respect of the land called Ard 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 fee of LP. 2.—.

Delivered this 8th day of September, 1937.

A/President.

CRIMINAL APPEAL NO. 117/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J., and Abdul Hadi, J.

In the case of:—

Mohammad Fad Abu Taha — Appellant.

v.

The Attorney General — Respondent.

Firearms — Production of firearm to Court — Emergency (Amendment) Regulations (No. 5), 1936, Reg. 8A (i).

Non production of firearm to Court not an irregularity in procedure, though production desireable.

Boudeiri for Appellant.

Omar Wa'ri for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 20.9. 1937, whereby Appellant was convicted of being in possession of a serviceable rifle of military value and amunition, contrary to Regulation 8A (i) of the Emergency (Amendment) Regulations (No. 5) of 1936, and sentenced to five year's imprisonment.

JUDGMENT.

It is quite clear that there was evidence before the Court that the Accused was in possession of a rifle and amunition. 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 desireable 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.

CIVIL APPEAL NO. 187/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.) and Khayat, J.

In the case of:—

Yacoub Hassan Saghir Khamra — Appellant.

v.

1. Itzhack Bitty
2. S. Astashinasky — Respondents.

Land — Ways of possession — Recovery of possession — Magistrate's Law, Art. BD.

1. Regular visits to property one of various ways in which possession may be had.

2. Question of possession being one of degree and depending upon facts in each particular case, Court of trial to decide whether facts amounted to possession or not.

Khamra for Appellant.

Gavison for Respondents.

Appeal from judgment of Land Court, Haifa, sitting in its appellate capacity, dated 2.7.1937, setting aside the judgment of the Chief Magistrate, Haifa, dated 8.5.1937.

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 Magistates' 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 coersion, 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 wether 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 Defendant's case, I cannot, when deprived of the power to decide the issue of ownrship 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 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.

CIVIL APPEAL NO. 169/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge, (Manning, J.) Khayat, J. and Abdul Hadi, J.

In the appeal of:—

Eliya Ibrahim Sinani — Appellant.

v.

Elie Barouch Masoudah — Respondent.

Certified copy of document — Proof.

Copy of original document, if not properly authenticated and certified, not acceptable as sufficient proof.

Amon for Appellant.

D. Dajani for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 26.7.37.

JUDGMENT.

The Respondent applied to the District Court of Jerusalem for an order appointing him to be the Mutawali of a waqf alleged to have been created by one Sadaqe. 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 a 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 pièce" presented by one Erian Maafi 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 to 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.

CIVIL APPEAL NO. 172/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—British Puisne Judge (Greene, J.), Khaldi, J. and Abdul Hadi, J.

In the case of:—

Nimer Khazim of Bineh Village
Acre, Sub-District — Appellant.

v.

Mahmoud Muhammad Ali Abdul Rahim on behalf of all the heirs of his father.

Respondent.

Magistrate's Court — Procedure on appeal — Preliminary point — Substituted judgment of District Court.

Where Magistrate decides case on preliminary point without giving parties opportunity to complete defence, and District Court, on appeal, reverses Magistrate's judgment, it must remit case to him to hear pleadings of both parties as to merits of case.

Abcarius for Appellant.
Respondent in person.

Appeal from judgment of District Court, Haifa, dated 25.3.37 given on appeal from judgment of Magistrate's Court, Acre, dated 29.12.1936.

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 Section 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 opininon 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 of October, 1937.

British Puisne Judge.

CIVIL APPEAL NO. 141/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), and Abdul Hadi, J.

In the case of:—

Jamal Abdul Hadi el Kasem — Appellant.

v.

Suhbi el Ayyoubi — Respondent.

Land Settlement — Register of rights — Land Settlement Ord. Sec. 66.

> Last part of first paragraph of Sec. 66 of Land (Settlement of Title) Ordinance not applicable when right recorded in existing register has been varied by Settlement Officer or Courts on Appeal from Settlement Officer.

Appellant in person.

Goitein for Respondent.

Appeal from judgment of Land Court, Nablus, dated 14.6.1937.

JUDGMENT.

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 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 officers, 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 7.11.1935.

It is clear, therefore, that the Plaintiff in the Court below (now Re-

spondent) 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.

CIVIL APPEAL NO. 186/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.) and Greene, J.

In the case of:—

Rivka Cashman (otherwise Rivkin) Appellant.

v.

Lindsay Gordon Cashman Respondent.

Interpretation of law — Construction of Palestine Order-in-Council 1922, Art. 64 — Dissolution of marriage — Decree of nullity.

Art. 64 of Palestine Order-in-Council, 1922, must be construed in its ordinary meaning.

In ordinary meaning of words dissolution of marriage includes a decree of nullity and therefore comes within prohibition of Art. 64 of Palestine Order-in-Council, 1922.

Jacob S. Shapiro for Appellant.

For Respondent: No appearance but duly served.

Appeal from judgment of District Court, Haifa, dated 29.7.37.

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 purpose 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 af 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.

CIVIL APPEAL NO. 62/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.) and Greene, J.

In the case of:—

Mary Haddad — Appellant.

v.

Amin Michael Haddad — Respondent.

Divorce — Natural justice — Competence of Civil Courts — Religious Courts — Ex-parte decree of dissolution of marriage —

Alimony — Maintenance — Interpretation of Law — Jurisdiction of Civil and Religious Courts — Palestine Order-in-Council, 1922, *Art.* 51, 53 54.

1. Ex parte decrees of dissolution of maariage being contrary to natural justice, Civil Courts will refuse recognition of such a decree issued by a Court of a Religious Community, if its law has no provisions allowing dissolution of marriage on mere ex parte application or without any application at all.

2. Alimony and 'Maintenance' Art. 51, 53, 54, of Palestine Order-in-Council, 1922, has the same meaning as in English Law.

"Alimony" means allowance claimed or adjudged to wife when relation between her and husband still subsist, but parties separated either by consent or judicial order, or while suit for separation or dissolution pending.

'"Maintenance" always used to describe allowance claimed by or adjudged to wife when husband deserted.

Hassan Hawa for Appellant.
Hanna Atalla for Respondent.

Appeal from judgment of District Court, Haifa, dated 23.2.1937.

JUDGMENT.

1. 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.

2. 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.

3. 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 to 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 an 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 purpose of this case the parties are still husband and wife.

4. 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.

5. 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 Palestine 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 ollowance when a matrimonial suit is pending, and this is called alimony pendente 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 separating or dissolution is pending.

6. 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 hus-

band is that he wilfully neglected to provide reasonable maintenance for his wife and chidren.

The order given by the Court is always called a "maintenance order" and the Legislative 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 statemnt 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.

8. 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.

9. I cannot find in the proceedings below that there was any 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, and such future 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.

CIVIL APPEAL NO. 171/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Greene, J., Khaldi, J. and Abdul Hadi, J.

In the case of:—

Benjamin Mashieff of Haifa — Appellant.

v.

Fritz Sonnenfeld — Respondent.

Arbitration — Award — Applicability of English Law and practice — Submission in Court recorded in Court's record — Action on award.

1. Submission by parties in Court to arbitration recorded in Court's record amounts to "written submission".

2. Principles of English Law and practice apply to cases brought in Palestine upon award so far as no conflict with Palestine Law.

3. Party can bring action upon award instead of applying for confirmation of award, former remedy being open in England and no provision in Palestine to contrary.

Levitzky for Appellant.

Marein for Respondent.

Appeal against the judgment of District Court, Haifa, dated 30.6.1937 on appeal from the judgment of the Haifa Chief Magistrate, dated 9.4.1937.

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."

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

7. The appeal will be dismissed with costs to include LP.5.— advocate's fees.

Delivered this 9th day of November, 1937.

British Puisne Judge.

HIGH COURT NO. 52/37.

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

Before:—The Chief Justice (Trusted, C. J.), and Greene, J.

In the application of:—

Afifeh Kaiser Khouri — Petitioner.

v.

1. Chief Execution Officer, Haifa
2. Assistant Chief Execution Officer, Acre
3. Kamel Issa Khoury — Respondents.

Change of community — Religious Communities (Change) Ord., sec. 4(2) — Alimony — Maintenance — Jurisdiction in personal status matters — Special Tribunal.

1. Section 4(2) of Religious Communities (Change) Ordinance *not* utra vires.

2. Where proceedings are brought before Religious Court for payment by husband to his wife of what is necessary for her living, matter can be referred to Special Tribunal, if necessary, by said Court to decide whether "the case is one of personal

status within the exclusive jurisdiction of a Rligious Court".

E. Koussa for Petitioner.
1-st and 2-nd Respondents — no appearance.
Hassan Hawa for 3rd Respondent.

Application for an order to issue 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 27.2.1937, 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.

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) has 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 February, 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 Communities (Change) Or-

dinance 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 means 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 he 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 desireable 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 Communities (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.

CIVIL APPEAL NO. 199/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge, (Manning, J.), Khaldi, J. and Khayat, J.

In the appeal of:—

Naeemeh Suleiman Muhammad widow of Muhammad Husein El Khayed — Appellant.

v.

1. The Attorney General on behalf of the Palestine Government.
2. Yousef Aqleh in his capacity as guardian of his minor children Deif Allah Youseph and his brother

Respondents.

Procedure in Court — Evidence — Hearing of witnesses — Ground of Appeal.

If party wishes to call several witnesses and gives their names, and Court, after hearing only some of them and not being satisfied from their evidence, gives judgment against party, judgment will be quashed and case remitted to hear remaining witnesses and give fresh judgment.

Appeal from judgment of District Court, Haifa, dated 17.7.37.

JUDGMENT.

1. This appeal is concerned with an application to be paid compensation deposited in the Court under the Workmen's Compensation Ordinance.

2. The appellant claimed to be the widow of the deceased workman. The District Court was not satisfied from the evidence that she had ever been married to the deceased.

3. There is only one ground of appeal which it is necessary to deal with. The appellant gave notice in the Court below that she wished to call seven or more witnesses whose names were given, but for some reason the Court below heard the evidence of three witnesses only, although the appellant wished to call the others.

4. On this ground we decide that the judgment of the Court below should be set aside, so far as it affects the present appellant, and the case must be remitted to the District Court to hear the other witnesses of the appellant and to give fresh judgment as regards the appellant's claim. Costs to abide the event.

Delivered this 25th day of October, 1937.

Senior Puisne Judge.

CIVIL APPEAL NO. 190/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Khaldi, J., and Abdul Haldi, J.

In the appeal of:—

Yaqeen El Khayat — Appellant.

v.

Maliha Khalil Ramdan El Qeisi — Respondent.

Privity of contract — Party to action — Agent — Attorney — Preamble of agreement — Personal liability.

No privity of contract between A and C, if B being C's attorney enters into agreement with A but makes himself personally liable for breach and signs agreemnt in his personal capacity and nowhere said that he merely acts as agent for C although preamble shows that he had power of attorney from C and was authorised to sell C's property.

O. Saleh for Appellant.

Lipkin for Respondent.

Appeal from the judgment of the District Court of Jaffa, dated the 25th March, 1937.

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 of the respondent, he makes himself personally liable for any damage for breach, and he has signed the agreement in his personal capacity.

3. Omer 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.

CIVIL CASE NO. 403/34.

IN THE DISTRICT COURT OF JAFFA.

Before:—President (Edwards, J.) and Mani, J.

In the case of:—

Yakin Ibn Haj Mousa Khayat, Jaffa — Plaintiff.

v.

1. Maliha bint Khalil Ramadan El Kasi represented by Dr. Jos. Lipkin,
2. Hawamel Al Auran — Defendants.

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 Iben 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 Tapu." 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 principal) (word in Arabic "Bil 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 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, 1936.

President.

CIVIL APPEAL NO. 22/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J., Greene, J., and Frumkin, J.

In the case of:—

Haj Muhammad Ahmad Abu Laban — Appellant.

v.

1. Hamid Abu Laban
2. Rashid Abu Laban
3. Hassan Abu Laban — Respondents.

Finding of facts — Evidence before Court of trial — Liquidated damages — Costs and expenses — Assessment by Chief Registar.

1.—Appellate Court may reverse finding of facts if it sees that all evidence in Court of trial shows otherwise.

2.—If subject matter of agreement obtained and clause awarding liquidated damages no longer operative, purchaser not entitled to liquidated damages but to all legal costs and expenses incurred by him in obtaining subject matter.

3.—Legal costs and expenses to be taxed by Chief Registrar.

Eliash for Appellant.

Abcarius for Respondents.

Appeal from judgment of District Court, Jaffa, dated 18.1.1937.

JUDGMENT.

The Appelant 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 postion 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.5000.— 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 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.

CIVIL APPEAL NO. 4/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J., Greene, J., and Khaldi, J.

In the case of:—

Ishhadeh Yousef el Budeiri — Appellant.

v.

Fareedeh bint Jiryes Sliman Abu Dayeh — Respondent.

Succession — Estate of deceased Moslems — Jurisdiction of Moslem Religious Courts — Ordinances infringing provisions of Order-in-Council — Scope of Art. 4 of Palestine (Amendment) Order-in-Council — Succession Ordinance, sec. 6, 21, 24(1) and (2) — Palestine Order-in-Council Art. 38, 46, 52, 57.

1. An Ordinance must be in conformity with provisions of Order-in-Council under which it is made; if it infringes conditions of Order-in-Council it must be treated as void.

2. Exclusive jurisdiction of Moslem Religious Courts in matters of personal status of Moslems not affected by Succession Ordinance, section 24 which is void in so far as questions of succession to estate of Moslems are concerned, for it infringes provisions of Art. 52 of Palestine Order-in-Council.

3. Any Ordinance or Order purporting to vary Order-in-Council must do so specifically and not merely by implication.

4. Main principles and limitations of principle Order-in-Council unaffected by Art. 4 of Palestine (Amendment) Order-in-Council, 1923, validating Proclamations, Ordinances etc. issued or enacted on or after 1.9.1922.

Ibrahim Kamal for Appellant.

Moghannam for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 22.12.1936.

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 Law) 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 provsions 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 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:—

Ariticle 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 jurisdic-

tion. They can refer only, from their context, to amendments of the Laws of Procedure of Moslems 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 Court.

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 LC., 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 *in*deed 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 Articles 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 these arguments, but I think that they fail.

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 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 enactments 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 insofar 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.

CIVIL APPEAL NO. 125/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J., Greene, J. and Frumkin, J.

In the appeal of:—

Noah Havkin — Appellant.

v.

1. Dr. H. Lachmann
2. Dr. Moses — Respondents.

Agent de facto — Building contractor — Authority to third person to expend money for principal — Set off.

Contractor bound by authority (to expend money on his behalf) given by a person whom he employed to supervise construction of house, who signed specification and was in general charge of building operations.

Appeal from judgment of District Court, Jaffa, sitting at Tel Aviv, dated 20.5.1937.

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 secod 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. Lachmann and Dr. Moses through the office of Hahersham."

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 obviously be cleared up, before this item can be 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 cost 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 stone.

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. 204/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Greene, J. and Khayat, J.

In the appeal of:—

Abraham Gudal — Appellant.

v.

Giza Bernfeld — Respondent.

Limitation of action — Lunar and Gregorian years — Mejelle, Art. 1660, 1113 — *Land Law (Amendment) Ord. sec.* 7 — *Delivery to one of two buyers — Expenses of administering an oath — Liability of each of two buyers —*

1. In actions relating to immovable property "years" mean Gregorian years, in those relating to other than immovable property — lunar years. But if action was founded on a document bearing a Gregorian date, then again Gregorian years.

2. In a sale of property to two buyers receipt by either of them sufficient to constitute delivery.

3. Expenses of administering oath must be deposited by party applying for oath.

4. If nothing indicates that buyers were sureties for each other, each of them only liable for his share.

Levin for Appellant.

King for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 21.5. 1937.

JUDGMENT.

1. On May 21st, 1937, the District Court of Jerusalem gave judgment against the appellant for LP.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, 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 clearly a curious one, but I am informed by my brethern of the Supreme Court who were here before the Occupation that the same position existed in Turkish times as regards actions other than those 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 Otoman 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 already 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 70 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 the 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.

CIVIL APPEAL NO. 106/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Greene. J., Khaldi, J. and Abdul Hadi, J.

In the case of:—

The Municipal Corporation of Jerusalem — Appellant.

v.

1. Muhammad Abed Sharaf, Jerusalem
2. Mrs. Argentine Mattia Morcos, Jerusalem
3. Mrs. Marie Michel Anton Morcos, Jerusalem
4. Albert Mattia Morcos, Jerusalem
5. Hanna Anton Morcos, Jerusalem
6. Charles Mattia Morcos, Jerusalem
7. Michael Anton Morcos, Jerusalem

Respondents.

Expropriation by Municipality — Rights of owner of expropriated building — Compensation — Widening roads — Land (Expropriation) Ordinance, sec. 4.

On expropriation of a building, owner also entitled to compensation in respect of land on which the building stood, regardless of fact that such land is less than 25% of total area of plot.

Saba Said for Appellant.

1st Respondent absent.

Eliash for 2-7 Respondents.

Appeal from judgment of the Land Court, Jerusalem, dated 24.5. 1937, in Land Case No. 15/37.

JUDGMENT.

This is an appeal from an order of the Land Court of Jerusalem whereby the Court ordered the Municipal Corporation to pay LP. 3,023,800 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.2.700.—.

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.

Senior Puisne Judge.

CRIMINAL APPEAL NO. 128/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Copland, J. and Khayat, J.

In the case of:—

Dr. Arieh Ulitski and
Mrs. Zehava Ulitski
of Jerusalem — Appellants.

v.

The Jerusalem Local Building
and Town Planning Commission — Respondents.

Criminal proceedings by Local Building and Town Planning Commission — Right of appeal in criminal cases from judgments of Magistrate's Courts — Town Planning Ordinance, 1936, *sec.* 39 — *Municipal Corporations Ordinance,* 1934, *sec.* 131.

1. "Proceedings" in sec. 131 of Municipal Corporation Ordinance, 1934, applies equally to civil and criminal proceedings; Local Building and Town Planning Commission, being a Municipal Council, has therefore power to institute proceedings of a criminal nature.

2. Upon acquittal in Magistrate's Court only person who can appeal — Attorney General or his representative.

Levitsky for Appellants.
Saba Said for Respondents.

Appeal from judgment of District Court, Jerusalem, dated 30.6.37.

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 complaints 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 section are 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 to appeal from the judgment of the learned Magistrate. On this we are in agreement with him. Under section 5 of the Magistrate's Courts Jurisdiction Ordinance, No. 16 of 1935, only two persons have a right to 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 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 Reespondents 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 District Court must be set aside and the judgment of the learned Magistrate restored.

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

Delivered this 17th day of November, 1937.

Senior Puisne Judge.

CIVIL APPEAL NO. 174/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Khayat, J.

In the case of:—

Hanna Naser Abyad — Appellant.

v.

Mrs. Yola Shehab — Respondent.

Admission in regard to issue before tribunal — Admissions by advocate — Withdrawal of admission — Mejelle Art. 1647 — *Urquhart v. Butterfield,* 37, *Ch. D.* 357.

Admissions by council if made in regard to any issue before tribunal or for purpose of dispensing with proof in the trial bind the client and are in civil cases conclusive, if otherwise — merely prima facie evidence against client and can be withdrawn. (Ed. Note. See C.A. 129/36. Ct. L. R. Vol. I. R 45)

For Appellant: No appearance.

Levin for Respondent.

Appeal from judgment of District Court, Haifa, sitting in its appellate capacity, dated 29.4.1937, confirming judgment of Chief Magistrate, Haifa, dated 8.3.1937.

JUDGMENT.

This is an appeal from the judgment of the District Court of Haifa, dated 29.4.1937, confirming the judgment of the Chief Magistrate of Haifa, dated 8.3.1937.

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 to-day. 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 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 admssion 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.

HIGH COURT NO. 57/1937.

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

Before:—Greene, J. and Abdul Hadi, J.

In the application of:—

Husein Khalil El Daoudi — Petitioner.

v.

1. The Chief Execution Officer, Jerusalem
2. Muhammad Said El Jamai' — Respondents.

Discretionary powers of Chief Execution Officer — Payment of judgment debt by instalments — No interference by High Court.

Question of rate of instalments to be paid by judgment debtor being within discretion of Chief Execution Officer High Court cannot interfere.

Petitioner in person.

1st Respondent — no appearance.

2nd Respondent in person.

Application for an order to issue to the Respondents directing them to show cause why the order of the first Respondent made on 22.9.37 in the Execution File No. 1722/37 should not be set aside.

JUDGMENT.

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 aplication dismissed.

Delivered this 4th day of November, 1937.

British Puisne Judge.

HIGH COURT NO. 47/34.

(*E.N. Referred to in C.A.* 170/37, *Ct. L.R. Vol. II. No.* 15. *p.* 123)

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

Before:—The Senior Puisne Judge and Abdul Hadi, J.

In the Application of:—

Ahmad Attiyeh Jaber — Petitioner.

v.

The Chief Execution Officer, Jerusalem

Shihadeh Saleh — Respondents.

Mortgage — Foreclosure — Amount due under mortgage — Procedure in case of contest.

1. Where Chief Execution Officer finds that mortgagor has prima facie grounds for contesting amount due on mortgage he is not to order sale until amount due has been ascertained by competent Court; application to Court must be made by mortgagee.

Application for an order to issue to the first Respondent directing him to show cause why his order dated the 7th May, 1934, in the Execution File No. 469/34, should not be set aside.

ORDER.

It has been laid down in H.C. 90/32, ex parte Raji Issa and another, that where "the President of the District Court finds that the mort-

gagor has prima facie grounds for contesting the amount due on the mortgage, his proper course is to refuse to make an order for sale until the amount due has been ascertained by judgment of a competent Court."

And the judgment in C.A.64/32, Hassan Shihab ed Din v. Khaduri Suleiman Darwish, makes it clear that the application to the Court must be made by the mortgagee.

It is true that in H.C. 90/32 this Court held that the President of the District Court had power to order immediate payment "of such part of the amount claimed as is admitted by the mortgagor to be due and postpone making an order for sale with regard to the amount in dispute.."

In the present case, however, no part of the amount claimed is admitted by the Respondent to be due.

We hold, therefore, that the Respondent of the District Court was right in refusing to make an order for sale.

The Order of this Court made on the 4th July, 1934, is discharged and the petition is dismissed.

The petitioner will pay the costs of this application, including LP.2.— the fees of the second Respondents advocate.

Delivered this 13th day of December, 1934.

Senior Puisne Judge.

CRIMINAL APPEAL NO. 122/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Coplannd, J. and Khayat, J.

In the case of:—

Albert Floyd of Jerusalem and
Moshe Shapiro of Jerusalem — Appellants.

v.

The Attorney General — Resepondent.

Interpretation of "Ordinance" — Publication of enactments as drafts — Rules, Regulations and By-Yaws — Palestine Order-in-Council, Art. 17 — *Misd. Ap. No.* 18/28 (*PLR p.* 283).

1. "Ordinance" in Art. 17(1)(d) of Palestine Order-in-Council as substituted means an ordinance promulgated by High Commissioner after consulting Advisory Council and does not include any rules, regulations or by-laws, made under provisions of an ordinance.

2. No provision in law of Palestine that any rules, regulations or by-laws should be made public for a month before enactment.

Geichman for Appellants.
Salant for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 30.9.37.

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 Art. 17(1)(b) enacts that "No Ordinance shall be promulgated by the High Commissioner until he has consulted the Advisory Council...". 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 brethern 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 McDonell 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 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. The 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. 130/1936.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J. and Khaldi, J.

In the appeal of:—

Bishara Liko — Appellant.

v.

1. Hahim Ramadan Abu Khadra
2. Raisa bint Ramadan Abu Khadra
3. Akifa bint Ramadan Abu Khadra — Respondents.

Meaning of "Practice" or "Procedure" — Rule making power of Chief Justice — Judgment by default (District and Land Courts) Rules, 1926, Rules 4(4) and 13 — Ottoman Civil Procedure Code Art. 159 — Opposition to judgment by default — Rights of parties to action.

1. "Practice" or "Procedure" when used in its ordinary and common sense does not involve or imply anything relating to extent or nature of jurisdiction of a Court or the right given to party by substantive law.

2. Rules 4(4) and 13 of Judgment by Default (District and Land Courts) Rules of 1926 purporting to take away right to enter opposition under Art. 159 of Ottoman Civil Procedure Code are ultra vires sec. 20(1)(b) of Courts Ordinance.

M. Rashid for Appellant.

J. Budeiri for Respondents.

Appeal from judgment of District Court, Jaffa, dated 17.11.1936.

JUDGMENT.

The facts that give rise to this appeal are as follows:—

The present Appellant obtained judgment in the District Court of Jaffa against the Respondents in default on 20.1.36. The latter entered an opposition which was duly heard on 15.9.36 in the absence of the Appellant, when the original judgment was set aside and the case against the three Respondents was dismissed. On 3.10.36 the Appellant entered an opposition against the judgment given against him in default and on 17.11.36 the District Court gave the following judgment:

> "The Court finds that there is no suggestion in the law entitling the original plaintiff when he is opposed to oppose and therefore decided to dismiss the opposition and hold on the previous judgment of 15.9.36."

The Appellant has now appealed to this Court. As we see it, the

only question in this appeal is whether Article 159 of the Civil Procedure Code has been amended by the Judgment by Default (District and Land Courts) Rules of 1926.

Article 159 of the Civil Procedure Code is in these terms:—

> "...If the party against whom opposition is made fail to appear on the date fixed, and judgment be given against him by default, he shall have the right to make opposition against such judgment within the period and in the manner prescribed in articles (153) and (155)."

The relevant Rules are as follows:—

> "Rule 4 (4). If the plaintiff does not appear upon the hearing of the opposition, the court shall, if satisfied that he was duly cited, proceed to hear the opposition as if it were contested."
>
> "Rule 13. Notwithstanding anything in Articles 151 to 160 and Article 188 of the Ottoman Code of Civil Procedure or in Article 25 of the Ottoman Law amending the Ottoman Code of Civil Procedure dated 8 Rabi Thani, 1329, the right of a plaintiff or defendant to make opposition to a judgment by default shall be limited to the cases and be subject to the conditions set forth in these rules."

There can be no doubt that if Article 159 has not been amended then cleary the Appellant had a right of opposition, but Rule 4 (4) purports to take this right away. Rule 4(4) was made by the Chief Justice under the powers given to him by the Courts Ordinance (Cap. 28) Section 20 (1)(b) which permits him to make rules "for regulating the pleadings, practice and procedure of the Supreme Court, District Courts and Land Courts..". Unless Rule 4 (4) can be said to be a rule for regulating practice and procedure, there was no authority to make it.

In Poyser v. Minors (7 Q.B.D. p. 329 at p. 333) Lush L.J., in discussing the meaning of the word "practice" said:—

> "Practice" in its larger sense... denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the Court is to administer, the machinery as distinguished from its product. 'Practice', and 'procedure', as applied to this subject, I take to be convertible terms:"

The "practice" of a Court, when that word is used in its ordinary and common sense, denotes the Rules that make or guide the course of a case, and regulate procedure within the walls or limits of the Court itself, and do not involve or imply anything relating to the extent or nature of its jurisdiction; thus, an Act of Parliament, enabling the now abolished Barons of the Exchequer to frame Rules for making "the process, practice and mode of pleading" on the Revenue side of the Court uniform with that on the Common Plea side did not give them the power they assumed to exercise, of giving an appeal in Revenue

cases. See A. G. v. Sillem (10 H.L. Ca 704). And in Kirby v. North British and Mercantile Insurance Company (1896) 2.Q.B. p. 99 A. L. Smith L. J., said "In my judgment the Rule Committee have no power to repeal the provisions of an Act of Parliament. They have power to make rules as to practice and procedure, but, if an Act of Parliament provides that, in order that there may be a right of appeal, a certain notice must be given I do not think the Rule Committee can repeal that provision by a rule."

It is true that the Civil Procedure Code, which is substantive law, contains many matters which are matters of practice and procedure. It is true that these Judgment by Default Rules were framed by a Chief Justice of great experience, and that they have been accepted and acted upon by all Courts for more than ten years, without any objection having been taken before, and any Court will always be strongly in favour of the validity of a Rule, and will hesitate to declare it ultra vires, unless it is clear beyond all argument, that the Rule-making power has been exceeded. But Article 159 of the Civil Procedure Code gives the Appellant, in the circumstances of this case a right to enter an opposition It is a right by law. Rules 4 (4) and 13 purport to take away this right. They alter Article 159 by saying that, in the circumstances of this case, he shall not have a right to enter an opposition. They have altered the law of the land.

Following the cases I have cited, I think that this was ultra vires, and that, therefore, this appeal must be allowed.

The judgment of the District Court must be set aside and the case remitted to them to retry on the footing that Rules 4 (4) and 13 are ultra vires, and that Article 159 is the law to be applied.

Costs to await result of the retrial.

Delivered this 31st day of May, 1937.

British Puisne Judge.

CIVIL APPEAL NO. 191/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Khaldi, J., and Abdul Hadi, J.

In the appeal of:—

Sheikh Suleiman Taji el Farouqi — Appellant.

v.

1. Michael Habib Raji Ayoub
2. Yousef Habib Raji Ayoub
3. Shibly Habib Raji Ayoub
4. Rosa Habib Raji Ayoub — Respondents.

Breach of contract — Liquidated damages — Penalty — Ottoman Code of Civil Procedure, Art. 111 *and* 112 *— Palestine Order-in-Council, Art.* 46 *— Equitable distinction between penalty and damages applicable in Palestine.*

1.—Art. 112 of Ottoman Code of Civil Procedure applies to contracts in which only undertaking is payment of money; it does not apply to a contract in which payments of money are some only among other undertakings.

2.—Art. 46 of Palestine Order-in-Council makes principle of equity distinguishing between penalty and liquidated damages part of the Law of Palestine.

3.—Wherever a specified sum had been agreed on as damages Court may construe agreement, to ascertain whether that sum was a penalty or liquidated damages, and if found to be a penalty to assess real damage caused by breach.

4.—It will be deemed a penalty if breach consists only in not paying a sum of money, and sum stipulated is greater than what ought to have been paid.

5.—It will be presumed to be penalty when a single lump sum is made payable by way of compensation on occurrence of one or more of several events, some of which may occasion serious and others but trifling damages.

B. Joseph for Appellant.

Eliash for Respondent.

Appeal from judgment of District Court, Jaffa, dated 17.6.1937.

JUDGMENT.

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. Clause 7 and 8 of the agreement were as follows, the respondents being the first party and the appellant the 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 ar-

ticle 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 the 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 which 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 interpretor 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, articles 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 urged 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 applies 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 Lipchitz 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 No. 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 LP. 2000 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. 2000 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 issue 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. 2000 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 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 the 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 the

existence of those provisions of the article which "enrich" our jurisdiction with principles of Englsh 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 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-inCouncil 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, J. J.) 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 prosperity 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. 85 of 1937), so the question of penalty and liquidated damages was not considered. I may say that I agree very 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 Law and Equity in cases to which the Ottoman Law does not extend or apply.

17. Mr. Eliash lastly urged that LP.2500 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.2500 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.— advocate's fees.

Delivered this 28th day of November, 1937.

Senior Puisne Judge.

Khaldi J.

JUDGMENT.

(*Translation*)

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. 2500 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.2500 damages.

2. On the 12th November, 1932, the District Court dismissed respondents' claim on the grounds that firstly 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.2500 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.2500 damages included the letter and awarded against the appellant the payment of LP.2500.

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 attention 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.2500 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 nrespect 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.2500 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 11 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 that sum. The question as to whether the sum stipulated in the contract is 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 Ordinances, 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 provisions for the payment of LP.2500 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.— advocate's fees.

Delivered this 25th day of November, 1937.

Puisne Judge.

Abdul Hadi, J.

JUDGMENT.
(*Translation*)

1. This appeal arose from the judgment 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, undertook to pay them up to the end of February, 1930, 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, that 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 does 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 this 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 obiligations under the letter is 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 the case to the District Court to determine two specified points to make is 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 liqiudated damages.

5. The District Court of Jaffa dealt with the case again. On the 17th June, 1937, 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. Then to facilitate dealing with this appeal I think it convenient to quote here the provisions of article 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 am of the opinion that it is restricted to the damages payable for the delay in payment of a sum of money arising out a document of debt or any contract for other transaction where payment of money is due on an ordinary debt. It does not apply to the payment of 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 strenghtened 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 this 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, varies depending on the terms of the contract itself and the intenion of the parties. In this particular case the appellant undertook in clause 8 of he 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 does 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 provided 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 actual loss is a question for the Court of trial, I am of the opinion dated 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 lose caused to the respondent 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 February, 1937.

Puisne Judge.

CIVIL APPEAL NO. 205/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Khaldi, J. and Abdul Hadi, J.

In the appeal of:—

1. Ismail Mustafa Shehadeh
2. Awad Muhammad Suleiman Shehadeh

Appellants.

v.

1. Othman Abed Siam
2. Ahmad Omar Siam

Respondents.

Inspection of land — Right of parties to call witnesses — Report of inspectors — Witnesses after inspection — Decision arrived at merely on report and opinion of inspectors.

Report and evidence of inspectors where inspection was ordered being only part of evidence in case, either party entitled to call witnesses. Judgment not to be given on mere report and opinion of inspectors but only after whole case heard.

Abcarius for Appellants.
Omar Saleh for Respondents.

Appeal from judgment of Land Court, Jerusalem, dated 26.9. 1937.

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 two of the 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.— advocate's fees to abide the event.

Delivered this 16th day of November, 1937.

Senior Puisne Judge.

CIVIL APPEAL NO. 142/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), and Greene, J.

In the case of:—

David Moyal — Appellant.

v.

Elhanan Karwassarsky
as Curator for the properties and chattels of
Sheikh Tewfiq el Dajani, interdicted. — Respondent.

Advocate's services in consideration of purchase price — Champerty — Advocates Ordinance, sec. 22.

Advocate may give his professional services in part consideration of price for property he agreed to purchase.

Goitein for Appellant.

Respondent in person.

Appeal from judgment of District Court, Jaffa, dated 20.6.1937.

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 paras. 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 Palesine, 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 plaintiff or defendant in a suit and third person, campum partire, to devide 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 ac-

tion at his own expense; or it is the purchasing the right af action or suit of another person.

Under the contract in this case the Defendant sold to the Plaintiff certain land at the price of LE. 20 (Egyptian) per dunam.

It apeared 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 purchaser 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 directiy in point cf. the Advocate's 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 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 to 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 to 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 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. The 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.

CIVIL APPEAL NO. 196/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Khaldi, J. and Abdul Hadi, J.

In the appeal of:—

1. Mahmoud Suleiman Kowa'ly
2. Salim Suliman Kowa'ly — Appellants.

v.

1. Hassan Abu Iskout
2. Hussein Ali Abu Iskout — Respondents.

Land Court — Award of Arbitrators — Objection to award — Record of proceedings.

Case will be remitted to Court below, if record does not show that party who made application objecting to confirmation of award given during pendency of case was given opportunity to state his

objections or that Court took his written objections into consideration.

1st Appellant in person.

2nd Appellant: no appearance.

R. Shawa for Respondents.

Appeal from judgment of Land Court, Jerusalem, sitting at Beersheba, dated 21.7.1937.

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 occured.

It is clear that the parties agreed to the dispute being referred to an arbitartor, 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. Cost 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.

CIVIL APPEAL NO. 212/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge, Copland, J. and Khayat, J.

In the appeal of:—

David Kinsbrunner, Administrator
of Berl Kinsbrunner's Estate — Appellant.

v.

Berl Kolb — Respondent.

Status of Administrator appointed by foreign Court — Rule of English Private International Law applicable in Palestine.

Status in Palestine of administrator appointed by foreign Court governed by English Private International Law.

Administrator appointed by foreign Court has no right to take or to recover property in Palestine without first obtaining letters of administration from Palestinian Court.

Dr. Fleischer for Appellant.

Dr. Amdur for Respondent.

Appeal from judgment of District Court of Jerusalem, dated the 7th day of October, 1937.

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 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 adminisration 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 Pivate 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 day of December, 1937.

Senior Puisne Judge.

CRIMINAL APPEAL NO. 125/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Copland, J. and Khayat, J.

In the appeal of:—

Martha Czernichovsky — Appellant.

v.

The Attorney General — Respondent.

Constitution of Court — Application for British Judge sitting alone — Date of committal wrongly stated — Courts Ordinance, sec., 11 *as amended by Courts (Amendment) Ordinance,* 1935.

1. Where inspite of application that British judge shall sit alone Court was constituted of President (or Relieving President) and t wo judges, Court will be held to have had jurisdiction, if no objection was made in due time by applicant to constitution not being in accordance with application.

2. Fact that date of committal was wrongly stated in information causing no miscarriage of justice not ground for judgment being quashed.

Goitein for Appellant.
Hogan for Respondent.

Appeal from the judgment of District Court, Jerusalem, dated 8.10.1937, whereby the Appellant was convicted of causing a miscarriage contrary to Article 192(2) and (5) of the Ottoman Penal Code and sentenced to one year's imprisonment.

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 crimnal 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 counter part 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 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. Neusbaum 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.

HIGH COURT NO. 59/1937.

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

Before:—The Senior Puisne Judge (Manning, J.), Khayat, J.

In the application of:—

1. Farha Abboud Mansour
2. Katrina and Mary Khalil Rofael on behalf of the Estate of Khalil Rofael — Petitioners.

v.

1. The Chief Execution Officer, Jaffa
2. Farid Knesevitch — Respondents.

Sale by public auction — Assessment and reassessment of property — Discretion of Chief Execution Officer — Proper use of exercise of discretion.

Order that property attached and put up to auction should be reassessed is a matter within discretion of Chief Execution Officer and if in the circumstances, it was a proper use of exercise of his discretion, order will not be set aside.

Parties in person.

Application for an order to issue 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.

JUDGMENT.

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.

CIVIL APPEAL NO. 164/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Khayat, J.

In the case of:—

The Labour Council of Tel Aviv and Jaffa — Appellants

v.

David Illgovsky — Respondent.

Interpretation of submission to arbitration — Meaning of Hebrew expression "Borer Makhriya" occuring in submission — Umpire and Third Arbitrator.

Hebrew expression "Borer Makhriya"*) in submission to arbitrators means "Umpire" notwithstanding interpolation of Hebrew word 'Shelishi' ("third") which suggests meaning of third arbitrator with casting vote.

Krongold for Appellants.

Pevsner for Respondent.

Appeal from judgment of District Court, Jaffa, sitting at Tel-Aviv in its appellate capacity, dated 31.5.37, setting aside judgment of Chief Magistrate.

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.

*) Presumably also the corresponding expression "Mumayiz" in the Arabic version of sec. 6(1)(c).

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 definetely from the documents submitted to us by the parties in proof of their conflicting arguments as to the meaning of the words occuring 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 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.

CIVIL APPEAL NO. 198/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice, (Trusted C. J.), Copland, J. and Khaldi, J.

In the appeal of:—

Suleiman Abu Ghazaleh — Appellant.

v.

Agudath Shechunath Hazrifim
"Maccabi" Cooperative Society Ltd. — Respondents.

Land occupied by co-owner — Rent claimed by one partner from other — Cooperative Societies Ord. sec. 2 — Mejelle Art. 1075, last para. — C.A. 115/29.

Cooperative society not liable to pay rent for land occupied by its members and owned by it and claimant in undivided shares.

Cattan for Appellant.

Olshan for Respondents.

Appeal from judgment of District Court, Jaffa, dated 15.7.1937.

JUDGMENT.

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 centention to the effect that 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 praragraph of Ar-

ticle 2 of the Cooperative Societies Ordinance, No. 50/33 (Drayton, page 360). 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 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 the position of the Plaintiff vis a vis the members of the society as distinct from the society, if any, occupying the land, which does 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. JUDGMENT.

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 Me-

jelle were obviously intended to deal with the question of village musha', and occur 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 purpose 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.

CIVIL APPEAL NO. 60/1936.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Copland, J. and Khayat, J.

In the Appeal of:—

Yassin Yousef Keitawi — Appellant.

v.

Moshe Motzman — Respondent.

Validity of contract — Consideration — Mutual promises.

Contract consisting of mutual promises cannot be held void because no consideration mentioned therein, each promise being consideration for other promise.

H. Asfour for Appellant.

Respondent in person.

Appeal from judgment of District Court, Haifa, dated 4.5.1936.

JUDGMENT.

1. 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.

2. The contract consists of mutual promises, each promise being the consideraion 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.

3. The judgment of the District Court must be set aside and the action remitted for a new trial. The appellant will have the costs of this appeal to include LP.5.— advocate's fees.

4. 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.

HIGH COURT NO. 68/1937.

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

Before:—The Senior Puisne (Manning, J.), Copland, J.

In the application of:—

Muhammad Mansour O'Jely — Petitioner.

v.

1. The Chief Execution Officer, Jaffa
2. Victor Abulafia
3. Marco Abulafia — Respondents.

Sale of Judgment Debtor's dwelling house — Order of final sale — Execution Law Art. 90 *and* 115.

Application under Art. 90 of Execution Law to rescind order of sale of Judgment Debtor's house cannot be considered, if made final sale was ordered.

Petitioner in person.

Application for an order to issue to the first Respondent directing him to show cause why his order dated the 22nd of November, 1937, in Execution File No. 15921/36 should not be rescinded.

ORDER.

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.

Delivered this 6th day of December, 1937.

Senior Puisne Judge.

CIVIL APPEAL NO. 158/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Khayat, J.

In the appeal of:—

1. Leib Neussihin
2. Moise Abramovich Neussihin
3. Berta Kananova — Appellants.

v.

Miriam Neussihin — Respondent.

Validity in Palestine of a marriage which took place abroad and was invalid according to foreign law — Certificate of marriage given by Palestinian Religious Court — Wife's succession to husband, a foreign subject, whom she married abroad according to Religious Law and who subsequently became Palestinian citizen — Consent of parties to jurisdiction of Religious Court — Questions of personal status before Religious Courts and principles of Private International Law — Composition of Court — When Appellant estopped from raising question of composition of Court below — Succession Ordinance, sec. 23(a) and (b) — Palestine Order-in-Council, 1922, Art. 64 (iii) and 65.

1.—If Court of Religious Community in Palestine upon application of parties who are members of that Community gives a Certificate of marriage reciting that parties had been married abroad in accordance with Religious Law of that Community, such Certificate amounts to a decree of marriage delivered by a Competent Court.

Civil Courts not to canvass correctness of decree by Religious Court at to status of parties nor to consider whether Religious Court had taken in consideration any principles of private international law.

2.—If party consents to lenghty hearing before Court composed of President (or Relieving President) and another member instead of President sitting alone, Court of Appeal will not exercise its discretion in favour of Appellant's argument that composition of trial Court was wrong.

Dr. Smoira for Appellants.

Eliash for Respondent.

Appeal from Judgment of District Court, Tel Aviv, dated 9.7.1937.

JUDGMENT.

1. 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) strenously 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 th 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 nationaliiy 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 tim both foreigners but in the circumstances the fact that they agreed to the jurisdiction cannot be contested. 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 entitlted 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 President sitting alone. In the present case it was constituted of a Relieving President and another member which is a usual constitution of a Ditsrict 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 lenghty 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 reason 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.— advocates' fees

Delivered this 17th day of December, 1937.

Senior Puisne Judge.

CIVIL APPEAL NO. 216/1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Greene, J. and Khayat, J.

In the case of:—

The Municipal Council Jerusalem — Appellant.

v.

Joseph Weinberg — Respondent.

Municipal rates — Assessment list — Rateable value — Urban Property Tax Ordinance — Sec. 107 of Municipal Corporations Ordinance — Refusal to hear witnesses — Judgment of District (or Land) Court not dealing with ground of appeal.

Saba Said for Appellant.

Sharf for Respondent.

1.—Assessment Committee not relieved by sec. 107 of Municipal Corporations Ordinance from publishing each year a list with regard to any person the rateable value of whose property had already been assessed under Urban Property Tax Ordinance.

2.—If Magistrate refuses to hear witnesses (where oral evidence admissible) in proof of material fact, and if refusal was made a ground of appeal and judgment of appellate Court did not deal with it, both judgments will be set aside and case remitted to Magistrate's Court to hear the witnesses.

Appeal from Judgment of District Court, Jerusalem, dated 28.10. 1937.

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 Assessement Committee from publishing each year a list with regard to any person the rate able 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 fullly in agreement with the judgment of the District Court with regard to the construction of Sec. 107.

4. A second point has, nowever, 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 November, 1937.

Senior Puisne Judge.

HIGH COURT 60/1937.

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

Before:—Copland, J. and Greene, J.

In the application of:—

The General Mortgage Bank of Palestine Ltd.

Petitioners.

v.

1. President District Court sitting at Tel Aviv in his capacity of C.E.O. or otherwise acting by virtue of the powers conferred upon him by sec. 14 of the Land Transfer Ordinance.
2. S. B. Sassoon of Tel Aviv, in his capacity as trustee in bankruptcy of Tova Halpern a bankrupt

Respondents.

Application under Land Transfer Ordinance — President acting as Chief Execution Officer — Rights of secured creditor — Foreclosure of mortgage when mortgagor bankrupt — Land Transfer Ordinance, see 14 *— Bankruptcy Ordinance, sec.* 8(1), (2) *and sec.* 10 *— Bankruptcy Rules, Rule* 47 *— C. A.* 16/27 *and C. A.* 67/28.

1.—President of District Court when dealing with an application for sale under Land Transfer Ordinance is exercising functions of a Chief Execution Officer.

2.—A rule made under an Ordinance cannot take away or diminish any right conferred by that Ordinance.

3.—A secured creditor, where debtor bankrupt, can apply for foreclosure in ordinary way, regardless of Rule 47 of Bankruptcy Rules.

Horovitz for Appellants.

Sassoon, Trustee in Bankruptcy, for second Respondent.

Application for an order to issue to the First Respondent commanding him to assume and exercise jurisdiction under Sec. 14 of the Land Transfer Ordinance in the matter of an application submitted to him for the sale of immovable property in satisfaction of mortgages, and to determine all matters arising out of the said application according to law.

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 his 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 furher 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.I, p, 126), and Shahin v, El-Hayek, Civil Appeal No. 67/28 (P.L.R.I. 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 Court 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. Sections 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 Secion 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 hereafter, 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 Wadell 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 consent 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.

CIVIL APPEAL NO. 189/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), and Khayat, J.

In the case 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. — Respondent.

Appeal from judgment of Land Court, Haifa, sitting in its appellate capacity, dated the 26th July, 1937, confirming the judgment of the Land Settlement Officer, dated 4.1.1937.

Registration of Miri land as Wakf — Waqf claiming acquisition of prescriptive title to miri land — Registration in Land Registry as estoppel against Government claiming land — Land Law, Art. 78 *— Mejelleh, Art.* 100 *— Waqf Law by Omar Hilmi, Art.* 330 *and* 55.

1. Miri land without any grant as Mulk and without leave of Sultan cannot legally be registered as Waqf.

2. Undisputed and undisturbed possession of Miri land by Mutawalli of Waqf for more than 10 years does not give Mutawalli prescriptive title under Art. 78 of Land Code against Government.

3. Fact that Miri land has been registered in Land Registry in name of Mutawalli of Waqf on behalf of Waqf does not create estoppel against Government claiming the land.

A/Government Advocate for Appellant.

Hanna Asfour for Respondent.

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 bedonging 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 whcih extracts were produced, in the name of the Fatima bint Ahmad, otherwise known as Rudail Hanum, who died in 1326 (Turkish year).
>
> (2) A dedication by her on 8th Jumada-l-Ula' 1321, of the land and of the trees and buildings then standing on the land as Waqf. The Waqfiya is in order as to form.
>
> (3) Registration of 12th 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 wer 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 properly 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 where Miri land since 1925 has been registered by Land Registrars in Palestine in the names of various Waqfs or in the names of Mamurs Awqaf; 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 Mauqafa. The land subject to this action will accordingly be registered as Miri but in the name of Mutawalli for the time being of the Waqf of the Mosqe 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 Mutawalli of a waqf, cannot by use of the property of the waqf acquire Arazi mirié, or Arazi mevqufe, or an Ijaretein property in order that revenues from them may be obtaineid for the waqf.
>
> 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 Mutawalli of a Waqf buy something an account of the waqf out of the income of the waqf, this thing does not become waqf by the mere fact that it has been purchased out of the income of the waqf.
>
> Therefore the Mutawalli can, with the consent of the vendor, annul the sale or sell that thing to another.
>
> But if the Mutawalli has, after the purchase limited the thing, in accordance with the law, by a decree of the judge, for the benefit of the waqf, then the thing becomes waqf.
>
> But if the Mutawalli does not buy the said thing with the income of the waqf, and acquires it by the expenditure of the thing originally dedicated, in such a case that thing becomes waqf by the mere purchase.
>
> E. g. If the Mutawalli buy a property with dedicated money appointed to be converted into property, such property becomes waqf 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 (quadi).

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 dedi-

cate 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 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 special 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 provisions 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 astoppel 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.*

CIVIL APPEAL NO. 179/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—The Senoir Puisne Judge (Manning, J.), and Khayat, J.

In the appeal of:—

Alice Hanna Dahdeh, widow of Nicola Andrawes Zarour in her personal capacity and also as guardian of her minor children Fawzy, Andrawes, Georgetie, Shuheila, Farid and Afrodite. Appellant.

v.

Karimeh bint Khalil Abu Ghazaleh Respondent.

Matters of succession before Ecclesiastical Court — Order under sec. 9 of Succession Ordinance appealable — Interlocutory order of Court of Appeal requesting President of Court below to state reasons on which he based his order — Erroneous exercise of discretion — Waiver of heir to succeed to part of estate — When consent to jurisdiction of Religious Court in matters of succession unnecessary — Succession Ord., sec. 9 — Civil Procedure Code, Art. 176.

1. Any order made under sec. 9 of Succession Ordinance appealable before Supreme Court.

2. Court of Appeal may by interlocutory order ask President of Court below to state reasons for order made by him.

3. President, District Court, not to make order under sec. 9 (1) of Succession Ordinance for purpose of amending and revising decisions already come to by Ecclesiastical Court.

4. If heir waives any right he might have had to succeed to any part of estate, his consent to jurisdiction of Ecclesiastical Court unnecesseary.

Levitzky and Faragalla for Appellant.

Germanous for Respondent.

Appeal from judgment of District Court, Jaffa, dated 23.7.1937.

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 case to be transferred to the District Court in order

that the District 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 cognissance 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 Ecclsiastcal Court from dealing further with a succession suit.

This is 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 Eccelesiastical 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 we therefore order that his order be set aside and that this appeal be allowed with costs to include LP. 5.— advocate's fees.

The attachment ordered on 17th July, 1937. will be relased.

Delivered this 22nd day of December, 1937.

Senior Puisne Judge.

CIVIL APPEAL NO. 179/1937.

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 disposition 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 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 chidren, 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.

PROBATE FILE NO. 34/37 JAFFA.

MEMORANDUM

by President District Court, Jaffa, (Cressall, J.)

In accordance with the request contained in para. 7 of the Order of the Supreme Court in Civil Appeal No. 179/37, dated 2nd November, 1937, I, P.E.F. Cressall, President of the District Court, Jaffa, hereby state that the following were the reasons upon which my order dated 23rd July, 1937, was based:—

There were two matters which I had to consider in the application, namely

(*a*) the question as to whether the applicant, Karimeh Khalil Abu Ghazaleh, mother of the deceased, had in fact submitted to the jurisdiction of the Ecclesiastical Court, and

(*b*) whether the so-called waiver, vide Exh. "A", was a valid and binding document, which has divested the applicant of her inheritance in the Estate of her son' Nicole Anrdawes Zarour, deaceased.

As to (a), it was not proved to my satisfaction that this waiver was submitted by the applicant or on her behalf to the Ecclestiasticall Court by the preson seeking the Certificate of Succession, namely the widow, and the Ecclesiastical Court issued the Order ex parte without hearing the applicant. From these facts is was clear to me that there was no

submission by the applicant to the jurisdiction of the Religious Court.

With regard to (b), as the maker of the so-called waiver had repudiated it, certain legal problems had to be solved in order to decide the validity of this document and its effect with regard to the distribution of the estate. The questions in issue, as far as I recollect, were:—

(i) whether the so-called waiver was null and void since it purports to dispose of immovable property outside the Land Registry, contrary to the provisions of the Land Transfer Ordinance, and

(ii) if it was not so, but simply an agreement to effect transfer of the immovable property which devolved upon the applicant by inheritance from the deceased, was there any consideration for it?

In view, therefore, of the legal points involved, I considered that the matter was one which could more justly and conveniently be dealt with by a District Court in its probate jurisdiction than by a Religious Court consisting of Laymen.

Dated this 4th day of December, 1937.

President.

ESTATE CASE NO. 34/37.

IN THE DISTRICT COURT OF JAFFA.

Before:—The President (Cressall, J.).

Zarour of Ramle, deceased.

In the matter of succession of Nicola Andrawes Zarour of Ramle, deceased,

and

In the matter of an Application under Sec. 9 of the Succession Ordinance by:
Karimeh Bint Khalil Abu Ghazaleh, mother of the said deceased, Petitioner.

v.

The Chairman of the Greek Orthodox Ecclesiastical Court, Jerusalem, Alice Bint Hanna Daddah, widow of the said deceased and her children Fawzi, Andrawes, Georgette, Suheila, Farid and Afrodite. Respondents.

ORDER.

Upon hearing Mr. N. Germanus for Petitioner and Mr. B. Farajallah for Respondents.

It is hereby ordered that the Greek Orthodox Ecclesiastical Court, Jerusalem, be prohibited from taking cognizance of, or from dealing

further with, the succession of Nicola Andrawes Zarour, deceased, and that the administration and distribution of the estate of the said deceased shall be within the exclusive jurisdiction of this Court.

Any proceedings which may be pending in the said Ecclessiastical Court in connection with the succession of the said Nicola Andrawes Zarour, deceased, shall forthwith be transferred to this Court.

It is further ordered that a copy of this Order shall be served upon the Director of Lands in accordance with Sec. 9(2) of the Succession Ordinance.

The application by the Respondents to release the attachment granted by this Court on the 17.7.37 is refused. If, however, the Respondents can advance good reasons to show that the guarantee filed by the Petitioner is insufficient to cover any damages which they may be put to, I will be prepared to consider whether a stronger guarantee should be furnished.

Dated and Delivered this 23rd day of July, 1937.

By the Court,

President.

CIVIL APPEAL NO. 184/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), and Khayat, J.

In the appeal of:—

Fahima Khanum widow of Kiamil Pasha — Appellant.

v.

Sheikh Ass'ad Shukeiri — Respondent.

Period of limitation how to be calculated (Gregorian and Hejira years) — Limitation of action in land cases arising before 1933 — *Prohibition of Courts to decide ownership of land valid excuse under Art. 20 of Ottoman Land Code — C.A.* 112/31 *and L.A.* 43/36.

1. In cases regarding land commenced before enactment of Law (Amendment) Ordinance period of limitation must be reckoned in lunar years.

2. Time during which the Courts in Palestine were prohibited from deciding ownership of lands must be deducted from period of limitation (Khayat, J. dissenting).

(E.N. See C.A. 204/37, Ct. L. R. Vol. II p. 153).

Dr. Weinshall for Appellant.

Abcarius for Respondent.

Appeal from judgment of Land Court, Haifa, dated 23.6.1937.

JUDGMENT.

Manning, J.

1. On the 7th February, 1928, the Appellant brought an action against the Respondent in the Land Court of Haifa. She claimed to be the owner of certain land which had been transferred to her by her husband in 1923. Her husband had been in Palestine from 12th February, 1919, to 26th Feburary, 1919, but had taken no action to assert his ownership of the land. The Respondent set up the defence of limitation, urging two facts in its support; firstly, that time must begin to run from the 12th February, 1919, and secondly, that limitation period must be calculated in Hejira years. The Land Court agreed with him in both respects and the Appellant's action was dismissed.

2. I think the Land Court erred in holding that time began to run against the Appellant's husband in February, 1919. He had been allowed to visit Palestine in that month, but only for a period of 14 days. In 1919 the Courts in Palestine were prohibited by law from giving any judgments deciding the ownership of land, and it was therefore impossible for the Appellant's husband to take any action in assertion of his right. This to my mind was a valid excuse within the meaning of Art. 20 of the Ottoman Land Code. Abcarius Bey, on behalf of Respondent, argues that even though the Courts were prohibited from giving judgments in cases such as this, there was nothing to prevent the Appellant's husband from filing an action. It may be that an action would have been filed; but in the then state of the law it would have been nugatory, the substantial effect of the relevant Proclamation being to deprive the Courts of any jurisdiction to deal with disputes of this nature. It is admitted that the first opportunity to bring this action occured in February, 1919. At that time the Courts had no jurisdiction to grant the Appellant's husband the relief which he required. This was a valid excuse for postponing his action and the period during which it operated must be disregarded when calculating the period of limitation.

3. Abcarius Bey, for the Respondent, has directed our attention to section 16 of the Establishment of Courts Proclamation, 1918. This section allowed the Courts, in calculating any period of prescription or limitation, to deduct the period between the last sitting of the competent Court under the Ottoman Rule and the opening of the Courts established by the Proclamation. He argued that the enactment of such a provision showed that this was the only relief to be allowed, and that by implication no deduction could be allowed in a case such as the present. I think this argument fails for two reasons, firstly, because no Courts were established by the Proclamation having jurisdic-

tion to decide questions as to the ownership of land; and secondly, because in addition to the section article 20 of the Ottoman Land Code was in full force and effect, allowing for a valid excuse and for the period to commence to run from the time the excuse ceased to exist.

4. Land Courts to deal with these matters were set up in Palestine in May, 1921. The Appellant's husband did not return to Palestine till July, 1923. Whichever of these dates be taken, and whether the period be calculated in Gregorian or Hejira years, the defence of limitation fails.

5. On the point whether the period of limitation is to be calculated in Hejira or Gregorian years there is the case of Sabbagh v. Strahilevitz, reported on page 674 of the Law Reports of Palestine, 1920-33, decided in 1932. In that case this Court held that where the relevant documents in a case bore Gregorian dates, then the period of limitation must be calculated in Gregorian years, and that it must be calculated in lunar years if the documents bore Hejira dates or no dates at all. By implication it may be taken to have decided that Hejira years are to be the basis of calculation in cases in which limitation is pleaded and where the party pleading is not relying on any document. In addition to my brother Khayat who sat with me on this case, I have consulted the other judges who were here before the occupation. They have informed me that in cases relating to the limitation of actions for the recovery of immovable property year always meant a Hejira year. In Art. 20 of the Ottoman Land Code "a period of ten years" meant a period of ten Hejira years.

6. Dr. Weinshall, for the Appellant, relies on 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 giving 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".

The Ordinance was enacted in 1933; this action was commenced in 1928.

7. I do not agree with Dr. Weinshall that the section is declaratory and therefore retrospective in its operation. The words used are "shall be deemed"; if it were meant to be retrospective apt words might easily have been used to make the intention clear. The law in force when the action was commenced is the law applicable, and in cases relating to immovable property the period was at that time calculated in Hejira years. Section 7 must be regarded as an amendment of the law applicable in 1933 and as such cannot affect any proceedings pending at

that date. I am in agreement with the Court below that in the present case the period must be calculated in Hejira years; but as I have already indicated this does not help the case for the Respondent.

8. This point was raised before this Court in Calmi vs. Politis (Land Appeal No. 43 of 1936), where the Court consisted of myself and Plunkett, J. The matter was not fully argued and the Court decided that "the practice of the Courts in this country since the occupation has been to compute the period of limitation in calendar years". This decision as to the practice was to a large extent correct, but after fuller argument and consideration I have come to the conclusion that, whatever the practice may have been in many instances, the period in land cases arising before 1933 must be reckoned in Hejira years. This means that in the Politis case this point was wrongly decided, but it made no difference to the actual result, as the defence of limitation depended on the period being calculated backwards from the time the action first came on for hearing, instead of from the time when the action was filed.

9. It does not seem that the Land Court entered into the merits of the dispute. My order, therefore, would be that the judgment of the Land Court should be set aside and the action be remitted to it with a direction that the plea of limitation fails and to give judgment according to law.

Delivered this 3rd day of December, 1937.

Senior Puisne Judge.

JUDGMENT.

Khayat, J.

1. The subject matter of this appeal is a plot of miri land situated in Acre which was registered in the name of the Appellant's husband. The respondent has been in possession of this plot of land since 1915 and has erected a house thereon. The appellant's husband was outside Palestine. He came to Palestine for the first time, after 1915, in February, 1919. His next visit was in 1923 when he transferred the land to the present appellant in the Land Registry. On the 7th February, 1928, the appellant brought an action in the Land Court of Haifa claiming the return of the said plot of land after the demolishing of the house and boundary wall.

2. The Land Court, Haifa, gave judgment on the 9th April, 1932, dismissing appellant's action as it held that there was limitation of action and that such period commenced from the date when the respondent was first in possession.

3. On appeal to this Court, it was held that in view of the provisions of article 1663 and 1665 of the Mejelleh and as the appellant and her predecessor in title were out of the country, the period of limitation of action did not begin to run until the first arrival of the appellant or her predecessor in title in this country, and remitted the case to the Court below to ascertain by calculation whether or not there was limitation of action.

4. The Land Court decided on the 23rd June, 1937, that appellant's predecessor in title was in Palestine between the 12th and 26th February, 1919, and held that the period of limitation of action began to run from that date and dismissed her action.

5. Mr. Weinshall, on behalf of the appellant, argued that in calculating the period of limitation of action the Courts should take the Gregorian years, and not the Hejira years, into consideration. In view of the numerous decisions of this Court on this point, I do not agree with Mr. Weinshall on this point and therefore it fails.

6. The second point argued by Mr. Weinshall is that the lower Court erred in calculating the period of limitation of action from the 12th February, 1919, as the Courts, established at the time, were prohibited from giving judgments regarding title to immovable properties. I cannot accept this argument as the appellant's husband could have lodged an action in 1919 to stop the running of the period of limitation and further he had ten years from 1919 to bring his action. He came to Palestine in 1923 and no action was lodged except in 1928. There were more than ten Hejira years between the 12th February, 1919, and the 7th February, 1928 (sic). The appeal must be dismissed with costs to include LP. advocae's fees.

As the two members of the Court differ the appeal is dismissed with costs to include LP. 5.— Advocate's fees.

Puisne Judge *Senior Puisne Judge.*

CIVIL APPEAL NO. 100/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Khaldi, J. and Khayat, J.

In the case of:—

1. Ata Husein Aqil
2. Muhammad Abdul Razzaq
3. Yousef Salim Husein
4. Salim Muhammad Ramadin
5. Raja Abu Galajel — Appellants.

v.

1. Sheikh Hassan Abu Seoud
2. Dr. Husam Ed-Din Abu Seoud
3. Mustafa Abu Seoud
4. Osman Abu Seoud
5. Abdul Qader Abu Seoud

In their capacity as Mutawallis of the Zaqieh Faqrieh Wakf, which is part of the Wakf Abu Seoud in Jerusalem — Respondents.

Preliminary objections to appeal — Prescribed form of bond — Civil Procedure Rules 1935.

Bond given on appeal to Supreme Court not containing security of real property and hence not in form 19 of Schedule I of Civil Procedure Rules, 1935 — insufficient, and omission, without good cause shown fatal to appeal being heard.

Levitzky for Appellants.

Zaki Ousta for Respondents.

Appeal from judgment of Land Court, Jerusalem, dated 8.5.1937.

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 guaranted 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 omission to comply with the law.

No good cause has been shown for the omission. We are, therefore, unable to grant the prayer of Mr. Levitzky, 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.

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