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Central Building, Jerusalem

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CIVIL APPEAL NO. 177/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Gottlieb Bauerle — Appellant.

v.

1. Moses Doukhan
2. Bernard Joseph

Joint liquidators of the Pheonix Life Insurance Company, Vienna. — Respondents.

Insurance Policy — Insurance Company in liquidation — Loan secured on policy — Revival of loan — Valuation of policies — 6th and 7th Schedules of Assurance Companies Act. 1909.

1. Insurance policy comes to an end if insuring company goes into liquidation.

2. If insured who received a loan from insuring company cannot give consideration for discharge of loan, even though not by his fault, but only because insuring company went into liquidation, loan cannot be deemed as discharged.

Appeal from judgment of District Court, Jerusalem, dated 16.7. 1937.

Amdour for Appellant.

Doukhan for Respondents.

JUDGMENT.

This is another case arising out of the liquidation of the Phoenix Life Insurance Company, Vienna. At the date when the order for liquidation was made, the Appellant had two policies with the Company, one for £. 2000 sterling and one for L. 306 sterling. This latter policy came into existence in the following manner:—

The Apellant had received £. 306 from the Company as a loan secured on a £. 2000. gold policy which he then held. As the result of an agreement between him and the Company, the £. 2000. gold policy was changed into for £. 2000. sterling, and a further policy was issued for £. 306. in which there was a condition in effect that in consideration for the premiums on this second policy the loan would be considered discharged on the death of the Appellant, or on the maturity of the policy, but that in the event of the termination of the policy under Article 4 of the Regulations — which deals with the provisions regu-

lating the conversion of the policy into a paid-up policy for a reduced amount — and also in the event of any payment by the Company prior to the expiration of the period for which the premiums are payable, the loan will revive and interest would become payable thereon, with a set-off for premiums already paid. The policies do not mature until 1848.

The Appellant filed a proof of debt with the liquidators, and claimed that the loan should be deemed to be discharged. The liquidators, in accordance with the instructions of the District Court to apply the Rules of English Law contained in the 6th and 7th Schedules of the Assurance Companies Act, 1909, have duly valued both policies for £. 2000. and £. 306. and have deducted from the valuation the amount of the loan for £. 306. The Appellant appealed to the District Court who have upheld the decision of the liquidators, holding that, in the events which had happened, a payment was being made prior to the expiration of the period which premiums were payable, and that therefore the loan had revived. The Appellant has now appealed to this Court.

It is an established principle in English Law that a policy of insurance comes to an end if the insurers, being a company, go into liquidation. See Law of England, Hailsham Edition, Vol. 18, page 454. This is exactly what has happened here. The contract between the parties has been terminated by operation of law, and since the full consideration for the discharge of the loan, namely, the payment of premiums until 1948 or until the death of the insured, whichever event should first happen, has not been, and in fact cannot now be given, the loan has not been discharged, and the decision of the liquidators is, in our opinion, correct. If we were to hold otherwise, the effect would be that the Appellant would receive not only the amount of the present valuation of the policy of £. 306., but also the loan which this policy was issued to secure, in other words, a greater benefit then he could ever have got if the Company had not gone into liquidation and the policy had matured in the normal way.

The appeal fails and must be dismissed with costs and LP. 5 advocate's fees.

Delivered this 22nd day of December, 1937.

British Puisne Judge.

CIVIL APPEAL NO. 63/36.

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:—

1. Rayan Muhammad Rayan
2. Abdul Rahman Ali Rayan — Appellants

v.

Menashe Isaac Saad — Respondent.

Parties acting upon arbitration clause — Arbitration without duly stamped submission — When Court will set aside award.

1. If contract contains arbitration clause, and parties acting upon that clause appear before arbitrator and argue their case, they cannot subsequently take technical objection that there was no proper submission duly stamped.

2. Court will only set aside award where arbitartor misconducted himself or award improperly procured.

Appeal from judgment of District Court, Jerusalem, dated 24.1.1936.

Goitein for Appellants.

S. Mizrachi for Respondent.

JUDGMENT.

This is an appeal by leave from a judgment of the District Court confirming an award. The Appellants who were not satisfied with the award did not toke steps to have the award set aside, but waited until the Respondent applied for its confirmation, and then brought forward their objections which the District Court over-ruled.

One of the grounds of appeal is that there was no proper submission duly stamped. The contract entered into between the parties contained an arbitration clause. The parties acted upon that clause, appeared before the arbitrator and argued their case, and they cannot, therefore, at this stage, take this technical objection. The appeal on this point must fail.

Another ground of appeal was that the award was bad in law on the face of it and the other grounds are merely elaborations of that ground to show why the award was bad on the face of it, such as that the arbitrator did not deal with the counterclaim and disregarded a waiver of a breach.

The District Court, in dealing with an award, is not acting as a Court of Appeal from the arbitrator's decision and will only set aside an award where an arbitrator has misconducted himself or the award has been improperly procured. What the Appellants actually did in objecting to the enforcement of the award, was a roundabout way of asking for the award to be set aside. No allegation of misconduct was ever made, nor was it alleged that the award was improperly procured.

But even assuming the Appellants are allowed to oppose the enforcement of the award on the ground that it was bad on the face of it, I do not see that their request is warranted.

The arbitrator clearly dealt with the counterclaim which was that the Respondent committed a breach. By deciding that the breach was committed by the Appellants he clearly decided against them on the counterclaim. On the alleged waiver of a breach on the part of the Respondent, the arbitrator not only held that the Certificate of Inheritance which the Appellants had to produce within ten days from the date of contract was not produced within that period, but that it was not produced at all, even at any time after the extended period. I am, therefore, of opinion that there are no merits in the appeal, which must be dismissed with costs, to include LP. 3.— advocate's fees.

Having decided against the Appellant it it not necessary to deal with the preliminary objection of the Respondent that the appeal is out of time.

Delivered this 26th day of May, 1937.

Chief Justice.

LAND APPEAL NO. 50/36.

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:—

Fayez Odeh Elias — Appellant.

v.

Bishara Odeh Elias — Respondent.

Admissibility of oral evidence against Kushan — Application of English Law — Equitable right to Land — Fraudulent breach of trust — Oral evidence between relatives — Land Courts Ordinance, sec. 8 *— Ottoman Civil Procedure Code, Art.* 80 *and* 82 *— Palestine Order-in-Council, Art.* 46.

1. Oral evidence admissible in Land Court in support of claim in contradiction of Kushan (Certificate of registration in Land Registry).

2. Ottoman law having no provision by which a written document can be contradicted on ground of fraud, Art 46 of Palestine Order-in-Council has to be resorted to and English Law may be applied.

3. Art 80 of Ottoman Code of Civil Procedure as to inadmissibility of oral evidence against document does not apply when parties are relatives, such as mentioned in Art. 82 of said Code.

George Elia for Appellant.
Respondent in person.

Appeal from judgment of Land Court, Jerusalem, dated 5.10.1936.

JUDGMENT.

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

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

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

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

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

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

Costs of this appeal will abide the event.

Delivered this 30th day of April, 1937.

Senior Puisne Judge.

HIGH COURT CASE NO. 73/37.

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

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

In the application of:—

Hanna Yousef Shami — Petitioner.

v.

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

Final order of sale made by Chief Execution Officer — When such order may be upset — Affect of judgment of partition on final order of sale.

1. There must be very strong grounds for asking High Court to upset final order of sale made by Chief Execution Officer.

2. Order of final sale of land made by Chief Execution Officer will not be affected bp judgment of partition issued shortly before, but not brought to notice of Chief Execution Officer until after said order was given.

George Elia for Petitioner.

Levin for 1st Respondent.

Application for an Order to issue to the second Respondent directing him to show cause why his Order dated 11th December, 1937, ordering the final sale of the property of Petitioner and others to the last bidder, the first Respondent, should not be set aside.

JUDGMENT.

This is a return to a rule nisi given by this Court on 23rd December, 1937, calling upon the second Respondent to show cause why the Order of final sale made by him on the 11th December, 1937, should not be set aside.

I need not go into the many details in connection with the original

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

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

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

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

Delivered this 3rd day of January, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 214/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Hanna Jubran Karam — Appellant.

v.

Haj Khalil Khartabil — Respondent.

Newly opened window overlooking bedroom — Place frequented by women — Excessive damage under Art. 1202 *of Mejelle.*

Bedroom does not come within purview of Art. 1202 of Mejelleh which gives protection to places frequented by women from being seen by outsiders.

George Elia for Appellant.

Rashed Haddad for Respondent.

Appeal from judgment of District Court, Nablus, dated 15.10.37.

JUDGMENT.

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

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

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

Delivered this 4th day of January, 1938.

Senior Puisne Judge.

HIGH COURT CASE NO. 66/37.

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

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

In the application of:—

Negib Mansour — Applicant.

v.

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

Powers of President, District Court, when dealing with foreclosure applications — Pleas that sale should not take place — Postponement of operation of order of sale — Land transfer Ordinance, sec. 14.

1. President, District Court, when asked to order sale of land in satisfaction of debt, has no power to deal with matters other than those contemplated in section 14 of Land Transfer Ordinance.

2. If President, District Court, satisfeid that there si a bona fide matter with which he cannot deal, he may adjourn application and give parties opportunity to go to appropriate Court, or may

make order for sale but postpone for a fixed period operation of it.

George Elia for Applicant.
Nishry for 2nd Respondent.

Application for an order to issue to the First Respondent directing him to show cause why his order dated the 22nd October, 1937, in Execution File No. 3520/37, should not be set aside.

JUDGMENT.

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

Thie Chief Execution Officer's order to which objection is taken is as follows:—

> "I hold that it is not for me as Chief Execution Officer to go into the question of the validity of the mortgages.
>
> On the face of it Mortgagee is entitled to Foreclosure.
>
> Order for Foreclosure for LP. 400 interest from 28.11.34 at 9% costs and advocate's fees of LP. 5.— order not to be acted upon for 1 month to give Mortgagor opportunity to institute any proceeding he may wish in Competent Court".

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

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

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

It happens — as happened in this case, that the respondent, usually the mortgagor, may have some reason to urge why the sale should not take place other than those contemplated in the section. It is clear under the section that the President of the District Court has no power to deal with such matters, and the question arises how should he deal with the position thus created.

In our opinion if he is satisfied that there is such a bona fide matter

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

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

Delivered this 11th day of January, 1938.

Chief Justice.

HIGH COURT CASE NO. 71/37.

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

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

In the application of:—

1. Michael Suedan
2. Anis Suedan — Applicants.

v.

The Director of Land Registration, Jerusalem — Respondent.

Transfer of land — Discretionary powers of Director of Land Registration — Refusal of consent to transfer — Land Transfer Ordinance, sec 4 *— Courts Ordinance, sec.* 6(*b*).

Director of Land Registration exercising statutory discretion vested in him may refuse his consent to transfer of land.

Olshan for Applicants.

Application for an order to issue to the Respondent commanding him to withdraw the refusal of his consent to the transfer by Applicants of their lands registered in their names under Volume No. 6, Folio No. 11, at the Land Registry Office of Beisan.

JUDGMENT.

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

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

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

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

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

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

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

Given this 11th day of January, 1938.

CIVIL APPEAL NO. 213/37.

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:—

Mahmoud Es-Salameh of Beit Leed — Appellant.

v.

Hafez Ahmad El-Hamadallah in his capacity as a guardian of the minors of Fuad El-Hamadallah of Anabta — Respondent.

Finding on question not in issue — Judgment exceeding claimant's prayer.

1. If appellate court while confirming the judgment appealed from decides that a certain question of fact was not in issue before court below, such decision annuls finding of trial court on said question.

2. Court must not exceed claimant's prayer in his statement of claim.

Eliash for Appellant.

A. Zueitar for Respondent.

Appeal against judgment of Land Court, Nablus, dated 6.10.37 in Land Case No. 108/34.

JUDGMENT.

This appeal arises out of a land dispute before the Land Court of Nablus. The Respondent sued the Appellant claiming the ownership of certain land and the Court gave judgment in his favour. The Appellant has appealed to this Court.

His first ground of appeal is that the Court below erred in proceeding in his absence at the hearing on 6th October, 1937. On that date the Appellant failed to appear, and a medical certificate was produced to the effect that he was ill and unable to attend the Court. The only question which the Court below had to decide was whether this certificate satisfied it that the facts stated therein were correct. The Court below for reasons given came to the conclusion that the certificate was unsatisfactory and proceeded with the hearing in the absence of the Appellant. We are of opinion that this was a matter entirely within the discretion of the Court below, and we do not propose to interfere with their decision in this respect. If any prejudice was caused to the Appellant it was entirely his own fault.

The second ground of appeal relates to an issue which was raised before the Court below. The Appellant alleged that the land was sold to him in 1925 by Fuad El-Hamadallah, an ancestor of the Respondent. Against this the Respondent alleged that at the time when he transferred the land to the Appellant, Fuad ElHamadallah was non compos mentis and therefore, under Art. 50 of the Land Code, incompetent to transfer his land. The Court below heard a large amount of evidence on this point and decided in favour of the contention of the Respondent.

Before the Court below certain proceedings of the Sharia Court of Tulkarem had been produced. The Sharia Court had had before it in 1925 an application to interdict Fuad El-Hamadallah as a prodigal. In the course of the proceedings another application was made to the Sharia Court to declare Fuad El Hamadalla an imbecile and consequently incapable of transferring property. The Sharia Court decided that Fuad El-Hamadallah was sane and quite capable of entering into transaction with regard to land or otherwise, but it found that he was a prodigal and therefore interdicted him from any such transactions.

There was an appeal to the Sharia Court of appeal, which decided that the question of Fuad El-Hamadallah's sanity or otherwise was not in issue before the Court below and it confined its decision to affirming the decision of the Court below that Fuad El-Hamadallah was a prodigal. We regard the decision of the Sharia Court of Appeal as annulling any decision of the Court below on the question of Fuad El-

Hamadallah's sanity. This disposes of the point raised by Mr. Eliash that there is in existence a decision of the Sharia Court declaring Fuad El-Hamadallah to be sane in 1925, and we are in full agreement with the finding of the Court below on this issue.

The third point raised by Mr. Eliash was that the Court exceeded the prayer of the Respondent in his statement of claim, and it is quite clear that it is so. The Respondent was claiming an area of about 80 dunams only, and the judgment of the Land Court assigned to him an area of about 350 dunams. Adel Eff. Zueiter, for the Respondent, admits that only 80 dunams are claimed.

For these reasons our order will be that the decisions of the Court below, with regard to proceeding in the absence of Appellant and as to the effect of the judgment of the Sharia Court, were right, but that the judgment of the Court below must be set aside and a judgment substituted therefore for the Respondent in terms of the statement of claim.

If the parties do not agree as to the situation of the land in dispute, either of them may submit an application to this Court for directions.

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

Delivered this 16th day of December, 1937.

P.C.L.A. CIVIL APPEAL NO. 13 of 1937.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the application of:—

Maurice Goldenthal Morrison — Petitioner.

v.

Antoine F. Albina — Respondent.

Leave to appeal to Privy Council — Ascertainment of amount in dispute involved — Matter not urged before Supreme Court.

Allegation that fees charged by arbitrators were excessive, if not embodied in grounds of appeal to Supreme Court and not urged before it, cannot on application to Privy Council be said to form part of matter in dispute.

Dr. Smoira for Petitioner.

Eliash for Respondent.

Application for Conditional Leave to appeal to his Majesty in Council from the Supreme Court dated 3.6.1937.

ORDER.

1. In a dispute between one Morrison and one Albina a chartered accountant named Young was appointed arbitrator. He gave his award

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

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

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

4. Furthermore from the affidavit filed it is clear that Morrison does not dispute the award to him of 225 shares, on the ground that more shares should have been awarded and that the value of what should have been awarded would amount to LP. 500 or upwards. The affidavit shows that the only matter in dispute between the parties is the correctness of the arbitrator's award in ordering Morrison to pay LP.488. 750 mils. For the above reasons I am in agreement with Mr. Eliash and am of opinion that leave to appeal cannot be granted. Albina will have the costs of this application to include LP. 5 advocate's fees.

Delivered this 3rd day of December, 1937.

Senior Puisne Judge.

LAND APPEAL NO. 46/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case of:—

1. Farah Salti
2. Rajah Rayes on behalf of the estate of the late Salim Rayes,
3. Administrators of the estate of the late Iskandar Kassab — Appellants.

v.

1. Costandi Habib Hawa
2. Jalileh Habib Hawa
3. Nassibeh Habib Hawa — Respondents.

Ineffectiveness of power of attorney through non-user — Purchaser of bad title to land.

1. Irrevocable power of attorney becomes ineffective if not used for a period exceeding 15 years.

2. Buyer cannot acquire good title to land sold to him by virtue of a power of attorney subsequently held ineffective, if a few simple enquiries would have shown him that ownership of land was acknowledged by vendor to be in dispute not yet definitely determined.

Eliash for Appellants.

Abcarius for Respondents.

Appeal from judgment of Land Court, Haifa, dated 13.6.1936.

JUDGMENT.

We have already intimated that in our opinion this appeal failed, and we now give our reasons for that opinion.

The facts of the case are very clearly set out in the judgment of the Land Court, and it is unnecessary to repeat them here. It is sufficient to say that, whilst this case was previously on appeal before this Court, the 2nd and 3rd Appellants, taking advantage of the removal of an attachment on the lands in question in 1929, had these properties registered in their names by virtue of an irrevocable power of attorney executed in 1912 but never used, the Land Court having previously dismissed the Respondents' claim for lack of jurisdiction.

The Land Registrar obtained from the 2nd and 3rd Respondents a written acknowledgement that they were aware of the fact that the lands registered in their names were the subject matter of a dispute, and this acknowledgement was kept in the file. Most of the lands were subsequently sold to the first Appellant and later this Court quashed the first judgment of the Land Court and remitted the case for retrial to hear the arguments of the first Appellant, who was not involved in the first hearing in the Court below, his vendors having succeeded there.

From the first judgment on appeal given by this Court, we do not think that there can be any doubt that they decided that the power of attorney had become ineffective through non-user for a period exceeding 15 years. This is the interpretation given by the Land Court in their judgment now under review and in our opinion that is the correct interpretation. Nor does it make any difference that the Appellants took possession of the lands. They took possession by virtue of a power which was subsequently held to be ineffective, and void, and they also took possession at a time, when the Respondents were strenuously contesting the validity of the power, the case being then under appeal. Nor is the first Appellant in any better position. If he had examined the Land Registry files he would have found on it the acknowledgement of the other Appellants that the ownership of these lands was in dispute and a few simple enquiries would have shewn him that this dispute had not yet been definitely determined.

For these reasons, as well as these given by the Land Court in their very carefully reasoned judgment, to which no exception can be taken and which we adopt, we hold that this appeal fails and must be dismissed with costs and LP. 5.— advocate's fees.

Dated this 24th day of June, 1937.

British Puisne Judge.

CIVIL APPEAL NO. 50/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the case of:—

1. Fadil Abbas El-Fahoum
2. Nayif Amin El-Fahoum

Appellants.

v.

1. Riziq Mahmud Muhammad Khalaf
2. Muhammad Said Suleiman el Bakkar
3. Musa el Nasir

Respondents.

Confirmation of award by Land Court — Restoration of action — Meaning of "shall" in Section 6(2) of Land Courts Ordinance — Negation of natural justice — Rule 2 of Judgment by Default (District and Land Courts) Rules — Rule 13 of Court Fees Rules 1935 — C.A. 58/28.

1. Land Court competent to confirm (or remit or set aside) award of abitrator, if matter has been referred to arbitration by that Court.

2. Provision of Rule 13 of Court Fees Rules 1935 that an action or matter which has been struck out may be restored on payment of fees not contradictory to, and not affected by, Rule 2 of Judgment by Default (District and Land Courts) Rules.

3. Word "shall" in section 6(2) of Land Courts Ordinance directory only, not peremptory; failure by Court to authenticate award within 6 months does not render award null and void.

4. Where a party has done everything in his power and with exceptional diligence to get a decision of a Court he should not be denied his rights owing solely to failure of Court to decide his application within prescribed limit of time.

Cattan and *Omar Saleh* for Appellants.
Boustani for Respondents.

Appeal from judgment of Land Court, Nablus, dated 9.3.1937.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Nablus dismissing the Appellants' claim to confirm an arbitration award, on the grounds, first, because the authentication of the award was not made within six months of the publication of the award as required by Section 6(2) of Land Courts Ordinance (Cap. 75, Laws of Palestine), and, secondly, because by Rule 2 of the Judgments by Default (District and Land Courts) Rules, 1926, the right to renew a case, after it has been struck out, has been abolished.

The facts of the case are as follows:—

On the 1st October, 1933, the Appellants filed their claim in the Land Court asking for the Respondents to be prohibited from trespassing on their land. After various hearings, both parties to the action, on 17th June, 1935, asked that the matter might be referred to arbitration to an arbitrator named by them, and it would seem that the Court thereupon referred the matter to the named arbitrator, since on 8th January, 1936, the Court ordered the "case to be struck out with liberty to parties generally to apply when award has been published". On 9th March, 1936, the award was issued, and on 12th March, 1936, three days after that issue, the Appellants applied for confirmation of the award. The case was set down for hearing on 8th April, 1936,

but on the parties not appearing the case was struck out a second time. On 9th April, 1936, the case was renewed by the Appellants and was fixed for hearing on 28th April, 1936. On that day, however, owing to the disturbances which had broken out in Palestine, no President, District Court and therefore no Court was available, and the case was adjourned, the parties being so informed. It was not until 9th March, 1937, that the case was again set down to be dismissed for the reasons I have stated above.

The relevant provisions of the Land Courts Ordinance are:—

> "6.—(1) A Land Court may, with the consent of the parties refer to arbitration any dispute arising before it in any matter under this Ordinance.
>
> (2) Subject to the powers set out in subsections (3) and (4) as to remitting or setting aside the award, a Land Court shall, within six months of its issue, authenticate the award, and the award when so authenticated, shall have the effect of a judgment of a Court and shall be executory."

On his appeal, Mr. Cattan, for the Appellants, in addition to submitting that the two conclusions as to the law made by the Land Court were wrong, has argued that the confirmation of this award lies within the sole jurisdiction of the District Court under the Arbitration Ordinance. To this I do not agree. The reference to arbitration was made by the Land Court under section 6(2) of the Land Courts Ordinance, and by section 6(2) the Land Court has full power to authenticate such an award when it has been issued.

As to the finding by the Land Court that there is no right now to renew an action which has been struck out, I think that the Land Court was wrong. Rule 2 of the Judgment by Default Rules gives a right to enter a fresh action when a case has been struck out for non-appearance. but Rule 13 of the Court Fees Rules, 1935, undoubtedly contemplates the renewal of an action which has been similarly struck out. Both sets of Rules are of equal legal validity as against each other, and I do not think that they are contradictory when read together. And in any case the Court Fees Rules are of later date and should prevail in the event of inconsistency with any previous Rule.

I come now to the most important point in this appeal: namely, if the Court does not authenticate an award within six months of its publication, does the award lapse and become incapable of authentication?

The answer to this question depends partly on the meaning to be assigned to the word "shall".

The law on this point is summarized in Stroud's Judicial Dictionary, Second Edition, page 1851, in these terms:—

> "Whenever a statute declares that a thing "shall" be done, the natural and proper meaning is that a peremptory mandate is enjoined. But where the thing has reference to the time or formality of completing any public act, not being a step in litigation or accusation.... the enactment will generally be regarded as merely directory, unless there be words making the thing void if not done in accordance with the prescribed requirements."

A very large number of cases are cited in Stroud. None of them seems to throw much light on the present case, except Re Tharlow (1895, 1 Q.B. 729) where it was held that the words 'shall adjuge' in Section 20(1) Bancruptcy Act 1883, did not deprive the Court of the power to adjourn given by Section 105(2). And in Mayer v. Harding (L. R. 2 Q.B. 410) it was held that where a party had done all that he could in order to comply with a statute he should not be penalised because the condition in the statute was, in the circumstances of the case, impossible of performance, owing to the Court Offices being closed. Meller, J. said: "As regards the conduct of the parties themselves, it (i. e. lodging in due time a case) is a condition precedent. I think it can not be considered strictly a condition precedent where it is imposssible of performance in consequence of the Offices of the Court being closed. Here all that was possible was done, and I think that it is sufficient."

Applying the principles in these cases to the present problem, it seems to me that Appellant have done all that they could possibly do. They had applied for confirmation of the award within 3 days of its issue — different considerations might well have applied if they had waited until the last week of the six months, thereby rendering it impossible for the Court to adjudicate within the prescribed limit. I do not see what else the Appellants could have done, for I know of no method in this Country to compel a Court to adjudicate or to sit: and Section 6(2) does not contain any word which could be construed as rendering the award void if not confirmed within the prescribed limit.

The point, however, has previously come before this Court. In L.A. 58/28 this Court confirmed a judgment of the Land Court of Jerusalem of19.5.28. The Land Court had held by majority stating that they did so with regret and reluctance, that the word 'shall' in Section 6(2) was peremptory, and that therefore an award which was not authenticated within six months of its issue must be considered as null and void. The Supreme Court merely dismissed the appeal without assigning any reasons. It would not appear that the attention of either Court was drawn to the cases which I have cited: nor to the fact that the word 'shall' may, in certain circumstances, be directory and peremptory. This argument was never considered.

In these circumstances, I consider myself free to express my own opinion, untrammelled by the previous Ruling. It seems to me, that where a party has done everything in his power and with exceptional diligence, to get a decision of a Court, that it would be a negation of natural justice if he were denied his rights, owing, solely to a failure on the part of the Court, to decide his application within a prescribed limit of time. I think that the word 'shall' in Section 6(2) is directory only, that is that authentication should be given, if possible, within six months, but that a failure to do so by the Court, does not render the award null and void.

For these reasons I think that this appeal should be allowed, the judgment of the Land Court set aside and the case remitted for re-trial.

Delivered this 16th day of June, 1937.

British Puisne Judge.

CIVIL APPEAL NO. 117/37.

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:—

Itzchak Yosef Rottermund — Appellant.

v.

Efraim Safrai — Respondent.

Right of way — Jurisdiction of District Court — Injunction.

District Court has jurisdiction to decide whether right of way (the existence of which is not denied) was being interfered with and if so to issue an injunction prohibiting the defendant or his servants or agents from interfering with said right.

Appeal from judgment of District Court, Jaffa, sitting at Tel Aviv, dated 11.5.1937.

JUDGMENT.

The Appellant brought an action in the District Court of Jaffa for an injunction to restrain the Respondent from interfering with a right of way. The District Court held that it had no jurisdiction because there was a dispute as to the existence of a right of way and its extent.

We think the District Court was wrong. It has been freely admitted here by the Respondent that there is no dispute as to the existence of a right of way. As far as the extent is concerned, the documents disclose a right of way on foot, and it was within the jurisdiction of the District Court to decide whether the right was being interfered with so as to justify the issue of an injunction.

In the circumstances we see no necessity to remit the case. The dispute can be settled by an order declaring that the extent of right of way in width is to be one metre and a further order prohibiting the Respondent or his servants as agents from interfering with the said right of way.

The judgment of the District Court is set aside and for it an order substituted as above.

Each party will pay his own costs.

Delivered this 15th day of July, 1937.

Senior Puisne Judge.

CIVIL APPEAL NO. 175/37.

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:—

Leon Levy — Appellant.

v.

Shafiq Qa'war — Respondent.

Ground of Appeal — Point not raised in Court below.

Court of Appeal will not consider a point not raised in lower court.

Appeal from judgment of District Court, Haifa, dated 28.4.1937.

JUDGMENT.

This is an appeal against the judgment of the Land Court of Haifa confirming the judgment of the Magistrate in a partition action. The only ground of appeal is that the opinion of the Registrar of Lands was not obtained as to whether the property was capable of partition. The point was not raised either before the Magistrate or before the Land Court. We decline therefore to consider it on this appeal.

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

Delivered this 5th day of November, 1937.

Senior Puisne Judge.

CIVIL APPEAL NO. 159/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

1. Meir Gorodissky

2. Baruch Weiner — Appellants.

v.

Husni Ramadan Abu Khadra — Respondent.

Bankruptcy notice — Commencement of proceedings in bankruptcy — Appeal from order setting aside bankruptcy notice — Issue of a new bankruptcy notice — Bankruptcy Ordinance, 1936, *sec.* 94.

1. Order of Court setting aside bankruptcy order issued by it not appealable, as proceedings in bankruptcy not yet commenced.

2. Bankruptcy notice issued by Court having jurisdiction in bankruptcy cannot be set aside by it otherwise than in accordance with provision of Bankruptcy Ordinance, 1936 and Rules.

3. Where bankruptcy notice issued by Court has been set aside by it otherwise than in accordance with Bankruptcy Ordinance 1936 and Rules, Court can issue another bankruptcy notice.

Linderman for Appellant.

George Salah for Respondent.

Appeal from judgment of District Court, Jaffa, dated 9.7.1937.

JUDGMENT.

In the first place we think that there is no appeal from the District Court, as proceedings in bankruptcy have not commenced, but it seems to us that the District Court misdirected itself in setting aside the bankruptcy notice otherwise than in accordance with the provision of the Bankruptcy Ordinance, 1936, and the Rules.

We see no reason why another bankruptcy notice should not be issued, and this view which I have indicated will be conveyed to the Court below.

The appeal will therefore be dismisssed with costs and LP. 3.— advocate's fees.

Delivered this 5th day of October, 1937.

Chief Justice.

CIVIL CASE 82/37.

IN THE DISTRICT COURT OF JAFFA.

JUDGMENT.

Attachment and sale of property is a remedy for the creditor to collect his debt. It is in fact in the nature of security to the debt, and in that light, proceedings in Bankruptcy are a remedy incompatible with that remedy. The result is the same i.e. the sale of the property to satisfy the debt. The creditor can ask for either remedy but not for both at the same time. The Bankruptcy Notice is therefore set aside. Costs and LP. 2.— advocate's fees.

9.7.1937.

CIVIL APPEAL NO. 223/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Greene, J. and Khayat, J.

In the appeal of:—

Wart Gaspar Aghajanian — Appellant.

v.

Gaspar Aghajanian — Respondent.

Exemption from payment of Court fees — Exemption from bond or deposit in Court of Appeal — Civil Procedure Rules, 1935, *Rules* 93, 94.

Where it appears to the Supreme Court that Appellant had a fair trial it will not exempt him from filing a bond or paying a deposit in lieu thereof notwithstanding fact that he was exempted from Court fees both in Court below and in Court of Appeal.

Appellant in person.

Hanna Atalla for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 22.10. 1937.

JUDGMENT.

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

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

The appeal must be dismissed with costs.

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

Delivered this 17th day of January, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 194/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J. and Khayat, J.

In the appeal of:—

Marcus Maier — Appellant.

v.

The joint liquidators of "Phoenix" Life Insurance Company, Vienna in liquidation — Respondents.

Agreement with Company — Insurance policy — Clause as to jurisdiction.

Where agreement with company contains clause that any dispute arising out of agreement is within jurisdicton of Courts of certain place outside Palestine, Courts of Palestine not competent to deal with such dispute, even though company here is being wound up.

Dr. Natan for Appellant.

B. Joseph for Respondents.

Appeal from judgment of the District Court, Jerusalem, dated 2.8. 1937.

JUDGMENT.

1. The present appellant took out five insurance policies with the Phoenix Life Insurance Company of Vienna. To suit the convenience of the appellant, the company agreed to issue the policies in Palestine. The parties, by agreement, inserted a clause in the policies that any dispute arising out of these policies is within the jurisdiction of the Courts of Zurich.

2. The respondent Company is being wound up and the appellant submitted his proof of claim to the Liquidators, which was rejected. He then appealed to the District Court, Jerusalem, against that rejection. The District Court dismissed his petition.

3. The parties having agreed that all disputes arising out of the policies are within the jurisdiction of the Courts of Zurich, and this being a dispute arising out of the policies, the Courts in Palestine are not the competent Courts to deal with it.

4. For these reasons and for the reasons given by the District Court, and without calling on Mr. Joseph, the appeal shall be dismissed with costs to include LP. 5.— advocate's fees.

Delivered this first day of November, 1937.

British Puisne Judge.

CRIMINAL 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:—

Mohammad Ali Kurdi — Appellant.

v.

Attorney General — Respondent.

Forgery — Theft by employee — Construction of sec. 275 of Criminal Code Ord. — Jurisdiction of District Court in trying misdemeanours — Criminal Code Ord. sec. 275, 334(1), 336 — Criminal Procedure (Trial Upon Information) Ord. sec. 72 (See also Art. 40(1) of Palestine Order-in-Council 1922).

1. District Court in trying cases upon information has no jurisdiction to try cases of misdemeanour, — Conviction by District Court in such case for a misdemeanour therefore a nullity.

2. Qualification that money stolen must exceed LP. 50 applies to whole of first limb of sec. 275 of Criminal Code Ordinance:— Conviction under said section for theft without said qualification will be quashed.

Cattan for Appellant.

Crown Counsel (J. Hogan) for Respondent.

Appeal from judgment of District Court, Jaffa, dated 1.12.1937, whereby the Appellant was convicted of charges under sections 275, 334(1) and 336 of the Criminal Code Ordinance and sentenced to 6 months imprisonment.

JUDGMENT.

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

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

He was also charged with an offence under Section 275 of the Criminal Code Ordinance. That is a section which enhances the penalties for theft in certain cases. The first part of the section deals with offences of clerks and servants who steal the property of their employers or pro-

perty coming into their possession on account of their employers, and the second part deals with stealing by directors or officers of corporations or companies, and in each case the offender is liable to heavy punishment.

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

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

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

Delivered this 5th day of January, 1938.

Chief Justice.

CRIMINAL APPEAL NO. 101/37.

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:—

Muhyeddin Ruslan — Appellant.

v.

The Attorney General — Respondent.

Charge before Magistrate — Election of Court — Magistrate's Courts Jurisdiction Ordinance, 1935.

Accused person brought before Magistrate (or British Magistrate) should be charged before he elects Court.

Ben Israel for Appellant.

Fawzi Bey Ghussein for Respondent.

Appeal from the judgment of the District Court of Haifa, dated 12. 7.1937, sitting in its appellate capacity, confirming the judgment of the

Magistrate's Court, Haifa, dated 17.5.1937, whereby Appellant was convicted of entering Palestine without a passport, contrary to Sections 5 and 12 of the Immigration Ordinance, 1933, and sentenced to 10 days' imprisonment and recommended for deportation.

JUDGMENT.

The first point which is raised in this appeal is a technical point which concerns the construction of Section 3(1) of the Magistrate's Courts Jurisdiction Ordinance, 1935. We think that it is clear from that Section that an accused person should be charged before his election. So far as this particular case is concerned, it is for the Appellant to prove to us that procedure laid down in Section 3(1) was not properly followed, and this he has not done; moreover, it is quite clear from the record that the accused was represented by an advocate, and if the procedure was not strictly complied with we do not think any miscarriage of justice has occured.

The second point raised is the question of sufficiency of evidence under Section 6 of the Evidence Ordinance. In this case there was not the evidence of a single witness but of two witnesses, both Police Constables. The first constable said:

> "When I arrested him he had no passport on him and admitted to me that he entered Palestine without a permit, he did not mention to me the date of entry into Palestine".

The second constable later took a statement from the accused which he reduced into writing and to which the accused affixed his thumb print.

These witnesses were called at the trial and accused did not deny the statements. We are of opinion that there was sufficient evidence against him.

The appeal will be dismissed.

Delivered this 30th day of September, 1937.

CIVIL APPEAL NO. 236/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case of:—

Simha Zissel Shapira — Appellant.

v.

Raphael Yehoshua — Respondent.

Construction of clause of agreement — Intention of parties — Competence and duty of Court to interpret statement of claim.

Where in his statement of claim Plaintiff complained that no account had been rendered to him by Defendant as provided in agreement, though he (Plaintiff) did not ask for any relief in this respect, Court should read into statement of claim an application by Plaintiff that an account should be made between him and Defendant.

Olshan and *Eisenberg* for Appellant.
Ben Aharon for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 15.11. 1937.

JUDGMENT.

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

2. The Appellant paid altogether to the Respondent the sum of LP. 1514.900 mils and sometime after that payment he came to the conclusion that he had paid too much and he demanded from the Respondent a statement of account. This statement was not rendered and the Appellant then sued the Respondent before the District Court, Jerusalem, for the sum of LP. 439.325 mils.

3. Before the District Court no evidence was taken and the case resolved itself into an argument between the parties as to the interpretation to be placed on Clause 3 of the agreement. The Appellant contended that in any event the cost to him should not be more than LP. 75 a dunum plus LP. 50. On the other hand, the Respondent contended that he at any rate was to have a sum of LP. 500, and that the proviso with regard to LP. 75 operated only with regard to the cost of the land to the Respondent and the expenses incurred. The District Court agreed with the contention of the Respondent and the Appellant's claim was dismissed.

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

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

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

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

Delivered this 20th day of January, 1938.

Senior Puisne Judge.

CIVIL CASE NO. 105/37.

IN THE DISTRICT COURT OF JERUSALEM.

J U D G M E N T.

There is only one point of issue in this case viz. the construction of Clause 3 of the Contract.

Plaintiff interprets the Clause as follows:—

Plaintiff undertook to pay Defendant LP. 500 plus the price the De-

fendant paid for the land, plus expenses, provided that if the price per dunum to the Plaintiff — which price is ascertained by adding together LP. 500.— plus cost price to Defendant plus expenses and dividing that total by the number of dunums — is more than LP. 75.— per dunum another LP. 50.—.

In other words the Plaintiff maintains that the maximum he could be called upon to pay was LP. 75.—. ped dunum (which sum included the LP. 500.—.) and an additional LP. 50.—.

Defendant on the other hand interprets the Clause as follows:—

Plaintiff undertakes to pay me LP. 500.— in addition to what the land costs me and expenses provided that if the price per dunum to the Plaintiff viz. cost price to me plus expenses should in no event exceed LP. 75.—.

In other words that the Plaintiff's liability should be limited to LP. 75.— per dunum plus 500.—.

I find myself in entire agreement with the interpretation of Defendant the sum of LP. 500.— is a matter of commission and is entire and apart from any question of cost per dunum to the Defendant. As I read Clause 3 the Plaintiff undertook to pay Defendant LP. 500.— as commission, and he further agreed to pay for the land what the Defendant had paid plus all expenses, but if these two items exceeded LP. 75.— per dunum he should still only have to pay LP. 75.— per dununm.

For the foregoing reasons I dismiss the claim of Plaintiff with costs and advocate's fees of LP. 3.—.

15.11.1937. *R/President.*

The relevant articles of the agreement.

(*Literal Translation*).

3. The purchaser agrees to give the vendor in consideration of the transfer in the Tabu to his name or to the name of his nominee of the shares mentioned in the aforesaid two contracts a sum of LP. 500.— profit besides the capital and the expenses which the vendor has paid and incurred on account of the said purchases, provided that the price of each dunum shall not exceed LP. 75.—, and in case the price of each dunum will exceed LP. 75.—, then the purchaser undertakes to pay to the vendor LP. 50.— more, and no more than this.

4. In order to ascertain the expenses and the capital price paid and expended by the vendor as mentioned in art. 3 of this agreement the vendor undertakes to furnish the purchaser with a detailed account of all the expenses, and this within 48 hours from the date of the transfer in the Tabu.

CIVIL APPEAL NO. 231/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Saleh el Ahmad and others — Appellants.

v.

1. Raja El Rais
2. Palestine Land Development Co. — Respondents.

Incorrect joinder to an action — Irregularity of procedure causing no prejudice.

Joinder of a person to an action who is not a proper party to it — no ground to quash judgment, if Appellant was in no way prejudiced by the incorrect joinder.

Adel Zueiter for Appellants.

Eliash for Respondents.

Appeal from judgment of Land Court, Nablus, sitting as a Court of Appeal, dated 28.9.37.

JUDGMENT.

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

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

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

In the result we have come to the conclusion that the Appellants have

not in any way been prejudiced by the joinder of the first Respondent to the action, and for this reason the appeal must be dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 19th day of January, 1938.

British Puisne Judge.

HIGH COURT NO. 65/37.

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

Before:—The Senior Puisne Judge (Manning, J) and Khaldi, J.
In the application of:—

Gedaliah Fein — Petitioner.

v.

1. Relieving President,
   District Court, Jerusalem.
2. Abraham Mordechai Horowitz
3. Noah Weintraub — Respondents.

Jurisdiction of President, District Court, in matters regarding mortgages — Order of foreclosure — Order to sell mortgaged property — Effect of old well established practice — Allegation of payment by mortgagor — Who to go to Court? — Land Transfer Ord. sec. 14 — *Execution Law, art.* 1 *and* 36.

1. President, District Court, has jurisdiction to order only sale of immovable property in satisfaction of a mortgage, but no juridiction to order foreclosure.

2. Wording of art. 36 of Execution Law (providing for procedure to be followed in case of a dispute between parties as to a payment of principal or interest on account of judgment debt) clearly shows that article does not apply to mortgages, but in view of old well established practice is must be held to apply.

3. Production of an alleged receipt by mortgagor before Pre-

sident, District Court, seized of an application for sale of mortgaged property makes no difference as to procedure to be followed; mortgagor must be given sufficient opportunity to apply to a Court having jurisdiction.

Dr. Amdur for Petitioner.
Naaman for 2nd and 3rd Respondents.

Application for an order to issue to the First Respondent directing him to show cause why his order dated the 4th November, 1937, in Execution File No. 3151/37 should not be set aside, and why he should not proceed with the foreclosure of the mortgaged property.

JUDGMENT.

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

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

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

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

3. The petitioner than applied to this Court for an order directing the Relieving President to proceed with the application for foreclosure. An order nisi was granted, but not in the form as prayed. The order called on the Relieving President to show cause why the application should not be restored and only temporarily delayed pending the application of the mortgagors to a Court having jurisdiction in accordance with Article 36 of the Execution Law.

4. This Article reads as follows:—

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

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

> "1. Decree issued by all Sharia, Civil or Mercantile Courts, decrees granted by Criminal Courts concerning private rights, and agreements and orders, execution of which is effected under the law by the Execution Office, will be carried out by that Office. The decree-holder may apply to any Execution Office for execution of his decree."

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

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

agree with the learned Relieving President that the production of an alleged receipt by the mortgagors makes any difference as to the procedure to be followed. The Order nisi must therefore be made absolute, and the petitioner will have the costs of the application to include LP. 5.— advocate's fees. The learned Relieving President should make it clear to the parties that the application before him is one for sale and not for foreclosure.

Delivered this 27th of day of January, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 234/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

Palestine Land Development Co. Appellants.

v.

Obeid Mousa el Kuheily and 46 others Respondents.

Interpretation of Cultivators (Protection) Ordinance — Meaning of "Notwithstanding anything contained in this Ordinance" — Disregard of conflicting provisions in same Ordinance — Cultivators (Protection) Ord. sec. 6 and 15.

1. If in any section of an Ordinance the words "Notwithstanding anything contained in this Ordinance" occur, they must mean that if any other provisions in the whole Ordinance conflict with the provisions of that section, they must be disregarded.

2. Order made by District Commissioner under sec .15 of Cultivators (Protection) Ordinance not subject to restrictions imposed by sec. 6; Magistrate fully entitled to give judgment for eviction if such an order is produced to him.

Horowith and *Solomon* for Appellants.

F. Atalla for Respondents.

Appeal from judgment of Land Court, Haifa, sitting as a Court of Appeal, dated 12.11.37.

JUDGMENT.

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

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

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

> "Notwithstanding anything contained in this Ordinance, the District Commissioner may . . ."

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

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

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

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

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

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

Delivered this 18th day of January, 1938.

British Puisne Judge.

R. Copland.

CIVIL APPEAL NO. 225/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the Appeal of:—

Mohammad Ahmed Abu Laban — Appellant.

v.

Haj Mustafa Sabbagh — Respondent.

Opposition to default judgment — Grounds of defence in document of opposition — Judgment by Default (Magistrate's Courts) Rules, Rule 3(4).

1. When opposition is made to judgment be default main issue to be decided by Court is whether opposing party had or had not good cause for non-appearance.

2. Failure to state grounds of defence in document opposing judgment by default no ground to reject opposition. *Sed quaere.*

M. Adel Muwakkeh for Appellant.

George Elia for Respondent.

Appeal from judgment of District Court, Jaffa, in its appellate capacity, dated 3.7.1937.

JUDGMENT.

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

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

3. On reference to the Judgment by Default (Magistrate's Court)

Rules on p. 2341 of Vol. III of the Laws of Palestine, we find that Rule 4 para. 3 contains the following words:—

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

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

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

Costs will abide the event.

Delivered this 11th day of January, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 195/37.

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. Salameh Hammad Abu Khusah
2. Abdullah Hammad Abu Khusah
3. Salim Hammad Abu Khusah
4. Abed Rabbo Muhammad Abu Khusah
5. Abdul Rahman Muhammad Abu Khusah
6. Abdul Aziz Muhammad Abu Khusah
7. Ghanim Hassan Abu Khusah
8. Muhammad Said Abu Khousa
9. Hassan Mousa Abu Khousah
10. Husein Mousa Abu Khousah
11. Abdul Jaber Ali Abu Khousah
12. Hamid Ahmad Abu Khousah

Appellants.

v.

1. Salameh Ahmad Abu Sweireh
2. Salem Ahmad Abu Sweireh
3. Salim Ahmad Abu Sweireh
4. Mifleh Muhammad Abu Sweireh
5. Muhammad Suleiman Abu Sweireh

Respondents.

Undisturbed possession of land — Prescription — Absence of any registered title or title deed — Evidence of possession in support of claim of ownership.

Magistrate's Law, art. 27 — Ottoman Land Law, art. 20 and 78 — Land (Settlement of Title) Ordinance sec. 51. — L.A. 13/34, L.A. 56/35, L.A. 76/25, L.A. 25/32.

1. While possession cannot create any title to land (apart from cases contemplated by art. 78 of Ottoman Land Code and sec. 51 of Land Settlement Ordinance), yet parties entitled to adduce evidence, whether written or oral, of possession in support (or rebuttal) of claim of ownership to land in dispute.

2. Were neither party has any registered title or title deed, Court may infer title from fact of possession.

A. Shedadeh for Appellants.

R. Shawa for Respondents.

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

JUDGMENT.

This appeal arises out of a dispute as to the ownership of land. It began more than ten years ago when the appellants were dispossesed by a judgment of the Magistrate's Court of Majdal. Article 27 of the Magistrates Law reads as follows:—

> "A decision given in favour of the plaintiff in an action for the recovery of possession does not imply that he is the owner. Consequently if the party who has been ordered to give up possession claims to be the owner of the immovable property in dispute the question will be decided as a separate action in accordance with the law by the competent Court."

In accordance with this article the appellants brought an action in the Land Court of Jaffa to establish their claim to ownership. Neither they nor the respondents had a registered title or title deed. The Land Court heard evidence and inspected the land and gave judgment in favour of the appellants. On appeal to this Court the respondents succeeded in getting this judgment set aside and having the case remitted to the Land Court on the ground that the evidence of certain witnesses for the respondents had not been heard. In view of what I shall have to say hereafter it is of importance to note that one of the grounds of appeal was that oral evidence of possession could not be relied upon to prove ownership. It is clear that this Court did not regard this ground of appeal as having any weight; if it had, it would have allowed the appeal at once instead of remitting the action for further evidence.

2. The judgment of this Court was given in 1931. For some reason the Land Court did not deal with the remitted action until 1937. The Court then asked the appellant what proofs they had to produce in support of their claim. They replied that they had proof of their possession and that the only documentary evidence was receipts for the payment of taxes. The Court apparently decided that it would be a waste of time to go into the merits of the dispute or hear any evidence. Relying on a recent decision of this Court, Lahham v. Hamed and others, Civil Appeal No. 80 of 1937, the Land Court dismissed the appellants' claim.

3. All that this Court said in the Lahham case (supra) was that there was a "practice that the Court could not hear oral evidence of the fact of possession by a plaintiff in support of a claim of ownership by prescription". This did not apply to the facts of the present case. The appellants were not claiming ownership by prescription. Under local law there are only two cases in which a person may claim ownership and registration on the ground of possession for a definite

period, viz: article 78 of the Ottoman Land Code and Section 51 of the Land (Settlement of Title) Ordinance. The appellants were not relying on either of these provisions. Their case was: "we claim ownership of this land. To show that we own it we propose to prove that we, and only we, have always possessed it and cultivated it without deriving our right to do so from any other party, and that we have paid the taxes on it". They did not say that their possession gave them any right to the land; they adduced their possession merely as part of the evidence in support of their claim. That they were entitled to do so is clear from the previous decisions of this Court.

4. The authority most frequently cited in cases of this kind is a passage from the judgment of Corrie, Acting Chief Justice, in Inkeiri and another v. Zaideh (Law Reports of Palestine, 1920-33, page 87). The Acting Chief Justice said:—

> "I hold that while it may be that, after ascertaining all the facts of the case, including those of possession, the Court may declare that a person who has had long undisturbed possession is entitled to registration as owner, there is no rule which entitled a plaintiff to judgment on proof of ten years' undisturbed possession. The provisions of article 20 of the Land Code are only valid as a defence."

Article 20 of the Land Code provides for a period of limitation of ten years in actions for the recovery of miri land and of course is only available to a defendant in an action. Of itself it confers no title; the person in possession relies on the inability of others to eject him. But the Acting Chief Justice in the earlier part of the judgment said that possession is an element in the evidence that a plainitff may adduce. He makes the distinction quite clear between the fact that possession cannot create any title (apart from the provisions of the law to which I have already referred) and the fact that a plaintiff should be allowed to lead evidence of possession in support of his claim.

5. I have already said that in the present case neither party has a registered title or any document of title and therefore the case which ought to have been followed by the Court below is Issa and others v. Shedadeh and another (Land Appeal No. 13 of 1934). The Court said:—

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

6. A case frequently referred to is Da'ibes v. Da'ibes and another (Law Reports of Palestine p. 766). It is merely an authority for the obvious proposition that article 20 of the Land Code does not create

any prescriptive right to ownership of land. In this the Court professed to follow the Inkeiri case (supra) but took no notice of what Corrie, Acting Chief Justice, said as to evidence of possession being one of the matters to be considered by a Land Court in determining questions of ownership. The case cannot be cited, as it sometimes is, to justify the exclusion of evidence of possession in disputes as to the ownership of land.

7. My decision in the present appeal is based on the particular facts of the case, but I wish to refer to a passage from the judgment of this Court in the case of Hajla and others v. Sayegh and others (Land Appeal No. 56 of 1935)."

> "In deciding an issue as to the title of a claimant to land a Court is bound to consider all relevant evidence placed before it, whether that evidence be oral or documentary. If oral evidence is admissible as to possession and boundaries, then such evidence has to be weighed in conjunction with the documentary evidence. A court is at liberty to refuse to rely on it, but if it regards it as convincing it is not entitled to disregard it merely because it is oral.

8. In my opinion the judgment of the Land Court should be set aside and the action remitted to it to hear such evidence as the appellants may adduce in support of their claim, and if necessary, such evidence as the respondents may adduce in rebuttal and to decide the dispute in accordance with the law. Costs of this appeal to include LP.3. advocates'fees to abide the event.

Delivered this 15th day of December, 1937.

Senior Puisne Judge.

HIGH COURT NO. 67/37.

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

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

In the application of:—

Salim Daoud Za'rour — Petitioner.

v.

1. Chief Execution Officer, Jaffa
2. Farah Hanna Dabeet
3. Sultaneh Mina Shnoudi — Respondents.

Sale in execution of dwelling-house — Origin of judgment debt immaterial — When dwelling-house regarded as such — Effect of attempt by judgment debtor to sell his dwelling-house — Setting aside part of proceeds of sale for provision of another dwelling-house.

Execution Law, art. 90.

1. Once Execution Law is applied, its provisions must be in force with respect of debt for which execution is sought, irrespective of how that debt may have arisen.

2. What the Chief Execution Officer has to direct his attention to when applying art. 90 of Execution Law is whether debtor's dwelling-house is suitable for his position or is too large or too luxurious.

3. House occupied by judgment debtor at the time of execution proceedings must be regarded as his dwelling-house, notwithstanding fact that it had not been occupied by him before debt arose.

4. Attempt made by judgment debtor to sell his dwelling-house does not deprive him of his privilege under art. 90 of Execution Law.

5. If after having satisfied himself that judgment-debtor's house not a suitable dwelling-house for his position Chief Execution Officer orders its sale, he should use his discretion as to what proportion of proceeds of sale should be set apart to purchase a suitable dwelling-house for judgment-debtor.

Negib Germanus for the Petitioner.
Peter Malak for the Second and Third Respondents.

Application for an order to issue to the first Respondent directing him to show cause why his Order dated 27th February, 1937, in Execution File No. 308/36, Ramleh, should not be set aside.

JUDGMENT.

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

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

3. With regard to the second ground, the procedure laid down in Article 90 has not been followed. A debtor's dwelling-house is exempt from sale if it is suitable for his position, and it is the duty of the Chief Execution Officer to decide what dwelling-house is suitable for the debtor's position. If the dwelling-house is so suitable, it is exempt from being sold in execution if it is of such a nature that, in the opinion of the Chief Execution Officer it is too large or too luxurious for a person in the position of the judgment debtor, then it may be sold in execution, but the practice is that in such a case a part of the sum realised has to be set aside to purchase a suitable dwelling-house for the judgment debtor.

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

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

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

Delivered this 29th day of January, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 239/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Mannin g,J.), Greene, J. and Abdul Hadi, J.

In the appeal of:—

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

v.

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

Non-existence of documents of title to land — Ownership of land inferred from fact of possession — Land Appeal 13/34.

When neither party has a registered title evidence of possession may be submitted and ownership may be inferred from fact of possession.

Hanna Atalla for Appellants.

Cattan for Respondents.

Appeal from judgment of Land Court, Nablus, dated 13.11.1937.

JUDGMENT.

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

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

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

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

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

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

Delivered this 24th day of January, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 244/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

1. Saleemeh Sheikh Mohammad Soufan
2. Khadijeh Sheikh Mohammad Soufan Appellants.

v.

Hussein Mohammad el Duka Respondent.

Dispute as to ownership of land — Absence of any registered title or title deed — Evidence of possession in support of claim of ownership.

Where neither party has a registered title or title deed to the land in dispute, Land Court should go into facts of possession and hear evidence which Plaintiff may adduce in support of his claim of ownership and which Defendant may adduce in rebuttal.

Bushnak for Appellants.
Seifi for Respondent.

Appeal from judgment of Land Court, Nablus, dated 1.12.1937.

JUDGMENT.

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

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

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

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

Delivered this 26th day of January, 1938.

British Puisne Judge.

CRIMINAL APPEAL NO. 158/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

1. Khalid Makhlouf
2. Nafeh Rashid Haj Mahmoud Appellants.

v.

Attorney General Respondent.

Construction of Criminal Code — Expressions sufficient to convey threats — Art. 290 of Criminal Code Ordinance.

Criminal Law must be construed strictly yet with common-sense and reasonable; expressions like "beware — do not delay payment" followed by signature "Black Hand Society" in a letter containing unlawful demand of money must be deemed sufficient threats within scope of art. 290 of Criminal Code Ordinance.

Sanders for 1st Appellant.
2nd Appellant in person.
Waary for Respondent.

Appeal from judgment of District Court, Haifa, dated 15.12.1937, whereby each of the Appellants was sentenced to 10 years imprisonment under Section 290 of the Criminal Code Ordinance.

JUDGMENT.

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

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

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

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

Whilst it is true that the Criminal Law must be construed strictly, yet it should also be construed with common-sense and reasonable. As we have said, expressions used in the letter can only mean one thing to any reasonable man, and that is threats of injury if the demand is not complied with.

With regard to the other point raised, that it is not sufficient to write the letter but the offender must cause a person to receive it, we are of

the opinion that the writting of the letter by the first appellant at the dictation of the second appellant then delivered it by the dictator and another man to the addressee must be deemed to be a conspiracy between the three and the writer is therefore equally guilty. Further the first appellant admitted having written other letters of a similar nature.

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

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

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

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

Delivered this 17th day of January, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 221/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Hasharon Kvutsat Poalim Leityashvut Shitufit Bearavon Mugbal, Ramat David — Appellants.

v.

The General Manager, Palestine Railways, Railway Administration, Haifa — Respondents.

Damage caused through negligence of Railway Administration — Crops destroyed by fire — Government Railways Ordinance, sec. 30(2) — Smith v. Landon South Western Railways Co. L.R. 6 C.P. (1870-1) p. 14.

Railway Administration responsible for damage caused by fire due to their negligence in allowing inflammable material to remain on their own property immediately adjoining Railway Line.

Salomon for Appellants.

Salant, J.G.A. for Respondents.

Appeal from the judgment of the District Court, Haifa, dated 14. 11.1937.

JUDGMENT.

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

On the findings of fact made by the Court below, that Court should have entered judgment for the Appellants. We have no doubt that the Defendants were negligent in allowing inflammable material to remain on their property immediately adjoining the Railway Line, and on the authority of the case which has been cited to us by Mr. Salomon — Smith v. London South Western Railway Co., L.R. 6 C.P. (1870-71) p. 14, a very strong case indeed, we find that the Palestine Railways Administration are responsible for the damage caused to the Appellants. The respondents cannot avail themselves of the provision of Sec. 30(2) of the Government Railways Ordinance (Cap. 44) since the fire was due to their negligence in allowing this inflammable material to remain in their own property, and whether the fire arose through sparks emitted by the locomotive or not is in these circumstances immaterial.

Since the value of the crops destroyed is not disputed, we enter judgment in favour of the Appellants against the Respondents for the amount claimed, namely LP. 311,650 together with interest from date of action, i. e. October, 1936, with costs here and below to include LP. 5.— advocate's fees.

Delivered this 18th day of January, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 246/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

Raphael Palstnik — Appellant.

v.

1. Itzhaq Huri
2. Joseph Azar
3. Baruch Azar Shamai
4. Abraham Azar Shamai — Respondents.

Interpretation of contract — Undertaking in one contract to sell 2 plots of land — Divisibility of contract — Refund of money paid owing to misrepresentation.

1. Contract is divisible and may in part be rescinded, if made for sale of two plots of land of which one only is actually owned by vendor, while undertaking with regard to other is a mere misrepresentation and therefore void.

2. Party to contract entitled to refund of money which he paid to other party owing to misrepresentation by latter.

Felman for Appellant.
Aizen for Respondents.

Appeal from judgment of District Court sitting at Tel Aviv, dated 10.11.1937.

JUDGMENT.

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

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

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

After the contract had been entered into, it was discovered that the Municipality of Tel Aviv held no land whatever on behalf of the Respondents. Consequently no rights as regards that land were transferred to the Appellant, and the Appellant took action in the District Court of Tel Aviv for the recovery of the price of the land in category "B", namely, LP. 786.896 mils and also for LP. 750.— liquidated damages under the terms of the agreement. The District Court rejected the claim of the Appellant on the ground that, by asking the Municipality of Tel Aviv to transfer its rights in the land to the Appellant, the Respondents had fulfilled the necessary condition of the contract. We are unable to understand how the District Court arrived at this decision, because if the Municipalitiy of Tel Aviv had no rights in the land in category "B", any order to them by the Respondents with respect to that land would be merely a barren order and of no avail to the Appellant.

The proper way to look at the issues between the parties is to consider clause 1 of the agreement as divisible into two portions: the first portion containing a declaration by the Respondents that certain land belonged

to them under an assignment and was held by the Municipality of Tel Aviv on their behalf; and the second portion consisting of an undertaking by the Respondents to order the Municipality to transfer that land to the Appellant. If, as happens to be the case, the declaration in the first portion was a misrepresentation, then the second portion cannot create any obligation and that part of clause 1 becomes merely a void agreement. This being so, the Appellant was clearly entitled to a refund of the money which he had paid owing to the misrepresentation of the Respondents.

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

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

Delivered this twenty-seventh day of January, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 218/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Mohammad Taher Nehd Salah
Fatmeh Taher Nehd Salah — Appellants.

v.

Rabah Hassanein Fakhr el Nishasi — Respondent.

Land Settlement — Admission in Court — Equitable rights to land — Land (Settlement of Title) Ordinance.

Settlement Officer right in giving effect to equitable rights to land acquired by virtue of admission and compromise which was made a judgment of Land Court.

Nasri Nasr for Appellants.
Kehaty for Respondent.

Appeal from judgment of Land Court, Nablus, sitting in its appellate capacity, dated 1.11.1937.

JUDGMENT.

This is an appeal from the Land Court, Nablus, which reversed the decision of the Settlement Officer in the Tulkarem area. Before the Settlement Officer the Appellants claimed ownership of one half share out of 13 shares in a certain land. They claimed this half share by virtue of a judgment which had been delivered by the Land Court, Samaria, in 1928. In a case before that Land Court the father of the present Appellants and the present Reespondent were parties and the judgment was given by the Land Court as a result of a compromise. In the judgment it is declared that the present Respondent admitted the ownership of the father of the Appellants to the land which is now claimed by the Appellants and the Respondents with others undertook to transfer this land to the father of the Appellants within two months and to pay all damages caused by delay in registration. It should be unnecessary to say that this judgment is binding upon the parties to this appeal and it seems futile that the present Resepondent should contest the claim of the Appellants. Respondent, however, relies on two matters to support his opposition to the claim. The first is that in the judgment of the Land Court, Samaria, there was an undertaking to pay damages for any delay in registration. If this clause may be construed to mean an agreement to pay damages for a failure to transfer we are of the opinion that the judgment gave to the present Appellants a choise of two remedies; firstly, a claim to the ownership of the land, secondly, a claim for damages; and they were entitled to resort to whichever remedy they chose. Under the Land (Settlement of Title) Ordinance, a Settlement Officer is bound to give effect to equitable rights to land, and there can scarcely be a clearer case than the present, in which the appellants had acquired an equitable title to the land by virtue of the admission of the Respondent that they are the owners thereof, and by virtue of the compromise which was made a judgment of the Land Court. It is noteworthy also that in December, 1932, the present Respondent sought to have the title of the present Appellants registered in the Land Registry. This constitutes a further

admission of the Appellants' title and an admission that he himself had no title.

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

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

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

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

6. The judgment of the Land Court must be set aside and the judgment of the Settlement Officer dated 5.4.1937 (Case 37 and 39/Kafr Saba) restored. The Appellants will pay the costs of this appeal to include LP. 5.— advocate's fees.

Delivered this 13th day of January, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 222/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

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

Appellants.

v.

Eliahu Basrawi

Respondent.

Aval on promissory note — First endorser also giver of aval — Guarantor freed if party guaranteed discharged — Construction of sec. 57(3) of Bills of Exchange Ordinance.

Bills of Exchange Ord. sec. 57, 90(2).

1. An aval or guaranty of payment on a promissory note, in default of a statement on whose account it was giwen, is deemed to be given for first endorser, if there is any, even where latter and giver of aval are same person.

2. Giver of aval guarantying himself is in same position as any other person giving an aval guarantying him.

3. Giver of aval not under greater liability than party he guarantees; if patty guaranteed is discharged from liability for any reason, giver of aval is also discharged'

M. Levanon for 1-5 Appellants.

Appellant No. 6 in person and on behalf of Nos. 7 and 8.

Dr. Amdour for Respondent.

Appeal from judgment of District Court, Jerusalem, in its appellate capacity, dated 28.10.1937, confirming the judgment of the Magistrate, Jerusalem, dated 21.9.1937.

JUDGMENT.

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

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

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

One would have thought that the original proceedings before the Magistrate could have been straight forward. The Plaintiff should have put in his note, proved the signature, if not admitted and proved the facts entitling him to call upon the giver of the aval. According to the Magistrate's judgment the Defendants confined themselves to a counter-claim, which we now know was a claim for the return of the note based on the allegation that it was handed to the Plaintiff for collection. It may be noted that this allegation clearly involved a defence also, i.e. that the Plaintiff was not the holder or assignee. The Defendants also apparently wished to set up the defence of lack of consideration. These matters, and any other defences, should have been put forward, investigated and decided. Failing this, the Magistrate had recourse to Article 1746 of the Mejelle, but how that provision could assist in deciding the questions of fact and Law involved I find it difficult to understand.

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

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

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

It is clear that the object of the aval is to guarantee payment by a

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

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

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

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

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

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

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

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

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

The first question for us is, therefore, is a party to a promissory note or bill, signing an aval guarantying himself, in any different position

to any other person or party giving an aval guarantying him? I do not think that he is.

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

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

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

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

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

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

In my opinion this appeal should be allowed and judgment entered for the Defendants, with costs. Advocate's fees LP. 10.

Delivered this 10th day of February, 1938.

Chief Justice.

CIVIL APPEAL NO. 217/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J. and Khayat, J.

In the appeal of:—

Shichun Workmen's Housing Company Ltd.

Appellants.
(Third Party).

v.

1. Hassan Ali Abu Dyouk
2. Mustafa Ali Abu Dyouk — First Respondents. (Plaintiffs)

and

Government of Palestine — Second Respondents. (Defendants)

Admission as Third Party to action — Enforceable legal right — Civil Procedure Code, art 117 — *Mejelle, art* 1635.

To be admitted as Third Party in an action applicant must show he has some legal right which can be enforced against one or other of parties. Unless question of collusion between parties to action arises, it is not sufficient that applicant has rights in respect of property in dispute or that he thinks he can present case better than one of parties.

B. Joseph and *Smoira* for Appellants.
Subhi Ayubi and *Aziz Shedadeh* for First Respondents.
E. Salant J.G.A. for Second Respondents.

Appeal from the order of Land Court, Jaffa, dated 16.11.1937, whereby the application by the Appellants to be joined as a third party was refused by that Court.

JUDGMENT.

In this case the present Appellants applied in the Land Court of Jaffa to be admitted as third parties in a case brought by the first Respondents against the Second Respondents in which the First Respondents claimed ownership of certain lands, which the Second Respondents alleged were property belonging to the Government of Palestine. The application of the Appellants was based on the ground that they were in possession of the lands in dispute by virtue of a lease granted to them by the second Respondents and that, therefore, they were interested parties and by Article 117 of the Civil Procedure Code were entitled to be joined as Third Parties in order to protect their interests under the lease.

On the hearing of this application the Judges of the Land Court were divided in opinion — the learned President thought that in order to be admitted as a Third Party an applicant must prove that he had a cause of action arising out of the issue before the Court against one or other of the parties, or a right of recourse against one of them — which it is admitted the present applicants had not got. On the other hand Judge Aziz Bey Daoudi was of opinion that the Appellants should be admitted since they had spent large sums of money on the

land held by them on lease and that they had rights in respect of the property under the lease granted by the second Respondents; also that by virtue of Article 1635 of the Mejelle, the proper persons to be sued were the persons having actual possession of the land in dispute. Owing to the difference in opinion the application of the Appellants was dismissed and they have now appealed to this Court.

We are in entire agreement with the judgment of the learned President for the reasons given by him. We think that an applicant in order to be admitted as a Third Party in an action must show that he has some right which can be enforced against one or other of the parties to the original dispute.

In the present case the dispute is regarding the ownership of the land — the Appellants are merely lessees and have made no claims to ownership — they could have no claim against the First Respondents, and any claim which they might have had against the Second Respondents they have waived under the terms of the lease from the latter. They must, therefore, be deemed to have had full notice that their lessors' title was in dispute. No question of collusion between the First and Second Respondents arises and is not even suggested. The Apellants have no legal rights which they can enforce against either set of Respondents and having no claims, they can in no way affect the issue to be decided in the main dispute. Their real reason for intervention would seem to be that they think that they can present the case of the Second Respondents better than the latter can do it themselves. This is not, in our opinion, a sufficient reason; If they were to be admitted, then all their sub-tenants, who may number dozens, could with equal justice ask to be joined, and the result, in the words of the learned President, would be tantamount to creating a state of affairs resulting in chaos and confusion and would certainly not simplify the determination of the dispute.

Being of this opinion on the second point raised in the appeal, which settles the case, we do not think that it is necessary to deal with the first point raised, namely the necessity or otherwise of calling in a third Judge in the event of a disagreement in a court of two Judges.

The 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. 238/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Nifjeh el Mousa el Khalil — Appellant.

v.

1. Ahmad Mohammad
2. Mahmoud Mohammad — Respondents.

Non-existence of documents of title to land — Ownership of land in dispute inferred from fact of possession — Land Code, Art. 78 — *Land (Settlement of Title) Ordinance, sec.* 51 — *L.A.* 13/34, *L.A.* 195/37 (*Ct. L. R. Vol. III p.* 41).

If in an action regarding ownership of land neither party has any registered title or any document of title to land in dispute, they may submit evidence of possession and ask Court to infer title from fact of possession.

Ibrahim Sa'adeh for Appellant.
Abdel Quader Shibli for Respondents.

Appeal from judgment of Land Court, Nablus, dated 13.11. 1937.

JUDGMENT.

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

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

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

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

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

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

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

The issue as to res judicata was not discussed by the Court below and we say nothing with regard to it. In the circumstances the judgment of the Land Court must be set aside and the case remitted for a new trial.

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

Delivered this 24th day of January, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 252/37.

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:—

Zwi Feinberg — Appellant.

v.

Jacob Botkovsky — Respondent.

Effect of signing note as guarantor for maker — Addition of words above signature on note — Ordinary guarantor and guarantor pour aval — Joint and several liability of guarantor and maker. Bills of Exchange Ordinance, sec. 57(3) *and* 64.

1. Person admitting having signed promissory note as a guarantor for maker prior to its delivery to first payee cannot avail himself of defence that his intention was to be an endorser and not a guarantor and that words indicating that he is guarantor pour aval have been added without his knowledge and consent.

2. No distinction in Palestinian Law between an ordinary guarantor of a note and a guarantor pour aval; guarantor for maker jointly and severally liable with latter.

3. Addition of words above signature of guarantor indicating that it is a guarantee pour aval is not a material alteration in meaning of sec. 64 of Bills of Exchange Ordinance.

Pelly for Appellant.

Agranat for Respondent.

Appeal from judgment of District Court, Haifa, sitting in its apellate capacity, dated 26.7.1937.

JUDGMENT.

Frumkin, J.

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

2. The Appellant admits that he signed this note as a guarantor for the maker upon the latters request but alleges that his intention was to be a guarantor as an endorser and not a guarantor pour aval and

that the rubber stamp was affixed after his signature and without his knowledge and consent.

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

4. The Appellant succeeded in the Magistrate's Court but failed in the District Court and obtained leave to appeal to this Court on two points of law. We are mainly concerned with the point whether or not the addition of the words indicated an aval above his signature constitutes a material alteration of the note or not.

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

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

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

Delivered this day of 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 164/37.

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 Labour Council of Tel Aviv and Jaffa Applicants.

v.

David Illgovsky Respondent.

Leave to appeal under Arbitration Ordinance — Interpretation of

Law — Arbitration Ordinance, sec. 15(2) *and* (3) *— Magistrates' Courts Jurisdiction Ordinance* 1935, *sec.* 6.

1. If application was made to District Court for leave to appeal under Arbitration Ordinance and was refused, application for leave to appeal after such refusal can be made to Supreme Court sitting as a Court of Appeal.

2. District Court may grant leave to appeal (to Supreme Court) not only from an order made by it under sec. 15(2) of Arbitration Ordinance but also from a decision given by it under sec. 15(3) of that Ordinance on an appeal from an order of a Magistrate's Court.

3. When there is an ambiguity raising a doubt as to whether a certain provision in a section (or sub-section) in an amended Ordinance applies to whole or part only of that section (or sub-section), Court may look back to original Ordinance and its amendments to ascertain intention of legislator.

(*See Ct. L. R. Vol. II p.* 194).

Krongold for Appellants.
Pevsner for Respondents.

Application for leave to appeal from judgment of District Court, Jaffa, sitting at Tel-Aviv, in its appellate capacity, dated 27th July, 1937, refusing to grant leave to appeal from its judgment dated the 31st May, 1937, setting aside the judgment of the Chief Magistrate.

JUDGMENT.

This is an application for leave to appeal to this Court from a decision of the District Court of Jaffa, sitting at Tel-Aviv which involves the interpretation of rather an interesting provision under the Arbitration Ordinance. The particular Section concerned is Section 15(3) which lays down as follows:—

> "An appeal shall lie from an order of a magistrate's court to the district court of the District in which the magistrate's court is situated, and the decision of the district court shall be final; no appeal. Our decision is final under Section 15(3). The appli- of the court or of the Court of Appeal."

In this case the decision was given originally by a magistrate; there was an appeal to the District Court which reversed the Magistrate's decision; an application was then made to the District Court for leave to appeal to this Court and the District Court held:—

> "We hold that there is no power in this Court to give leave to appeal' Our decision is final under Section 15(3). The application for leave to appeal is dismissed."

Now it seems to me that in the ordinary meaning of the words the provisions of the sub-section either mean the decision of the District Court on an appeal from a Magistrate is literally final, and the latter part

applies to an order made by the District Court under sub-section 2, or it is final unless and until leave to appeal is granted (cf. Section 6 Magistrate's Courts Jurisdiction Ordinance, 1935.

It is clear from the marginal note of the Revised Edition of the Statutes that this sub-section (Sub-section 3) came into existence in its present form by an amendment of the original ordinance. When there is an ambiguity of this sort, the Court may look back to the original ordinance and its amendments to ascertain the intention of the legislature. In the original provision in the 1926 Ordinance, which there appears as Section 15(2), we find the words "no appeal shall lie except by leave of the Court, or by leave of the Court of Appeal". In 1928, when the Ordinance was amended in order to extend its provisions to Magistrate's Courts, these particular words were transposed from their original place and put at the end of the new sub-section which applies to Magistrate's Courts, and the words — "from the order of a district court" were inserted between the word "lie" and the word "except". In my view the effect of this change was to make these words "no appeal shall lie from the order of a district court, except by leave of the court or of the Court of Appeal" applicable both to Sub-section (2) and Sub-section (3).

It is argued that a distinction can be drawn between these two sub-sections, in that in Sub-section (2) there is no mention of the word "decision", whereas in sub-section (3) the word "decision" occurs and in the last part of that sub-section the word "order" occurs. In my view, for this purpose, there is no distinction between the words "decision" and "order", and this argument therefore does not offer (sic! alter, affect?) the view I have expressed.

In my opinion, leave to appeal to this Court should be granted, and as my brother Greene agrees with me, it will be granted.

Delivered this 6th day of October, 1937.

Chief Justice.

I have had the advantage of discussing this point with His Honour the learned Chief Justice, and of going back to the history of this sub-section, and I agree with His Honour's decision.

British Puisne Judge.

CRIMINAL APPEAL NO. 5/38.

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 Appeal of:—
Said Issa Hazboun of Bethlehem — Appellant.

v.

The Attorney General — Respondent.

Irregularities not causing injustice — Sentence exceeding maximum — Criminal Procedure (Trial Upon Information) Ordinance, sec. 65, 72.

Court of appeal, if satisfied that irregularities at trial resulted in no injustice to appellant except that by an oversight appearing to be due to a clerical mistake penalty imposed exceeds maximum prescribed by law will dismiss appeal but reduce, sentence to one not exceeding maximum.

Moghannam for Appellant.
Crown Counsel for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 11.1.38, whereby the appellant was convicted of being in possession of firearms contrary to Section 36(2)(a) and(f) of the Firearms Ordinance, and Section 23 of the Criminal Code Ordinance, 1936.

JUDGMENT.

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

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

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

Delivered this 2nd day of February, 1938.

Chief Justice.

CRIMINAL APPEAL NO. 13/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the Appeal of:—
Ahmed Nimr Said el Nijem — Appellant.

v.

The Attorney General — Respondent.

Unlawful sexual intercourse — Conviction for offence not set out in information.

Criminal Code Ordinance, sec. 151(1)(a), 152(1)(c).

Criminal Procedure (Trial Upon Information) Ordinance, sec. 52.

Court cannot convict accused of an offence not set out in information, if such offence not covered by evidence in case and by findings of facts necessary to establish offence charged.

Hassan Hawa for Appellant.

Hogan, Belle for Respondent.

Appeal from judgment of District Court, Haifa, dated 10.1.1938, whereby Appellant was sentenced to 4 years imprisonment under sec. 152 (1)(c) of Crim. Code Ordinance, 1936.

JUDGMENT.

In this case the appellant was charged before the District Court of Haifa with having had intercourse with a female under the age of 16 contrary to section 152(1)(c) of the Criminal Code Ordinance. The Court having heard the evidence came to the conclustion that the female concerned was over the age of 16 but found as a fact that the intercourse had been against her will and accordingly proceeded to convict the appellant of an offence under Section 152(1)(a) of the Criminal Code Ordinance and sentenced him to imprisonment for 4 years.

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

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

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

3. In this case the necessary findings of fact to establish the offence charged were firstly that the appellant had had intercourse with this girl, and secondly that this girl was under the age of 16. These findings of facts did not cover a charge under section 151(1)(a) because in a charge under that section the question of whether a girl was under the

age of 16 or not would be entirely immaterial, and a further finding of fact as to lack of consent would be necessary. We therefore decide that it was not open to the Court below to convict the appellant on a charge under Sec. 151(1)(a).

4. This disposes of the appeal but we wish to say that on the facts given in evidence before the Court below we think that the verdict was not a reasonable one and could not be supported even if the original charge had been one under Section 151(1)(a).

The appeal is allowed and the conviction and sentence quashed.

Delivered this 7th day of February, 1938.

Senior Puisne Judge.

HIGH COURT NO. 4/38.

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

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

In the case of:—

Amneh Mohammad Abu Leila — Petitioner.

v.

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

Law applicable to sale of mortgaged property — President of District Court exercising functions of Chief Execution Officer — Execution Law — Land Transfer Ordinance, sec. 14.

1. President of District Court acting under sec. 14 of Land Transfer Ordinance is not a Court but is exercising functions of Chief Execution Officer.

2. Execution Law must be applied when President of District Court is dealing with an application for sale of immovable property in satisfaction of mortgage.

3. Supreme Court will not be prepared to interfere with practice existing in Palestine since occupation and sanctioned as correct by a number of decisions of Supreme Court sitting as High Court of Justice.

George Elia for Petitioner.

No appearance for 1st Respondent.

Elias Nasser for 2nd Respondent.

Application for an order directed to the first Respondent to show cause why he should not apply the Execution Law in the proceedings

in Execution File No. 2992/35 Jaffa for the sale of immovable property under a mortgage.

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

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

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

Delivered this 15th day of February, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 215/37.

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. S. Gertel
2. L. L. Gluckman
3. M. Litwinsky — Appellants.

v.

Gabriel Chelouche — Respondent.

Signing a contract for a Committee — Personal liability of representative of association — Oral evidence against written contract — Substantial variation of contract, mere forbearance as regards mode of performance.

Halsbury Vol. VII p.343 — Ottoman Civil Procedure Code, art. 80, 81, — Morris v. Baron 1918 *A.C.* 1, *p.* 30.

1. If person representing a voluntary association which was formed for a temporary purpose and was not a legal entity signs a contract for that body and circumstances show that he was not a mere agent but was actively concerned as principle rendering himself personally liable on contract to other party, he can be sued for whole sum due, not merely for a proportionate part of it; also not necessary to make him defendant in a representative action.

2. Oral evidence admissible against written contract to prove not a variation of substance but a mere forbearance to insist on some particular term which is merely a mode of performance, no matter whether such forbearance has actually been agreed to orally or has been exercised by tacit consent of parties.

B. Joseph, Horovitz for Appellants.

Eliash for Respondent.

Appeal from judgment of District Court, sitting in Tel-Aviv, dated 26.7.1937, in Civil Case No. 429/36.

JUDGMENT.

Senior Puisne Judge.

This appeal is concerned with the making of a road from Tel-Litwinsky to the main road between Jaffa and Petah-Tiqva. A committee was formed to negotiate for the construction of the road by a competent Engineer. It was known as Hashachar Road Committee and for all

relevant purposes connected with the negotiations, it was represented by the three appellants. They selected the respondent as the Engineer to construct the road and a written contract was drawn up for the purpose. In November 1936 the respondent alleging that the road had been completed and that there was a sum still due to him for its construction, took action against the appellant for LP.1,824.709 mils. The District Court of Jaffa rejected part of his claim but entered judgment in his favour for 1062.260 mils.

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

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

The District Court based its decision on the fact that the relevant documents did not suggest that there were any other members of the Committee besides the three appellants. This does not appear to be correct. The contract itself showed that there was a Committee and that it was merely represented by the appellants. The true principle which ought to determine the issue is whether the appellants made themselves personally liable to pay to the respondent whatever might be found due to him under the contract. I think that an examination of the relevant documents shows that they did. In the first place, they were the parties who gave the order to the respondent to construct the

road. The contract and the correspondence are signed by them. Secondly, there is a memorandum attached to the contract as follows: "This contract shall be binding on the employers only if they will succeed to collect all the money required for the execution of this road from the persons interested in the said road and this will be ascertained after three weeks from to-day". This memorandum is initialled by the three appellants. Then on the 18th December, 1934, the Committee wrote to the respondent informing him that "we have collected all the monies and pledges for the Hashachar Road, the contract between us with all its details in connection with the construction of the road will come into force". This letter was signed "Hashachar Road Committee" and immediately below these words appeared the signatures of the three appellants.

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

Mr. Horovitz's second ground of appeal is put in this way. Clause 24 of the contract lays it down that payments are to be made on cer-

tificates signed by the Engineer and clause 45 says that engineer means the District Engineer of the Public Works Department in Jaffa. The present payment demanded by the respondent has no certificate of this engineer to support it. Mr. Horovitz says a certificate is a condition precedent to any payment to the respondent and that therefore the present claim must fail.

On the other hand Mr. Eliash for the respondent points out that all previous payments to the respondent were made on the certificate of Mr. Okrainitz, the engineer of the appellants. He says that this indicates a mutual agreement between the parties that Mr. Okrainitz, and not the Public Works Engineer should be the engineer to certify the payments. To this Mr. Horovitz replies that clause 45 of the contract provides that all payments before the final payment are merely payments on account and may be reviewed before the final payment and that the appellants are entitled to insist on the certificate of the Engineer as provided for in the contract. The contention of Mr. Eliash prevailed with the Court below. From an examination of the evidence it is easy to see what happened. The parties adopted the standard form of a Public Works Department Contract and in such contracts a clause such as clause 45 always appear. From the course of business it is clear that it was never the intention of the Parties that the Public Works Engineer should be the Eigineer to certify the payments. Mr. Noble who was the Engineer in question, was never consulted by either party as to his consent to act as certifying Engineer; he never acted as such. Nevertheless the contract is there, agreed to by both parties; but I am quite satisfied that there was an understanding between them that the Engineer need not be the Public Works Engineer but that the necessary certification might be done by the appellants' Engineer. The inference as to this understanding arises from the evidence and Mr. Horovitz has contended that evidence leading directly or indirectly to this inference was inadmissible as contradicting a very definite clause in an agreement which had been reduced into writing. In the case Morris vs. Baron 1918 A. C. 1, at page 30, Lord Atkinson says in his speech that a distinction must be drawn between the oral variation of a contract required by law to be in writing and cases "in which one party at the request of an for the convenience of the others forbears to perform the contract in some particular respect strictly according to its letter". He goes on to say that "in such a case the contract is not varied at all but the mode and manner of its performance is, for the reasons mentioned, altered.

The Ottoman Law has strict rules forbidding the admission of oral evidence to contradict documents which by law or custom are reduced

to writing, but the same principle as suggested by Lord Atkinson (supra) must apply. The agreement must be examined to see whether the oral variation is in reality a variation of substance or whether it is a mere voluntary forbearance to insist on some particular term which is merely a mode of performance. I do not think that any distinction is to be drawn between a forbearance which has actually been agreed to orally and one which it is clear has been exercised by the tacit consent of the parties. The principle is of even greater effect in a case such as the present where forbearance has been due to a mutual mistake in the drawing up of the contract. On this view of the matter, I find myself in agreement with the judgment of the Court below. There was a mutual forbearance by both parties to insist on the certificate being given by the Public Works Engineer and an agreement that it might be given by the appellants' Engineer. Evidence was rightly admitted to prove this. It is, therefore, unnecessary to consider the authorities cited by Mr. Horovitz from Hudson on Building contracts for the purpose of showing the necessity of a final certificate before any payment can be made.

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

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

is, however, clear from the evidence is that the work of digging the ditches was an extra (see clause 3 of the general specification) and was indispensably necessary for the preservation of the road. On this ground, I think that the decision of the District Court awarding the respondent the cost of these ditches should not be interfered with.

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

Delivered this 17th day of February, 1938.

Senior Puisne Judge.

I concur

British Puisne Judge.

I concur

Puisne Judge.

CIVIL APPEAL NO. 247/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

Mohammad Jabr Abu Hiljeh — Appellant.

v.

1. Taha Suleiman Abu Taha
2. Ali Suleiman Abu Taha
3. Habsa Ismail Abu Hiljeh — Respondents.

Inspection of property — Power of Chief Justice to make Rules — Default judgment against one out of several defendants — Evidence on Commission Rules, Rule 4 and 5 — Ottoman Civil Procedure Code, Art. 63 — C.A. 130/36 (Ct. L. R. Vol. II p. 166) — Poyser v. Minors 7 Q.B. Div. 329.

1. Chief Justice has no power to make rules altering substantive law.

2. Art. 63 of Ottoman Civil Procedure Code (dealing with inspections ordered by Court and providing that members of Court shall be appointed as deputy to make inspection) merely a rule of practice and procedure; Evidence on Commission Rules made by Chief Justice by which said article has been repealed not ultra vires.

3. In an action concerning a claim to land (or, semble, any other property) in which there are several defendants no

judgment determining rights to property in dispute can be given, even if one of Defendants fails to appear, until facts of case are investigated.

Goitein for Appellant.
1st Respondent in person.
2nd Respondent in person.
3rd Respondent, no appearance, served.

Appeal from judgment of Land Court, Nablus, dated 27.11.1937.

JUDGMENT.

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

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

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

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

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

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

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

Delivered this 17th day of February, 1936.

Senior Puisne Judge.

I concur

British Puisne Judge.

I concur

Puisne Judge.

CRIMINAL APPEAL NO. 145/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Hassan Saleh Hammad — Appellant.

v.

The Attorney General — Respondent.

Leave to appeal from judgment in criminal case remitted to District Court upon election by accused — Period of imprisonment in default of payment of fine — Jurisdiction of District Court in criminal matters — Maximum penalty.

1. District Court has power under sec. 73(1) of Criminal Procedure (Trial Upon Information) Ordinance to grant leave to Appeal to Supreme Court from a judgment in a criminal case remitted to District Court under provisions of sec. 3 of Magistrates' Courts Jurisdiction Ordinance.

2. If Court convicting a person for an offence imposes a fine and, in default of payment, imprisonment-period of imprisonment should not exceed maximum provided in sec. 42(2) of Criminal Code Ordinance and also not that prescribed for such offence.

3. If District Court convicted and sentenced a person in a criminal case which was wrongly remitted to it under sec. 3 of Magistrates' Courts Jurisdiction Ordinance conviction and sentence will, on appeal, be quashed.

Cattan for Appellant.

Crown Counsel (*Belle*) for Respondent.

Appeal from judgment of District Court, Jaffa, dated 23.11.1937, whereby Appellant was convicted of:—

(1) Cruelty to animal, contrary to Section 386(1) (b) (c) of the Criminal Code Ordinance, 1936; and

(2) Obstructing and beating a Police Officer in the due execution of his duty, contrary to Section 251(b) of the Criminal Code Ordinance, 1936;

and sentenced to a fine of LP. 5.—, and in default, to one month's imprisonment on the first count, and to six month's imprisonment on the second count, both sentences to run concurrently.

JUDGMENT.

This is an appeal from the District Court of Jaffa, which comes to this Court by leave granted by me. Inter alia — one or two technical points in connection with it influenced me in granting leave, and it is desirable to make them clear.

The first count, that is — cruelty to animals — comes under Section 386 of the Criminal Code Ordinance, and in the absence of a previous conviction, the penalty which can be imposed is imprisonment for one week or a fine of five pounds.

The Appellant elected to be tried by a District Court, and the Magistrates' Courts Jurisdiction Ordinance, 1935, which provides this procedure for a person to elect to go from one Court to another, lays down in Section 3(1) as follows:—

> "(1) Where any person is charged before a magistrate with any offence not triable upon information the maximum penalty for which exceeds imprisonment for fifteen days or a fine of five pounds, such magistrate, if not a British magistrate, shall inform such person that he has a right to be tried by a British Magistrate or by the District Court".

The offence in question is below the minimum laid down under the above sub-section, and I do not think that the Accused had the right to elect to be tried by the District Court, but, in fact, he was tried by the District Court and was given a penalty of five ponuds fine, and in default, to suffer one month's imprisonment. As I have already said, that in the absence of any previous convictions, the maximum is one week's imprisonment or five pounds fine. It may be arguable that if a fine only is imposed first the provisions of Section 42(2) of the Criminal Code Ordinance may come into operation, but I do not think this view should be upheld. The section imposes a maximum imprisonment of one week, in the absence of any previous convictions, and if a person is convicted under that section I do not think the Court should, in default of payment of a fine, impose imprisonment exceeding the maximum laid down, i. e. seven days.

An application was made to the District Court for leave to appeal, and the District Court, in dealing with this matter said:—

> "The present application must have been made under Section 73(1) of the Criminal Procedure (Trial Upon Information) Ordinance, (Cap. 36), as there is no other provision of law under which the application can be based.
>
> Obviously, therefore, this Section 73(1) cannot apply to the case which we have tried, and we are of opinion that leave to appeal must be declined on this ground".

I think this is a misapprehension which was brought about through a change in the numbering of the sections made by Mr. Drayton. The Magistrates' Courts Jurisdiction Ordinance, 1935, by Section 12 thereof, provides as follows:—

> "Notwithstanding anything contained in Section 1 thereof the provisions of Sections 47 to 70 inclusive of the Trial Upon Information Ordinance, 1924-1935, shall apply to summary trials by District Courts of persons whose trial is referred thereto under the provisions of this Ordinance as though they were trials upon information."

The old sections, 47 to 70, as shown in the Gazette, have been renumbered in Mr. Drayton's Edition of the Laws of Palestine, and Section 11 of the Revised Edition of the Laws Ordinance provides:—

> "Whenever in any enactment or in any document of any kind reference is made to any enactment affected by the operation of this Ordinance, the reference shall, where necessary and practicable, be deemed to extend and apply to the corresponding enactment in the revised edition".

We find, therefore, that the old Section 70 is now Section 73 and the District Court was wrong in holding that it had no power to grant leave to appeal.

An allegation was made that an increased penalty had been imposed because the Accused had elected to be tried by the District Court. We have enquired into that matter, and we can find no ground for this allegation.

As regards the first count, we held that the District Court had no jurisdiction, and the conviction on that count will be quashed.

As regards the second count, it has been suggested to us that there was no evidence upon which the Accused could be convicted, but we are satisfied that there was evidence on which the Court below could convict.

It has further been suggested that the sentence under Section 251(b) is excessive. We have considered the facts and probabilities and taking them into consideration we feel justified in reducing the sentence from one of six month's to one of three month's imprisonment to run from today. In so doing we have taken into account that the Accused has already been in prison for some thirty days.

Delivered this 24th day of February, 1938.

Chief Justice.

CIVIL APPEAL NO. 28/38.

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:—

Anis Bustani — Appellant.

v.

Yosef Ben Hanania — Respondent.

Judgment by default as if in presence — Defendant attending at first and defaulting at following hearing — Breach of contract — Penalty and liquidated damages.

1. If defendant who at first hearing raised a preliminary objection was unable because of illness to attend Court at following hearing, whereupon judgment was given against him, appellate Court may remit case to hear both parties and give judgment on merits.

2. In trying case for breach of contract Court must consider whether sum mentioned in contract is a penalty or liquidated damages, and in former case assess damages.

Hassan Hawa for Appellant.
Maman for Respondent.

Appeal from judgment of District Court, Haifa, dated 29.7.1937.

JUDGMENT.

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

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

It has transpired and it is not denied now that the appellant was ill on the 10th March, 1937, and so ill that he was unable to attend Court. He appealed to the District Court of Haifa and his appeal was dismissed. But the District Court did not consider the question as to whether his failure to appear at the Magistrate's Court had a valid excuse to support it. The advocate for the respondent before us has been generous enough to agree that the proper course to take in the circumstances is that the case should be remitted to the Magistrate so that

both sides may be heard and a judgment be given on the merits. It is unncessary for us to consider the other grounds on which the decision of the District Court has been challenged. In remitting the case to the Magistrate we give a direction that he should consider the question as to whether the LP. 50 mentioned in the contract is a penalty or liquidated damages, and if he finds the amount to be a penalty to assess the damages.

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

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

Delivered this 22nd day of February, 1938.

Senior Puisne Judge.

CRIMINAL APPEAL NO. 4/38.

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 appeal of:—

Abdul-Rahim Muhammad Nassar of Yalo village — Appellant.

v.

The Attorney General — Respondent.

Possession of ammunition — Jurisdiction of Civil and Military Courts — Interpretation Ordinance, sec. 5.

Jurisdiction of Civil Courts not ousted by Military Courts established under Defence Ordinance, 1937.

Shafic Asal for Appellant.

Hogan for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 10.1.1938 whereby the appellant was found guilty of being in possession of ammunition contrary to Section 8(a) Emergency Regulations No. 4 (1936) as amended by No. 3(1) of the Emergency Regulations 5(1936) Sec. 5 of the Emergency Regulations No. 8(1936) Sec. 10 Defence Ordinance, 1937, and sentenced to 5 years' imprisonment.

JUDGMENT.

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

It has been said that at the time the accused was tried, namely the 10.1.38, the District Court had no jurisdiction to try him as Military Courts had already been established by a Gazette dated 11th November, 1937, which became operative on the 18th November, 1937.

The substance of the argument is that the accused should have been tried by a Military Court as the Civil Courts had no jurisdiction. As I pointed out to counsel for the accused during the hearing, even if we were to agree with him, the effect of our decision will be to declare the proceedings a nullity and the Appellant will be liable to be tried by a Military Court which can hardly be said to be favourable to the accused owing to the increased penalty to which he would be liable. In our view having regard to sec. 5 of the Interpretation Ordinance, the accused was properly tried by the Civil Court.

The appeal is dismissed and the conviction and sentence affirmed.

Delivered this 2nd day of February, 1938.

Chief Justice.

CIVIL APPEAL NO. 233/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Malka Reisel Elkunin — Appellant.

v.

1. Daniel Elkunin
2. Yusef Elkunin
3. Levy Elkunin
4. Arie Elkunin
5. Kaete Karsinti
6. Mariam Elkunin
7. Hadassah Yurshi
8. Fania Elkunin
9. Kanilla Elkunin
10. Nakhama Elkunin
11. Lina Elkunin
12. Kina Elkunin
13. Braina Kastel
14. Sima Dovinoff Elkunin — Respondents.

Prescription — Cause of action — Legal and equitable rights in land — Claim as against Kushan prior to 1921 *— Land Courts Ordinance,* 1921.

Until Land Courts Ordinance 1921 came into force Courts had no power to entertain claim based on unregistered documents as against Kushan, they could only have regard to legal but not to equitable rights in land, claimant had no remedy and no cause of action; time could not, therefore, prior to that Ordinance, run against him.

Eliash for Appellant.
Gorodisky for Respondents No. 8, 9, 10.
Smoira and *Barshira* for Respondent No. 14.
Respondents No. 11, 12, 13, served by advertisement.
Respondents No. 1-7, served — absent.

Appeal from judgment of Land Court, sitting at Tel-Aviv, dated 17.11.1937.

JUDGMENT

This is an appeal from the Land Court, Tel-Aviv, in which the appellant's claim to be registered as the owner of certain landed property was dismissed. The Land Court came to this decision on the ground that more than 15 years has elapsed from the time when the appellant, the then plaintiff, had the right to bring an action in respect of the claim. Now it is quite clear that in Turkish times the appellant had no cause of action at all because her husband was the owner of the Kushan and no unregistered documents were of any value as against the Kushan, and it was not until 1921 when Land Courts Ordinance came into force that the courts of this country had the power to have regard to equitable rights in land as well as legal rights. Previous to 1921 the appellant had no remedy and therefore had no cause of action. Since 1921, until the date when she brought the claim, less than 15 years had elapsed and therefore we hold that the Land Court was wrong in dismissing the claim. The appeal must be allowed.

As regards respondents No. 1-7 judgment is given in favour of the appellant on the ground that, both in the Court below and here they have admitted the claim and asked that judgment be given in favour of the appellant.

With regard to respondents Nos. 8-14 the case must be remitted to the Land Court in order that they may hear it on its merits.

No costs as against respondents No. 1-7.

As regards respondents 8-14 the appellant will have the costs of this appeal and LP. 5.— advocate's fees.

The provisional attachment granted against Respondents No. 1-7 is confirmed.

Delivered this 28th day of February, 1928.

British Puisne Judge.

CIVIL APPEAL NO. 254/37.

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:—

Joseph Albina — Appellant.

v.

Carolina el Batarse — Respondent.

Taking over a debt (Hawaleh) — Relief to be given by Court.

1. If A takes over and undertakes to pay to B a debt of C, latter is, according to Ottoman Law entirely released from his obligation, and A has no further right of recourse against him.
2. If Court finds on facts proved that claimant was entitled to relief, it need not concern itself with what he was claiming but has to give him that relief.

Mizrahi for Appellant.
George Salah for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 22.12.1937.

JUDGMENT.

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

The appellant undertook to advance to the respondent a sum of LP. 721.896 mils. The respondent on the other hand undertook ta pay to the appellant a sum of LP. 473.024 mils owing by her husband to the appellant and also undertook to effect a mortgage of certain property as security for the difference between those amounts. An action on the contract by the appellant came before the District Court of Jerusalem. The District Court found as a fact that the respondent had committed a breach of her agreement by refusing to mortgage the property which she had agreed to mortgage. The District Court in the course of the proceedings asked the appellant's advocate whether he was claiming damages, and the appellant's advocate replied in the negative. It is quite clear to us that when the appellant's advocate made that reply he was referring to the term "damages" as understood in the Ottoman Law and not the term as more widely understood in English

Law. The District Court need not have concerned itself with what the appellant was claiming. If it found on the facts proved that he was entitled to relief, then it should have given him that relief. When the respondent took over and undertook to pay to the appellant the debt of her husband the effect of that undertaking in accordance with the Ottoman Law and the terms of the contract was that the husband was entirely released from his obligation and that the appellant in consequence had no further right of recourse against him for that debt. The appellant had a right to sue the respondent for the debt and this was what his action was in reality. If the respondent alleged any debt due to her by the appellant or any breach of contract by him she should have counterclaimed.

For these reasons we think that this appeal should be allowed, the judgment of the District Court should be set aside and judgment entered for the appellant for the sum of LP. 473.024 mils with legal interest on the said sum from the date of action, costs in the Court below to include LP. 5.— advocate's fees and costs of this appeal to include LP. 5.— advocate's fees.

Delivered this 23rd day of February, 1938.

Senior Puisne Judge.

CIVIL CASE NO. 157/35.

IN THE DISTRICT COURT OF JERUSALEM.

Before:—R/President (Curry, J.) and Anton Atalla, J.

In the case of:—

Yousef Albina — Plaintiff.

v.

Madam Carolina el Batarse
wife of Issa Mansour el Batarse — Defendant.

Amon for Plaintiff.

George Salah for Defendant.

Nature of claim:—Application for the sum of LP. 473.024 mils balance of "Hawaleh" (Assignment) plus interest.

JUDGMENT.

I think it necessary to relate briefly the history of this case which started some 7 years ago.

Under an agreement entered into between Plaintiff and Defendant and her husband, Defendant agreed in consideration of the Plaintiff

advancing to her a loan of LP. 721.896 to take over a debt of LP. 473. 024 and 2 bills amounting to LP. 105.080 owing by her husband and to mortgage certain of her property for LP. 1300.

It is alleged by Plaintiff that although he was willing and ready to advance the loan of LP. 721.896, Defendant refused to mortgage the property.

Plaintiff brougth an action Civil Case No. 377/30 claiming the sum of LP. 578.104 mils as a debt owing from her under the terms of the above agreement. The Court disagreed and the action was dismissed (C.A. 17/31).

Plaintiff brought a further action claiming the sum of LP. 473.024 mils (the bills having paid in the meantime) alleging that this sum was due by her by way of transfer of debt (Hawaleh). This Court held that the action was chose jugee and dismissed the claim. On appeal (C.A. 206/33) it was held that the first judgment was simply a decision that the Appellant had brought the action in the wrong form and that the matter was not res judicata. The judgment was set aside and the case remitted for the Court to go into the merits of the case.

From the evidence that we have heard we are of the opinion that the Plaintiff was willing to advance the further sum of LP. 721.896 but that Defendant was not willing to effect the mortgage.

The next point for consideration is the nature of the Plaintiff's claim and the relief to which he is entitled as a result of the breach by Defendant.

Plaintiff does not claim Specific Performance of the contract, nor does he appear to claim damages, he was explicitly asked the question and he said he was not claiming damages. He claims in respect of the assignment of debt agreed to under that contract.

A breach of the contract having been proved, can the Plaintiff still treat as existing this one part of the contract where a third party assigned his debt to the Defendant the consideration for which, was the loan by the Plaintiff to Defendant?

In my opinion this contract is not divisible in this manner and one cannot treat that part of the contract as existing whilst the rest has come to an end. To do so would be to hold that the assignment was complete and separate from the advance of LP. 721 and the mortgage.

Suppose for one moment that Plaintiff had committed a breach and had refused to advance the LP. 721, it is beyond doubt that he the Plaintiff could not then have sued the Defendant on the transfer of debt, as the advance formed the consideration for the transfer. The fact that the Defendant and not the Plaintiff has committed the breach cannot alter the agreement. If the agreement is indivisible, when the

Plaintiff commits a breach it must still be indivisible if the Defendant commits a breach.

The remedy of the Plaintiff might lie in an action for damages but must fail in this action which he explicitly states is not for damages, but on the assignment. Even if this action were construed as a claim for damages Plaintiff would fail as he has not proved any damages and has apparently not endeavoured to obtain satisfaction from the principal debtor.

For the foregoing reasons Plaintiff's action is dismissed with costs and Advocate's fees LP. 2.—.

Delivered this 22nd day of November, 1937.

R/President.

I agree:

Atalla, J.

CRIMINAL APPEAL NO. 2/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Hussein Rabah el Hablawi — Appellant.

v.

The Attorney General — Respondent.

Weighing of evidence matter for trial Court — Non interference by Court of Appeal.

Weighing of evidence and its cogency being entirely a matter for trial Court, Court of Appeal notwithstanding its opinion that case against appellant was week, will not interfere with judgment of lower Court on that gorund.

George Elia for Appellant.

Hogan for Respondent.

Appeal from judgment of District Court, Jaffa, dated the 5th January, 1938, whereby appellant was convicted of Attempted Robbery, contrary to Sections 187, 288, 23 and 29 of the Criminal Code Ordinance, 1936, and sentenced to five years imprisonment.

JUDGMENT.

1. The appellant was convicted on the 5th January, 1937, on a charge of jointly with other persons breaking into a house and attempt-

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

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

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

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

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

Delivered this first day of February, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 250/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the Appeal of:—

Abdallah Mukhles — Appellant.

v.

Hussein Shalaby — Respondent.

Ground of Appeal — Point not raised in Court below.

Point not raised before Court below will not be dealt with by Supreme Court sitting as Court of Appeal

Anis Khamra for Appellant.

Respondent in person.

Appeal from the judgment of District Court, Haifa, dated 24.11.37.

JUDGMENT.

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

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

Delivered this 8th day of February, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 248/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Yousef Habib — Appellant.

v.

Menachem Lichtenstein — Respondent.

Ground of Appeal not mentioned in lower Court.

Ground of appeal not included in appeal before District Court will not be considered by Supreme Court.

Koussa for Appellant.

Levitsky for Respondent.

Appeal from judgment of District Court, Haifa, dated 19.11.1937, confirming judgment of Chief Magistrate, Haifa, dated 16.9.1937.

JUDGMENT.

This appeal arises out of the following facts:—

The appellant and the respondent and one Mansour entered into an agreement to buy cement and sell it at a profit and to share the profits. After the cement has been sold, the respondent was paid his share of profits LP. 260. He took an action in the Magistrate's Court, Haifa, against the present appellant and Mansour for LP. 189,675 balance alleged to be due to him on the transaction. The learned Chief Magistrate gave judgment in his favour for LP. 166,341 mils.

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

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

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

5. The learned Chief Magistrate included in his judgment a sum of one third of LP. 35 alleged to have been paid by the respondent as expenses. There is no corroboration whatsoever as regards this LP. 35, and we think that the learned Chief Magistrate should have disallowed any claim in that respect.

6. For these reasons, the appeal will be dismissed, but the judgment of the learned Chief Magistrate will be varied by making it a judgment

for LP. 130, costs and interest. The respondent will have the costs of this appeal to include LP. 5.— advocate's fees.

Delivered this first day of February, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 228/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Muhammad Ibn Ahmed Ayoub — Appellant.

v.

1. Safiyeh Bint Ayoub Sheikh
2. Ghazaleh Bint Ayoub Sheikh — Respondents.

Possession by co-heir — Title to land — Claim of title to land based on long possession — Land (Settlement of Title) Ordinance sec. 51 — Ottoman Land Code, art. 78.

1. No long possession by co-heir can destroy title of other co-heir.

2. Title to land cannot be claimed on ground of long possession except under sec. 51 of Land (Settlement of Title) Ordinance and under art. 78 of Ottoman Land Code.

Adel Muwakkeh for Appellant.

1st Respondent in person.

2nd Respondent: said to be dead, her son Mustafa present in Court.

Appeal from judgment of Land Court, Jaffa, sitting at Gaza, dated 2.11.1937.

JUDGMENT.

This appeal arises of a land dispute before the Land Court, Jaffa. The allegation of the appellant in his statement of claim is that his grandfather was the registered owner of two vineyards and two gardens and that when his grandfather died the property passed to the appellant's father, to the two respondents and to other persons who are not concerned in the dispute. The appellant says that his father took possession of the whole of this property on the death of the grandfather and that he cultivated it and planted trees. He now claims that because he and his father cultivated it and planted trees on it for a long period, he is therefore in a position to oust the respondents from their share in the property.

The appellant and respondents are co-heirs of this property and no long possession of the appellant could destroy the title of the respon-

dents. The facts being stated as they were in the statement of claim, the Land Court was justified in declining to hear any evidence and in dismissing the claim of the appellant.

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

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

Delivered this 21st day of February, 1938.

Senior Puisne Judge.

HIGH COURT CASE NO. 11/38.

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

Before:—The Chief Justice (Manning, J.) and Copland, J.

In the application of:—

"Pardess" Cooperative Society of orange Growers, Ltd. Petitioners.

v.

1. The Chief Execution Officer, Tel-Aviv
2. Zesa Kahans Respondents.

High Court refuses application, if other remedy was available.

Whoever had a remedy and did not avail himself of it cannot come to High Court for relief.

Harari for Petitioner.

(ex parte)

Application for an order to be issued to the 1st Respondent directing him to show cause why his order dated 28.1.1938, in Execution file No. 14751/37 should not be set aside.

ORDER.

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

We therefore refuse the application.

Given this 22nd day of February, 1938.

Chief Justice.

CRIMINAL APPEAL NO. 160/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

1. Ali Ahmed Jarad
2. Yousef Abdul Muhsen Abu Rukbeh
3. Rifai Hassanein Rifai
4. Khalil Mahmoud Liddawi Shahin — Appellants.

v.

The Attorney General — Respondent.

Law of evidence in Palestine — Provisions of Mejelle regarding evidence — Applicability of English Common Law — Retrospective construction of rules of evidence — Uncorroborated evidence of accomplice — Evidence Ordinance, sec. 6 — Evidence (Amendment) Ordinance No. 68 of 1936 — Mejelle, art. 1685 — Queen v. Griffiths, 1891, 2 *Q.B.D.*, 145 — *R. v. Beebe* (41 *T.L.R.* 635) — *R. v. Baskerville,* 1916, 2 *K.B.* 658 — *Mahadeo v. The King, Privy Council Appeal No. 79/35 — Hinkis v. Attorney General Cr. Ass. A.* 2/30 (*P.L.R.* 441)..

1. Provisions of Mejelle regarding evidence replaced by Evidence Ordinance — not revived by Evidence (Amendment) Ordinance No. 68 1936.

2. In so far as Evidencee Ordinance may be defective, English Common Law has to be applied.

3. Unlike enactments creating new offences those which affect only procedure and practice of Courts may be construed retrospectively.

Kind and quantum of evidence which the Court may require to prove accused guilty must be governed by law in force at time of trial, not at time of committing the offence; insufficiency of proof not being a defence, although it may be an effective answer to a charge.

4. Evidence of accessory must be corroborated in some material particular not only bearing upon the facts of the crime but upon accused's implication in it.

Evidence of an accomplice not available as corroboration of another.

An accused should not be convicted solely upon uncorroborated evidence of an accomplice.

Abcarius for Appellant No. 1.
Cattan for Appellants Nos. 2, 3 and 4.

Crown Counsel for Respondent.

Appeal from judgment of the Court of Criminal Assize sitting at Jaffa, dated 23.12.1937, whereby each of the accused was sentenced to death under Sections 214(c), 215 and 23 of the Criminal Code Ordinance, 1936.

JUDGMENT.

This appeal raises several important points of law.

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

Abcarius Bey submitted that the Evidence Ordinance notwithstanding the present Section 2, did not repeal the provisions of he Mejelle and that the effect of the 1936 Amendment was to revive Article 1685 of Mejelle, which in ordinary cases required the evidence of two males, or one male and two females.

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

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

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

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

an amendment would be retroactive so as to make a bigamous marriage contracted before the date of such an amendment an offence, if it was not an offence at the time when it was contracted.

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

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

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

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

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

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

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

When a judge gives the necessary warning to the Jury, he has done all that the law requires him to do. He has no further control of the situation. The Jury may disregard his warning. But when there is no Jury the setting is entirely different. In the present case it was the duty of each Judge to warn himself that it is always dangerous to convict on the uncorroborated evidence of an accomplice. Having done so was he in a position to restrain himself from doing what it is always dangerous to do? If, knowing that it is always dangerous, he proceeds to convict, was he acting in an unreasonable manner so that the conviction should not be supported on appeal? As stated, the word "always" is important. Does it afford any loophole for a Judge to consider that the particular circumstances of some case justify him in taking a dangerous course? Further, he cannot direct himself that he ought to convict merely because he is quite satisfied that the accomplice is telling the whole truth and nothing but the truth.

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

> "It is well settled that the evidence of an accessory, which Sukraj plainly was on his own showing, must be corroborated in some material particular not only bearing upon the facts of the crime but upon the accused's implictation in it and further that evidence of one accomplice is not available as corroboration of another, (The King v. Baskerville (1916) 2 K.B. 658). This rule as to corroboration, as was pointed out in the case just cited, long a rule of practice, is now virtually a rule of law, and in a case like the present it is a rule of the greatest possible importance".

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

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

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

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

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

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

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

Delivered this 21st day of February, 1938.

Chief Justice.

CIVIL APPEAL NO. 21/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the application of:—

Eliezer Bernstein — Applicant.

v.

Itzhaq Hayutman — Respondent.

Award of arbitrators — Court setting award aside yet remitting it — Interpretation by appellate Court of ambiguous judgment. Arbitration Ordinance sec. 12, 13. C.A. 5/37.

Where Court gives ambiguous judgment regarding award of arbitrators in that it uses the expressions "set aside" and "remit", appellate Court must look to see what is real effect of that judgment (which will either be to set aside or to remit).

Hamburger for Applicant.
Eliash for Respondent.

Application for leave to appeal from judgment of District Court, Tel-Aviv, dated 13.10.1937.

JUDGMENT.

This is an application for leave to appeal from a judgment of the District Court of Tel-Aviv arising out of an arbitration.

Unfortunately, there seems to be some confusion in the mind of some Courts as to their powers under the Abitration Ordinance. The powers as I understand them, are similar to the powers of the Court in England. The Courts, according to the circumstances, have power either to set aside an award or remit it with directions to the Arbitrators to do what may be right. See section 13 and 12 of the Arbitration Ordinance, Chapter 6.

The Court in this case used this expression — "set aside" — and went on to speak of "remitting". The actual words of the judgment are as follows:—

> "We accordingly set aside the award and remit the matter to the three persons who acted, with instructions to them to make an award either unanimously or by a majority of two to one".

The judgment, therefore, as it stands, is ambiguous.

A similar point arose in another case, No. 5 of 1937, the judgment of the District Court in that case concluding as follows:—

> "We therefore set aside the award and remit it to the umpire in order that he may give the defendant an opportunity of cross-examining the plaintiff in respect of the statements made and plans produced in his absence, and give a fresh award".

In this case there were allegations of legal misconduct by the arbitrators.

On appeal to this Court it was held:—

> "Unfortunately, the judgment of the District Court is not clear, but in our opinion the effect of that judgment is to set aside the award."

When a judgment is ambiguous in that it uses the expressions "set aside" and "remit", this Court must look to see what is its real effect.

In this case we are of opinion, particularly having regard to the express reference to Section 12, that the effect is not to set aside but to remit. The application for leave to appeal is therefore refused, with costs. Advocate's fees LP. 3.—.

Dedivered this 3rd day of March, 1938.

Chief Justice.

CIVIL APPEAL NO. 235/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Simon Baer Lande — Appellant.

v.

Abraham Ryndsunski — Respondent.

Addressing Court as friend of party — Advocates Ordinance, sec. 5(6).

No necessity for a party to appear in person, if Court satisfied that person applying for leave to under sec. 5(6) of Advocates Ordinance is applying as a friend and Court decided to grant leave.

Saul Lande, son of Appellant, for Appellant.

Gratch for Respondent.

Appeal from judgment of District Court, sitting in Tel-Aviv, dated 16.11.1937.

JUDGMENT.

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

2. The relevant provision in Section 5 of the Advocates Ordinance, Chapter 2 of the Laws of Palestine, enacts that "no person who is not the holder of valid licence to practise as an advocate in Palestine shall have the right to be heard on behalf of any other person at any hearing before a Court or in any other judicial proceeding in Palestine". There are two exceptions to this rule under the provisos (a) and (b) to the Section. Proviso (a) does not arise in the present circumstances and the proviso (b) enacts that "any person may with the leave of the Court or Judge address the Court as a friend on behalf of a party not represented by an advocate".

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

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

There will be no costs of this appeal.

Delivered this 31st day of January, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 240/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

Palestine Mercantile Bank Ltd. — Appellant.

v.

1. Jacob Fryman
2. Eitan Belkind — Respondents.

Scope of Art. 46 of Palestine Order-in-Council — Court's duty to examine sources, if necessary, and expound law — Contract of guarantee under Ottoman Law — Doctrine of consideration — Commission apart from legal interest — Palestine Order-in-Council, Art. 46 — Mejelleh, Art. 84, 622, 623, 643.

1. Where there exists an Ottoman Law on a particular subject, Art. 46 of Palestine Order-in-Council cannot be resorted to.

As regards point where that Law is silent or obscure; Judge

has to examine the sources in order to ascertain what the law is; where a provision of that Law is capable of two or more interpretations, he has to lay down to the best of his ability the correct one.

2. When law as to a contract is covered by Ottoman Law, Law on the particular kind of contract has to be studied to see if consideration is necessary.

3. Under Ottoman Law on subject of guarantee consideration is not a necessary element in this kind of contract.

4. Bank entitled to make an agreement with a customer that he shall pay it apart from legal interest also some amount for its service in keeping his account.

Olshan, Kouriansky, for Appellant.
Gratch for Respondents.

Appeal from judgment of District Court, Haifa, dated 21.11.1937.

JUDGMENT.

Senior Puisne Judge.

The facts in this case were as follows:—

One Yoel Fryman made an arrangement with the Appellant bank for an overdraft, and on the 19th May, 1935, he signed the usual agreement with the bank. Inter alia he engaged to pay 9% interest on the overdraft and a commission of 1% for the services of the bank in keeping his account. Towards the end of 1935 the overdraft amounted to LP. 384.704. The bank apparently got nervous and were pressing for a settlement. Fryman assuaged their fears by producing a guarantee from the two respondents, in which they jointly and severally undertook, in case Fryman failed to settle, to pay the LP. 384.704 within one year. The guarantee was dated the 29th December, 1935. Neither Fryman nor the respondents paid, and on the 24th May, 1937, the bank took an action against them in the District Court of Haifa for the balance due, viz LP. 326.751. The District Court decided that the bank was not entitled to charge 1% commission for the keeping of Fryman's account, and that there was no consideration for the guarantee. Fryman had not appeared so judgment was given against him by default for the full amount claimed, but the action against the respondents was dismissed.

2. The bank has appealed and the first question that arises is the one of consideration. The District Court came to the conclusion that the Ottoman Law on the point was not clear and that therefore the English doctrine of consideration must be applied.

I think the District Court misdirected itself in taking this view. It relied on Article 46 of the Palestine Order-in-Council, but the Article nowhere states that English Law is to be applied if the Ottoman Law is not clear. The words used are "so far as the same shall not extend

or apply." If the Ottoman Law is not clear it is the duty of judges to expound it, however difficult it may be. A judge cannot say "I do not understand this provision of the Ottoman Law and therefore I shall apply English Law". In most systems of legislation there are obscure provisions and provisions capable of two or more interpretations, and a judge has the difficult task of laying down to the best of his ability the correct interpretation. In Palestine a large and important part of the Ottoman Law is still in force, and Article 46 of the Order-in-Council is not intended to be a refuge when a judge finds difficulty or doubt in its interpretation.

The District Court, however, doubly misdirected itself in this case, for the Ottoman Law on the subject of guarantees makes it quite clear that consideration is not necessary element in this kind of contract. The Law is set out in Book III of the Mejelle. It consists of sixty one articles and there is not the slightest intimation that a contract of guarantee is not binding unless it is supported by consideration.

3. It was argued that as the Ottoman Law on this point does not contain any doctrine of consideration, this doctrine of English Law should be applied. This, to my mind, is a misunderstanding of Article 46 of the Order-in-Council, as I shall explain shortly. It is also based on the misconception that a law of contract cannot be complete unless it has such a doctrine. This is not so. The law of South Africa, Roman Dutch Law, has no doctrine corresponding to the English Law. In the case of Conrad v. Barron (S.A.L.R. 1919 App. Cas. 279) it was held that a gratuitous option was binding and that there was no doctrine of consideration in Roman Dutch Law. Gratuitous promises are also enforced in Scotch Law except that gratuitous promise to pay money requires something in writing to prove it. Consideration is not necessary.

The doctrine itself has become discredited in England, and a recently appointed Committee has recommended its abolition except as regards oral promises. The Committee spoke of the inconvenience and possible injustice resulting from the doctrine. In the case of Dunlop Pneumatic Tyres Co. Ltd. (1915 A.C. 847) Lord Dunedin made a scathing comment on it, saying that owing to it a person could "snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the party seeking to enforce it has a legitimate interest to enforce".

4. It may be as well that I should state my view on what I conceive to be the effect of Article 46 of the Order-in-Council. So far as the Ottoman Law and local legislation to dot extend or apply, the jurisdiction of the Courts is exercised in conformity with the common

law and the doctrines of equity in force in England. The law of Equity, as it is known in England, has no counterpart in the Ottoman Law; that is, the doctrines are not collected as one definite part of the substantive law, though some of them may well be present to the minds of judges and others who have to expound the law. In general, the Ottoman Law does not extend as to comprise the doctrines of equity in force in England. These doctrines may therefore be applied so far as the circumstances of Palestine and its inhabitants permit; if they already exist in Ottoman Law well and good; if they do not exist they may be resorted to. Where, however, there exists an Ottoman Law on particular subjects, such as sale, hire, guarantee or agency, then that law both extends and applies to all questions that have to be determined with reference to these species of contracts. Two things have to be remembered, first, that the law in force is the Ottoman Law as it existed on November 1st 1914, save in so far as it has been altered by legislation.

The second thing is that the Mejelle it not exhaustive. I am in agreement with what Mr. Hooper says at p. 23 of Volume II of his "Civil Law of Palestine and Trans-Jordan."

> "As regards points where the Code is silent, it is submitted that it is the obvious duty of Courts to examine the sources in order to ascertain what the law is".

In the present case we are dealing with the law of guarantee. The Ottoman Law has its own law of guarantee. It is silent on the doctrine of consideration and it must be concluded that it never occured to the lawgiver to include such an artificial restriction on the freedom to contract. Where there is no Ottoman Law dealing with branches of jurisprudence which are necessary to the ordered life of civilised communities, such as those branches of the law of torts which are concerned with negligence and defamation, then the Courts of Palestine have to consider whether in the circumstances English common law may be resorted to.

5. Further, the English doctrine of consideration stated in its simplest form is that a promise not under seal cannot be enforced unless there is consideration to support it. The Ottoman Law knows of no such distinction as that between simple contracts and contracts under seal, and it is difficult to see how the English Doctrine could ever be applicable in Palestine. When the law as to a contract is covered by the Ottoman Law, then the Ottoman Law on the particular kind of contract has to be studied to see if consideration is necessary.

In the judgment of the Court below and in the argument before us local cases were cited in which agreements had been held to be unenforceable because they were not supported by consideration. These

agreements were not guarantees and the authorities are therefore not applicable. It must be assumed that the Court in these cases found that consideration was necessary in the particular kinds of contract with which the cases were concerned.

6. Apart from this, it seems that the Court below did find facts showing that there had been consideration for the guarantee of the respondents. They seem to have found that the bank had agreed with the respondents that it would not sue Fryman if the respondents guaranteed the overdraft. I think this would have been a sufficient consideration even according to English Law.

7. As regards the 1% commission for keeping the account, the Court below came to the conclusion that this was a mere subterfuge on the part of the bank to enable it to charge 10% interest on the overdraft, that is, 1% more than the maximum rate of interest allowed by law. I do not agree. A bank is entitled to make an agreement with a customer that he shall pay it some amount for its service in keeping the account. In this case the customer agreed, and the guarantors also agreed to this 1% being charged. The bank was therefore justified in charging this commission as well the 9% on the overdraft.

8. For these reasons I think this appeal should be allowed. I do not think it is necessary to send the case back as the respondents admitted the guarantee and that Fryman had not paid. In my opinion, the judgment of the Court below should be varied by making it a judgment against Fryman and the two respondents jointly and severally for LP. 326.751 with costs and interest from May 1st, 1937. The bank should have its costs against the respondents in the Court below (to include LP. 4.— advocate's fees) and also the costs of this appeal to include LP. 5.— advocate's fees.

Delivered this 4th day of March, 1938.

Senior Puisne Judge.

I concur: *Puisne Judge (Khayat, J.)*

Frumkin, J.

This appeal involves two points of interest. On the first point, that of consideration, I wish to emphasize that in the Mejelleh there is a slight indication which could be taken to show that the doctrine of consideration is not altogether unfamiliar to Moslem Law.

2. Article 84 of the Mejelleh provides that "a promise is binding when made subject to the fulfilment of a condition." Taking this rule from the negative aspect, it shows that an ordinary promise is not binding. Where this rule of the Mejelleh corresponds with the English doctrine of consideration, it is in that an ordinary promise is not binding. But while English Law in certain cases requires consideration in

order to make a promise, or a contract binding, the Mejelleh is satisfied if such promise is made subject to the fulfilment of a stipulated condition. It is not necessary, however, that the promisor should derive any benefit in the nature of consideration or otherwise.

3. The illustration given in the said article makes it clear:—

> "If a person says to another: sell these goods to X and should he not pay the money for it, I will pay it; if the purchaser does not pay it the person making the promise is bound to pay the money."

4. Certain commentators of the Mejelleh derive from this rule and example the adverse rule that when the promisor simply says: "I will pay the price" without conditioning the non-payment by the purchaser there would be no binding promise, but nobody goes so far as to suggest that the promise would not be binding if no consideration is obtained.

5. Based on Art. 84 there is Art. 623 of the Mejelleh which provides that a guarantee is constituted also by a conditioned promise. So that there is a guarantee when a person says to another "If X does not pay your debt, I will pay it."

In the light of what was said before it might be assumed that had the person just said "I will pay X's debt" there would be no binding guarantee. But it is obvious that the main object is that in order to make a person liable on his promise it must be clear that he in fact intended to assume liability. It is one way of making such intention clear when he makes his promise subject to the fulfilment of an act to be completed by another person as in Art. 84 or 623. But not necessarily only by that means. There is a binding guarantee when the guarantor uses the term "I am a guarantor" or a similar term which makes it quite clear what his intention was (See Art 622). And once he becomes thus a guarantor he is liable to pay as per Art 643.

6. It is quite clear, that on this point the Mejelleh is exhaustive, and contains no provision that consideration is required in order to make a guarantee binding, and it is therefore not necessary to resort to either Section 46 of the Palestine Order-in-Council or to the sources of the Mejelleh.

7. As regard reference to the sources of the Mejelleh I might as well take this opportunity of making my view clear on this point.

8. A distinction must be made between the interpretation of an obscure passage in the Mejelleh or the definition of a legal term and a case where the Mejelleh is silent altogether. In the first case, sources of Moslem Law might be resorted to in order to clarify such obscurity and thus to arrive at the real meaning of the passage or term. But not so in cases where the Mejelleh is silent altogether.

9. Although the Mejelleh is entirely composed of Moslem Law it became operative and applicable in the Civil Courts in Turkey and later in Palestine not as such but as having become part and parcel of the legal system of Ottoman Law by an Imperial Iradeh. The Mejelleh is a codification of certain parts of Moslem Law, but not of all the Moslem Law, and unless the Civil Legislative Power of the Ottoman Empire has elected to embody certain parts of Moslem Law other than the Mejelleh in its legislation it cannot be applied in the Civil Courts.

10. It follows that when on a given point the Mejelleh is silent altogether in the sense that it does not extend or apply to it and there are also no other provisions in he Law of Palestine extending or applicable to such point, Art 46 of the Palestine Order-in-Council is to be resorted to and not the sources of the Mejelleh.

11. In conclusion, I concur on this point with my learned brother Manning.

12. To come now to the second point of this appeal, namely, the commission charged by the Bank to Fryman at the rate of 1 per cent which the Court below found to be excessive interest.

13. No doubt any bank can charge commission for services rendered, and such commission can be in the form of a fixed charge per annum as well as at a percentage rate. So far as I know when commission is charged at a percentage rate it is levied one time on the performance of the transaction.

Of course, I don't want to exclude any possibility not within my knowledge that banks also charge their commission at a percentage rate per annum as in the present case. But just the fact that in this case the bank charged the maximum legal rate of interest and above it a further one per cent per annum on a monthly accumulative basis as the interest, makes one feel as if this form of commission was used to hide an additional one per cent which the bank could not otherwise charge, without coming into conflict with the law relating to usurious interest.

14. I am therefore of opinion that on this point the case must be remitted to the Court below to go into the matter of the practice of Banks in this country in charging commission for services rendered. The test must be this: If it is established that even when charging less than the legal maximum rate of interest, banks do charge a commission in the form of an accumulative percentage rate added to the rate of interest charged there will be judgment for the appellant. Otherwise, the commission will have to be reduced to the rate normally charged.

Puisne Judge.

HIGH COURT NO. 9/38.

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

Before:—The Senior Puisne Judge (Manning, J.) and Copland, J.
In the application of:—
Joseph Weinberg — Petitioner.
v.
The District Cimmissioner,
Jerusalem District — Respondent.

Petition writer — Misconduct justifying cancellation of licence — Functions of District Commissioner considering question of cancelling petition writer licence.
Petition Writer (Licensing) Ordinance — R. v. Dublin Corporation (2. *L.R.W.* 371).

When District Commissioner has before him a question as to whether he should cancel a licence under Petitioner Writers (Licensing) Ordinance, he is exercising functions of a judicial nature; he must act properly and judicially and give petition writer opportunity to defend himself against allegation of misconduct.

Olshan for Petitioner.
For Respondent: No appearance.

Application for an order directed to Respondent to show cause, if any, why his order dated the 7th December, 1937, cancelling Petitioner's licence as Petition Writer and directing him to deliver his license at Respondent's Office should not be set aside.

JUDGMENT.

This is a return to an order nisi to the respondent to show cause why his order cancelling the Petitioner's license as a petition writer should not be set aside. On the return day the respondent failed to appear and no affidavit had been filed by him in reply to the petition. The petitioner was a licensed petition writer under the Petition Writers (Licensing) Ordinance. Under that Ordinance the District Commissioner has the power to cancel a licence for misconduct or the use of improper or abusive language in petitions. On the 7th December, last year the District Commissioner of the Jerusalem District cancelled the licence of the petitioner on the ground that he was satisfied that the petitioner had already misconducted himself. The petitioner had

not been given an opportunity of explaining his alleged misconduct.

2. We are of opinion that when a District Commissioner has before him a question as to whether he should cancel a licence under the Ordinance, he is exercising functions of a judicial nature. In the case of R. v. Dublin Corporation (2. L.R.W. 371) Chief Justice May said:—

> "In this connection the term "judicial" does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act means to be an act done by competent authority, upon consideration of acts and circumstances, and imposing liability or affecting the rights of others".

3. If a District Commissioner desires to cancel a licence under the Ordinance, he should act properly and judicially and give the petition writer an opportunity of defending himself against the allegation of misconduct. This was not done in this case and the action of the District Commissioner cannot be supported. An order will therefore be issued to the respondent directing him to restore to the petitioner his licence under the Ordinance, the effect of his being that the order of the 7th December, 1937, must be taken to be a nullity and cancelled.

4. Petitioner will have the costs of this application to include LP. 5.— Advocate's fees.

Delivered this 24th day of February, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 37/38.

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:—

Jamal Abdul Hadi el Kasem — Appellant.

v.

Subhi el Ayyoubi — Respondent.

"Khalit" — Right of way — Servitude not conferring priority in land.

A's right of way across B's land — if not ancient but having its origin in settlement proceedings — does not render A a "Khalit" or co-owner to be entitled to priority in B's land.

Appellant in person.
Respondent in person.

Appeal from judgment of Land Court, Nablus, dated 5.1.1938.

JUDGMENT.

In this appeal from the Land Court, Nablus, the appellant claimed priority in respondent's land, as a "Khalit" in a right of way across the land of respondent. The Land Court found that the appellant had a right of way across the respondent's land to enable him to get to his own land but that this was not an ancient right and that it had its origin in settlement proceedings. The contention of the appellant was that because he had this right of way, he and the respondent were co-owners. The Land Court rejected this contention of the appellant and we think that it was right. The appellant's right of way was a mere servitude vested in himself, the land on which the right of way existed belonged to the respondent in its entirety and the respondent could not be said to be a co-owner, in any land which belonged to himself alone.

This appeal must, therefore, be dismissed with LP. 1.— advocate's fees, and costs for respondent.

Delivered this 24th day of February, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 6/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the application of:—

Nathan Sheinkar — Applicant.

v.

Dov Segalovitch — Respondent.

Award; opposition to confirmation distinct from request to set aside — Arbitration Ordinance sec. 15(3) — *Arbitration Rules rule* 2(1) (f), (g), (*Drayton Vol. III p.* 2323) — *Halsbury 2nd Ed. Vol. I para.* 1123 *p.* 670.

If application to confirm award is opposed to, Court may either reject application or opposition but not set aside award unless moved by request to do so.

Felman for Applicant.

Hamburger for Respondent.

Application for leave to appeal under Section 15(3) of the Arbitration Ordinance.

ORDER.

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

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

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

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

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

Delivered this 17th day of February, 1938.

Chief Justice.

CIVIL APPEAL NO. 3/38.

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:—

1. Shukri Ibn Daoud Zayed Kattan, on behalf of the Estate of his father Daoud Zayed el-Kattan
2. Nimeh Bint Zayed Kattan — Appellants.

v.

Bischara Elias Anton Kattan — Respondent.

Appeal from Land Court without point of law — Sale of land by public auction — Claim of ownership after sale through Execution Office completed — Provivsional Law Regulating the Right to Dispose of Immovable Property, art. 17.

1. Appeal from a Land Court only allowed on questions of law; appeal in which no point of law urged must fail.

2. Land Court not to hear case regarding ownership of immovable property sold through Execution Office by public auction, if, without good cause shown for delay, case brought after sale is completed.

Ibrahim Kammar for Appellants.

Amon for Respondent.

Appeal from judgment of Land Court, Jerusalem, dated 9.12.37.

JUDGMENT.

Manning, J.

In this case the Respondent obtained possession of certain house property at Beit-Jalla, as a result of an execution sale. The Appellants took action before the Land Court of Jerusalem claiming that the whole of this house property had not belonged to the judgment debtor and that they were entitled to certain shares therein. The Land Court, having heard evidence and perused the relevant documents, dismissed the claim of the Appellants on the ground that there had been a sale of this property to two persons named Ibrahim and Habib by their father during his life-time, that consequently the Appellants were not entitled to any share in the property. The Appellants have appealed to this Court and the first remark I have to make is that no point of law has been urged against the judgment of the Land Court.

2. Appeals from the Land Court to this Court are only allowed on questions of law and for that reason alone this appeal would have to be dismissed. There is, however, a further reason why this appeal must be dismissed, i. e. Article 17 of the Provisional Law Regulating

the Right to Dispose of Immovable Property. That article reads as follows:—

> "Actions claiming the ownership of immovable property, sold through the Tapou office by public auction in accordance with special laws, must be brought before the sale is completed. In that case if the court suspends the proceedings of the auction and if the claimant in the end loses his claim he will be responsible for the damages and loss of profit caused by the suspension of the auction or from any other cause.
>
> The Courts are forbidden to hear cases where the claim is brought after the sale has been completed unless the delay was due to a lawful cause"

3. The present case comes under the circumstances contemplated by the second part of the article. The sale has been completed and no facts have been adduced to justify the delay. If this point had been taken before the Land Court, that Court must have decided that the case could not be heard. There are other defects in the claim put forward by the Appellants but in view of what I have said I do not think it is necessary to consider them.

In my opinion the appeal should be dismissed with costs to include LP. 5.— Advocate's fees.

Delivered this 16th day of February, 1938.

Puisne Judge (*Abdul Hadi, J.*) *Senior Puisne Judge.*

JUDGMENT.

Frumkin J.

I concur with my learned brother presiding, in both the conclusions he arrived at as to the dismissal of the appeal namely; that there was no point of law and that in view of Article 17 of the Provisional Law Regulating the Right to Dispose of Immovable Property, 1331, the Appellants were too late in bringing their action.

2. Having, however, listened to counsel on both sides as to the facts of the case, I might as well point out that even on the facts as stated on behalf of the Appellant, they made out no case.

3. The case of the Appellants rests entirely on the alleged fact that the claimed property was held by and registered in the name of their two elder brothers Ibrahim and Habib as nominees on behalf of all the brothers including themselves.

4. It is clear, however, that the property in question was as early as 1309 transferred partly in the name of Ibrahim and partly in the name of Habib. The transfer was effected by their father during his lifetime by way of sale and no evidence to the satisfaction of the Court of trial was produced to prove that the registration in their names was as nominees.

Delivered this 16th day of February, 1938.

Puisne Judge.

CRIMINAL APPEAL NO. 6/38.

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 appeal of:—

Issa Jaber Abu Iswai — Appellant.

v.

The Attorney General — Respondent.

Offences against Emergency Regulations — Possession of ammunition — Jurisdiction of District Court — Military Courts — Emergency Regulations No. 4 of 1936 sec. 8(a) as amended by Emergency Regulations No. 8 of 1936 sec. 4 — Palestine (Defence) Order-in-Council, Sec. 10. E.N. see Cr. A. 4/38 (Ct. L. R. Vol. III p. 85-6).

District Courts have jurisdiction to try offences against Palestine (Defence) Order-in-Council and Emergency Regulations committed, but not tried, before establishment of Military Courts.

Asal for Appellant.

Crown Counsel for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 11.1. 1938 whereby the appellant was convicted of being in possession of ammunition contrary to sec. 8(a) of the Emergency Regulations No. 4 of 1936 as amended by Sec. 4 of the Emergency Regulations No. 8 of 1936 read with sec. 10 of the Palestine (Defence) Order-in-Council, 1937, and sentenced to five years' imprisonment.

JUDGMENT.

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

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

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

The District Court has added a recommendation that the case may be brought to the notice of His Excellency the High Commissioner for the reduction of the sentence, and that recommendation will be forwarded. Delivered this 2nd day of February, 1938. *Chief Justice.*

*) Cr.A. 4/38.

CIVIL APPEAL NO. 241/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Greene, J. and Abdul Hadi, J.

In the appeal of:—

Rubin Abdel-Wahhab Kiyali — Appellant.

v.

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

Promissory note obtained by holder mala fide.

If on sufficient evidence before it Court finds that promissory note sued upon was obtained by holder mala fide, Court is right in dismissing claim.

Nuwake for Appellant.

Zein el-Din for Respondent.

Appeal from judgment of District Court, Jaffa, dated 10.11.1937.

JUDGMENT.

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

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

This appeal must be dismissed with costs and LP. 5.— advocate's fees.

Delivered this 25th of January, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 253/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Zeev Kraus — Appellant.

v.

David Shapira — Respondent.

Agreement to transfer land — Recovery of money paid on contract for sale of land — Damages for breach of void contract — Repudiation of contract.

Land Transfer Ordinance, sec. 11 — *C.A.* 147/26 (*P.L.R. p.* 116).

Edit. Note: The case alluded to in this judgment is C.A. NO. 31/37 (*Ct. L. R. Vol. I R.* 51).

1. Agreement to transfer land in Land Registry not a disposition of immovable property; sec. 11 of Land Transfer Ordinance — of no avail to party asking for return of money advanced on such agreement.

2. No damages recoverable for breach of void contract.

3. Where contract provides that in certain circumstances party entitled to recover the money he paid, he cannot be said to repudiate the contract when he claims money back alleging that such circumstances had arisen.

Gavison for Appellant.

Olshan for Respondent.

Appeal from judgment of District Court, Haifa. dated 24.11.1937.

JUDGMENT.

By a contract dated 12.12.1934, David Shapira (the Defendant in the action and the Respondent before us) agreed to transfer certain lands to Zeev Kraus (the Plaintiff in the action and the appellant before us). Clause 4 of the agreement provided:—

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

Clause 8 further provided:—

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

Twenty pounds was paid on the signing of this contract.

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

The only question to my mind, therefore, was — was Krauz entitled to invoke Clause 8 of the contract? In other words, had there been

such a delay (or interference) as was contemplated by that clause.

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

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

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

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

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

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

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

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

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

This seems to overlook the words of Clause 8 of the contract from

which it is clear that the parties contemplated that, in certain circumstances, Krauz should be entitled to the return of the money paid. In my opinion, he was clearly entitled to go to the Court and say those circumstances had arisen without thereby repudiating the contract.

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

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

Delivered this 7th day of February, 1938.

Chief Justice.

Khayat, J.

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

I therefore agree with the conclusions of my brethren.

Puisne Judge.

Frumkin, J.

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

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

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

Delivered this 7th day of February, 1938.

Puisne Judge.

CIVIL APPEAL NO. 2/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Zvi Gaber — Appellant.

v.

"Migdal" Insurance Co. Ltd., Tel-Aviv — Respondent.

Admissions in Land Registry — Contract to lend money — Specific performance — Cause of action. — Mejelle, art. 1589, 1737 — *Court of Cassation, judgments of* 13.6.1314 *and* 6.11.1315 — *Ottoman Civil Procedure Code, Art.* 90 — *Evidence Ordinance,* 1924 — *Mortgage Law (Amendment) Ordinance, sec.* 5 — *Land Transfer Ordinance, sec.* 8 — *C.A.* 360/20, *C.A.* 78/28, *L.A.* 14/32, *L.A.* 137/20, *C. A.* 306/20, *C. A.* 110/32, *C. A.* 77/33, *L. A.* 20/32, *C. A.* 10/34, *C. A.* 131/26.

South African Territories v. *Wellington,* 1898, *Appeal cases,* 309.

1. Admissions in entries of Land Registry create estoppel (similar to that created by execution of deed in English Law), but party may rebut it by proof of fraud or duress and may, in certain circumstances, show that despite his admission he has not received the consideration stated.

2. Courts in Palestine will not carry doctrine of specific performance further than Courts in England do, hence specific performance of contract to lend money will not be granted.

Karwassarsky for Appellant.

Horowitz for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated 16.12. 1937.

JUDGMENT.

On 27.12.36 the Plaintiff (Appellant before us) executed in the Land Registry, Tel-Aviv, a mortgage in favour of the Defendant (Respondent), which was in the usual form and recited that the mortgagor had received the sum of LP. 650 as the consideration therefor.

The Plaintiff now alleges that that sum was never paid to him, and brought an action therefore in the District Court. His statement of claim recited the mortgage and paragraphs 2 and 3 thereof were as follows:—

"2. Plaintiff has, true, admitted in the Deed of Mortgage the receipt of LP. 650, assuming that the loan will be paid to him as usual, but this amount was never paid to him, neither at the time of transaction nor afterwards, in spite of the demands of the Plaintiff, and the Notarial Notice sent to Defendant through the Notary Public of Tel Aviv.

3. Plaintiff prays that the defendant be summoned and ordered to pay LP. 650, legal interest from 27th December, 1936, costs and advocate's fees."

The Defendants in their defence pleaded:—

(a) That the statement of claim disclosed no cause of action;

(b) that the Plaintiff was bound in law by the admission in the mortgage that he received the LP. 650;

(c) that the amount was duly paid to the Plaintiff or his order.

Upon the issues so raised argument was heard in the District Court. The learned President, with some regret, took the view that upon the authorities the Plaintiff was in effect estopped from denying the receipt of the money, and that the Plaintiff was asking for specific performance of a contract to lend money, which the Court would not grant. His Honour Judge Korngrun took the view that the Plaintiff should be allowed to call evidence as to the facts.

As the result of this difference of opinion the action was dismissed.

The Plaintiff appealed to this Court.

The first point for our consideration is, what is the true effect of an admission made in a transaction in the Land Registry.

The first reported authority was decided in August, 1920, in that case the Plaintiff having made an admission. The question raised was whether the Defendant could be called upon to take the Istizhar oath. The judgment states:—

"Having considered this point, this Court is of opinion that admissions that take place in an Official Department do not come within the wide meaning of Article 1589 of the Mejelle. The Court of Cassation in its judgment of June 13th, 1314, and November 6th, 1315, appears to have taken this view.

The admission in this case having taken place in an Official Department, viz., the Tabu Department, attention would not be paid therefore to the statement that it was false".

Article 1589 of the Mejelle provides —

"If anyone maintains he has not spoken the truth in an admission which he has made, the person in whose favour the admission is made, is made to take an oath that it is not false."

or as translated by Mr. Hooper —

"should a person allege he has not been truthful in making

> an admission, the person in whose favour the admission is made shall swear on oath that such admission is true.

It is not clear what was the basis of this decision, but from the reference to the Tabu Department it is possible that the Court had in mind Article 1737 of the Mejelle which provides —

> "The Sultan's berat and the registration in the Imperial Land registries, by reason of their being secure from fraud, are acted upon."

I doubt if this case was authority for anything beyond the proposition that Article 1589 did not apply to a formal admission, but it has been followed, however, in a number of cases to which I will refer later.

It may be noted that in 1924 the Evidence Ordinance, now incorporated in Chapter 54, was passed which enlarged the rights of a party to give evidence on his own behalf.

In Civil Appeal 78/28, in which the question was also the taking of an oath by the person in whose favour the admission was made, the Court followed No. 360/20 and purporting to quote that judgment stated — "That an allegation of a false admission cannot be heard before the Land Registry." If the report in the Palestine Law Reports is accurate this would seem to be a misquotation.

In Land Appeal 14/23 the Court held — "In accordance with the principle that no parol evidence is admissible to disprove an admission made before the Land Registry the appeal must be dismissed."

It will be seen that this judgment extends the principle to parol evidence.

In Land Appeal 20/32 the Court held:—

> "Following the judgment in Civil Appeal No. 78/28, Civil Appeal No. 306/30 and Land Appeal No. 137/30, wherein it was decided that a person once having made an admission before the Land Registry in a land transaction, the person making the admission cannot subsequently set up the defence that such an admission was a false admission and request the oath to be taken by the person in whose favour the admission was made, neither can an allegation of a false admission be heard as against admission made before the Land Registry."

In Civil Appeal 110/32 the President of the Court referred to the principle, but the case was decided upon other grounds.

In Civil Appeal 77/33, the judgment states:—

> "The Appellant further argues that the Respondent's admission having been made in proceedings in the Land Registry the Respondent cannot be heard to allege that the admission is false. In support of this argument the Appellant cites the decision of the Court of Appeal established under O.E.T.A. (S) in Civil Appeal No. 306/20, Khadijeh Ismail Abu Khadra

v. Ammeh Khalil Abu Khadra; and the judgments of this Court in Civil Appeal No. 78/28, Jamile bint Mahomed Sarban v. Ibrahim Mohammad Faraj El Hussein, and Land Appeal No. 20/32, Ibrahim Abu Habib v. Said Mohammad Yasin."

and goes on to hold —

"The rule that an admission made in a formal document in the Land Registry cannot be rebutted (by the person?) by whom it was made, however inconvenient that rule may be, appears to us to be established by the cases cited by the Appellant. It follows that the Respondent cannot now bring evidence to prove that plot (c) was not transferred to him by the Appellant."

In Civil Appeal 10/34 the majority of the Court held —

"The Court has already decided in Civil Appeals 306/20, 78/26 and 110/32, that where a person makes an admission before the Land Registry, the person making such an admission is bound by it and is estopped from setting up anything to the contrary.

In accordance with these decisions we are of opinion that Appellant having agreed to the amount transferred to Respondent before the Registrar, and the same having been duly registered (in the absence of fraud) which is not alleged, he is now estopped from setting up the plea that the area conveyed was more then the amount agreed upon and registered."

Khayat, J. who dissented holding —

"In my view the fact that incorrect area and price were mentioned in the deed of transfer before the Land Registry did not prevent an action being heard for proving such incorrectness especially when there is a legal contract between the parties upon which the sale was based and the price was assessable according to the area.

I agree that no claim for the basic alteration of the contract is admissible such as to make it one of mortgage or security, but a claim that the price was not correctly stated is, in my view, admissible.

It should be remembered that the fact that incorrect price and area were mentioned was in the interest of the purchaser who paid transfer fees less than the legal fees. He cannot benefit by misleading and cheating the Government to abstain from paying the actual price in accordance with the contract.

Apart from this the administration is not bound by the price fixed in the sale transaction and may put down a value other than the value recorded in the deed lodged.

Accordingly, on the authority of Civil Appeal No. 131/26, Sheikh Tawfik Dajani and Moses Khankin, where reference was made to the agreement for the purpose of ascertaining the value of the transferred lands, and their categories and areas and not to the Tabu deed, I am of opinion that the Court may go into the merits of the case and try the claim."

Although I can discern no reference thereto in the judgments I have

quoted, it may be noted that Article 90 of the Ottoman Code of Civil Procedure provides —

> "Official documents shall be admitted in evidence as aforesaid. Such official documents include Imperial Berats, entries in Tabu registers, and decrees issued by Civil or Religious Courts which are not subject to appeal and are free from forgery or fraud. Such documents shall be deemed sufficient proof of a claim."

It may also be noted that Section 4 of the Mortgage Law as amended (set out in the Mortgage Law (Amendment) Ordinance, Chapter 95, Section 5) is as follows:—

> "4. Any person who wishes to make immovable property security for a debt must do so in accordance with the provisions of the Land Transfer Ordinance and must execute a deed in the form and manner prescribed; and deeds so executed will be accepted as evidence of the matters therein contained in all courts and by the administrative authorities without further proof."

and that the Land Transfer Ordinance, Chapter 81, which deals with the registration of dispositions and transactions of land, provides in Section 8 —

> "No guarantee of title or of the transaction is implied by a consent given under section 4 and the registration of the deed."

In my judgment the effect of the legislation to which I have referred and the authorities I have cited is not to lay down a rule of law that entries in the Land Registry are conclusive and unimpeachable, but to provide that admissions made therein create an estoppel similar to that created by the execution of a deed according to English law. Such an estoppel may be rebutted by proof of fraud or duress, and in certain circumstances it is open to a party to show that despite his admission he has not received the consideration stated.

Mr. Horowitz pressed upon us the undesirability in this territory of weakening in any way the sanctity of formal contract. It may be that attempts to avoid contracts are more common here than in some other countries. As to that I express no opinion, but I agree that Courts should not be over eager to interfere with formal contracts. They can only do so having regard to the provisions of the Evidence Ordinance, Chapter 54, and the rights of third parties must be protected.

In the case before us, in his statement of claim, the Plaintiff makes no allegation of fraud, and he sets out no facts explaining why he did not receive the sum of LP. 650; moreover, it may be noted, that the Appellant's advocate referred to a letter of 22.3.37 (i. e. before the Plaintiff filed his statement of claim) from the Respondent's then advocate, addressed to the Plaintiff, which states —

> "That sum was paid to you on that date before the signature of the mortgage by a cheque to Bank Tel-Aviv Ltd. No. 15045 signed by me to your order to Bank Tel Aviv Ltd., and you have endorsed the cheque, and it was on your instructions that the said cheque was handed over to Bank Tel Aviv Ltd., and on consideration for that cheque the Bank debited my account on 31.12.36."

I am satisfied that the Plaintiff has not alleged any matters which bring the case within the principles I have set out.

The Plaintiff, in his statement of claim, recited the mortgage, and having alleged that the sum of LP. 650 was not paid to him, asked for payment of that sum. In my opinion this amounts to a claim for specific performance of a contract to lend money. It is unnecessary to discuss the extent to which the Courts of this Territory will specifically enforce contracts, but they certainly will not carry the doctrine of specific performance further than it is carried by the Courts in England.

In South African Territories v. Wallington, 1898 Appeal Cases, 309, Lord Halsbury, referring to a claim for especific performance of a contract to lend money, said —

> "With resepect to the claim for specific performance, a long and uniform course of decisions has prevented the application of such remedy, and I do not understand that any Court or any member of any Court has entertained a doubt but that the refusal of the learned judge below to grant a decree for specific performance was perfectly right. But, of course, in this, like any other contract, one party to the contract has a right to complain that the other party has broken it, and if he establishes that proposition he is entitled to such damages as are appropriate to the nature of the contract."

For the above reasons I am of opinion that the statement of claim disclosed no cause of action, and the appeal should be dismissed with costs. Advocate's fees LP. 5.—.

Delivered this 14th day of March, 1938.

Chief Justice.

CIVIL APPEAL NO. 4/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

Abraham Yom-Tov — Appellant.

v.

Yousef Es-Eddin Ahmad el Ghyssein — Respondent.

Contract for sale of land without basis of title — Deposit paid

on void contract — Damages on void contract — Interest on sums advanced on void contract.

1. If basis or title offered in contract of sale of land goes, contract void.
2. Money paid as deposit on basis of a void contract must be returned.
3. No damages payable on void contract.
4. If Court disallows damages on void contract, it will also disallow interest on sums advanced on that contract.

Gorodissky, Goitein for Appellant.
Cattan for Respondent.

Appeal from judgment of District Court, Jaffa, dated 8.12.37.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jaffa; that Court having held that no damages and no return of deposit could be made on the ground that neither Plaintiff nor Defendant in the original action had any cause of action.

Now in the agreement between the parties which opens with a number of recitals, it is definitely stated:—

> "Whereas the vendor is the owner of a piece of land hereinafter described, registered today in the Land Registry, Jaffa, in the name of Yusef Bek Moyal, by virtue of a judgment of the Land Court, Jaffa, in file No. 195/25".

It is quite clear that that recital is the basis of the title which the Respondent was offering to the present Appellant. That judgment actually was set aside — the grounds on which it was set aside do not concern us here — but having been set aside, and set aside before the contract was entered into between the parties, that statement was an untrue statement, and the whole basis of the title offered went. We are of opinion that, in these circumstances, this contract was a void contract and therefore that the District Court was wrong in not ordering the return of the deposit paid by the Appellant to the Respondent.

Being a void contract, we held that no damages are payable.

The appeal must therefore be allowed in part, and judgment entered for the Appellant in the sum of LP. 200, being the amount of deposit paid by him on two separate dates. We do not allow interest, since to allow interest will be in the nature of allowing damages. The Appellant will get the costs here and below to include LP. 5.— advocate's fees.

The provisional attachment already granted is confirmed.

Delivered this 9th day of March, 1938.

British Puisne Judge. (*Copland, J.*)

CIVIL APPEAL NO. 22/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—Copland, J., Greene, J. and Khayat, J.
In the appeal of:—
Iser Goldberg — Appellant.
v.
Lietuvos Kredito Bankas — Respondent.

Claim of money in foreign currency — Bills made in foreign country — Foreign Law with regard to bills.

1. Suing on bills is different from an action for a sum of money where the bills are produced merely in support of claim.
2. When trying case where money expressed in currency of a foreign country is claimed and bills made in that country are produced, Court not concerned with Law of that country, regarding bills, if plaintiff is not suing on the bills, but produces them merely as evidence in support of his claim.

Dr. Rabinowitch for Appellant.
Dr. Silberg for Respondent.

Appeal from judgment of District Court, Tel-Aviv, (C.A.D.C. 242/37) 22.11.1937, confirming the judgment of the Magistrate.

JUDGMENT.

We need not trouble you Dr. Silberg. This appeal fails. The respondents sued the appellant in the Magistrate's Court for a sum of money expressed in Lithuanian currency and produced in support of their claim some bills given by the appellant to them. The Magistrate gave judgment in favour of the respondents holding that Lithuanian Law was of no use in this case, seeing that the respondents who were the plaintiffs in the original case were not suing on the bills themselves but for money lent.

The District Court dismissed the appeal and gave leave to appeal to this Court. We think that the Courts below were perfectly correct in the view which they took. The bills were produced here merely as evidence in support of the claim and therefore the intricacies of Lithuanian Law with regard to these bills do not concern us in this case in the least.

This is another instance of a defendant endeavouring to evade his liabilities by any artifice which he can think of. This is a state of affairs which is only too prevalent in this country. There is nothing in this appeal which is a vaste of time and we therefore dismiss it with costs and LP. 5.— advocate's fees.

Delivered this 3rd day of March, 1938.

British Puisne Judge.
(Copland, J.)

CIVIL APPEAL NO. 23/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—Copland, J., Greene, J. and Khayat, J.
In the appeal of:—

1. Moses Doukhan
2. Bernard Joseph
   Joint Liquidators of the Phoenix Life Insurance Co., Vienna — Appellants.

v.

1. Sally Wolf
2. Mrs. Alice Wolf — Respondents.

Delegation of powers by one of two joint liquidators of a Company — Notice of appeal not signed by both liquidators — Partner of second liquidator holding a general Power of Attorney from him.

1. A liquidator appointed by Court cannot delegate his powers to any one designated by him.
2. No appeal where notice of appeal signed by one only of two liquidators appointed by Court, though also signed by a partner of second liquidator, temporarily absent from country, who has given a general Power of Attorney to said partner.

Doukhan for Appellants.
Levitsky, Hopp for Respondents.

Appeal from judgment of District Court, Jerusalem, dated 7.10.38.

JUDGMENT.

In this appeal which is stated to be by the joint liquidators of the Phoenix Life Insurance Company, Vienna, a preliminary point has been

taken that there is no appeal before this Court in as much as the notice of appeal is not signed by both liquidators. This is a fact, and it appears that Dr. B. Joseph, the second liquidator, is not at the moment in this country and that the notice of appeal was signed by one of his partners who holds a general Power of Attorney from Dr. B. Joseph. We are of opinion that this is not sufficient. We do not think that a liquidator appointed by the Court can delegate his powers to any one designated by him. The proper course would have been either for both liquidators before the departure of the one, or the remaining liquidator, to have applied to the Court for directions and such appointment as the Court should see fit to make. There is therefore no appeal before this Court.

2. An application has been made for an extension of time within which to lodge the appeal. We do not think that we should do this because a mistake of this nature is not a sufficient ground for us to grant the facility, there being as I have said no appeal before this Court. The application must be dismissed with costs and LP. 5.— advocate's fees.

Delivered this 3rd day of March, 1938.

British Puisne Judge.
(Copland, J.)

CRIMINAL APPEAL NO. 31/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

The Attorney General — Appellant.

v.

Jamil Suleiman Halhal — Respondent.

Appeal by Attorney General from order quashing information — Offences against Emergency Regulations committed before establishment of Military Courts — Emergency Regulations No. 4, of 1936, Reg. 8A (i) — Emergency Regulations No. 5, of 1936, Reg. 3(1) — Criminal Procedure (Trial Upon Information) Ordinance sec. 67(1) (b).

1. Order of District Court quashing information may be regarded as a judgment from which the Attorney General (or his representative) can appeal on ground that the law was wrongly applied to the facts.

2. Offences against Emergency Regulations committed before establishment of Military Courts are triable by District Courts.

Crown Counsel (*Hogan*) for Appellant.
F. Attalla for Respondent.

Appeal from judgment of District Court, Haifa, (Majority Judgment, the President dissenting), dated 6.1.1938, whereby the Information under which Respondent was charged with being in possession of firearms, of military value, without a licence or lawful excuse, contrary to Regulation 8A (i) of the Emergency Regulations No. 4 of 1936, as amended by Regulation 3(1) of the Emergency Regulations No. 5 of 1936, was quashed.

JUDGMENT.

So far as this appeal is concerned, in the first place it has been suggested that the Attorney General cannot appeal. I think that the order of the Ditsrict Court could be regarded as a judgment and as such, it could be appealed under Section 67(1)(b) of the Criminal Procedure (Trial Upon Information) Ordinance, on the ground that the law was wrongly applied to the facts. Since the delivery of the judgment of the District Court in this case, this Court has taken the view in two cases*), that the offences against the Emergency Regulations, committed before the establishment of the Military Courts, should be tried by the District Courts.

The appeal will therefore be allowed, the order of the District Court quashing the information will be set aside, and the information will still stand.

Delivered this 17th day of March, 1938.

Chief Justice.

CIVIL APPEAL NO. 182/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

Yousef el Khalil — Appellant.

v.

Ibrahim el Khalil — Respondent.

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*) Ed. Note: see Cr.A. 4/38 Ct.L.R. Vol. III. p. 85) and Cr. A. 6/38 Ct.L.R. Vol. III. p. 117).

Evidence to contradict registered title to land — Admissions contained in invalid and illegal document.

1. In any dispute as to land, where statement of claim discloses a cause of action, Land Court not precluded from hearing evidence to contradict registered title nor bound by Rules of Evidence contained in Ottoman Code of Civil Procedure.

2. A document purporting to dispose of land when such dispositions were totally prohibited by law is not invalid and illegal for all purposes and can be tendered in evidence by party claiming that it contains certain admissions in his favour effecting the land in dispute.

Asfour for Appellant.
Eliash for Respondent.

Appeal from judgment of Land Court, Haifa, dated 22.7.1937.

JUDGMENT.

This appeal arises out of a dispute with reference to land before the Land Court of Haifa.

In the Statement of Claim it was alleged by the Plaintiff that his father had bought certain land for the plaintiff an his three brothers and that owing to arrangements between them the land was registered in the name of the respondent alone. He alleged that after this arrangement, and because the land happened to be registered in the name of the respondent, the respondent claimed to be sole owner of the property. The defence of the respondent was based on limitation. This point was never considered by the Court below and we say nothing about it in this appeal. The Court below came to the conclusion that it was precluded from hearing any evidence whatever to contradict the registered title of the respondent. In this we think the Court below misdirected itself. The Statement of Claim disclosed a cause of action, and when the Land Court has before it a dispute as to land it is its duty to hear the case and to give a judgment, and it is not bound by the Rules of Evidence contained in the Ottoman Code of Civil Procedure.

We also think that the Court misdirected itself on another point. A document had been produced dated 11th September, 1919. This document effected to dispose of certain immovable properties and according to the law at that date all dispositions of immovable property were totally prohibited. It was alleged, however, by the appellant that the document contained admissions by the Respondent in his favour, and he contended that the Court should for that purpose treat the document as admissible in evidence. The Court below came to the con-

clusion that as the disposition of the land was prohibited, the document itself was illegal and invalid. We do not think that the document was illegal and invalid for all purposes. We think that it was admissible in evidence, and that the Court below should have taken it into consideration to see whether it contained an admission by the respondent and particularly if any such admission affected the land in dispute. As we have said when a Land Court has a dispute before it regarding land and the Statement of Claim discloses a cause of action, it is the duty of the Court to hear all admissible evidence which the plaintiff desires to produce. This was not done in the present case, and we therefore order that the judgment of the Land Court be set aside, that the case be remitted to it for a new trial with directions to hear all admissible evidence that the appellant may desire to produce, and to consider also, if necessary, the defence of limitation put forward by the respondent. Costs of this appeal to include LP. 5.— advocate's fees to abide the event.

The provisional attachment will be restored.

Delivered this 14th day of March, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 12/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

1. Musbah Ammar
2. Yousef el Amassi — Appellants.

v.

1. Said Kayali
2. Abdul Jawad Joudeh
3. Abdel Rahim Kayali
4. Izzat Kamal — Respondents.

Burden of proof shifted — Possession of leased property — Rent for period of arab strike in Palestine in 1936.

1. If Court finds as a fact that lessee was in possession of premises on a certain date and also on a later date, burden of proof shifted to lessee to prove that he has, in any way between those two dates given up possession of the premises.

2. Lessees liable to pay rent also for period of the arab strike in Palestine (which began on or about 19.4.1936).

Cattan for Appellants.
Kanafani for Respondents.

Appeal from judgment of District Court, Jaffa, dated 11.1.1938.

JUDGMENT.

This is an appeal from the District Court of Jaffa in which they altered the judgment of the Chief Magistrate and gave judgment against the two appellants for rent for a period from the 19th April, 1936, to the 27th October in the same year. The Magistrate had previously given judgment in favour of the Respondents for a period from the 27th October, 1936, to the 17th January, 1937. Against the second part of the Magistrate's judgment, there is no appeal.

2. The first ground of appeal is that the District Court, sitting as an appellate Court, had no power to interfere with the finding of fact of the Magistrate. If we examine the judgment, we find that they had not in fact intefered with this finding. The Magistrate found as a fact that the Appellants were in possession of these premises on the 19th April, 1936. He also found as a fact that the Appellants were in possession on the 27th October, 1936. In our opinion, the burden of proof is thereby shifted to the other side to prove that they have, in any way, between these two dates given up the possession of the premises. The learned Magistrate also would seem to be under the impression that for the period of the strike the lessees were not liable to pay rent. This of course is a wrong principle and the correct law has been laid down by this Court in another Jaffa case*).

3. With regard to the other points raised by the Appellants, we are of opinion that there is nothing in them.

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

Delivered this 8th day of March, 1938.

British Puisne Judge.
(Copland, J.)

CIVIL APPEAL NO. 30/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

Hanneh Habib Talhami, on her own behalf

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*) Ed. Note: see C.A. 138/37 (Ct. L. R. Vol. II. p. 73).

and on behalf of the heir of Salim Matta Bahhous — Appellants.

v.

Zarifeh Naser Jarrous, on her own behalf and on behalf of the heirs of Hanna Matta Bahhous — Respondents.

Joint possession of land by predecessors in title of present parties — Interruption of limitation.

Document in form of application by predecessor in title of both parties showing that lands in question were held by them in joint possession interrupts period of limitation.

Fouad Attallah for Appellants.
Asfour for Respondents.

Appeal from judgment of Land Court, Haifa, (sitting in its appellate capacity), dated 29.11.1937.

JUDGMENT.

This appeal arises out of a land dispute between the appellants and the respondents. The Settlement Officer in the Haifa settlement area decided in favour of the appellants, but on appeal his decision was reversed by the Land Court of Haifa, and there is now an appeal to this Court. Such an appeal is allowed only on a question of law.

2. I have had some difficulty in finding what is the exact point of law on which the appellants have appealed. In the judgment of the Land Court, the respective claims of the parties are summarized and it appears that the appellants contested the claims of the respondents on the ground that they had been in exclusive possession for the period prescribed.

The Land Court had before it a document dated the 4th of May, 1926, which was an application signed by the predecessors in title of both parties showing that the lands in question were held in joint possession by the predecessors of both parties. The Land Court came to the conclusion that the effect of this document was to interrupt the period of limitation. That is the only point that I can find in the appeal, and I am, therefore, of opinion that the appeal should be dismissed with costs to include LP. 5.— advocate's fees.

In these circumstances it is unnecessary to say anything as regards preliminary objection raised by Mr. Asfour.

Delivered this 17th day of March, 1938.

Senior Puisne Judge.

CRIMINAL APPEAL NO. 18/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

The Attorney General — Appellant.

v.

Saleh Yousef Suleiman — Respondent.

Appeal filed by Crown Counsel — Amendment of charge by Court without consent of prosecution — Emergency Regulations and "disturbances". Criminal Procedure (Trial Upon Information) Ordinance sec. 67 — Law of Procedure (Amendment) Ordinance 1934 sec. 2(b) and 4(1) — Criminal Appeal No. 97/37.

1. "Prosecute" in sec. 4(1) of Law of Procedure (Amendment) Ordinance includes filing of a charge; filing of an appeal is therefore, also within competence of Attorney General or his representative, including Crown Counsel.

2. Court must give verdict on the charge as laid.

3. Emergency Regulations — substantive law in Palestine, their application does not depend on continuance or otherwise of disturbances, which only affect constitution of Court.

Hogan for Appellant.

Asfour for Respondent.

Appeal from the judgment of the District Court, Haifa, dated 16. 12.1937, whereby Respondent was convicted of possession of firearms and ammunition, contrary to Section 36(2) (a) and (f) of the Firearms Ordinance, and sentenced to one year imprisonment, to run from 25th August, 1937.

JUDGMENT.

In this case the District Court of Haifa, on trying a charge of possession of firearms under the Emergency Regulations, at the close of the prosecution held, that since the charge did not arise out of the disturbances the proper charge should have been under the Firearms Ordinance. They thereupon purported to amend the charge accordingly; the accused pleaded guilty and was sentenced to one year's imprisonment. The Attorney General has appealed and the ground alleged by him is that without the consent of the prosecution, which has not been given in this case, the Court cannot alter the charge. Certain preliminary points have been taken by the counsel for the respondent and the main one is that by section 67 of Chapter 36 power is given to Attorney General himself personally only to appeal in criminal cases. This clause,

however, has been altered by the Law of Procedure (Amendment) Ordinance, 1934. By section 4(1) of that Ordinance the Attorney General or his representative may prosecute any criminal proceedings in any Court and may appear and be heard in any Court, in any appeal, application etc. By section 2(b) in the same Ordinance the Attorney General's representative is defined as including the Attorney General and certain specified officers and certain persons authorised by the Attorney General. The word "prosecute" necessarily includes the filing of a charge since that filing is the first step in a prosecution, and it follows that the filing of an appeal, which is a step in a prosecution must equally be within the competence of the Attorney General or his representative.

The actual appeal is signed by Mr. M. J. Hogan, Crown Counsel, and we are satisfied that Mr. Hogan in his capacity as a Crown Counsel is a person duly authorised by the Attorney General. The name Crown Counsel has no particular importance; the argument as to the Crown having no legal status in Palestine, besides being incorrect, is immaterial. It has been argued that, supposing that the appeal is properly laid, the ground alleged is not a ground upon which the Attorney General can appeal. We do not agree with that contention. We are of opinion that the law was wrongly applied to the facts of the case and that the Court has actually gone wrong as is admitted. But the essential point on which they went wrong is this they never gave a verdict on the charge as laid. If they thought that the charge should have been amended they should undoubtedly have given a verdict on the original charge which they did not do. The appeal must therefore be allowed and the case remitted to the District Court for a verdict to be given on the original charge as laid under Emergency Regulations. The conviction under the Firearms Ordinance must accordingly be set aside and when this case comes back before the District Court, we would like to call their attention to this fact. The Emergency Regulations are the substantive law of this country, and their application does not depend on the continuance or otherwise of what were euphemiastically called "disturbances". It cannot be too often repeated that the existence of the so called disturbances merely affects the constitution of the Court which tries offences under Emergency Regulations. That principle has already been laid down by this Court in Criminal Appeal No. 97/37*) (Ijbara Abdel Aziz el Fakhoury v. The Attorney General). The appeal is allowed as I have said and the case remitted for a proper verdict to be given. Delivered this 10th day of March, 1938.

British Puisne Judge.
(Copland, J.)

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*) Ct. L. R. Vol. II. p. 95.

CIVIL APPEAL NO. 33/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

"Ahrayuth" Beth Harosheth Lemartzefoth, Ltd. — Appellant.

v.

Harry Rotter — Respondent.

Reports of experts appointed by consent of both parties — Examination and cross-examination of experts — Declining to hear further evidence.

If experts appointed by consent of both parties are examined and cross-examined and Court accepts their reports as conclusive on the points on which they gave evidence, Court under no duty to hear further witnesses on those points.

After having heard certain evidence Court may decline to hear any further evidence which it thinks would be irrelevant.

Shapiro for Appellant.

Respondent in person.

Appeal from judgment of District Court, Haifa, in its appellate capacity, dated the 12th November, 1937.

JUDGMENT.

We need not trouble the respondent. This appeal comes to us on a point of law stated by the R/President of the Hafia District Court, in these terms:—

> "Whether when the defendant applies, after the expert appointed by the Court has delivered his report and given evidence in connection therewith, that the Magistrate should hear his witnesses in order to prove his contentions, the Magistrate is, or is not bound to hear such witnesses, and the arguments of the parties before giving judgment."

The point is of course much too widely stated. There are many occasions on which the Magistrate would have been under the duty of hearing all the evidence tendered — there are many cases where he would be under no such duty. This case falls within the second class.

Experts were appointed by consent of both parties, they made their reports and gave evidence in Court and were cross-examined. That evidence was conclusive and on the points on which the experts gave evidence the Magistrate was under no necessity to hear further witnesses, if he accepted the experts' reports.

Two points were reserved by the experts for the decision of the Magistrate who heard certain evidence and declined to hear any further evidence on the ground that the evidence tendered would be irrelevant. In the circumstances of this case we think that the Magistrate was correct. The appellants had claimed that certain work had not been done by the respondent — the latter should have been called upon by the appellants to prove his claim that he had done it. The appellants did not see fit to take this course but odopted another one which was wrong.

The answer to the point stated is that in the circumstances of this case the Magistrate was justified in declining to hear the further evidence.

The appellants must pay the costs of this appeal together with LP. 2.— travelling expenses for the respondent.

Delivered this 22nd day of March, 1938.

British Puisne Judge.

CRIMINAL APPEAL NO. 19/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

1. Rabah Abdel Rahman Hassan
2. Mahmoud Ahmad el Hafi
3. El Abed Mohammad Abdel Wahhab — Appellants.

v.

The Attorney General — Respondent.

Extra judicial confession of accused — Criminal Code Ordinance, Sec. 23, 270, 287, 288. *Evidence Ordinance, Sec.* 9.
R. v. Sykes, C.A.R. Vol. VIII p. 236-237. — *R. v. Baskerville.*

Court may convict upon extra judicial confession of accused, if satisfied that it was free and voluntary and found consisted with ascertained facts.

Goitein for Appellants.
Crown Counsel (*Hogan*) for Respondent.

Appeal from the judgment of District Court, Jaffa, dated the 27th January, 1938, whereby Appellants were convicted of Attempted Robbery, contrary to Sections 287 and 288 (2) in conjunction with Section 29 of the Criminal Code Ordinance, 1936, and sentenced to ten years' imprisonment each.

JUDGMENT.

This is in itself a simple case, but it raises several important points which it is well should be made clear. All three Accused were charged with attempting to commit robbery contrary to Sections 287 and 288(2) of the Criminal Code Ordinance on two occasions, and with theft contrary to Sections 270 and 23 of the Criminal Code Ordinance on the night of 2-3.9.37 at Ramleh, and Accused No. 1 and No. 2 with possession of firearms contrary to the Firearms Ordinance on the 6th of October, 1937, but owing to the limitation of the Court's jurisdiction, they were convicted on the first two counts only, that is, of attempted robbery. The Accused all pleaded not guilty.

The main evidence against them consisted of extra judicial confessions which each had made, as to which at the trial Accused No. 1 said: "I made a statement to the Police. This is it. In that statement I told lies because they beat me." Accused No. 2 said: "I did not make a statement to the Police. I was beaten by the Police". And Accused No. 3 said: "I did not give a statement to the Police. I was told to put my thumb print. I thought it was a bail bond. I was beaten by the Police."

The Court of Trial found as to Accused No. 1 and No. 2, that "they were cautioned and both made voluntary statements to the Police, in the course of which they admitted they had been in the party who attempted to rob the houses of the above named witnesses", and as to the other Accused they found — "On 5.9.37 Accused No. 3 was arrested, and after having been cautioned, made a statement to the Police".

Mr. Goitein argued before us that even if admissible, these confessions and the other evidence are not enough to justify the conviction, and that the Court of Trial misdirected themselves concerning the confessions.

The provisions of Section 9 of the Evidence Ordinance dealing with confessions are clear ,and in practice the Courts have applied the English tests in order to ascertain if a confession was free and voluntary.

In this case it seems that the Court was satisfied that the confessions were free and voluntary. The question therefore arises — how far should the Court act upon these confessions in the light of the facts of the case.

It is clear that the evidence against each accused must be considered separately, and that the confession of each Accused is evidence against him only, and not against the others.

It is true that the Court, speaking of Accused No. 3's statement said that in it "he confirmed the statement made by No. 1 and No. 2 Accused", but by that I understand them to mean that he told sub-

stantially the same story and not, as I think appears from the later part of the judgment, that they thought his admission corroborated that of the others.

It may be dangerous to convict on an extra judicial confession alone, and in order to enable the Court to convict upon it, it is, in my opinion, necessary to show that a crime has or may have been committed, and then to apply, if I may so call them, common sense tests such as are set out in R. v. Sykes, C.A.R. Volume VIII, at pages 236 and 237. The passage is as follows:—

> "The main point, however, is one independent of all these details, the question how far the jury could rely on these confessions. I think the Commissioner put it correctly; he said: "A man may be convicted on his own confession alone; there is no law against it. The law is that if a man makes a free and voluntary confession which is direct and positive, and is properly proved, a jury may, if they think fit, convict him of any crime upon it. But seldom, if ever, the necessity arises, because confession can always be tested and examined, first by the police, and then by you and us in Court, and the first question you ask when you are examining the confession of a man is, is there anything outside it to show it was true? is it corroborated? are the statements made in it of fact so far as we can test them true? was the prisoner a man who had the opportunity of committing the murder? is his confession possible? is it consistent with other facts which have been ascertained and which have been, as in this case, proved before us?"

I think it is clear from the report as a whole that the learned Judge is not using "corroborated" in the full sense of R. v. Baskerville. The facts are not very fully set out, but at page 235 it is stated:—

> "The main evidence against the appellant was his own statements; the confession to Haigh was made in language of great obscenity and is quite unreliable; the next statement was made in the cells and was signed by him, and must carry considerable weight; then he gave information as to where his trousers and knife were hidden; then he made further statements retracting his confessions, and in one of them saying that a man named Gedney could prove an alibi".

In the case before us the Court found —

> "The accused have given evidence on their own behalf denying any connection with the offence. We do not believe their testimony.
>
> On the contrary we are abundantly satisfied from the evidence produced by the prosecution that their statements to the Police are correct and true account of what happened on the night in question and we therefore find them guilty of attempted robbery with violence contrary to Sections 287 and 288(2) of the Criminal Code".

Applying the tests which I have stated, was the Court justified in coming to that conclusion?

There was evidence that attempts were made by some armed men to rob the houses in question. The Accused were local men. The stories in their confessions were certainly possible, and so far as Accused No. 1 and No. 2 were concerned they were borne out by the production of a rifle and revolver, and on the whole the stories are consistant with the ascertained facts.

I see no reason, therefore, why the Court should not have acted upon them, and the appeal will be dismissed.

The sentences imposed are the maximum for the offence, and on the whole we do not think that facts warrant the maximum. We therefore reduce them in each case to one of seven year's imprisonment.

Delivered this 24th day of March, 1938.

Chief Justice.

HIGH COURT CASE NO. 1/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

JUDGMENT.

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

In the case of:—

Ishak Omar Hijasi — Petitioner.

v.

1. Chief Execution Officer, Jerusalem
2. Mr. Haim Shougerman — Respondents.

Time to apply to High Court.

Application to High Court should be made quickly. High Court will not assist a party who has allowed 6 months to elapse before making application.

Ades for Petitioner.

First Respondent: No appearance.

Kehaty for Second Respondent.

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

ORDER.

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

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

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

Given this 9th day of February, 1938.

Chief Justice.

CIVIL APPEAL NO. 10/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Shafiq Shuqair — Appellant.

v.

1. Salim Cotran
2. Na'im Cotran — Respondents.

Liability to pay interest — Notarial Notice demanding payment of debt but not containing demand of interest — Meaning of "presentation of a plaint" in art. 112 of Ottoman Civil Procedure Code — Interest from date of action — Ottoman Civil Procedure Code, Art. 112 — Notarial Public Law, Art. 69.

C. A. 75/34.

1. If no undertaking to pay interest — no interest payable, even though payment of capital sum was demanded by Notarial Notice, unless interest had been claimed, either in same Notice, or separately.

2. Plaintiff not entitled to interest from date of action, if he did not claim it, although he did claim in respect of a certain period enduing before date of action.

F. Atalla for Appellants.
Katafago for Respondents.
Appeal from judgment of District Court, Haifa, dated 20.12.1937.

JUDGMENT.

Copland, J.

In this case the appellant, who was the plaintiff in the District Court, sued the respondents for the interest on a loan to them from the appellant. This loan was secured by a deed drawn up and authenticated by the Notary Public, Acre, dated the 13th September, 1937, and in it the respondents promised to pay the debt, jointly and severally on the 20th May, 1938. The deed was as follows:—

> On Tuesday, 13th September, 1927, I Mohammad Hashim son of late Shafiq Abdul Dajani, Notary Public, Acre, went to the house of Dr. Na'im Cotran, at Acre; there Dr. Na'im and Salim Eff. Cotran declared before me that they have borrowed from Shafik Bek Shouqair of Cairo — Egypt, a sum of LE. 1428.40 piastres, to be spent by them on their own benefit. They undertook to settle the said debt, jointly and severally, on 20th May, 1928.
>
> This deed was made by me in presence of the undersigned witnesses.
>
> 13th September, 1927.
>
> *Sgd. Mohammad Hashim Dajani*
> Notary Public.
> *Sgd. Salim and Na'im Cotran*
> Debtors.
>
> Identifying witnesses:
> *Sgd. Jabra Abdul Nur.*
> *Sgd. Sam'aa Stabli.*

The debt was not paid on the due date, and on the 21st May, 1928, the deed was produced to the Notary Public and he was requsted by the appellant to notify the respondents to pay the said sum. The notice was duly served on the Respondents on the 22nd May, 1928, and was in these terms:

NOTARIAL NOTICE

To Messrs Salim and Na'im Cotran.

A deed was produced to me, authenticated by the Notary Public of Acre, dated 13th September, 1927, NO. 195/4092, signed by you, dated and containing an undertaking made by you to pay on 20th May, 1928 a sum of LE. 1428.40 piastres to Shafiq Bek Shouqair of Egypt. The fixed period expired without fulfilling your undertaking, by paying the said sum to their owner. Therefore, and by virtue of Art. 69 of the Law of the Notary Public, I hereby notify you, that you should pay the said sum to the Creditor within a period of 8 days as from the date of serving this notice, upon you, otherwise legal steps will be taken against you.

21st May, 1928.

Sgd. Abdul Rahman Jarrah
Notary Public, Acre.

Various amounts have since been paid off and the balance of the capital is under collection by the Execution Officer. The respondents declined to pay the interest on the amounts outstanding as from the date of service on them of the Notarial Notice. The appellant sued them before the District Court of Haifa which dismissed the claim, holding that, since the deed contained no undertaking to pay interest, and since no interest had been claimed in the Notarial Notice, no interest was therefore payable, and the Court based its judgment on Art. 112 of the Civil Procedure Code. This article reads:—

> "If the contract be for the payment of a certain sum of money, and there be delay in making such payment, damages may be awarded at the rate of one per cent, per month (reduced to nine per cent per annum by the Law on the Rate of Interest) on the principal amount, and the creditor shall not be required to prove that he has suffered any loss. If no stipulation for the payment of interest be included in the contract, it shall be payable from the date of the protest, if it was claimed in the protest, and otherwise from the date of presentation of the plaint".

A lengthy argument has been addressed to us that the presentation of a notarial notice and the application to the Chief Execution Officer are equivalent to the "presentation of a plaint". We do not agree. The terms of Art. 112 are very clear, and the words "presentation of a plaint", given their ordinary meaning, mean the entry of an action in the Court. It is true that in this case the appellant was under no necessity to file an action, since on default of compliance with the Notarial Notice he could at once lodge the deed for execution in the Execution Office, following the procedure laid down in Art. 69

of the Law of the Notary Public. This, however, does not affect the situation, because if the filing of an action is not necessary, one cannot assume a fictitious action and a fictitious date for its filing, in order to bring the matter within the terms of Art. 112 with regard to the payment of interest.

The appellant had his remedy, since there was no undertaking in the deed to pay interest, he should have served a notarial notice claiming interest, either with the official notice claiming repayment of the capital sum of the loan, or separately. This he has not done, and we think that the District Court was right in dismissing his claim.

The appellant in his argument has relied on the case of Said el Karmi v. Albert Far'oum, (Civil Appeal No. 75/34). This, however, concerned interest on a mortgage, and we do not think that it has any application in the matter now before us.

Though not entitled to interest from the date of the serving of the Notarial Notice, the appellant would, we think have been right in saying that the Court should have given him interest from the date of filing of his action in the District Court.. This follows from Art. 112 of the Civil Procedure Code, and indeed, the respondents do not dispute this. We say "would have been right", because if he had claimed it, he would have been entitled to judgment for the amount, but he did not claim it in his action. In his plaint he claims interest from the 22nd May, 1928, to the 31st August, 1937, only and in clause 6, he states— "the plaintiff reserved for himself the rigths of claiming interest on the balance of the debt as from 1st September, 1927, until complete payment". The statement of claim was filed on 9th September, 1937. He cannot now in this Court amend his statement of claim, claiming by something which he deliberately excepted in his original claim.

The appeal fails and must be dismissed with costs to include LP. 5.— Advvocate's fees.

Delivered this 24th day of March, 1938.

Puisne Judge. *British Puisne Judge.* *Chief Justice.*

CIVIL APPEAL NO. 34/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

Miller Neuman & Cargelli

"Installator" Appellants.

v.

David Haim Levy Respondent.

Finding made by arbitrator — Scope of "workman" under Workmen's Compensation Ordinance.

Court of Appeal will not interfere with finding of arbitrator in respect of a workman supplied together with other men to a sub-contractor by a Labour Exchange and paid not a daily wage but for one part of work — a lump sum and for other at piece rate — that he is none the less a "workman" within meaning of Workmen's Compensation Ordinance.

Feiglin, Levitzky for Appellants.
Avniel for Respondent.

Appeal from judgment of District Court, Haifa, dated 13.12. 1937.

JUDGMENT.

This is an appeal from the Haifa District Court, in a Workmen's Compensation Case, on a point of law stated by the R/President in this form:—

> "Whether there was sufficient evidence before the Arbitrator to support the finding that the Applicant was a "Workman" within the meaning of the "Workmen's Compensation Ordinance".

The facts so far as relevant are as follows:—

The appellants for the purpose of some work which they had undertaken to do arranged with a Mr. Braverman to construct a cess-pit and to dig a channel in connection therewith. Braverman, who thereupon became a sub-contractor, arranged with a Mr. Settner, who is the secretary of a Haifa Labour Exchange, to supply workmen for the job, and Mr. Settner detailed to this work certain men including the respondent. In the course of the work, the respondent was seriously injured. The respondent and the other men with him were paid a lump sum for the construction of the cess-pit, and at piece rates for the construction of the channel and used their own tools.

The appellants argue that the respondent and his fellow-workmen were sub-contractors and not "workmen" within the meaning of the Workmen's Compensation Ordinance.

Every case of this nature depends very largely upon its particular facts, and one of the most important factors is the condition of work in Palestine and the methods used — the methods adopted by labour here. It is a matter of common knowledge that a vast amount of building work is done by groups of workmen paid at piece rates, and

not at daily rates on particular jobs. The appellants admit that if the respondent had been paid a daily wage, he would undoubtedly have been a "workman" within the meaning of the Ordinance. Under the normal conditions of work in Palestine, we cannot see that being paid at piece rates makes him any less a "workman". Neither is the position altered because, in response to Braverman's request, he was offered the work by Settner, nor the fact that he did not know Braverman.

There was evidence before the Arbitrator on which he could find that the respondent was a "workman", whether he were so or not is a question of fact. If there were evidence both ways, then it was for the Arbitrator to make his decision. He has decided that the respondent was a "workman" within the meaning of the Ordinance and this Court cannot interfere.

We think that the arbitrator and the learned R/President rightly directed themselves in law, and it follows that this appeal must be dismissed with costs and LP. 5.— advocate's fees.

Delivered this 28th day of March, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 15/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—Copland, J. and Khaldi, J.

In the appeal of:—

1. Mohammad Said el Kassem
2. Mahmoud Mohammad Barakat
3. Mustafa Mohammad Barakat
4. Yousef Mohammad Barakat — Appellants.

v.

Younes Daoud el Younes — Respondent.

False statement of claim — Equitable rights to land — Land settlement — Agreement for sale of Land — Specific performance — Palestine Order-in-Council, sec. 46. —

Haj Hassan Hammad v. Latin Patriarch, L.A. 1/36 — *Abdullah Bey, Chedid v. Tennenbaum, P.C.* 47/32 (*P.L.R. p.* 831) — *Sheikh Suleiman Taji v. M. Ayoub & others P.C.* 1/35.

1. Case must be dismissed, if statement of claim deliberately false and party continually changes the nature of his claim, and arguments.

2. Equitable rights to land exist in Palestine on same principles as in England.

If party to agreement for sale of land paid the purchase money and was let into possession and remained in it for some

years, and land still registered in name of vendor but by no default of purchaser, latter has an equitable right to land and entitled to sue for specific performance (Khaldi, J. dissenting).

Moghannam for Appellants
Adel Zu'eiter for Respondent.

Appeal from judgment of Land Court, Nablus, sitting in its appellate capacity, dated the 8th December, 1937, and delivered in the presence of parties, on th 23rd December, 1937, confirming the judgment of the Land Settlement Officer, Tulkarm, Settlement Area, dated 20.1.1937.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Nablus dismissing an appeal from a judgment of the Tulkarm Settlement Officer.

The case is rather confused and even in this Court the appellants did not seem to be very clear in their arguments. Before the Settlement Officer they counterclaimed for the land in dispute, alleging that the land had been sold by bei'bilwafa nearly ten years ago. In their pleadings before the Settlement Officer they altered this claim stating that the sale was a *"barrani"* one. Various other contradictory statements regarding the nature of the transaction were made at intervals, but finally they seem to have agreed that the transaction was an agreement to sell, and could therefore be avoided. They admitted that the original claim was wrongly made out, and that this was intentionally done, so as to force the respondent to produce the deed. The Settlement Officer dismissed their counetrclaim on the ground that they had made a claim which they knew to be false, and since the respondent had been in possession for a number of years, ordered registration of the land in his name.

The appellants appealed to the Land Court which dismissed the appeal on substantially the same grounds. The appellants have now come to this Court. Here they have argued that the statement in the original counterclaim was only technically wrong, but much of whatever force this argument might have had is destroyed when they go on again to say that they had no other alternative to force the respondent to produce the deed of sale or agreement for sale. But no one is entitled knowingly to make a false statement in order to embarass an opponent. Alternatively, and somewhat condratictorily they advance the plea that they are illiterate fellaheen and are unacquainted with the niceties of legal forms and procedure. This argument, I confess, fails to impress me. One does not need a knowledge of legal matters to be honest and tell the truth.

Even here in this Court they are again not too clear as to what the nature of the transaction was. First of all they say that it was a mortgage, and then almost in the same breath, that it really was a contract to sell. But when the respondent brought forward the argument that the transaction was an equitable sale, and asked this Court to hold that the principles enumerated by one of the Judges in the case of Haj Hassan Hammad v. Latin Patriarch (L.A. 1/36) should be applied, they sought to distinguish this latter case, on the ground that there was an agreement for sale, whereas in the present case there was a void sale.

In view of these facts and circumstances, I frankly cannot see what other course the Courts below could have taken. It is all very well to say that settlement Officers exist to administer justice and they must not be too technical in matters of procedure. The basis of justice is frankness and honesty on the part of those who seek it, and I cannot regard a deliberate false statement as a mere technicality. Neither can parties expect much sympathie from a Court when they continually change the nature of their claims and arguments according to what they consider will best be to their advantage, however contradictory their arguments may be, I think that the Courts below were right in dismissing the appellants' case, and in my view this appeal should equally be dismissed.

This, as I see it, disposes of this appeal but since, however the question of an equitable title has been raised, it must be dealt with, so that if this case should be taken further, all the arguments advanced will have been considered and a ruling given on them.

The respondent's case on this particular point is that, having paid in full the price agreed upon, and having been in possession of the land in dispute, for a period which, though not exceeding ten years, somewhat nearly approaches it, he has acquired a good equitable title to the land, and that since Settlement Officers as well as Land Courts are instructed to pay regard to equitable as well as legal claims, he is enentitled to be registered as the owner, and he quotes in support of his claim the judgment of the Senior Puisne Judge in Hammad's case (supra). The appellant's answer is that there are numerous judgments of the Supreme Court to the contrary, and that the doctrine of specific performance is not recognised in Palestine.

In Haj Hassan Hammad v. The Latin Patriarch (supra) Manning, J., reviewed in detail the Palestine Law on the subject of land transfer in Palestine, considered the effect of Article 46 of the Palestine Order-in-Council, 1922, and two cases from the Palestine Courts which came before the Privy Council namely Abdullah Bey Chedid and others v. Tennenbaum (P.L.R. 831) and Sheikh Suleiman

Taji v. Michel Ayoub and others (Privy Council Appeal No. 1 of 1935). He also dealt with certain other cases decided by this Court which had been referred to in the course of the arguments. I do not propose to cover the same ground again — it would be unnecessary and superfluous — but the conclusions at which he arrived were that equitable rights to land do exist in this country on the same principles as in England. In para. 38 of his judgment he said this:—

> "To sum up, there was a valid agreement, for the sale of land by the appellant to the respondent. The respondent paid the purchase money, he was let into possession, and at the time of action brought had been in possession for five years. Owing to the default of the Appellant's agent certain provisions of the law were not complied with with the result that in law the appellant still remains the owner of the land. If the respondent is to be dispossessed now it is clear that damages will not afford an adequate remedy. There has been no default on the part of the respondent. He has thus an equitable right to the land and is entitled to sue for specific performance, and this is not affected by any of the penalty clauses in the agreement. Against any claim for the land by the appellant, the respondent has a good defence in equity".

In this present case now before us, the facts are almost exactly similar — there was an agreement to sell, the whole of the purchase price was paid by the respondent — the appellants let the respondent into possession and he has been in possession for nearly ten years. In such circumstances, and following the judgment of Manning, J. in Hammad's case, and I respectfully agree with his conclusion and statement of the law in toto, it seems to me that as against the appellants the respondent has a good equitable title to the land in dispute.

There is only one further point to which I must refer. The Land Court said in the course of the judgment now under appeal "Upon these facts and in other circumstances if plaintiff tenders the purchase price and damages, he might be allowed to go back on his contract and claim the land back". But in fact, as the Land Court found, no money was tendered and, therefore, holding as I do on the main issues in this case, it is unnecessary in my opinion to say anything further about this point.

For these reasons, in addition to those given by the Land Court, I think that this appeal should be dismissed.

As my brother Mustafa Bey holds a different opinion the Court is equally divided. The result is that the appeal must be dismissed with costs LP. 5.— advocate's fees.

Delivered this 29th day of March, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 18/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Nicola Schmidt — Appellant.

v.

Sheikh Mustafa el Khairy — Respondent.

Constitution of Land Court — Disagreement of Judges —Land Courts Rules 1921, *Rule* 2(2).

Land Courts Rules 1921 still applicable to Land Courts.
In case of disagreement in Land Court, third judge has to be called in.
Ed. Note: See Ct.L.R. Vol. I Report 27.

H. Attallah for Appellant.
Moghannam for Respondent.

Appeal from judgment of Land Court, Jaffa, (L.C. 535/33) dated 23.12.1937.

JUDGMENT.

This Court, constituted as it happens to be today, decided in April, 1937, that the provisions of the Land Court Rules, 1921, are still applicable to Land Courts, and this is the law until this view is overruled by a higher authority.

The judgment dismissing the action is set aside, the case remitted, and the Land Court is directed to call in a third judge and to decide the issue, with costs and LP. 5.— advocate's fees.

Delivered this 30th day of March, 1938.

Chief Justice.

CRIMINAL APPEAL NO. 22/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Julius Silberman — Appellant.

v.

The Attorney General — Respondent.

Finding of fact vitiating conviction — Identification of receptacle of prohibited matter — Importing Firearms and ammunition — Firearms Ordinance, Sec. 36 (1)(*b*) *and* (2)(*a*) *and*(*f*).

Court cannot convict of possession of prohibited matter, if it has found as a fact that it was impossible for the witnesses to identify with certainty the receptacle containing such matter i.e. the connecting link between it and accused.

Eliash for Appellant.

Fawzi Ghussein for Respondent.

Appeal from judgment of District Court, Haifa, dated 17.1.1938, whereby Appellant was convicted of Importing firearms of military value and ammunition secretly from outside Palestine, contrary to Section 36 (1)(b) and (2)(a) and (f) of the Firearms Ordinance, and sentenced to fifteen months imprisonment.

JUDGMENT.

The Appellant in this case was convicted by the District Court of Haifa, composed of the Relieving President sitting alone, on a charge under the Firearms Ordinance of having smuggled and endeavoured to import to Palestine ten automatic pistols and about 1200 rounds of ammunition. The Relieving President wrote a very long judgment clearly analysing alle the evidence and expressing very freely his belief that the evidence was very doubtful. At the end of his judgment he says:—

> "Having considered the evidence I find that it has been proved beyond a reasonable doubt that accused was the man who went to the Harbour Gate carrying the suit-case with the pistols and ammunition in it",

and convicted him and sentenced him to fifteen months imprisonment.

Now if this conviction is to stand it has got to be proved that it was this appellant who had this particular suit-case in which these pistols were found. Two witnesses apparently gave evidence that they had seen the appellant come to the gate with this particular suit-case, and the Court in its judgment said:—

> "In my judgment it is not possible for the witnesses to identify the suit-case with certainty. There may well have been a number of suit-cases like this one on the ship".

On that finding of fact alone by the Court this conviction cannot possibly stand, since it shows that the connecting link between the suit-case and the appellant is missing. That being so, it is not necessary for me to say anything more about this case.

The appeal is allowed, the conviction quashed and the Appellant is discharged.

Delivered this 2nd day of March, 1938.

British Puisne Judge
(Copland, J.).

HIGH COURT CASE NO. 13/38.

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:—
The Palestine Cigarette Co., Ltd. — Petitioner.
v.
1. Bejerano Bros.
2. Registrar of Trade Marks — Respondents.

Distinctive character of trade mark — Registration of trade mark consisting of a letter or group of letters — Trade Marks Ordinance, sec. 6 — Registrar of Trade Marks v. W. & G. Du Cros Ltd., 1913 *A.C.* 624 — *Garret's application,* 1916 1 *Ch.* 451.

> A trade mark in order to be registrable must be distinctive, i.e. adapted to distinguish the goods of the applicant from those of others.

A letter or group of letters cannot in themselves be deemed distinctive within meaning of sec. 6 of Trade Marks Ordinance.

Levin for Petitioner.
Dr. P. Joseph for first Respondent.
For second Respondent no appearance.

Application for an order to issue to the Second Respondent directing him to reject the application for the registration of a trade mark numbered 4624 in Class 45, in respect of cigarettes, published in Supplement No. 3 to the Palestine Gazette No. 736, of 11th November, 1937, at page 123, and for further order and directions as may seem just and proper.

JUDGMENT.

The Respondents to this application are seeking to register a trade mark which consists of the word "Alef" in script, running into a somewhat fanciful representation of the Hebrew character Alef.

The application was advertised under No. 4264, Class 45, Gazette No. 736, of the 11th November, 1937, and contained the following disclaimer:—

> "No claim is made by the application to the exclusive use of the word "Alef" and the Hebrew letter "Alef".

The applicants before us object on the ground that the proposed mark may infringe their registered mark "Aloof" and is calculated to deceive, and also on the ground that —

> "The said mark which the First Respondent has applied to register is not adapted to distinguish goods of the First Respondent and does not consist of any characters, devices or marks or combinations thereof which have a distinctive character".

I will deal with the last objection first.

Section 6 of the Trade Marks Ordinance, Chapter 144, provides:—

> "Trade marks capable of registration must consist of characters, devices or marks or combinations thereof which have a distinctive character".

The Ordinance gives no definition of "distinctive" but I think it should be given the English definition to which I am about to refer.

The use of letters as distinctive marks was considered in the House of Lords in the case of the Registrar of Trade Marks v. W. & G. Du Cros, Ltd., 1913, Appeal Cases, 625. Lord Parker in his speech, which constituted the leading judgment, said:—

"My Lords, if either mark be registrable, it must be because it is distinctive mark within the meaning of s. 9, sub-s. 5, of the Act. "Distinctive" is defined as meaning "Adapted to distinguish the goods of the applicant for registration from the goods of other persons". This definition is found for the first time in the Act of 1905, but the word "distinctive" was, I think, used in all the earlier Acts in the sense of "adapted to distinguish". The difficulty lies in finding the right criterion by which to determine whether a proposed mark is or is not so adapted. If, as is sometimes suggested, the mark is to be considered on the hypothesis that it will be admitted to registration, and in conjunction with the monopoly of user which such registration confers, I can imagine no mark which could not be adapted to distinguish the goods of the proprietor from those of other persons. Nothing could be better adapted for this purpose than some letter or combination of letters which no one else was at liberty to use. In my opinion, in order to determine whether a mark is distinctive it must be considered quite apart from the effects of registration. The question, therefore, is whether the mark itself, if used as a trade mark, is likely to become actually distinctive of the goods of the person so using it. The applicant for registration in effect says, "I intend to use this mark as a trade mark, i.e., for the purpose of distinguishing my goods from the goods of other persons", and the Registrar or the Court has to determine before the mark be admitted to registration whether it is of such a kind that the applicant quite apart from the effects of registration, is likely or unlikely to attain the object he has in view. The applicant's chance of succes in this respect must, I think, largely depend upon whether other traders are likely, in the ordinary course of their business and without any improper motive, to desire to use the same mark, or some mark nearly resembling it, upon or in connection with their own goods. It is apparent from the history of trade marks in this country that both the Legislature and the Courts have always shown a natural disinclination to allow any person to obtain by registration under the Trade Marks Acts a monopoly in what others may legitimately desire to use. For example, names (unless represented in some special manner) and descriptive words have never been recognised as appropriate for use as trade marks. It is true that they became registrable for the first time under the Act of 1905, but only if distinctive, and they cannot be deemed distinctive without an order of the Board of Trade or the Court. This registration does not apply to marks consisting of a letter or combination of letters, but before such a mark be accepted the Registrar or the Court has to be satisfied that it is adapted to distinguish the goods of the applicants from those of others. It need not necessarily be so adapted, and whether it is or is not so adapted appears to depend largely on whether other traders are or are not likely to desire in the ordinary course of their business to make use in connection with their goods of the particular letter or letters constituting the mark.

> There seems no doubt that any individual or firm may legitimately desire in the ordinary course of trade to use a mark, consisting of his or their own initials upon, or in connection with, his or their goods. The applicant company's cars are marked "W & G" because those are the initial letters of the christian names of the partners in the firm to whose business the applicant company has succeded. The use of the initials of an individual or firm, on the goods, packing cases, letter paper, and invoices of such individual or firm is common. Individuals whose names were William Green or Wallace Graham, or firms whose names were Weston and Gibbs or Wilcox and Gathorne, might desire to make use in this way of the letters WG or W and G, and it would be a strong thing to deprive them of the right to do so. It is to be observed that initials are even less adapted for trade mark purposes than names, and the latter (unless represented in a special manner) cannot be deemed distinctive without an order of the Board of Trade or the Court. Under these circumstances, I cannot think that the mark "W & G", whether in script or in block type, is in itself distinctive within the meaning of the Act."

In Garrett's application, 1916 1 Ch. at 451, in which it was sought to register the word "Ogee", Warrington L.J. said:—

> "But of course the discretion is a judicial discretion and must be exercised on reasonable grounds and not capriciously. The matter being now before the Court, the discretion is to be exercised by the Court. Are there, then, sufficient grounds for refusing the application? I think there are. If the application was for the registration of the letters "O. G." it would plainly fail on the authority of the "W and G." case referred to above' The word, though at the same time a dictionary word, represents the letters written out. Moreover, in considering questions of possibility of confusion or of deception regard must be had to sound as well as to sight, and the pronunciation of the word and of the letters is the same. If the goods of some one with the same initials were to be sold with the letters "O. G." upon them, persons asking for their goods as "O.G." might well obtain the plaintiff's goods and vice versa. The disclaimer of the right to use the letters themselves as a mark does not meet the case. It is from the sound that the possible confusion may arise. The application is in fact an attempt to use in another form initials which could not themselves be used, and I think it ought to fail".

It seems to me that these arguments are equally applicable to a single letter as to a group of letters and I do not think that the fact that the letters in question in the cases cited happened to be connected with the name of the applicants seeking registration affected them.

In my opinion this principle should be applied by this Court and the registration should not be granted. It is unnecessary to deal with the other matters raised, and as I understand proceedings are pending between the parties I make no observation upon them.

The Applicants' application is granted with costs. Advocate's fees LP. 5.—.

Delivered this 24th day of March, 1938.

Chief Justice.
Puisne Judge.

CRIMINAL APPEAL NO. 24/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Yousef Hussein el Haj Taleb — Appellant.

v.

The Attorney General — Respondent.

Attempted murder — Witnesses not in Palestine — Criminal Code Ordinance, 1936, *sec.* 222(*a*) *and* 23.

Court has no power to bring witnesses from foreign countries; fact of witnesses (for defence) not being in Palestine — no ground for appeal.

Appellant in person.

Fawzi Ghussein for Respondent.

Appeal from judgment of District Court, Haifa, dated 1.2.1938, whereby Appellant was convicted of attempted murder, contrary to Sections 222(a) and 23 of the Criminal Code Ordinance 1936, and sentenced to ten years imprisonment.

JUDGMENT.

This appellant has been sentenced by the District Court of Haifa to ten years' imprisonment for attempted murder. The charge was that he fired upon a man, hit him and smashed one of his hands. The man remained 33 days in hospital and 4 months under treatment.

There was ample evidence before the Court below to come to the conclusion to which it came and to convict you of the charge brought against you.

The fact about the witnesses not being there, these are from Syria and the Court has no power to bring witnesses from foreign countries.

There is nothing in this appeal and it is dismissed.

Delivered this 2nd day of March, 1938.

British Puisne Judge.
(Copland, J.).

CIVIL APPEAL NO. 17/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Aniseh bint Hassan Hamideh — Appellant.

v.

1. Chief Execution Officer, Haifa
2. Mohammad Baradeh Abbasi
3. Mohammad el Kalla
4. Shedadeh Assad Khoury — Respondents.

Insufficient investigation of facts by Court — Lack of findings — Remittal of case for thorough investigation.

If facts have not been thoroughly investigated by trial Court, case will be remitted in order that Court may go fully into the facts and make findings thereon.

Appellant in person.
Cattan for Respondents.

JUDGMENT.

It is clear that in the Statement of Claim the Plaintiff made allegations of collusion and fraud, and it also appears that she alleges that the Execution Officer dealt with the matter before the three days provided for in the Chief Excution Officer's order of 15.9.32 had expired. We do not understand the judgment of the trial Court in respect of these matters.

Mr. Cattan, on behalf of the Respondents, states that they desire the fullest investigation. We agree that in the interest of all concerned the facts of this case should be thoroughly investigated.

We therefore set aside the judgment and remit the case to the Land Court in order that it may go fully into the facts and make findings thereon and give a judgment accordingly.

Costs to abide the event.

Delivered this 30th day of March, 1938.

Chief Justice.

CIVIL APPEAL NO. 40/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Government of Palestine — Appellant.

v.

The Greek Catholic Church of Haifa, represented by His Grace Bishop C. Hajjar — Respondent.

Ownership of land — Refusal of application to hear evidence — Remittal of case to hear rebutting evidence.

Case will be remitted to trial Court, if, after hearing evidence of Plaintiff, Court despite an application by Defendant's advocate refused to hear evidence he was prepared to produce.

Salant for Appellant.

Asfour for Respondent.

Appeal from judgment of Land Court, Haifa, dated 25.1.1938.

JUDGMENT.

This is a case which has unfortunately been dragging on for some time and in which Government did not make its position clear.

It seems from the judgment that the Land Court has found that the Plaintiff has established his ownership of the land and that Court made a declaration of ownership to the land. Before they did so, they heard the evidence of the Plaintiff. Despite an application by the advocate for the Defendant, the Court refused to hear the evidence he was prepared to produce.

We think that in a case such as this, if one party is allowed to bring evidence to prove certain allegations, the other party is entitled to call evidence to disprove them.

The judgment of the Land Court will therefore be set aside and the case remitted to it to hear the evidence of the witnesses named by the Defendant, and any other evidence of the Plaintiff that it may consider necessary, and in the light of such evidence to give a fresh judgment.

Costs to abide the event.

Delivered this 31st day of March, 1938.

Chief Justice.

HIGH COURT NO. 15/38.

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

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

In the appeal of:—

Dr. Mandelberg Rogalsky — Appellant.

v.

Director of Medical Services, Jerusalem — Respondent.

Licence to practice medicine — Citizens by birth and citizens by naturalisation — Legislative powers of High Commissioner — Medical Practitioner Ordinance, sec. 4 and 4A — Palestine Order-in-Council 1922, sec. 17 — Palestine Citizenship Order-in-Council 1935, sec. 8.

High Commissioner not empowered to promulgate legislation by Ordinance which is at variance with a provision of an Order in Council. Sec. 4A of Medical Practitioners Ordinance — ultra vires.

Olshan for Appellant.

Crown Counsel (*Bell*) for Respondent.

Appeal from the order of the Respondent dated the 4th January, 1938, which was communicated to the Appellant by the Senior Medical Officer, Department of Health, Jaffa.

JUDGMENT.

The Appellant applied to the Director of Health for a licence to practice medicine under Section 4 of the Medical Practitioners Ordinance. In the reply of the Director of Health to her application, she was told that no licence could be granted to her for the year 1938, but that she might apply to be considered for a licence during the year 1939. In order to undderstand the issue involved in her appeal to this Court from the decision of the Director of Health it is necessary to consider the history of the legislation on this subject. By the Medical Practitioners Ordinance, which came into force on the 15th February, 1928, it was provided in section 4, that the Director of Health should

grant a licence to all Applicants who are Palestinian citizens or had received permission to remain permanently of in Palestine if they satisfied him that they were of good character and had studied medicine in a recognised school for 5 years and had obtained a recognised diploma. By an Ordinance which came into force on the 30th of October, 1935, a new section 4 was substituted for the previous section. Under the new section a distinction was made between persons who are Palestinian citizens by birth or who had become Palestinian citizens before the first of December, 1935, and persons who became Palestinian citizens after the 1st of December, 1935. The persons in the 1st category were entitled to be granted a licence by the Director of Health if they satisfied him on the matters already referred to. Persons in the second category were also entitled to a licence but by section 4A, a new section introduced by the amending Ordinance, the High Commissioner was given authority at the end of each year to prescribe the maximum number of licences which might be granted during the following year. The Appellant had not become a Palestinian citizen until the end of the year, 1937. She became a Palestinian citizen by marrying a person to whom a certificate of naturalisation as a Palestinian citizen had been granted. As a consequence she fell into the second category above mentioned, and at the time when her application was refused she was informed that the refusal was based upon the fact that she was a person who had become a Palestinian citizen after the 1st of December, 1935, and that the maximum number of licences had already been allotted.

Mr. Olshan, who argued the appeal on her behalf, conceded that the amending Ordinance was an Ordinance which might be considered necessary for the peace, order and good government of Palestine and that therefore its validity could not be challenged on the ground that it was ultra vires of section 17 of the Palestine Order-in-Council, 1922. He argued, however, that the substituted section 4 and the new section 4A of the amending Ordinance were inconsistent with article 8 of the Palestine Citizenship Order, 1935, which reads as follows:—

> "A person to whom a certificate of naturalization is granted by the High Commissioner shall, subject to the provisions of this Order, be entitled to all political and other rights, powers and privileges and be subject to all obligations, duties and liabilities to which a Palestinian citizen is entitled or subject."

He said that the effect of this article was to guarantee to all persons to whom a certificate of naturalisation had been granted, the same rights and privileges as all other Palestinian citizens, but that the effect

of the amending Ordinance was to discriminate between those who are Palestinian citizens by birth and those who obtained a certificate of naturalisation after the 1st of December, 1935. Mr. Bell for the Director of Health, on the other hand, says that article 8 cannot be construed as an enactment to restrict the powers of High Commissioner to make such a distinction between Palestinian citizens as has been affected by the amending Ordinance.

It is clear that the effect of the Ordinance is that A, who is Palestinian citizen by birth and who can satisfy the Director of Health on the matters above referred to, is entitled to the privilege of being granted a licence to practice medicine; while B who has been granted a certificate of naturalisation after the 1st of December, 1935, and who similarly satisfies the Director may be refused a licence on the ground that the number of Applicants in his category exceeds the maximum prescribed by the High Commissioner. This category seems to show that in this respect a person who has been granted a certificate of naturalization is not entitled to the same privilege as a Palestinian citizen by birth. The whole object of article 8 was to ensure that there should be no such descrimination as this, and that there should be the same law for all Palestinian citizens no matter in what way their nationality was acquired. The amending sections are in conflict with the principle embodied in the article. In my view, the High Commissioner is not empowered to promulgate legislation by Ordinance which is at variance with a provision of an Order-in-Council, and the result must be that Section 4A of the Ordinance which gives the High Commissioner authority to fix a maximum, and gives the Director of Health an unfettered discretion to refuse a licence to a person who has become a Palestinian citizen otherwise than by birth after December, 1st, 1935, if the number of Applicants exceeds the maximum is to be regarded as ultra vires. This being, so, the Appellant is entitled to succeed in her appeal. The order of this Court should be, in my opinion, that the Director of Health should deal with her application as if the words "subject to the provisions of section 4A of this Ordinance" were absent from Section 4, sub Section 3 of the Ordinance. The Appellant will have the costs of her appeal, to include LP. 5.— Advocate's fees.

Delivered this 25th day of March, 1938.

Senior Puisne Judge.

I concur and have nothing to add.

Puisne Judge.

CIVIL APPEAL NO. 42/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J., Frumkin, J. and Khayat, J.
In the appeal of:—

1. Shmuel Broza
2. Haim Greenberg — Appellants.

v.

Herzl Weinshinker — Respondent.

Delay in appearaing at Land Registry — Time for appearance fixed by Notarial Notice — Breach of contract.

If party to contract regarding land fixes by Notarial Notice the time for effecting the transaction and such fixing of time is not warranted by contract, arrival of other party at Land Registry after time fixed in such Notice not a breach of contract.

Eliash for Appellants.
Gratch for Respondent.

Appeal from judgment of District Court, sitting at Tel Aviv, dated 12.1.1938.

JUDGMENT.

Frumkin, J.

The main point in this case is whether the Respondent committed a breach by arriving at the Land Registry 25 minutes after the time fixed in the Notarial Notice of the appellants, and 5 minutes after the appellants left the Land Registry. The fixing of the time was not warranted by the contract. The Court below held that this delay does not constitute a breach and we are not prepared to interfere with this finding.

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

Given this 24th day of March, 1938.

British Puisne Judge.
Puisne Judge.

CIVIL APPEAL NO. 31/38.

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:—

Jacob Mouchly — Appellant.

v.

Richard Juhl — Respondent.

Conversations not crystallized in binding agreement — Refund of deposit — Claim of damages — Pleadings dispensing Court with hearing evidence.

If Court from a consideration of the pleadings finds that there was no binding agreement between parties, it is right in ordering return of deposit paid on alleged agreement and in disallowing damages for alleged breach, even without hearing any witness on behalf of either party.

Harari for Appellant.

For Respondent: no appearance.

Appeal from Judgment of District Court, Haifa, (C.C. 134/37) dated 12.12.1937.

JUDGMENT.

The facts in this case were as follows:—

There were certain conversations between the Appellant and the Respondent; as a result both parties thought at the time that some form of binding agreement had been entered into, and on the strength of that the Respondent paid to the Appellant a deposit of LP. 500. The alleged agreement in the opinion of the Respondent was not carried out by the Appellant, and he consequenly took action in the District Court of Haifa claiming the return of his deposit. The Respondent put in a counterclaim claiming damages, commission and expenses. When the matter came before the District Court, that Court gave judgment for the Respondent for the return of his deposit, and dismissed the counterclaim of the Appellant.

The judgment of the Court below is not quite clear on certain points, and there are some obvious misdirections in law, but it is clear that from a consideration of the pleadings it came to the conclusion that the conversation between the parties had been of so vague a nature that no binding agreement had ever been entered into. This being the

case the Respondent was entitled to the refund of his deposit and the Appellant was not entitled to any damages, or commission or expenses. As the Court below came to this conclusion on the pleadings we do not think it was necessary for it to hear any witnesses on behalf of either party.

We therefore order that the appeal be dismissed and that the judgment of the Court below be confirmed. The Respondent will have the costs of the appeal to include LP. 5.— advocate's fees.

Delivered this 21st day of March, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 9/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Khadijeh Ahmad el Arrawi — Appellant.

v.

Hassan Ahmad el Arrawi — Respondent.

Evidence before Land Settlement Officer — Adjournment of hearing — Securing of attendance of witness.

Investigation into claims before Land Settlement Officer should be as complete as possible and parties should be given fullest opportunity of presenting their evidence in support of their claims.

If a witness properly summoned does not attend, Settlement Officer must adjourn hearing in order to secure his attendance.

Machles for Appellant.

For Respondent: No appearance.

JUDGMENT.

It seems to us that the judgment of the Land Court was right. It is clear from the record that the Respondent raised the point that he wanted to call a witness but was not given an opportunity of doing so, though no record of this request appears in the proceedings.

The appeal will be dismissed with costs, but no advocate's fees are granted, as the advocate for the Respondent did not appear.

Delivered this 8th day of March, 1938.

Chief Justice.

LAND SETTLEMENT APPEAL NO. 104/37.

IN THE LAND COURT OF JAFFA SITTING AS A COURT OF APPEAL.

Before:—The President (Cressal, J.) and Daoudi, J.

In the case of:—

Hassan Ahmed El Arrawi — Appellant.

v.

Khadijeh Ahmed El Arrawi — Respondent.

Appeal from judgment of the Settlement Officer, Gaza Area, dated 16.8.37.

JUDGMENT.

In his claim before the Settlement Officer the Appellant based his claim on two grounds:—

(*a*) Adverse possession for the prescriptive period,

(*b*) A deed of sale dated 1327.

With regard to (a) the Settlement Officer having heard witnesses decided that adverse possession had not been proved and with this finding we are not prepared to interfere.

With regard to (b) however the matter is on a different footing.

It appears that most of the witnesses to the deed are dead but there is still one signatory to the deed who is alive. This person was duly summoned by he Appellant but did not appear and the Settlement Officer thereupon gave judgment holding that the document was not a valid one.

Now the object of the Land Settlement Ordinances is to provide for the settlement and registration of land in those villages where on account of the lack of a proper cadastral survey in Turkish times the registration of existing rights is unreliable and confused. The investigation into these claims should be as complete as possible and the parties should be given the fullest opportunity of presenting their evidence in support of their claims. If therefore a witness who has been properly summoned does not attend, the Settlement Officer should adjourn the hearing in order to secure this attendance for it must be obvious that delayed justice is always better then accelerated injustice.

We, therefore, remit the case to the Settlement Officer with directions to reopen the hearing of the Appellant's claim so far as it is based on the deed of sale dated 1327.

Costs to follow the event.

Given this 9th day of December, 1937.

Delivered in open Court this 18th day of December, 1937.

President.

HIGH COURT NO. 14/38.

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

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

In the application of:—

Nasrallah Salim Khoury — Petitioner.

v.

Registrar District Court, Haifa — Respondent.

Judicial and non-judicial functions of Registrar — Registrar overstepping his functions — Assessment of remuneration of a syndic in bankruptcy — Courts Ordinance, sec. 6(b) — Registrars Ordinance.

1. High Court may be invoked to restrain Registrar if he oversteps his functions (other than judicial functions).

2. Assessment of remuneration payable to a syndic in bankruptcy is not one of judicial functions which a Registrar may carry out.

Dr. Weinshall for Petitioner.

Crown Counsel (*Hogan*) for Respondent.

Application for an order to issue to the Respondent directing him to show cause why he should not refrain from dealing with the assessments of the remuneration payable to the syndic and/or former syndics and/or Judge Commissaire in the Bankruptcy of the firm S. M. Khoury.

DECISION.

This is a return to a rule nisi directed to the Registrar of the District Court of Haifa, calling upon him to show cause why he should not refrain from dealing with the assessment of remuneration payable to a syndic in the Bankruptcy of the firm of S. N. Khoury.

In the Registrars Ordinance, the Registrars of the District Courts are clothed with certain functions of a judicial nature and in exercising any of the functions may be regarded as a Court.

It is admitted, however, by Mr. Hogan, who appeared on behalf of the Registrar, that the assessment of the remuneration payable to a syndic is not one of the judicial functions which a Registrar may carry out, and in view of this, we are of the opinion that the Registrar in this instance cannot be regarded as a Court, that he was simply purporting to exercise functions as a public officer and that therefore the jurisdiction of the High Court may be invoked to restrain him if he oversteps his functions.

We have no doubt that in this particular case he did overstep his functions and that therefore this is a case contemplated by Section 6 of the Courts Ordinance, and that he should be restrained from proceeding further with the matter.

The rule will be made absolute. As the applicant does not ask for costs, there will be no order as to costs.

Given this 16th day of March, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 227/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Official Receiver and Liquidator of the Palestine Shipping Co. Ltd. — Appellant.

v.

1. Marin Faric
2. N. F. Haniel & Co. — Respondents.

Applicability of Ottoman Maritime Code in Palestine — Wages of crew claimed as secured debts — Balance of wages due to crew claimed as privileged — Claim for price of coal supplied to ship — Secured creditors under Bankruptcy Ordinance — Coal supplied to ship "before departure of vessel" — Ottoman Maritime Code, art. 5 paras. 5, 6, 7, 8 — French Commercial Code, art. 191 — Bankruptcy Ordinance, sec. 2, 10, 33, 142.

1. Ottoman Maritime Code still in force in Palestine, except in so far as it may have been affected by Merchant Shipping Act.

2. Claims in art. 5 of Maritime Code are claims *in rem* against ship and are not affected by fact that company owning it has gone into liquidation.

3. For purposes of sec. 2 and 10 of Bankruptcy Ordinance creditors having a charge or lien given by legislation are in the position of creditors secured by charge or lien created by private agreement.

4. Crew have a privileged claim against general assets of Company in respect of any balance of wages due to them.

5. "Before departure of vessel" in para. 8 of art. 5 of Maritime Code refers only to voyage immediately preceding the claim.

Eliash for Appellant.

Horovitz, Solomon for Respondents.

Appeal from judgment of District Court, Haifa, dated 5.11.1937.

JUDGMENT.

This is an appeal from a judgment of the District Court, Haifa, on an application for directions by the Official Receiver and Liquidator of the Palestine Shipping Co. Ltd. in liquidation.

Two points were raised — first, whether the officers and seamen of the s.s. Tel-Aviv were entitled to the preference laid down in the Ottoman Maritime Code in respect of their wages, or to the preference conferred by the Bankruptcy Ordinance 1936, or otherwise, and secondly, whether a claim for the price of coal supplied to the ship by a German Co. was preferential claim under the Ottoman Maritime Code or not.

The District Court decided against the Official Receiver holding that the crew and the Company supplying the coal were entitled to the respective preferences set out in the Ottoman Maritime Code, and further that the crew also had a privileged claim in respect of the balance of their wages, if any, against the general assets of the Company, as provided in section 33 of the Bankruptcy Ordinance. Hence this appeal.

It has been argued before us that the Ottoman Maritime Code is no longer in force in Palestine. With this contention we do not agree. We think that the District Court was right in holding that since the Maritime Code does not deal with bankruptcy, it is not affected by the provisions of Sec. 142 of the Bankruptcy Ordinance, which lays down that Art. 147 to 315 of the Ottoman Commercial Code, and any other Ottoman laws and regulations dealing with bankruptcy shall no longer have effect in Palestine. It is quite true that it is very seldom, if ever, that the Maritime Code is applied, but the Code is still in force, except in so far as it may have been affected by certain parts of the Merchant Shipping Act, with which however we are not concerned in this case.

We agree with the District Court that the claims in Art. 5 of the Maritime Code are claims *in rem* against the ship, and we do not think that these claims are affected by the fact that the Company owning the ship has gone into liquidation. Sec. 2 of the Bankruptcy Ordinance defines a secured creditor as "a person holding a mortgage charge or lien on the property of the debtor, or any part thereof . . ." and by sec. 10 of the same Ordinance secured creditors are not restrained in the exercise of their legal remedies in respect of their security. The crew are in the position of secured creditors and we cannot see why a charge or lien given by legislation should be any less effective than one created by private agreement. It follows therefore that the crew have a good claim against the ship in respect of the

wages due to them for the last voyage in accordance with para. 6 of Art. 5 of the Maritime Code.

We also think that the District Court was right in holding that the crew also have a privileged claim against the general assets of the Company in respect of any balance of wages due to them under Sec. 33 of the Bankruptcy Ordinance.

To turn now to the claim for coal supplied to the ship. This depends on the true construction of para. 8 of Art. 5 of the Ottoman Maritime Code. This para. is identical in terms with Art. 191 of the French Commercial Code and is as follows:—

I quote from Goirand's French Commercial Law:—

> Art. 191 (8) the sums due to the vendors, outfitters, tradesmen workmen employed, if the ship has not yet made a voyage; and the sums due to the creditors for goods supplied, work, manual labour, refitting, victualling, fitting out and equipment, before the departure of the vessel, if it has already made a voyage.

The only question for us to determine, since we hold that the Ottoman Maritime Code is still law in this country, is whether the claim for coal supplied must be limited to that supplied for the last preceding voyage, or whether it can be made for all voyages within the last three years immediately preceding the claim, there being a general prescriptive period for claims of three years laid down in the Code. Paras. 5, 6 and 7, limit claims to those incurred in respect of the last voyage. Para. 8 however, allows claims in respect of goods supplied "Before the departure of the vessel". We think that the correct interpretation of the words "before the departure of the vessel" must be that one voyage only is meant — that they refer to the voyage immediately preceding the claim. If more than one voyage were meant, then the word "departure" should have been "departures" in the plural, and in any case if all departures within the last three years were meant to be included, then the phrase "before the departure of the vessel" would be unnecessary.

The appeal must therefore be allowed in part and the judgment of the District Court varied by ordering that the preferential claim under Art. 5(8) for coal supplied must be limited to that supplied for the last preceding voyage.

With regard to costs in the circumstances we think that the fairest course will be to order that the costs of all parties both here and below should be paid out of the general assets of the winding up, to include LP. 5.— advocate's fees to each side.

Delivered this 1st day of March, 1938.

Chief Justice.

CIVIL APPEAL NO. 51/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Shlomo Mintz — Appellant.

v.

Sara Mintz — Respondent.

Matters of marriage — Decree of divorce — Consent of parties to jurisdiction of Rabbinical Court — Maintenance allowed by District Court.

Dinfeld v. Dinfeld C.A. 112/36.

If party to a matrimonial suit elects to go to Rabbinical Court and other party consents to its jurisdiction, Rabbinical Court competent to hear case, and it will not be open to any party to go to a Civil Court.

Rottenstreich, Dr. Joseph for Appellant.

Shneur — Aharanov for Respondent.

Appeal from judgment of District Court, sitting at Tel Aviv, dated 17.2.1938.

JUDGMENT.

In this case Appellant raised the question of jurisdiction. It is clear from the record of the Court below that the parties had consented to the Jurisdiction of the Rabbinical Court. After obtaining a decree of divorce and an order for the payment unto her of LP. 300 from the Rabbinical Court, the wife tried to obtain, and did in fact obtain, a judgment for maintenance from the District Court. In Dinfield's case*) this Court held that the practice of going from one Court to another should not be allowed.

In this case the Respondent elected to go to the Rabbinical Court and the Appellant willingly consented to the jurisdiction of that Court. We see, therefore, that the Rabbinical Court is the competent Court to hear the case.

The appeal is therefore allowed, the judgment of the District Court set aside, and the claim dismissed. The cross-appeal is also dismissed. As the Appellant does not ask for the costs no order is made therefor.

Delivered this 5th day of April, 1938.

British Puisne Judge.
(Copland, J.)

*) Edit. Note: See C.A. 112/36 Ct.L.R. Vol. I. R. 12.

CIVIL APPEAL NO. 19/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Ahmad Mahmoud Esh-Sharif — Appellant.

v.

Widad Shukri El-Husseini — Respondent.

Appeal from order of Registrar — Registrars Ordinance Sec. 6(b) and 8.

No appeal to Court of Appeal from order made by Registrar, District Court under sec. 6(b) of Registrars Ordinance.

Khadr Aweida for Appellant.

Cattan for Respondent.

Appeal from judgment of the Registrar of District Court, Jaffa, dated 4.11.1937.

JUDGMENT.

This is an appeal from an order made by the Registrar of the District Court, Jaffa, under Section 6(b) of the Registrars Ordinance, 1936.

The Respondent objects to the appeal on the ground that no appeal lies under the provisions of section 8 of that Ordinance and that the Appellant's remedy was by way of opposition.

We think that that objection is well founded.

The appeal will therefore be dismissed with costs, Advocate's fees LP. 5.—.

Delivered this 31st day of March, 1938.

Chief Justice.

HIGH COURT NO. 22/38.

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

Before:—Copland, J. and Frumkin, J.

In the application of:—

Haim Eiderberg — Petitioner.

v.

1. Superintendant of the Central Prison, Acre
2. Chief Execution Officer, Haifa
3. Yosef Katz, Haifa — Respondents.

Imprisonment for debt — Habeas corpus application — Multiplicity or orders against same judgment debtor — Debtor's ability to pay — Assessment by Chief Execution Officer of amount to be paid by debtor — Debt (Imprisonment) Ordinance, sec. 11.

Where many orders against same debtor, Chief Execution Officer should take all of them into consideration when assessing amount to be paid, either in a lump sum or separately, or in determining debtor's ability to pay.

Yehuda for Petitioner.

For Respondents: Ex parte.

Application for a writ o Habeas Corpus to issue against the First Respondent to produce the body of the Petitioner and for an order to issue against the Second Respondent to show cause why his order for the arrest of the Petitioner for debt, dated 23.1.38 in file No. 3517/37 of the Execution Office, Haifa, should not be set aside.

ORDER.

In this case we think that the order should be refused, because the only onus upon the Chief Execution Officer is to apply Section 11 of the Debt (Imprisonment) Ordinance. From the petition which is before us, there is nothing to show that Section 11 was applied. The debtor was heard before the order was made.

We would further make this observation that where there are a large number of orders against the same debtor, the Chief Execution Officer should take the whole of these orders into consideration when assessing the amount to be paid, either in a lump sum or separately, or in determining the ability of the debtor to pay.

In this case, we think that a further application should be made to the Chief Execution Officer on these lines.

Given this 6th day of April, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 52/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case of:—

Heinrich Wittstock — Appellant.

v.

Boris Schoenberg — Respondent.

Remuneration for services done — Services without request — Mejelle, art. 563 and 564.

No remuneration can be allotted for unrequested services.

Fellman for Appellant.
Ruda for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated 2.1.38.

JUDGMENT.

This appeal fails for a very simple reason. According to Articles 563 and 564 of the Mejelle remuneration for services done may be allotted when there is a request for such service to be done. There must be such a request. The whole point is that the District Court found that there was no such request. Therefore, we find that the judgment of the District Court was right in setting aside the judgment of the Chief Magistrate as on the facts before him the requirements of Articles 563 and 564 were not complied with.

The appeal must be dismissed with cost to include LP. 5.— advocate's fees.

Delivered this 11th day of April, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 36/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

1. Mohammad Amin Salah
2. Hamdan Mustfaf Ibrahim Abu Zmiro
3. Abdul Rahim Mustafa Ibrahim Abu Zmiro
4. Ali Mustafa Ibrahim Abu Zmiro
5. Su'aad Mustafa Ibrahim Abu Zmiro
6. Kamleh Mustafa Ibrahim Abu Zmiro
7. Khadra Mustafa Ibrahim Abu Zmiro
8. Khdra Ibrahim Abu Zmiro
9. Khadijeh Mohammad Mustafa Ibrahim Abu Zmiro
10. 'Aisheh Mohammad Mustafa Ibrahim Abu Zmiro
11. Zahiyeh Mohammad Mustafa Ibrahim Abu Zmiro
12. Halimeh Said Mustafa Abu Zmiro
13. Abdul Rahman Kaid El Ahmad — Appellants.

v.

Yehoshua Hankin — Respondent.

Lodging of appeal on last day of prescribed period — Appeal fees paid to other than regular cashier — C.A. 15/30 Mussafar v. Dirhalli (P.L.R. 625).

Appeal — out of time, if on last day lodging it the fees. on account of cash books being closed, were paid to a clerk not authorised to receive the money.

Abcarius Bey, Osman Bushnak for Appellants.

Eliash for Respondent.

Appeal from judgment of Land Court, Nablus, dated 25.11.1937.

JUDGMENT.

It is very unfortunate, but I am afraid that this case will again have to go back to the Land Court.

The Magistrate's Court gave judgment on the 9th September, 1937. On the 17th September the present Respondent endeavoured to file this appeal at the offices of the Land Court, Nablus, but being a Friday the cash books were closed and the money for the fees was accepted by a clerk, other than the regular cashier and an endorsement was made on the papers to the effect that the money was so received on that day. The money was entered in the cash books and an official receipt issued on the 18th September.

It has been argued that the clerk who received the money was not authorised to do so. If he were not so authorised, then following the decision of this Court in Sheikh Abdel Kader Mussafar v. Abdel Hamid Dirhalli, C.A. 15/30 (P.L.R. 625), it would appear that this appeal would be out of time. The point was taken before the Land Court, but unfortunately that Court did not deal with it in their judgment.

In my opinion the appeal should be allowed, and the judgment of the Land Court quashed, and the case remitted to the Land Court for that Court to determine whether the clerk who accepted the fees was in fact duly authorised to do so.

Delivered this 14th day of April, 1938.

British Puisne Judge.
(*Copland, J.*)

HIGH COURT CASE NO. 20/38.

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

Before:—Copland, J. and Greene, J.

In the application of:—

Younis Hallak — Petitioner.

v.

1. Chief Execution Officer, Nazareth
2. Malek Hallak — Respondents.

Stay of execution of judgment of Ecclesiastical Court — Non interference of High Court with judgments of Ecclesiastical Court.

High Court having before it documents issuing from and under seal of Ecclesiastical Court and purporting to be genuine will regard them as such; not for High Court to say whether the documents are right or not.

Shafik Asal for Petitioner.

For Respondents: Ex parte.

Application for an order to issue to the First Respondent, directting him to show cause why his order dated the 26.3.1938, for the attachment of money in Execution File No. 118/37, Nazareth, should not be set aside and why the Execution of the late judgment of the Ecclesiastical Court of the Greek Orthodox Community, dated 7.4.1937, should not be stopped.

JUDGMENT.

In this case there are two documents issuing from and under the seal of the Ecclesiastical Court of the Greek Orthodox Partriarchate. It is not for us to say whether the said documents are right or not, for as they purport to be genuine we have to regard them as such.

The Petitioner may have his remedy by applying to the Ecclesiastical Court for stay of execution of judgment, and it is for the said Court to determine whether the additional sum of 900 piastres introduced by it in its second judgment does actually represent the costs.

The application for the order nisi is therefore dismissed with costs.

Delivered this 5th day of April, 1938.

Senior Puisne Judge.

HIGH COURT NO. 18/38.

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

Before:—Copland, J. and Frumkin, J.

In the application of:—

Morgan Inshatow — Petitioner.

v.

Registrar of Patents and Designs — Respondent.

Request by Registrar of Patents to amend Specification — appealable — Decision of Registrar of Patents that Specification must be amended is an order which can be appealed from — Patents and Designs Ordinance, sec. 8(1), 52(2)(a), (f).

Appeal against order made by Registrar of Patents under sec. 8(1) of Patents and Designs Ordinance must be made to District Court; application to High Court cannot be therefore entertained.

Petitioner in person.

For Respondent: Ex parte.

Application for an order to issue to the Respondent, directing him to show cause why a patent should not be granted in respect of the patent application No. 930, upon the term prayed by the Petitioner.

ORDER.

This application must fail. The Petitioner asks us the High Court to order the Registrar of Patents not to do or to do certain things. It is obvious from the documents of 22nd November, 1937, and 24th December, 1937, that the Registrar refused to accept the Petitioner's specification without amendment — in fact the document of the 22nd November is headed "Decision of Registrar" and it is certainly an order. That the Registrar had the power to require amendments it is clear from Section 8(1) of the Ordinance. If the Petitioner objected to the Registrar's order he had a right of appeal to a Court under

Section 51(2)(a) or (f). But the Court referred to is the District Court and not the High Court, which never assumes a jurisdiction where there is another Court having jurisdiction.

The application is refused.

Delivered this 28th day of March, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 29/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Moshe Kastelanitz — Appellant.

v.

1. Isaac & Moshe Shwisha
2. Tewfiq Rinno — Respondents.

Contract of lease — Failure of lessor to comply with condition of contract — Right of lessee to rescind.

Lessee justified in rescinding contract of lease on discovering that lessor failed to fulfil his undertaking to obtain consent of Authorities to use the premises in manner provided for in contract.

Levin for Appellant.

Ben Israel for Respondents.

Appeal from judgment of District Court, Haifa, sitting in its appellate capacity, (C.A.D.C. 271/37), dated 23.12.1937, confirming the judgment of the Magistrate.

JUDGMENT.

The facts in this case were as follows:—

The appellant leased from the respondents a store situated in the Haifa Harbour area. The agreement was reduced into writing and one clause of the agreement translated into English reads as follows:—

> "The lessors undertake to write immediately to the Harbour Company to the effect that they rent the store at the corner with two doors in Kingsway for a store for vegetables whole-sale and to obtain their agreement.

The lessors did write to the Harbour Authorities and obtained their

agreement that the premises might be used as an office and that nothing but samples were to be kept therein.

2. The appellant entered into occupation of the premises. There was no evidence before either of the Courts below to show that he was aware of the difference between what was stipulated in the agreement with regard to the premises and what the Harbour Authorities actually gave permission for. Having occupied the premises for four months the appellant discovered this discrepancy and asked that the contract of lease should be rescinded. Before the learned Chief Magistrate and also before the District Court, the question turned upon the consideration of certain passages in the Mejelle with regard to inherent defects in hired premises, and on the ground that there was no inherent defect of the hired premises in this case, both Courts decided against the appellant. We are of opinion that both the Courts below misdirected themselves in considering the question of inherent defect. That question was not at all involved in the case for the appellant. It was clear from the statement of claim that the appellant complained that a condition precedent to carrying out of the contract had not been complied with by the respondents. Respondents had undertaken to obtain the agreement of the Harbour Authorities that the store might be used for the sale of vegetables whole-sale. It is not disputed that this agreement was not obtained. The whole object of the contract was that the appellant should be able to use the store in the manner contemplated and the failure of the respondents to obtain the necessary consent justified the appellant in rescinding the agreement as soon as he had discovered that the consent had not been obtained. We are, therefore, of opinion that the judgments of both Courts below were wrong, and that the appellant was entitled to succeed in his claim.

The judgment of the District Court and the Magistrate's Court will be set aside and there will be substituted a judgment for the appellant for LP. 12.500 mils and the return of the three promissory notes for LP. 75. — LP. 58.340 mils and LP. 75. — respectively, and if these notes are not returned to the appellant within three months, the respondents become liable to pay the cash value The appellant will have his costs in both Courts below and also the costs of this appeal to include LP. 5.— advocate's fees.

Delivered this 17th day of March, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 45/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

1. Hanna Habeeb
2. Issa Butros Saba
3. Ishaq Mitri Akel
4. Nasrallah Farah el Ghazaleh
5. Ghunein Salem Ghannam — Appellants.

v.

The Municipal Council of Ramallah — Respondent.

Farming of Municipal Taxes — Powers of Municipal Corporations — Promissory note based on void contract — Municipal Corporations Ordinance, 1934, *sec.* 94(*b*), 99(1).

Powers of a Municipal Corporation are limited to those contained in Municipal Corporations Ordinance.

Municipal Corporation not entitled to auction the right to collect taxes in their area.

Contract made by Municipal Corporation delegating collection of taxes in return for a lump sum payment — void.

Goitein for Appellants.

George Salah for Respondent.

Appeal from judgment of District Court, Jerusalem, in its appellate capacity, dated 31.1.1938, setting aside the judgment of the Magistrate of Ramallah.

JUDGMENT.

In this case the Respondents sued the Appellants before the Magistrate's Court for the sum of LP. 100.— due on two promissory notes given in consideration of the farming of taxes in the Ramallah Public Vegetable Market. The Magistrate dismissed the action holding that though the agreement between the parties was a legal one, yet the bidding should have been published in the Gazette in accordance with the 11th Schedule of the Municipal Corporations Ordinance 1934 and also that the agreement was in the nature of a concession and therefore required the approval of the District Commissioner under Section 94(b) of the Ordinance.

The District Court on appeal reversed the Magistrate on these points and remitted the case for retrial. The appellants have now come to this Court.

Many points have been urged before us, but, in the view that I take of the case, I need only deal with one.

The powers of a Municipal Corporation are limited to those contained in the Ordinance and I can find nothing in Section 99(1) or any part of the Ordinance to authorise the Municipal Corporation to auction the right to collect taxes in their area. They are authorised to levy and collect certain taxes themselves — they cannot delegate the collection to others in return for a lump sum payment.

I think therefore that the contract was a void one and thus the respondent cannot sue on it. The appeal must be allowed and the judgment of the District Court set aside and the action brought by the respondents dismissed.

The appellants will have all their costs both here and below to include LP. 5.— advocate's fees.

Delivered this 14th day of April, 1938.

British Puisne Judge.

I concur

Puisne Judge.

P.C.L.A. NO 2/35.

CIVIL APPEAL NO. 12/33.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the application of:—

1. Nathan H. Gordon
2. Dr. Bernard Joseph,
   Administrator of the estate of the late
   Asher Pierce — Petitioners.

v.

1. Nissan Aronowitch
2. The heirs of the late Jacob Valero, other
   than Mrs. Menucha Valero — Respondents.

Final leave to appeal to Privy Council — Appellant's failure to take further steps — Certificate of non-prosecution — Palestine (Appeal to Privy Council) Order-in-Council, art. 24.

Where final leave to appeal to Privy Council was given and for many months no steps were taken by Appellant, Court of Appeal will grant application to issue certificate of non-prosecution.

Dr. B. Joseph for Petitioners.

Dr. Smoira for Respondent No. 1.

No appearance for Respondent No. 2.

Application for a certificate of non prosecution under Article 24 of the Palestine (Appeal to Privy Council) Order in Council, 1924 .

ORDER.

This is an application under Article 24 of the Palestine (Appeal to Privy Council) Order-in-Council. The relevant dates are that final leave to appeal was granted in November, 1935. In May of the following year one of the two appellants died, and in September the same year, Dr. Bernard Joseph, who was the advocate of the surviving appellant, was appointed Administrator of the Estate of the deceased appellant.

No steps appear to have been taken with regard to the despatch of the record. In July, 1937, one of the respondents made an application under Article 24. It was discovered than that the record was defective. No person had been substituted for the deceased appellant. The application was occordingly dismissed. The fact that the application was made must have made it clear to the surviving appellant and to the administrator of the estate of the second appellant, that the record was defective, and that had the record not been defective, the application had every chance of succeeding. However, they took no steps to have the defect put right.

One of the respondents then asked for the amendment of the record in order to enable him to be in position to apply to the Court for a certificate of non-prosecution. This application was made in December, 1937, and was granted in February, 1938. As soon as this respondent has secured the amendment of the record he made a further application under Art. 24.

From what has been said we think that there is no necessity to dwell on the fact that this is the kind of delay which is contemplated by Art. 24. For ten months after the appointment of the Administrator of the deceased appellant no steps were taken either by him or the surviving appellant and when their attention was called to the defective state of the record they took no steps to put it in order. We think that this is a case in which a certificate should be issued under Article 24 and we direct that a certificate be issued.

We allow costs of the appeal to the respondent, as well as the costs of the application to include LP. 5.— advocate's fees.

The security submitted by the appellants may be returned to them when the costs have been paid.

Delivered this 17th day of March, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 46/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Shlomo Fried — Appellant.

v.

Aaron Zelig Volansky — Respondent.

Disagreement of the two judges in District Court — Right to sue Estoppel from suing.

1. On the two Judges in the District Court disagreeing as to whether Plaintiff had right to sue or not, action must be dismissed.

2. If A was given by B an undertaking to pay him certain amount in consideration of A's withdrawing his action and waiving his right against C, A is estopped if he has chosen to sue C again, from suing B on the amount due.

Frank for Appellant.

Amdour for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 15.11. 1937.

JUDGMENT.

This appeal fails. Two points have been raised before us. The first is that since the two Judges in the District Court disagreed, by some obscure process of reasoning judgment should therefore be given for the Plaintiff. The point on which they disagreed was this: whether the Plaintiff had the right to sue or not. That being so, I should have thought it followed that if they disagreed the action must be dismissed.

The second point is about the agreement that in consideration for giving by the Respondent of a promissory note for a certain sum to the Appellant, the Appellant was to withdraw the action against Respondent's mother. The promissory note was given, Respondent undertook not to sell a particular house, but if he sold the house he should pay from the proceeds the amount due to the Appellant. He sold his house and did not pay the Appellant. The Appellant then sued the mother. I should mention that the promissory note was due on a date considerably after the date on which these happenings occured. The Appellant said he had never waived any right against the mother. It is clear from his admission in Court that he waived his rights against the mother. The remedy of the Appellant was to sue the Respondent

either on the promissory note or under the agreement, having chosen to sue the mother again he is estopped from suing the Respondent on the amount due.

For these reasons and for the reasons mentioned in the judgment of the Relieving President of the District Court dismissing the action, this appeal is also dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 6th day of April, 1938.

British Puisne Judge.

CRIMINAL APPEAL NO. 41/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

Hilal Mustafa el Yousef — Appellant.

v.

The Attorney General — Respondent.

Free and voluntary confession of accused — Acts amounting to premeditation — Element of cold blood in premeditated murder.

Taking a rifle, loading it, and aiming at short range at another who is asleep may amount to premeditation.

Abdel Ghani, Abdel Hadi for Appellant.

Crown Counsel (*Hogan*) for Respondent.

Appeal from judgment of Court of Criminal Assize, sitting at Nablus, dated 30.3.1938, whereby Appellant was convicted of murder, contrary to section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death.

JUDGMENT.

The only point which arises in this appeal is whether or not the admission or confession made by the accused was properly admissible in evidence in the Court below. The Court in its judgment found quite clearly it was free and voluntary. They said:—

> "We are satisfied beyond all doubts that this confession was free and voluntary and that no inducement was held out to accused to make this statement.

and from the evidence before them the Court were justified in coming to that conclusion. If that confession is taken into consideration, then there can be no doubt that the accused was guilty of the offence with which he is charged.

The facts of this case are not dissimilar to the facts in the Attorney General v. Schwartz in which it was decided that if a person takes a rifle, loads it, and aims at short range at another who is asleep, such acts may amount to premeditation.

A suggestion was made that the accused may have been incited by a woman and therefore the element of cold blood was not present. The Court below found out that the killing was in cold blood and we think that they were justified in so finding.

The accused was properly convicted, not only on his own confession, but also on the evidence of the witnesses which bears out what he said as to the happenings on the night in question.

The appeal is dismissed and the conviction and sentence confirmed.

Delivered this 12th day of April, 1938.

Chief Justice *British Puisne Judge* *Puisne Judge.*

CIVIL APPEAL NO. 8/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

1. Ibrahim Ahmad Abdallah
2. Isaa Ahmad Abdallah — Appellants.

v.

Saleh Salim el Ibrahim — Respondent.

Compromise affecting ownership of immovable property — Confirmation by Magistrate of compromise affecting ownership of immovable property.

Confirmation of compromise affecting ownership of immovable property — beyond jurisdiction of Magistrate.

Moghannam for Appellants.

Sahyoun for Respondent.

Appeal from judgment of Land Court, Haifa, (L.A. 173/37) in its appellate capacity, dated 21.12.1937.

JUDGMENT.

In its judgment of the 21st December, 1937, the Court below held that a local inspection was desirable and remitted the case to the Settlement Officer with that end in mind. The inspection was to be carried out for the purpose of ascertaining whether the land in dispute was identical with the land referred to in the compromise concluded before the Magistrate. With this holding of the Land Court we are in full agreement.

The Attorney for Appellants contends that the Court below erred in stating in its judgment that it was beyond the jurisdiction of the Magistrate to confirm a compromise which affected the ownership of immovable property, as this question was not raised by either of the parties. The statement of the Court below as it stands is correct, and we refrain from interfering with it as such. Whether it applies in this case is not a matter which we need determine now.

We find, therefore, that the Land Court was right in setting aside the judgment of the Settlement Officer and remitting the case to him to hear the Respondent's (Appellant therein) plea of prescripive possession, and to hold an inspection, and the appeal is dismissed with costs and LP. 5 advocate's fee.

Delivered this 4th day of April, 1938.

British Puisne Judge.
(Copland, J.)

LAND APPEAL NO. 173/37.

IN THE LAND COURT OF HAIFA (APPELLATE CAPACITY).

Before:—The Relieving President (Shaw, J.) and Izzat Nammar, J.

In the appeal of:—

Salah As-Salim Al-Ibrahim — Appellant.

v.

1. Hanotaiah Ltd.
2. Yissakhar Ram
3. Ibrahim Ahmad Abdallah
4. Issa Ahmad Abdallah — Respondents.

Appeal from the decision of the Land Settlement Officer dated 19.5.1937.

JUDGMENT.

This is an appeal against the judgment dated 19.5.37 of the Land Settlement Officer in Case No. 31/Shefa Amr. In that Case the present Appellant Salah As-Salim — was one of the Defendants, and the present Respondents — Hanotaia' Ltd., and others — were the Plaintiffs.

Before the Land Settlement Officer the Respondent and one Issa Al Ilyas Al Hafi claimed a half share each in a parcel of land by unregistered purchase and by undisturbed possession for over 10 years.

It appears that in 1934 the Appellant brought an action in the Magistrate's Court (Case No. 4826/34) against Issa Ben El Haj Ahmad, who is Respondent No. 4.

As a result of those proceedings a compromise between the parties was drawn up and was approved by the Magistrate in a judgment given on 1.11.34. The effect of that compromise was that Respondent No. 4 was to pay LP. 75.— to the present Appellant whereupon all claims were discharged and the land remained the property of Respondent No. 4 and in his possession.

The Land Settlement Officer held that in view of that judgment giving legal effect to the compromise the Appellant could make no subsequent claim on the grounds of possession prior to that date (viz. 1.11.34).

Both before the Land Settlement Officer and in his statement of Appeal the Appellant averred that the compromise did not refer to the land now in dispute, but the Land Settlement Officer held that the boundaries were the same. Before the Land Settlement Officer the Appellant offered to point out the two pieces of land.

We think that this is a case in which a local inspection was desirable.

Further we would observe that it was beyond the jurisdiction of the Magistrate to confirm a compromise which affected the ownership of immovable property. The fact of the compromise, assuming that it does refer to the same land, could however be considered as evidence in the case before the Land Settlement Officer.

The decision of the Land Settlement Officer is set aside and the case is remitted to him to hear the Appellant's plea of prescriptive possession, to give Appellant an opportunity of demonstrating that the piece of land which is the subject matter of this case is different from the land which was the subject of the compromise, and to give a fresh judgment.

R/President.

CRIMINAL APPEAL NO. 38/38.

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:—

Ali Mohammad Ali — Appellant.

v.

The Attorney General — Respondent.

Criminal law administered as laid down in Criminal Code Ordinance — Reduction of sentence owing to age.

Court must administer Criminal Law as laid down in Criminal Code Ordinance; it cannot consider matters not forming part of the law.

Sanders for Appellant.
Fawzi Bey for Respondent.

Appeal from judgment of District Court, Haifa, dated 12.3.1938, whereby Appellant was convicted of attempted murder, contrary to Section 222(a) of the Criminal Code Ordinance, 1936, and sentenced to seven years imprisonment.

JUDGMENT.

This Court must administer the Criminal Law of the country as laid down in the Criminal Code Ordinance. We cannot take into consideration customs of the sort raised by Counsel for the Appellant in so far as they may not form part of the law. We are, however, in this particular case, prepared to consider a reduction of the sentence owing to the age of the accused. It is admitted that his age is in the neighbourhood of twenty, and for that reason and for that reason alone, we reduce the sentence from one of seven years to one of five years imprisonment.

Delivered this 13th day of April, 1938.

British Puisne Judge.

CRIMINAL APPEAL NO. 1/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Abdallah Hassan Abu Zind — Appellant.

v.

The Attorney General — Respondent.

Witness heard in criminal case after it went back to Court of trial — Quashing of conviction on presumption that trial Court might have acquitted, had it had before it evidence of a certain witness.

Where Court of Appeal is of opinion that if evidence of certain witness (who was heard after the case was remitted) had been before Court of trial they might have come to a different conclusion, it may quash conviction.

Moghannam for Appellant.
Crown Counsel, Hogan for Respondent.

Appeal from judgment of District Court, Nablus, dated 20.12. 1937, whereby Appellant was convicted of Robbery, contrary to Sections 287 and 288 of the Criminal Code Ordinance, 1936, and sentenced to three years imprisonment.

JUDGMENT.

It is perfectly clear that there was certain evidence which was not before the Court below and this Court ruled that the case should go back to the District Court to hear that evidence and to determine the issue whether or not the Mayor of Beisan saw the accused in company with the complainant the morning following the commission of the offence. The District Court heard the evidence of the Mayor and found that he did see the accused person in company with complainant on the morning following the commission of the offence.

That being so, we are of opinion that if this evidence had been before the Court of trial they might have come to a different conclusion and the conviction is therefore quashed.

Delivered this 13th day of April, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 43/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

1. Abdallah Es-Saalimi
2. Salem Es-Saalimi
3. Musa Ahmad Es-Saalimi
4. Mohammad Es-Saalimi — Appellants.

v.

1. Ahmad Khalil Fayyad
2. Mohammad Khalil Fayyad — Respondents.

Land dispute in connection with execution proceedings — Question which is partly one of fact not sufficiently enquired into by Court below.

Where question, though only partly one of fact, not sufficientyl enquired into by Court below, Court of appeal may remit case to trial Court to enquire fully into facts and ascertain rigths of parties.

Omar Es-Saleh for Appellants.
Said El-Khalafawi for Respondents.

Appeal from judgment of Land Court, Jaffa, dated 31.1.1938.

JUDGMENT.

We are of opinion that this appeal should be allowed.

It seems that there is a dispute as to whether or not a certain hakura (garden) as to which the Appellants allege that they have a kushan which shows the boundaries and of which I understand them to say they are in possession. On the other hand, it is alleged that it formed part of certain lands which were the subject of execution proceedings.

It is quite impossible for us to decide this question which is partly one of fact. We think that the case should go back to the Land Court to enquire fully into the facts and to ascertain whether the execution proceedings extended to the Appellants' garden, and to ascertain what are the Appellants rigths under their kushan.

The judgment of the Land Court will be set aside and the case remitted for retrial.

Costs to abide the event.

Delivered this 28th day of March, 1938.

Chief Justice.

LAND APPEAL NO. 72/34.

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:—

1. Mahmoud Abu Hana
2. Ahmed el Haj Mahmoud el Yehia
3. Mohammad Mustafa el Omar
4. Hassan Ayoub — Appellants.

v.

The Attorney General — Respondent.

Metruke land not assigned by deed or registered in Land Registry — Determination of category of land — Evidence of long usage of Metruke land — Claim by Village to Metruke land in excess of its needs.

1. Not necessary that Metruke land should be assigned by deed of grant or dedication or by entry in Land Registry.

2. When Government is Plaintiff in an action regarding land registered in its name, rights to village Metruke may be proved by evidence of long usage; but village cannot by such evidence establish a claim to more land than reasonably necessary for its needs.

Edit. Note: See Kyriako v. Principal Forest Officer (1894) 3 C.L.R. p. 87.

Goitein for Appellants.

Ghussein for Respondent.

Appeal from judgment of Land Court, Haifa, dated 26.6.1934.

JUDGMENT.

It seems that certain land in the village of Tantoura is registered as miri in the name of Government.

On the 5th of May, 1930, the High Commissioner, on behalf of The Government granted a lease for 49 years of a portion of this land to the Palestine Jewish Colonisation Association. I understand that some of the land was swamp and the lessees had undertaken to drain it.

The inhabitiants of the village claimed rights in the land and with the object of settling those claims the Government brought proceedngs

in the Land Court, Haifa, against certain persons representing the village. I do not understand the basis of the action, but broadly speaking the Attorney General was clearly acting properly in seeking to have the public rights ascertained.

As to certain lands there was no dispute and the Government was prepared to transfer them on payment of Bedl Misl.

The defendants (villagers) called evidence to show that land described as El Zour (or the Bass) were village pasture lands — and that rushes were also grown there. The area was not clearly defined and was claimed by them as Metruké. The Government apparently said the land was Mewat.

The Land Court held that the land was not Mewat, but went on to find:—

> "It is, in fact, land of that indeterminate class which, as has been suggested in Cyprus, happens, as a result of the provisions of the Land Code, to belong strictly to none of the recognised categories of land. It has been held also in Cyprus that this kind of land should be deemed to be regulated by the law relating to that class of land to which it comes nearest. (Goadby and Doukhan on the Land Law in Palestine, p. 45).
>
> In the present case, this would be Mewat because it is admitted that the land has never been cultivated".

This seems to me to be artificial. If land is not registered in any category it is possible that its history and physical characteristics may be factors in determining its category, but if it is registered, prima facie it belongs to the category in which it is registered; any other view would lead to a state of great confusion.

In my opinion the real question was, what amount, if any, of the land is Metruké of the village of Tantoura.

The Land Court took the view that none of the land is Metruké because there is no evidence of its assignment, but it went on to say:—

> "At the same time there is no doubt in our minds but that in fact both the Northern and Southern portions of the land have been used in the past by the inhabitants of Tantoura for grazing their animals and for supplying reeds and rushes for their matmaking, and accordingly the inhabitants have a strong moral claim on the Government to a portion of the land sufficient for their needs in these two respects. We have not considered the question of whether the Northern portion will or will not be sufficient because in our view it is not within our competence to do so."

I do not think it is necessary that Metruké should be assigned by deed of grant or dedication, or by entry in The Land Registry, and there must be many cases where land used and treated as Metruké is not registered as such.

I am of opinion that when the land is registered in the name of Government, and Government is the Plaintiff in the action, rights to village Metruké may be proved by evidence of long usage. On the other hand I do not think that by such evidence a village can establish a claim to more land then is reasonably necessary for its needs. I would add that I am dealing with the special powers conferred upon a Settlement Officer under the Land (Settlement of Title) Ordinance, Chapter 80.

In my judgment this case should go back to the Land Court to ascertain what land has been as village Metruké by Tantoura, and what portion of that land the village reasonably requires.

The hearing of this appeal has been delayed because of attempts to reach a settlement. In my view this is essentially a case for an amicable settlement and I hope that renewed efforts will be made in the light of this judgment.

Delivered this 24th day of March, 1938.

Chief Justice.

CIVIL APPEAL NO. 38/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

1. Mahdiya, Haj Omar el Hilu
2. Sirriya, Haj Omar el Hilu
3. Fatmeh Haj Omar el Hilu
4. Shafiqa Haj Omar el Hilu — Appellants.

v.

1. Hassan Haj Omar el Hilu
2. Said Haj Omar el Hilu
3. Shaban Haj Omar el Hilu
4. Hussein Haj Omar el Hilu — Respondents.

Land Registered in name of Government of Palestine — Dispossession of land in favour of cultivator — Magistrate's jurisdiction in matters of recovery of possession — Magistrate's Law, art 24 *and* 26.

Magistrate may order dispossession of defendant of certain shares in land registered in name of Government of Palestine in which shares Plaintiff has a right of cultivation.

Fawzi Dajani for Appellant.
Respondents: in person.

Appeal from judgment of Land Court, Jaffa, (L.A. 102/37) dated 17th and delivered on 23.12.1937.

JUDGMENT.

We are of opinion that the judgment of the Magistrate was right. The judgment of the Land Court will therefore be set aside and the judgment of the Magistrate will be restored.

The appeal is allowed with costs, to include LP. 3.— advocate's fees.

Delivered this 23rd day of March, 1938.

Chief Justice.

LAND APPEAL NO. 102/37.

NI THE LAND COURT OF JAFFA SITTING AS A COURT OF APPEAL.

Before:—The President (Cressal, J.) and Said Touqan, J. sitting in chambers.

In the case of:—

Hassan, Shaban, Said and Hussein,
Sons of el Haj Omar El Hilu — Appellants.

v.

Maddiya, Sirriya, Fatmeh and Shafiqa
daughters of Haj Omar El Hilou — Respondents.

Appeal from judgment of the Magistrate's Court, Gaza, dated 31.8.37 (Civil Case No. 1062/35) whereby Appellants were ordered to be dispossessed of the shares of the Respondents in the parcels in claim and deliver same to them as cultivators etc.

JUDGMENT.

On consideration it appears that the lands in dispute were not in possession of either of the parties to the action or their ancestors and that the Lower Court gave judgment for recovery of possession on the ground that the Respondents were cultivators on the said lands.

We find that a decision as to whether the Respondents were cultivators or otherwise is a matter within the jurisdiction of Commissions appointed under the Protection of Cultivators Ordinance and not within the competence of the Magistrate.

We further find, contrary to what the Magistrate decided, that the provisions of Sections 24-26 of the Magistrate's Law are not applicable to the Respondents' action in its present form.

In these circumstances the judgment, relating to the lands must be set aside and the Respondents' action dismissed with regard to the claim in connection with cultivators' rights. But since no appeal has been lodged against that part of the judgment relating to the house in dispute, we see no reason to interfere with the judgment of the Magistrate with regard to this matter of the house.

Given this 17th day of December, 1937.

Delivered in open Court this 23rd day of December, 1937.

President.

JUDGMENT OF THE MAGISTRATE (NO. 1062/35)

The plaintiffs — Mahdiya . . . . daughters of el Haj Omar el Hilou —, claim through their attorney Fawzi Eff. Dajani, Advocate, Gaza, against the defendants . . . . sons of el Haj Omar el Hilou that 5 Kirats of land out of 92 were left to them, the defendants and the rest of the heirs of their father in the whole Masha' lands of Koufkha village and in consideration of that and of one kirat out of 92 kirats to Ammuneh el Hilou the following plots of land were assigned:— Mares el Jurun; Land of Abu Atweh; . . . . a house composed of four rooms with a yard and appurtenances;

and that the defendants took possession of their inherited transfered shares in the said properties by force, and asked that the defendants be called upon and adjudged for dispossession of their shares in the lands and the house and the resoration of the previous state of affairs with costs and advocate's fees.

In the course of hearing which was in presence, the counsel for plaintiffs corrected his action and applied for the dispossession of the defendants from the plaintiffs' shares which are: to each one of them belongs 375 shares out of 92.000 in parcels No. 3, 5 of block 263, and parcels No. 2, 4, 6 . . .

and also to each one of them 3 shares out of 48 in parcels No. 4, 6, 8, 32 in block 258,

and produced 32 copies of Tabu entries, dated 17.6.37, to the effect that the mentioned parcels were registered in the name of His Excellency the High Commissioner for Palestine being the property of the Government, and that the plaintiffs had a right of cultivation in the shares stated above in lieu of payment of taxes imposed by the Government as tithes and others. Therefore and whereas the defen-

dants admitted that the house was left by their father and that the plaintiffs own their inherited shares amounting to 308 shares out of 3696 to each one of them and by virtue of arts. 24 and 26 of the Magistrate's Law, I give judgment for the dispossession of the defendants from the plaintiffs' shares in the parcels aforementioned and their delivery to them in their capacity as cultivators in them, and also the dispossession of the defendants from the plaintiffs' share in the mentioned house, and its delivery to them in order to dispose of it with the defendants and the rest of the inheritors in conjunction and each to the amount of his share, together with costs, fees and advocate's fees of LP. 1.— against the defendants.

Judgment delivered in presence, subject to appeal.

Dated 31.8.1937.

Magistrate.

CRIMINAL APPEAL NO. 17/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Mordechai Ben Yacob Schwartz — Appellant.

v.

The Attorney General — Respondent.

Circumstancial evidence and direct evidence — Onus of proof of premeditation — Inferences drawn from circumstancial evidence — Resolution, cold blood and preparation. — Criminal Code Ordinance, sec. 214(b), 216(a)(b) & (c).

1. Inferences drawn from circumstantial evidence must point in one direction only viz. to the guilt of the accused person without any reasonable doubt or without any other supposition being reasonably possible.

2. Onus of proof of premeditation — upon the Prosecution.

3. If a man shoots at the head of another, while that other is asleep, with a rifle, at close range, Court entitled to draw inference that he had resolved to kill him.

4. While there are rare cases (of causing death to a person) where there may be (a) resolution and (b) cold blood and where there cannot be said to be (c) preparation, the evidence called to prove (a) and (b) will nearly always also prove (c).

5. Preparation need not necessarily consist of physical acts only — it may be composed partly of physical acts and partly of intention and could also be proved by acts subsequent to actual killing.

Edit. Note:—As to inferences drawn from circumstancial evidence—see Cr.A. 96/37 Ct.L.R. II. p.108; as to premeditation see Cr.A. 41/38 Ct.L.R. III p. 187; Cr. Ass. Ap. 2/30 P.L.R. I. p. 441; Cr. Ass. Ap. 2/26 P.L.R. I. p. 92; Cr. Ass. Ap. 6/33.P. Post 22/6/1933; Cr.A. 73/33, P. Post, 31/10/1933.

Eliash, Abcarius, Keiserman for Appellant.
Crown Counsel (*Hogan*) for Respondent.

Appeal from judgment of the Court of Criminal Assize sitting at Haifa, dated 28.1.1938, whereby Appellant was convicted of Murder, contrary to Section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death.

JUDGMENT.

Copland, J.

The Appellant in this case was convicted by the Assize Court sitting at Haifa of the premeditated murder of a fellow-constable, Mustafa Houri.

The evidence in this case has been said to be entirely circumstancial, but it is for that reason none the less effective. Circumstantial evidence is as good as — possibly in many cases better, particularly in this country — than direct evidence, but cimcumstantial evidence of course gives rise to inference to be drawn from the facts that are proved, and, as it has been rightly said, these inferences must point in one direction only, namely, to the guilt of the accused person, without any reasonable doubt, or without any other supposition being reasonably possible.

The judgment of the learned Chief Justice has been subjected to a minute and microscopical examination and it has been argued with considerable ability that the inferences which he drew from the evidence before him were not justified, but no fault whatever can be found with the judgment, which is a most careful one, reviewing and analysing the evidence in detail, and giving the benefit of every doubt to the appellant. We are of opinion that, on the evidence which there was before the trial Court, that Court was fully justified in coming to the conclusion that the Appellant did wilfully kill the deceased constable.

I do not propse to deal with all the facts, but will merely mention the most fundamental of them which stand out as being the most important. Much has been made of apparent differences in the sequence of shots that were heard by the three witnesses. Two of these witnesses, at any rate, agreed that there was one shot first of all, followed after an interval by four or five other shots. There were then one or two shots afterwards and some whistling. No witness, however, heard more than eight shots, whilst the appellant said that he heard three shots, and that he himself fired eight shots afterwards, and whistled for help. It has been argued that all these witnesses did not hear all the same shots, but it has been pointed out by the Prosecution that, at any rate, the end of the firing was fixed by the whistling in each case. None of the witnesses heard the three shots which the Appellant, in his statement to the Court, alleged had been fired first by outside attackers. The trial Court was justified, therefore, in coming to the conclusion that there were no such things as three or indeed any shots fired from outside by other persons. Other pieces of evidence pointing to the guilt of the accused, to the exclusion of any other reasonable theory, are the faking, after the shooting of the deceased, of an attack on the tent. There is also the fact that the deceased was asleep at the time he was shot. The trial Court again was justified in coming to the conclusion that he had been shot when lying on his bed. The Court came to that conclusion on evidence which we think it was justified in believing, when it has found that it was impossible for the deceased to fall off the bed, or for the body to get onto the ground, unless the body had been pulled onto the ground. And who could have so pulled it but the appellant? Again there were further facts — that of the writing in the diary by the Appellant, and his own statement that after the firing he went out and sat down, in the glare of the electric lights in the camp, to summon help as he said. It is difficult to believe that a man, who had recently been attacked, would rush out into the glare of the electric lights, at such a time as this. The first instinct in such a case, particularly if he were frightened, would be to take cover in the dark.

There is the further evidence that two bullets were found in the tent, which goes to show that at least two shots, probably more, were fired inside the tent, bearing in mind the number of entrance and exit holes in the tent walls.

The only person other than the deceased who was inside the tent was this appellant. There are further inferences to be drawn from the blood on the towel, blood on the pillow, and the position of the towel. A certain point has been made that

the body could not have been long enough on the bed for all this blood to came out, but it must be remembered that the exit wound in the head was very large, and the effusion of blood must have been correspondingly large and quick. The trial Court was fully justified in holding, after hearing the appellant, that in view of the other evidence and the contradiction in his various statements, it did not believe his evidence.

There is only one further matter in this connection in dealing with the evidence to which I have to refer, that is, the position of the tent and its contents relative to its position. It must be remembered that Mr. Lucie Smith gave evidence that when he made his examination and conducted his experiments, the tent and its contents were in their original position and condition in which they were found after the murder was committed, and that nothing had been disturbed. The defence did not have that advantage, and much of the evidence of their experts, therefore, must be theoretical, and the trial Court was entitled to reject it. I do not attach much or, indeed, any importance to the question whether the brailing was closed or not; the most that could have happened would have been a very slight alteration in the relative positions of the bullet holes. In fact, if the brailing were closed, then the position of the holes would have been brought nearer to the ground thus supporting still further the theory of the prosecution. I am therefore of opinion that the trial Court was right in holding that the appellant did kill Mustafa Houry.

We now come to the last phase of this case, whether the conditions of Section 216 of the Criminal Code Ordinance have been complied with. Section 216 is as follows:—

> "216. For the purpose of section 214 of this Code a person is deemed to have killed another person with premeditation when —
>
> (a) he has resolved to kill such person or to kill any member of the family or of the race to which such person belongs, provided that it shall not be necessary to show that he resolved to kill any particular member of such family or race, and
>
> (b) he has killed such person in cold blood without immediate provocation in circumstances in which he was able to think and realise the result of his actions, and
>
> (c) he has killed such person after having prepared himself to kill such person or any member of the family or race to which such person belongs, or after having prepared the instrument, if any, with which such person was killed.

> In order to prove premeditation it shall hot be necessary to show that an accused person was in any state of mind for any particular period or winthin any particular period before the actual commission of the crime, or that the instrument, if any particular period or within any particular period before particular time before the actual commission of the crime."

I agree fully with the statement that it is for the Prosecution to prove their case — the onus is always upon them to do so. With regard to resolution, that I think is clear from the evidence. The Chief Justice, in his judgment, says:—

> "In my opinion, if a man shoots at the head of another, while that other is asleep, with a rifle, at close range, the Court is entilted to draw the inference that he had resolved to kill him".

That is entirely a correct inference to be drawn. With regard to the question whether the shooting was in cold blood without immediate provocation and in circumstances in which the person shooting was able to think, I think that the learned Chief Justice was also correct in his inference that the shooting here was in cold blood. The fact that there was no quarrel, no one else present — no provocation has been alleged by the defence — in the statement of the appellant himself no indication is given of any quarrel — the fact that the man was asleep, the fact that accident has been ruled out as a defence by reason of the number of shots fired and the holes in the tent, from all these I think that the killing was in cold blood. Each case of course must be judged on its own facts. In this case there was overwhelming evidence, in my opinion, from all the attendant circumstances that the killing was in cold blood. It is not for us to invent theories which have never been suggested or put to us as to what might have happened. We have the appellant's own tale that there was no quarrel.

The last point is the question of Section 216(c), that is, did the appellant prepare himself to kill or did he prepare the weapon with which the killing was effected? Now, if the requirements of paragraphs (a) and (b) of Section 216 are complied with, it must nearly always follow that the requirements of paragraph (c) are also present — not invariably, I agree. On the evidence called to prove the requirements of paragraphs (a) and (b), in the vast majority of cases there will be proved the requirements of paragraph (c). With all due respect to the judgment of the learned Chief Justice in the Sheinzwit case, I think that in that case he drew the requirements of the Section too rigidly. Resolution combined with cold blood in themselves connote a certain amount of preparation, in most cases. If the other ingredients of paragraphs (a) and (b) are present, then usually very

little evidence indeed, or inference from evidence, is necessary to prove preparation. The paragraph, to my mind, cannot on this view be said to be unnecessary or meaningless. There are cases, few in number possibly, where there may be resolution and cold blood and where there cannot be said to be preparation. I give one example which comes to my mind. A. has resolved to kill 'B' at the first opportunity that presents itself to him. By accident 'A' and 'B' find themselves walking along the edge of a cliff, and the opportunity of pushing 'B' over the cliff presents itself to 'A', and he proceeds to do so, and 'B' is killed. That would be murder committed which had been resolved upon, and murder committed in cold blood. I do not think it could be said that it was also committed after preparation. In this case I think that the trial Court was right in holding that there was preparation; that preparation consisted in the taking of the weapon from underneath the mattress, loading it, standing up and pointing it at the deceased, and firing, and else in the deliberate acts of the appellant to stage the appearance of an alleged attack by persons outside. Preparation need not necessarily consist, to my way of thinking, of physical acts only — it may be composed partly of physical acts, partly of intention, and further, preparation, to my way of thinking, could also be proved by acts subsequent to the actual killing.

In these circumstances, I am of opinion that the appeal should be dismissed.

The result will be that by a majority the appeal is dismissed and the conviction and sentence of death are confirmed.

Delivered this 1st day of April, 1938.

British Puisne Judge.

Greene, J.

I entirely agree with the judgment of my learned brother the Presiding Judge.

On the evidence which was before the trial Court that Court was fully justified in coming to the conclusion that Appellant did wilfully kill the deceased.

As regards paragraph (c) of Section 216 of the Criminal Code Ordinance, I am satisfied that the trial Court having come to the conclusion that paragraphs (a) and (b) of Section 216 had been proved, and that Accused by taking his rifle from under his mattress, loading it and firing at deceased while he was lying on his bed, prepared him-

self to kill the deceased, and that the three ingredients necessary under Section 216 of the Criminal Code Ordinance have all been proved.

Delivered this 1st day of April, 1938.

British Puisne Judge.

Frumkin, J.

I am satisfied that from the evidence before it the Court below was justified in finding as it did that the accused fired at the deceased while the latter was asleep, causing his death.

2. The question now to be considered is whether or not the accused has killed his victim with premeditation.

3. In the words of the learned Chief Justice in his considered judgment in another case known as the Sheinzwit case:—

> "The crime of murder with which the accused is charged is statutory and is defined in Section 214(b) and Section 216 of the Criminal Code Ordinance, 1936. The latter section deals with premeditation and requires three ingredients (a), (b) and (c) all of which must be present. I do not think that because two are present, the third may be assumed; but facts which are evidence of one may also be evidence of another".

In dealing with one of the ingredients in this case the learned Chief Justice refused to draw an inference without the existence of any evidence.

4. In the present case the learned Chief Justice further held that the onus was upon the prosecution to prove the requirements of Section 216, and he does not think that merely because A killed B, any of the requirements of Section 216 can be presumed. Each case must be considered on its own merits.

5. Of the three ingredients (a) deals with resolution (b) with cold blood and (c) with preparation. As said before all of the three must be present, neither of them can be assumed or presumed, each of them must be proved separately and the onus is on the prosecution.

6. I will deal first with the last ingredient as provided for in clause (c) which could be met in two ways, i.e. that the killing took place after the person having (a) prepared himself to kill or (b) prepared the instruments, if any, with which the victim was killed.

7. Strictly speaking I can hardly conceive a case where a person has resolved to kill and has actually killed in cold blood, and yet was the crime committed without the person having prepared himself. Even in a murder of a most primitive nature effected by say the use of one's fist or fingers, once the murderer has resolved to commit the murder and has done so in cold blood it could be said that he has prepared himself by approaching the victim or using his fist or fingers.

8. If I am right in this view clause (c) would appear to be entire-

ly superfluous and of no meaning whatsoever. If we have, however, as we are bound to, to attach any meaning to this clause which in addition to the requirements of clauses (a) and (b) also requires preparation one must come to the only possible conclusion that while (a) and (b) deal with mental requirements, clause (c) deals with purely material or physical requirements which must be proved independently of the mental requirements of the previous clauses.

9. In the present case the Court below seems to have taken the view, that in the case of a constable or other person who in the course of his duty is lawfully in possession of a rifle, while the mere act of taking the rifle is in itself not sufficient to establish preparation, there is preparation by coupling that act of taking the rifle with the intention to use the rifle for an unlawful purpose.

10. With all due respect I am unable to share this view. The intentions of the accused are matters to be dealt with and decided in considering the requiremtns of clauses (a) and (b). If apart of any intention of the accused, there was nothing which if taken alone could in itself form a material or physical act of preparation — the requirements of this clause were not met.

11. It has been suggested that if this were the case a constable or other person who in the course of his duty is in lawful possession of arms could never be charged under section 216. I don't think so. There might be many cases where such a person prepares himself for the act of killing other than by taking his arms with an intention to use it unlawfully. But even if it were so, it is a matter to be remedied by the legislature. We have to apply the law as it stands.

12. It follows that in my opinion the requirements of clause (c) of section 216 have not been proved and there could therefore be no conviction under that section.

13. This is conclusive in the matter of premeditation which requires the presence of all the three ingredients. But I would also like to say a few words on the requiremtns of clause (b) which reads as follows:—

> "(b) he has killed such person in cold blood without immediate provocation in circumstances in which he was able to think and realise the result of his action".

The following is the relevant passage of the judgment of the Court below on this point.

> "It is clear that if a man shoots at another, while that other is asleep, particularly if no other person is present the shooting can be in cold blood, without provocation, and in circumstances in which he is able to think".

14. It is noteworthy that the word used is 'can' and not 'must'.

I am fully in agreement with the learned Chief Justice that if a person shoots at another while that other is asleep, the shooting *can* be in cold blood and in many cases, perhaps in most cases it is so, but not necessarily so. There can also be cases where a person shoots at another while that other is asleep and yet the shooting was not in cold blood in circumstances in which he is able to think.

15. Take the instance of A and B sharing one bed or one room. A awakens from a bad dream or an imaginatory fright of being attacked. He instinctively grasps at a weapon easy at hand, uses it while still half asleep and kills B who shares his bed or room. I don't say that that is what happened in this case although something similar might have happened. I am only bringing this illustration to show that there can be a case of a person shooting at another while that other was asleep and the shooting was not in cold blood and in circumstances in which he is able to think.

16. There can be no immediate provocation when the victim is asleep but immediate provocation is not an indispensable element of clause (b). I mean to say that clause (b) cannot be invoked just becaused there is no provocation. The other elements, cold blood, ability to think must be proved.

17. When the law requires the presence of all three ingredients, when each ingredient is to be proved and not presumed, when the onus of proof lies on the prosecution, the Court could not, in the existence of double probabilities and in the absence of direct evidence as to one or the other come to the conclusion that there was cold blood on the presumption only that when one person attacks another while that other was asleep this attack *can* be in cold blood.

18. On the law as it stands I am of opinion that the requirements of both clause (b) and (c) have not been duly proved and the conviction under 216 must therefore be substituted for a conviction of manslaughter under section 212.

Delivered this 1st day of April ,1938.

Puisne Judge.

CIVIL APPEAL NO. 54/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Itzhaq Trachtengut — Appellant.

v.

1. Hamad Ismail Koulok
2. Said Mousa Sawafiri — Respondents.

Breach of contract — Non payment by lessee of rent — Absence of bad faith or fraud in breach of contract — Damages for direct loss and not for unearned profit — Ottoman Civil Procedure Code art. 109, 110.

1. Where no steps were taken by lessor to collect the rent due, lessor cannot by non payment of it be held to have committed breach of contract or shown his unwillingness to perform it.

2. Party to contract who committed a breach without bad faith or fraud — only liable to pay damages for direct loss, not for unearned profit.

Edit. Note:

As to willingness to carry out obligations under contract see Privy Council 47/32 P.L.R.I. p. 831, C.A. 100/34, P.L.R. II. p. 409.

As to assessment of damages see: C.A. 191/37 Ct. L.R. II p. 169, C.A. 181/37, Ct.L.R. II p. 118.

Dr. B. Joseph for Appellant.
Cattan for Respondents.

Appeal from the judgment of District Court, Jaffa, dated 30.9. 1937, confirming the judgment of the Magistrate's Court, Jaffa, dated 27.7.37.

JUDGMENT.

Frumkin, J.

The Appellant in this case is the landlord of a shop situated in Tel-Aviv let some time in December, 1935, to the Respondent for a period of 16 months. Rent was paid in advance for 4 months, and the balance was payable quarterly in advance. Promissory notes were given to secure these payments. It seems that the first of this quarterly instalments was duly paid.

2. On the 19th April, 1936, upon the outbreak of disturbances in Palestine the Respondent, an Arab, abandoned the shop, and has taken no steps in connection with the lease until November, 1936, when he sent a Notarial Notice to the Appellant asking for the redelivery of the shop or, damages at the rate of LP. 1.— per day from the date of notice until the expiration of the lease. The Appellant has then already let the shop to another.

3. The Appellant maintains that he has done so, seeing that the Respondent has abandoned the shop and ceased to pay rent for many months.

4. The Respondent sued the Appellant before the Magistrate's Court and obtained judgment for LP. 100 damages as claimed. On appeal before the District Court the Judgment was confirmed, but unfortunately no reason was given for so doing.

5. Against this Judgment the owner of the shop now appeals, and his grounds of appeal might be summarised thus:—

a) That he was entitled to let the shop to others upon its being abandoned by the tenant.

b) that the Respondent himself has committed a breach of the contract and has shown no willingness and readiness to perform the contract, and is therefore not entitled to sue for damages.

c) that, in the alternative, there being no bad faith on the part of the Appellant the most the Respondent can sue for is damages for direct loss under Article 109 of the Ottoman Civil Procedure Code and not damages for unearned profit under Article 110, and

d) that there was no evidence to support the finding of the Magistrate in fixing the damages.

6. In my view the Appellant committed a breach of the contract by letting the shop to a new tenant and allowing the latter to occupy it within the period of Respondent's lease.

7. The only obligation imposed upon the Respondent under the contract was to pay the rent. The payment of rent was secured by promissory notes. In strict application of the law there might be no obligation on the Appellant, to present the notes for payment to the Respondent who was the maker of the notes. Yet I am not prepared to go so far as to hold that by non payment of the rent the Respondent has committed a breach of the contract or shown his unwillingness to perform it when the Appellant has taken no steps to collect the rent.

8. There is nothing, however, to show that by letting the shop to another the Appellant acted in bad faith or fraud, as under the special circumstances of the case he was justified in assuming that there was no desire on the part of the Respondent to carry on his business in that shop. It follows that Article 109 of the Ottoman Code of Civil Procedure and not 110 is applicable.

9. The appeal is therefore allowed and the judgment of both the Magistrate's Court and the District Court are set aside and the case remitted to he Magistrate with directions to determine, if, and to what, extent, the Respondent has suffered any direct loss other than unearned profits, and give judgment accordingly.

Costs to follow the result.

Delivered this 5th day of May, 1938.

Puisne Judge.

HIGH COURT NO. 5/38.

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:—
1. Muhammad Ahmed Issa
2. Ibrahim Yousef Awad — Petitioners.

v.

Inspector General of Police — Respondent.

Withdrawal of criminal proceedings other than by way of stay of Proceedings — Inspector General of Police withdrawing criminal proceedings — Non interference by High Court — Criminal Procedure (Trial upon Information) Ordinance, sec. 59.

High Court has no power to prevent Inspector General of Police withdrawing a criminal proceeding.

Edit. Note:—The withdrawal in this case was before any evidence was tendered and any witness called.

M. Rashid for Petitioners.

Ex-parte.

Application for an order to issue to the Respondent calling upon him to show cause why he should not abstain from withdrawing certain criminal proceedings which had been commenced before the Civil Courts against the Petitioners. (Cr. C. Mag. Jm. 1087/37).

ORDER.

We have no power to prevent the Inspector General of Police withdrawing a criminal proceeding and the Order prayed for is therefore refused.

Chief Justice.

HIGH COURT NO. 21/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J. and Frumkin, J.
In the application of:—
Erich Flanter — Petitioner.

v.

1. The Director, Department of Customs, Excise and Trade, Haifa
2. The Surveyor of Customs, Jerusalem Respondents.

Documents retained by Customs authorities — Paying required duty under protest.

Customs authorities not entitled to retain documents of a person who expresses his readiness to pay the required duty under protest and against whom no criminal proceedings have been instituted in connection with the documents.

Smoira for Petitioner.

For 1st Respondent — No appearance.

2nd Respondent — in person.

Application for an order to be issued directing the respondents, or either of them, to deliver up to the petitioner, the documents. etc. of the Petitioner which are detained by the Respondents, and for alternative relief.

JUDGMENT.

This is a return to a rule nisi issuing from this Court on the 11th day of April, 1938, wherein it is provided that if criminal proceedings are instituted in the meantime against the Petitioner the rule would be suspended. No criminal proceedings have been instituted and the Petitioner has further expressed his readiness to pay the required duty under protest. It is clear that the Petitioner is entitled to recover the documents which have been retained by the customs authorities for more than two months.

The rule nisi is therefore made absolute on the undertaking of Petitioner to pay the duty under protest, with costs and LP. 5.— advocate's fees.

Delivered this 25th day of April, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 55/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Abdul Asim Ghoussein Appellant.

v.

Abdul Kader Ghussein Respondent.

Preliminary objection to hearing of appeal — Respondent's right to take advantage of Appellant's mistakes — Proper form of bond accompanying Notice of Appeal — Deposit in lieu of bond — Application to allow deposit paid at a later time — Civil Procedure Rules, Rules 93 (1) (b), 96.

1. Respondent entitled to take such advantage as he can of any mistakes made by this opponent and cannot lawfully be deprived of that right.

2.. Appeal to Supreme Court will be dismissed, if Notice of Appeal not accompanied either by proper bond as set out in Form 19 under Rule 93(1)(b) of Civil Procedure Rules 1935 or by application to Court to fix a deposit to be paid in lieu of bond.

Deposit paid at a later time by Appellant to Court without good cause shown for delay cannot cure defect.

Edit. Note:—See C. A. 126/36 Ct. L. R. I. R. 50; C. A. 57/36 Ct.L.R.I.R. 78; L. A. 33/35 Ct.L.R. II p. 16; C. A. 180/37 Ct.L.R' II p. 117; C. A. 129/37 Ct.L.R. II p. 87; C. A. 100/37 Ct.L.R. II p. 224; C. A. 223/37 Ct.L.R. III p. 25; L. A. 73/32 P. Post 13/12/1932; C. A. 170/32 P.L.R. I p. 852; C. A. 78/31 P.L.R. I. p. 661; C. A. 113/32 P.L.R. I. p. 788.

Said Zein El Din for Appellant.
Fahmi Husseini for Respondent.

Appeal from the judgment of Land Court 19/31, Jaffa, dated 1.2.1938.

JUDGMENT.

In this appeal a preliminary objection has been taken by the Respondent to the effect that the bond filed was defective, and that the Appellant had no right to file later an application to make a deposit in lieu thereof.

When an appellant files a notice of appeal he must at the same time do one of two things: he must either file a proper bond in the form set out in Form 19 to the Schedule to the Rules under Rule 93(1)(b), or he must file an application to the Court to fix a deposit to be paid in lieu of a bond under Rule 94.

The Appellant in this case has done neither of these two things, — the bond is not in the form set out in Form 19 to the Schedule, and the application to the Court to fix a deposit was not filed at the time of filing the notice of appeal. The Respondent is entitled to take such advantage as he can of any mistakes made by his opponent and cannot lawfully be deprived of that right.

An application has been made to us under Rule 96 to allow the deposit which has already been paid at a later time by the Appellant to count. Under the said rule a good cause should be shown in order that such application may be allowed. With the best will in the world we are unable to find any good cause.

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

Delivered this 25th day of April, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 80/38.
CIVIL APPEAL NO. 81/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J., Frumkin, J. and Khayat, J.
In the appeal of:—
Hannah bint Khalil Abu Abdallah — Appellant.
v.
Naser Mouan Ja'bour — Respondent.

Preliminary objection to hearing of appeal — Form of guarantee accompanying appeal — Time for lodging application to assess deposit in lieu of guarantee — C.A. 55/38.

On appeal to Supreme Court Appellant must either submit a proper guarantee or lodge an application for assessment of a deposit together with statement and grounds of appeal, otherwise appeal will be dismissed.

Edit. Note:—See C.A. 55/38 in this issue.

H. A. Atalla for Appellant.
Jawdate el-Kazini for Respondent.
Appeal from judgment of Land Court, Jerusalem, dated 31.1.1938.

JUDGMENT.

The two appeals must fail. The question involved in the first appeal is a pure question of fact, and such cannot be argued in this

Court. The Land Court heard the produced evidence, weighed such evidence and gave its judgment on the base thereof, and we are of opinion that there was sufficient evidence to justify the findings arrived at.

In connection with the second appeal a preliminary objection was raised by the Respondent to the effect that the application of the assessment of a deposit submitted by the Appellant was out of time. It has been already, and recently, held by this Court in Civil Appeal No. 55/38*) that when an appellant files an appeal he should do one of two things; he should either submit a proper guarantee or lodge an application for the assessment of a deposit together with the statement and grounds of appeal. In this case neither of these two requirements has been complied with. The original bond submitted by the Appellant is defective and the application of the assessment was filed after the appeal had been lodged. Even supposing that this Court overruled the preliminary point, the appeal would have equally been dismissed on the ground that it merely deals with a question of fact.

The two appeals are dismissed. Both parties to have their costs. No order is made as to advocate's fees.

Delivered this 5th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 67/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case of:—

Nathan Levy — Appellant.

v.

1. Itzhaq Levy
2. Haim Levy
3. Saul Levy — Respondents.

Court refusing application to hear further evidence — Court satisfied of the contrary of what had to be proved — Dissolution of partnership — Holding property in joint ownership — Alleged creation of partnership by operation of a clause in a will.

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*) published in this issue.

1. If Court after hearing evidence in proof of alleged fact decides not that they are not convinced of what claimant tried to prove, but that they are satisfied of the contrary, Court is right in refusing application to hear further evidence in support of that allegation.

2. The passing of property by will to more than one legatee and its becoming their common property does not necessarily create a partnership between the joint owners.

3. After conclusion of evidence full opportunity should be given to parties to address Court both on matters of fact and of law arising out of evidence heard. But if parties had an opportunity of addressing the Court at different stages, Court of Appeal will not be prepared to remit case on ground only that after all evidence was heard, no opportunity was given to appellant to address the Court.

Gratch for Appellant.
King for Respondents.

Appeal from judgment of District Court, Tel Aviv, dated 11.2. 1938.

JUDGMENT.

Frumkin, J.

This case is not so complicated as it looked at the beginning. The dispute is between three brothers arising out of differences in respect of the estate of their decased father. This estate included, among other properties, a business in Jaffa and the appellant claimed to be a partner in this business and applied for the dissolution of the partnership. Evidence was heard in the Court below which found that the appellant did not prove his case and dismissed his application for the dissolution of the partnership.

2. On appeal two points of preliminary character were raised by the appellant. One, that the appellant was not given the opportunity to bring all this witnesses to the Court. With this point I will deal later.

3. The second point was that after all the evidence was heard, no opportunity was given to the appellant to address the Court. It is of course very essential that after the conclusion of the evidence full opportunity should be given to the parties to address the Court both on matters of fact and of law as arising out of the evidence heard. In this case, however, the parties had an opportunitiy of addressing the Court at different stages and we are not prepared to remit the case on this ground alone.

4. On the main point whether or not the appellant was a partner in that business, it is clear of course that only if he were a partner he could claim the dissolution of partnership: the appellant's claim is twofold.

5. One, that he was a partner already during the lifetime of the deceased. This claim he failed to establish to the satisfaction of the Court below, which after hearing the appellant's own evidence decided that from his own evidence they are satisfied that he was not a partner. It is worth noting that what the Court below decided was not that they were not satisfied of his being a partner, in which event further evidence might be useful, but that they were satisfied that he is *not*. No useful purpose, therefore, could be served by hearing further evidence and the Court below was therefore right in refusing his application on this point.

6. Again the appellant relied in his claim as to the partnership on the will of his deceased father. Clause 6 of the will deals with this particular business and the appellant's allegation in that the business was intended by the will to become after the death of the deceased the common property of the three brothers, including the appellant, so that even if he was not a partner during the lifetime of his father, he automatically became a partner upon his death.

7. But this is not the case. A property might pass to more than one person by a will and that property becomes the property of the legatees in joint ownership but it does not necessarily constitute a partnership between the joint owners.

8. In other litigation between the same parties the President of the District Court sitting under the Succession Ordinance directed that under clause 6 of the will it was not the intention of the deceased to transfer the business to all three brothers, but that the interest of the appellant under this clause could be justified by the payment to him of a lump sum of LP. 1000.—.

9. No steps have been taken to set aside these directions and it is argued that as under Civil Appeal No. 118/1927 such directions are not appealable any other Court dealing with any matter under a will can go behind such directions.

10. It is not necessary, however, to deal with that point. Even if the Court below was not bound by the directions of the President, and could hold, if they so thought fit, that under clause 6 of the will the appellant is entitled to more than LP. 1000.— this clause did certainly not create a partnership. In our opinion no partnership has been constituted automatically nor could it be so constituted by the

will of the testator. There being no partnership, there was nothing which could be dissolved.

11. We express no opinion as to whether, notwithstanding the directions of the President, the appellant is, under clause 6 of the will, justified to claim his share in the value of the business. His case was for the dissolution of the partnership, and there being no partnership, the Court below was justified in dismissing his application.

12. The judgment of the District Court is therefore affirmed and the appeal dismissed with costs to include LP. 5.— advocate's fees.

Delivered the 27th day of April, 1938.

British Puisne Judge.
Puisne Judge.

CIVIL APPEAL NO. 69/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J., Greene, J. and Frumkin, J.
In the appeal of:—
Fuad Abdul Ghani Khaldi — Appellant.
v.
Ra'iseh Muhyiddin Khaldi — Respondent.

Hearing of evidence by all judges of Court — Calling in of a third judge in Land Court — Reading the evidence given in previous hearing — Land Court Rules, Rule 2(2).

Where a question of evidence involved, all judges of the Court should hear the evidence.

If a third judge called in in Land Court to join and give his opinion on the case, the evidence must be reheard; not sufficient to have third judge read the evidence adduced in previous hearings.

Edit. Note:—

As to disagreement of Judges in Land Court see:—L.A. 69/38 Ct.L.R.I.R. 27; C. A. 18/38 Ct.L.R. III. p. 153; as to variation in constitution of Court see C. A. 131/37 Ct.L.R. II. p. 106, C. A. 21/31 P.L.R. I. p. 709. C. A. 61/32; L. A. 16/35 P. Post 24/2/36; C. A. 74/35 P. Post 26/8/36; see also Civil Procedure Rules, 1938, Rule 197.

Abcarius for Appellant.
Moghannam for Respondent.

Appeal from judgment of Land Court, Jerusalem, dated 28.2. 1938.

JUDGMENT.

It is most unfortunate, but this appeal must be allowed. When this case*) was for the last time remitted to the Land Court it was so remitted for the purpose of calling in a third Judge to join and give his opinion on the case in accordance with Sub-Rule 2, of Rule2, of the Land Courts Rules. The Land Court held that it was not necessary to rehear the evidence and found it sufficient to have the third judge read the evidence adduced in the previous hearings. In thus holding we think that the Land Court was wrong. Where a question of evidence is involved all judges of the Court should hear the evidence.

The appeal is therefore allowed and the case is remitted to the Land Court to hear the evidence before the three judges.

Costs to await the result of the retrial.

Delivered this 2nd day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 77/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

British & Levant Agencies Ltd. — Appellant.

v.

1. Munir Farah
2. Adel Farah — Respondents.

Property prepared for hire used by misappropriation — Estimated value — Diminution in value — Mejelle, art. 472, 596, 900.

If property prepared for hire was used by misappropriation estimated rent and not diminution in value must be paid.

Edit. Note:—See C. A. 115/29 P.L.R.I. p. 606; C. A. 6/30 Col. of Judgments (Rotenberg) 1919-1933 p. 1162.

Dr. Ph. Joseph for Appellant.

Aziz Shedadeh for Respondents.

Appeal from judgment of District Court, Jaffa, dated 9.2.1936.

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*) L.A. 33/36 Ct.L.R. I. R. 27.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jaffa dismissing a claim for estimated rent of a tractor misapropriated by the Respondents.

The Appellant based his claim on Articles 472 and 596 of the Mejelle and claimed an estimated rent of LP. 5.— per day for the hire of this machine. The District Court dismissed his claim on the ground that the Appellant should have proceeded under Article 900 of the Mejelle and sued the Respondents for compensation based on diminution in value of the machine by reason of the wrongful act.

It is clear in this case that no contract was signed. Article 472 of the Mejelle applies, namely, where a person, without a contract or permission, uses the property of another, he is liable to pay the equivalent rent. We are therefore of opinion that the District Court was wrong in saying that the action should be based on Article 900 of the Mejelle.

The appeal is allowed, the judgment of the District Court is set aside, and the case remitted to them to hear evidence as to the preparation for hire of the machine, and as to the estimated rent of the machine in question and to give a fresh judgment.

Delivered this 4th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 116/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case of:—

Saadiah Paz — Appellant.

v

Heirs of Zamil Hajir — Respondent.

Contract for sale of land — Land sold to another after contract and before action — Claim of damages without notarial notice.

If there is an anticapatory breach of contract by a party to it as result of fact that he has put it out of his power to carry out the contract, other party may claim damages without being bound first to serve notarial notice.

Edit. Note:—See C. A. 18/35 P. Post 28/5/36, 1/6/36; C. A. 119/35 P. Post 4/9/36, C. A. 136/33 P.L.R. II. p. 115.

Feiglin for Appellant.
Respondent duly served — absent.

Appeal from the judgment of District Court, Haifa, dated 30.7. 1936.

JUDGMENT.

This appeal is allowed. A notarial notice might have been necessary, but inasmuch as the Respondent had sold the land in question after the conclusion of the contract and before action was brought, and as there has been an anticipatory breach of the contract by the Respondent inasmuch as the Respondent has put it out of his power to carry out the contract, there was no need for such notarial notice.

The case should be remitted to the District Court to hear it on its merits. Costs to await the result of the second trial.

Delivered this 28th day of April, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 76/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Mousa Khalil Hanna — Appellant.

v.

Messrs. "Palwoodma" Palestine Wood Work Machinery Trading and Manufacturing Co. — Respondent.

Case remitted to trial Court — Definite instructions by appellate Court — Refusal to tender oath after case was remitted for that purpose.

1. When case remitted by appellate Court with definite instructions to give Appellant opportunity to tender oath to Respondent, Court below has no power to do anything beyond such instructions.

2. If District (or Land) Court in its appellate capacity decides to remit case to Magistrate for completion, proper course for any party not satisfied with such decision to appeal to Supreme Court.

Edit. Note:—See C.A. 173/32 P. Post 17/2/33.

Fuad Atalla for Appellant.

Levin for Respondent.

Appeal from judgment of District Court, Haifa, sitting in its appellate capacity dated 31.1.1938.

JUDGMENT.

This appeal must fail. When this case was first on appeal before the District Court that Court remitted the case to the Magistrate in order to give the Appellant the opportunity to tender the oath to the Respondents. Thus, the Magistrate was under definite instructions from the District Court which in law he could not go beyond. The Appellant refused to tender the oath to the Respondents, but rather asked the Magistrate to do something which the latter had no power to do, and the Magistrate accordingly dismissed his case. On appeal to the District Court he failed, and now he is trying his last chance by appealing to the Supreme Court.

The proper course for the Appellant to follow was to appeal to the Supreme Court from the first judgment of the District Court. The point of law stated is one that does not arise in this case.

The appeal is dismissed with costs and LP. 5.— Advocate's fees.

Delivered this 4th of May, 1938.

British Puisne Judge.

HIGH COURT CASE NO. 27/38.

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

Before:—Copland, J. and Khaldi, J.

In the application of:—

1. Mrs. Efrosine Gaitanopoules
2. Mrs. Sultaneh Alessantopoules — Petitioners.

v.

1. Odeh Salem Mustafa
2. Registrar of Lands, Jerusalem
3. Director of Land Registration Respondents.

Application to High Court against order of Registrar of Lands — Order to Land Registrar not to register transaction in Land Registry — Remedy in a Court other than High Court.

High Court will refuse application for an order to Land Registrar not to register a certain transaction in Land Registry, Petitioner having a remedy in another Court.

Edit. Note:—See H.C. 99/35, P.L.R. II. p. 413.

Cattan for Petitioner.

Ex parte.

Application for an order to issue to Respondents to restrain them from proceeding with and effecting Land Registry transaction No. 507/38 in the Land Registry of Jerusalem and/or otherwise dealing with the house which is the subject matter of the said transaction unless and until first Respondent's ownership, if any, to the said house is declared by the competent Court.

ORDER.

This is an application for an order nisi to issue to the Land Registrar to restrain him from registering a mortgage transaction.

The Petitioners have a remedy in another Court, and that being so we decline to entertain the application.

The application is therefore refused.

Given this 27th day of April, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 75/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J., Frumkin, J. and Khayat, J.
In the appeal of:—

1. David Illgovsky
2. Gedalia Illgovsky — Appellants.

v.

Jacob Calderon — Respondent.

Leave to appeal — Due diligence to prosecute appeal — Period of appeal where leave required.

1. In cases where leave to appeal is required, Appellant must show due diligence in prosecuting his appeal, since leave to appeal was granted.

2. Period from date of judgment appealed from until time of filing grounds of appeal, but deducting the period between date of submitting the application for leave to appeal and date of notification of order granting such leave, must not exceed 30 days.

Pevsner for Appellants.
Krongold for Respondent.

Appeal from the decision of the Relieving president. of the District Court, Tel-Aviv, dated 10.9.1937.

JUDGMENT.

In this appeal a preliminary objection was raised by the Respondent to the effect that the appeal is out of time. In fact the application for leave to appeal was out of time. The important dates in this case are that on the 17th November, 1937, a copy of the award was sent by the superintendant of Courts by registered mail to each of the parties; on the 29th November, 1937, Appellants sent an opposition intimating their intention to apply for leave to appeal; on the 27th December, 1937, the application for leave to appeal was actually lodged by Appellants in the District Court. Thus there was a delay of 40

days between the receipt of the copy of the award and the date when the application for leave to appeal was actually filed. Leave to appeal was granted on the 31st day of January, 1938, and notification to that effect was made on the 7th day of March, 1938. The appeal was lodged on the 11th March, 1938.

There are two cases before this Court on the question at issue. The first case is Civil Appeal No. 33/1936*) wherein it was hold 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, since leave to appeal was granted. In another case, Civil Appeal 2/1936**) the Court, in which two of the Judges now present were sitting, adopted the same principle and held that the period from the date of the judgment appealed against until the time the grounds of appeal are filed, but deducting the period between the date the application for leave to appeal is submitted and the date of the notification of the order granting such leave, must not exceed thirty days.

In this case we come to the same conclusion and say, even supposing that Appellant had only received the copy of the award on the 28th November, 1937, which is most unlikely, that due diligence has not been displayed by the Appellant in prosecuting his appeal. We further say that when the law prescribes a manner of service whereby a copy of an award is required to be sent by the superintendant of Courts by registered post that constitutes sufficient service.

That being so the appeal should be dismissed with costs and LP 5.— Advocate's fees.

Delivered this 4th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 68/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Raji El Issa — Appellant.

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*)P. Post 5, 7/2/37, 8/4/37.

**) Ct.L.R. II. p. 64.

v.

Joshua Blumenfeld — Respondent.

Advocate claiming that he has no power to appear — Effect of advocate's signing summons to appear for hearing of case.

If advocate was stated in Statement of Appeal to be the representative of Appellant and also signed the notice sent to him to appear at fixed time in connection with this appeal, Court will not deal with his argument that he is not the attorney of Appellant and has no power of attorney authorising him to appear on his behalf.

Sidky Dajani for Appellant.
Baker for Respondent.

Appeal from judgment of District Court, Haifa, sitting in its appellate capacity, dated 27.1.1938, confirming the judgment of the Magistrate's Court, Haifa, dated 23.11.1937.

JUDGMENT.

In this case a notice was sent to an advocte, who was stated in the statement of appeal to be the representative of the Appellant, to attend in this Court today and at this very hour in connection with this appeal. The advocate signed the notice, and this means that he accepted to appear in this case on behalf of the Appellant. We are told by the advocate today that he is not the attorney of Appellant and that he has no power of attorney which authorises him to appear on his behalf. We are not prepared to deal with this argument for if this was the case he should not have signed the notice, the signing of which means that he accepts to appear on behalf of the party named therein.

We have read the notice and grounds of appeal and found this appeal to be entirely frivolous.

The appeal is therefore dismissed with costs and LP. 5.— Advocate's fees.

Delivered this 2nd day of May, 1938.

British Puisne Judge.

HIGH COURT NO. 35/38.

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

Before:—Copland, J. and Greene, J.
In the application of:—

1. Kamel Diab Hassan
2. Izzel Din Diab Hassan — Petitioners.

v.

1. Chief Execution Officer, Tel-Aviv
2. Jacob Heftzel
3. Isaac Gabrilovitz
4. Joseph Isaac Rivlin — Respondents.

Contesting amount of and liability to pay mortgage debt — Allegation that security not for an ascertained debt but for contingent amount — Judgment as to nature and amount of mortgage debt — Injunction to mortgagee to restrain from enforcing security.

1. Mortgagor who contest amount of and liability to pay mortgage debt alleging that the security is for a contingent amount, must obtain judgment to that effect from competent Court, then entitled to injunction restraining mortgagee from enforcing security until liability ascertained.

2. High Court may grant stay of execution to enable petitioner to go to competent Court.

Edit. Note:—As to contesting amount due on mortgage see: H.C. 47/34, Ct.L.R. II. 162, C.A. 170/37 ibid. 122; H.C. 65/37 Ct.L.R. III. 34.

Cattan for Petitioners.
Ex parte.

Application for an order to issue to the First Respondent calling upon him to show cause why he should not refrain from making an order of sale in Execution File No. 9303/37 (Tel-Aviv) and further why he should not direct the 2nd, 3rd and 4th Respondents to go to the competent Court, in order that they may establish their claim under the mortgage which they allege they hold on Petitioners' property.

ORDER.

In this case we think that the Petitioners' proper remedy is to go to the competent Court and obtain a judgment that this mortgage in respect of which an order for sale has been made against them is a security

not for an ascertained debt but for a contingent amount, the amount of which and liability to pay which is contested and not ascertained. If they can establish this to the satisfaction of that Court, then in our opinion they will be entitled to an injunction restraining the Respondent from enforcing the security until liability is established. It is not for us to say whether this mortgage ir or is not a security — that will of course be determined by the competent Court.

We grant a temporary stay of 14 days to enable the Petitioners to take this course.

Subject to that the order is refused.

Given this 13th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 70/38.

IN THE SUPPEME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Hayat Tenenbaum — Appellant.

v

Aziz Mikati — Respondent.

Sale with right of redemption (Bei'bil wafa) — Agreement that Bei'bil wafa shall operate as final sale if property not redeemed within certain period — Once mortgage always mortgage — Judgment of Court of Cassation dated 25.5.1318.

Baz's Commentary to Code of Civil Procedure pp. 277 *et seq.*

Sale with right to redeem within fixed period does not after expiry of period operate as final sale notwithstanding any agreement to that effect; such sale always remains a mortgage and must be treated as such.

Edit. Note:—But see Ott. Code of Civil Proc. art. 64 as amended, and Mejelle, art. 118, 300 and 305.

Abcarius Bey for Appellant.

Koussa for Respondent.

Appeal from judgment of Land Court, Haifa, dated 21.2.38.

JUDGMENT.

In this case the appellant sued the respondent in the Land Court of Haifa asking for the return to her of certain mortgaged property against repayment of the amount of the mortgage debt and for the

cancellation of the registration of the property in his (the respondent's) name and the registration in the name of the appellant.

The action is based on an agreement between the parties dated 28th May, 1929. This agreement was in the nature of a compromise, and settlement, of the financial relations between the parties. In it the appellant agreed to waive her right in an action brought by her in the High Court against the appellant and consented to the order nisi being discharged and she agreed to transfer the plot of land, the subject matter of the present action, to the respondent on the latter renouncing his rights under the mortgage subsisting between the parties.

The important clauses of the agreement are:—

1. "The second party undertakes to transfer to the first party the same plot whose locality, area and boundaries are described above for the sum of LP.3100."
2. "The second party undertakes to purchase the plot referred to above from the first party and to pay him its price amounting to LP.3.100 — this difference being in lieu of certain money paid by the first party to the second party and costs — within three months from the date hereunder."
3. "In case the first party declines to transfer the said land to the second party within the period prescribed in the preceding section he shall be liable to pay to the second party the sum of LP.1000 as liquidated damages".
4. "If the period of three months from the date hereunder expires before the second party shall have paid to the first party the sum of LP.3.100 referred to in section 1 of this agreement the second party would not then be entitled to ask the first party to effect the transfer and the first party would not be obliged to accept the sum agreed upon as price to the said land and the land would become the property of the first party."
5. "The second party is entitled, if he so desires, to pay the sum of LP.3.100 before the termination of the said period of three monhs, and the first party is liable to transfer the said land to the second party or his nominee."
6. "If any action or opposition is lodged in respect of the said land or if its transfer is restrained by any obstacle whatsoever without the will of the first party the second party will have to await the result of such action or opposition, and if an action of priority is instituted the other party shall not be responsible for any one else."

The transfer was duly effected in the Land Registry, the three months period in clause 2 passed, and in fact nothing happened until 1934 when the appellant served a notarial notice on the respondent calling upon him to appear in the Land Registry, take his money, and return the land to the appellant. The respondent refused and the

appellant thereupon entered this action in the Land Court. The Land Court gave judgment for the respondent, holding that any right to claim a retransfer of the capacity lapsed after the expiry of three months from the date of the contract. Hence this appeal.

The appellant before this Court has argued that here there is a fictitious sale, and that it is perfectly clear that the real nature of the transaction is a mortgage bei'bil wafa, that is, a sale with right of redemption, and argued that once a mortgage, always a mortgage. Her advocate, in support of this argument, has produced a judgment of the Court of Cassation dated 25th May, 1318, and quoted in Baz's Commentaries on the Code of Civil Procedure pp. 277 et seq. This judgment says:—

> "If a definite and final sale be made and a Tabu Sanad is given, and if a document appears later, the contents of which show that the sale was in fact a sale with a right of redemption and stipulating that if the vendor does not return the amount of the purchase price within the stipulated period, he shall have no right to redeem; such a sale shall not operate as a final sale but shall remain as a sale with a right of redemption so that if the vendor fails to pay the amount within the prescribed period, the Court shall order the sale of the mortgaged property and satisfy the debt out of the proceeds."

We think that this contention is right, and that the judgment of the Court of Cassation exactly fits the circumstances of this case.

That being so this appeal must be allowed, and the judgment of the Land Court set aside.

The case must go back to the Land Court to be tried on its merits.

The appellant will have the costs of this appeal and LP.5.— advocate's fees in any event.

Delivered this 11th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 82/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case of:—

Mustafa Attallah Ibn el Haj
Abdul Samad El Dajani — Appellant.

v.

Mansour Hassan Nasser — Respondent.

Non compliance with Civil Procedure Rules — Guarantee securring costs of appeal — Application for leave to make good the defect of guarantee — Civil Procedure Rules 1935 (1938).

If guarantee securing costs of appeal not in accordance with Civil Procedure Rules and no good cause shown for leave to make good the defect, appeal will be dismissed.

Edit. Note:—See C.A. 55/38 Ct.L.R. III. 210; C.A. 80, 81/38 Ct.L.R. III. 212.

Farajallah for Appellant.
Assal for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 10.12. 1937.

JUDGMENT.

As my brother Frumkin has pointed out the Rules are made to be complied with, and they must be complied with. In this appeal the guarantee securing the costs of the appeal is defective. The attorney for the appellant urged for leave to make good the defect. This might be granted on good cause. No good cause having been shown, the appeal is dismissed with costs and LP. 5.— advocate's fees.

Delivered this 9th day of May, 1938.

British Puisne Judge.

HIGH COURT NO. 31/38.

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

Before:—Copland, J. and Khayat, J.

In the application of:—

Siegbert Schwartz — Petitioner.

v.

1. His Worship, the Chief Magistrate in his capacity as Chief Execution Officer, Haifa
2. The Anglo Palestine Bank, Haifa
3. The Palestine Engineering Corporation
4. The Palestine Engineering Stores
5. Matatyahu Greenbaum — Respondents.

Right of preference in distribution of proceeds of sale in Execution Office — Pledgee asking for provisional attachment instead of executing the pledge — Implied renouncement by pledgee of his rights under pledge.

Pledgee who obtains judgment and provisional attachment instead of executing the pledge must be deemed to have renounced his rigths under the pledge.

Edit. Note:—But see H.C. 14/31, Col. of Judgments (Rotenberg) p. 1641, C.A. 85/31, ibid. p. 1467.

Sharf for Petitioner.

Ex parte.

Application for an order to issue to the First Respondent directing him to show cause why a right of preference in the distribution of the proceeds from the sale in the Execution File No. 5385/36 should not be granted to the Petitioner on account of his claim in accordance with the judgment in file No. 51/36 of Magistrate Court, Haifa, with costs and advocate's fees to be paid by the Respondents Nos. 2 to 5.

ORDER.

We are of opinion this rule must be refused for two reasons: in the first place there is no doubt that the petitioner came here after a long lapse of time, and in the second place, instead of executing the pledge, the petitioner went to the Magistrate's Court and obtained judgment and provisional attachment. In following this course, he must be deemed to have renounced his rights under the pledge. For these reasons the application must be refused.

Given this 16th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 87/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case of:—

Rahel Zabiezinsky — Appellant.

v.

Yehezkiel Zyskind Zabiezinsky — Respondent.

Preliminary objections with regard to bond — Due authentication of bond — Guarantor not mortgaging his property.

1. Bond submitted on appeal must be duly authenticated, and guarantor must actually mortgage his property.

2. Authentication of bond must be by a Notary Public, mere testification by two witnesses — not sufficient as authentication.

Edit. Note:—See C.A. 82/38 in this issue.

Dr. Spindel for Appellant.

J. Serlin for Respondent.

Appeal from judgment of District Court sitting in Tel-Aviv, dated 24.1.1938.

JUDGMENT.

Again, for the second time this morning, a preliminary objection has been taken with regard to defects in the bond. The rules regarding these bonds are very simple. In this case there are two requirements that must be complied with, first that the bond must be duly authenticated and secondly that the property must be mortgaged.

With regard to authentication the proper procedure to be followed in this country is that the bond must be authenticated by a Notary Public. Mere testification by two witnesses is not sufficient as authentication.

As to mortgage, the property must be actually mortgaged at the Land Registry. In the present case no mortgage has been effected and the respondent has no securities whatever.

No good cause having been shown, the appeal will therefore be dismissed with costs and LP. 3.— advocate's fees.

Delivered this 10th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 86/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case:—

1. Mohammad Naser el Din Ei Basheiti
2. Yusra Hussein El Basheiti
3. Nafiseh, the widow of Hussein Basheiti, in her personal capacity and as guardian of her minor daughters, Widad, Shehira and Kouther, and on behalf of the Estate of Omar Huussein el Basheiti — Appellants.

v.

Olaf Lind — Respondent.

Application on second appeal to consider guarantee produced on first one — Application in Notice of Appeal for direction by Court in case guarantee found insufficient — Application to grant leave to make good defect of guarantee.

1. On a second appeal to Supreme Court a fresh guarantee must be submitted, that produced on first appeal — of no avail.

2. Application in Notice of Appeal for Direction by Court in case guarantee found insufficient — of no avail, if no steps taken to ascertain Court's decision regarding this matter.

3. Court of Appeal will not without good cause shown grant leave to make good defect of guarantee.

Edit. Note:—L.A. 43/36 is the case of Calmi v. Politis, not reported.

As to guarantee see: C.A. 82/38 in this issue.

Rashed El Haddad for Appellants.

Olshan for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 7.2. 1938.

JUDGMENT.

In this case a preliminary objection had been raised, namely, that no guarantee was filed by the appellant. This is a second appeal and the appellant had asked that the guarantee produced in the first appeal be considered in the second one. It has been pointed out that the said guarantee has been partially executed by the respondent to secure his costs under the judgment of the first appeal.

Therefore, and following the ruling in Land Appeal 43/36 we are of the opinion that a fresh guarantee must be submitted on a second appeal.

The appellant says that he has applied in his Notice of Appeal for direction by the Court in case the guarantee is found insufficient. He admits, however, that he has taken no steps to ascertain the Court's decision regarding this vital and important matter to his appeal. We had on previous occasions pointed out that the Rules are made to be complied with, and they must be complied with.

We have the power to grant leave to make good the defect on good cause shown. But we are not prepared to do this on the mere negligence of the parties on vital matters.

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

We wish to point out that this is a third case within the last few days that mistakes have been made in connection with the bond. The rules regarding the bond are very simple and we do not see why such mistakes should occur.

Delivered this 10th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 56/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case of:—

1. Mohammad Ibrahim el-Ahmad
2. Ahmad Kassem el-Ahmad
3. Talla Taha el-Haj Amad — Appellants.

v.

1. Sheikh Asa'd Kaddoura on behalf of the heirs of his father
2. Aded Saleh el-Ibrahim — Respondents.

Third party opposition against judgment confirming award of arbitrators — Incompetence of Mukhtar to represent the individuals of his village — Representation by one person under Mejelle.

Mejelle, art. 1654.

1. Person not represented in original proceedings — entitled to enter third party opposition against judgment affecting his rights.

2. Third party opposition can be made against judgment confirming award of arbitrators given during pendency of case in Court.

3. Mukhtar not competent to represent individuals of his village who are considered by Plaintiff as his parties in the action; only circumstances in which representation can be made by one person is under art. 1645 of Mejelle.

Edit. Note:—As to 1. and 2. see Civil Procedure Rules, 1935, Rule 97 and 98, and Ottoman Civil Procedure Code, art. 162 (which ceased to have effect as from 9.4.36). As to 3. see Civil Procedure Rules, 1938, Rule 65, 68 and 69.

As to 3. see L.A. 92/36 Rot. 1015.

Elias Koussa for Appellants.

Abbasi for 1st Respondent.

2nd Respondent absent, served.

Appeal from judgment of Land Court, Nablus, dated 9.2.1938.

JUDGMENT.

This case was originally brought by the first Respondent against the second Respondent. It appears that the case was adjourned after the first hearing and at a subsequent hearing the first Respondent pro-

duced a submission to arbitration and an Arbitration Award and asked for the confirmation of the said award, and the Court confirmed the award as between the parties to the original action.

Later Appellants came to the Land Court and entered a third party opposition against the judgment confirming the award of the arbitrators, and the Land Court dismissed the opposition and this judgment is now appealed against.

In our opinion the Land Court was wrong in dismissing the opposition on the grounds that Appellants were represented in the original proceedings and we are of opinion that the Mukhtar is not competent to represent the individuals of his village who are considered by Plaintiff as his parties in the action. The only circumstances in which representation can be made by one person is under Article 1645 of the Mejelle, and this Article does not apply in this case because it has been established that the matter involved is one of public benefit or that the number of the individuals in question is limited.

Inasmuch as Appellants were not represented in the original proceedings they were entitled to enter a third party opposition in the Land Court.

The appeal must be allowed and the judgement of the Land Court set aside and the case remitted to the Land Court to hear the opposition on the merits and to give a fresh judgment.

Costs to abide the event.

Delivered this 16th day of May, 1938.

British Puisne Judge.

CRIMINAL APPEAL NO. 45/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

1. Yousef Mohammad Wahhab
2. Said Abdullah Wahhab — Appellants.

v.

The Attorney General — Respondent.

Perjury — Charge in information not supported by evidence at preliminary enquiry.

Criminal Code Ordinance sec. 117(1) *Criminal Procedure (Trial Upon Information) Ordinance, sec.* 18(2), 28(1) & (4).

Conviction cannot stand if founded on Information charging with offence not supported by evidence before examining Magistrate.

Hassan Hawa for Appellants.
Fawzi Ghussein for Respondent.

Appeal from judgment of District Court, Nablus, sitting at Safad, dated 6.4.1938, whereby Appellants were convicted of perjury, contrary to Section 117(1) of the Criminal Code Ordinance, 1936, and sentenced to four months imprisonment.

JUDGMENT.

This case comes to this Court by leave granted by me — the point being a technical one in that the Magistrate committed Appellants for perjury in respect of something said before a Magistrate's Court, and the District Court convicted them of perjury in respect of something said before a District Court.

Section 18 of the Criminal Procedure (Trial Upon Information) Ordinance which deals with the committal of persons by the Magistrate provides in Sub-section 2 as follows:—

> "(2) If he (that is the Magistrate) is of opinion that there is sufficient evidence to put the accused upon his trial, he shall commit the accused person for trial for such offence or offences of which there appears to be such sufficient evidence, notwithstanding that it or they may differ from the offence or offences as originally charged."

so that in the first instance the Magistrate's obligation is to commit the person charged for the offence or offences that emerge from the evidence before him.

The matter is carried a step further by Section 28 of the Criminal Procedure (Trial Upon Information) Ordinance, Sub-section 1 of which states as follows:—

> "(1) No person shall be put upon his trial upon information before the Court of Criminal Assize or District Court, notwithstanding that he may have been committed for trial by a Magistrate, except on information filed by, or on behalf of, The Attorney General in the Court in which he is to be tried."

and in the ordinary way the information charges the accused person with the offence or offences for which he was committed, but Sub-section 4 of the same Section provides:—

> "(4) Any offence may be charged in an information which is suppported by evidence taken at the preliminary enquiry."

so that the Attorney General is not bound by the committal order of the Magistrate, but can extend the charge in the information, sub-

ject to this, that the new charge must be supported by evidence before the Magistrate.

In this case the point was raised before the Court of trial and overruled and that Court proceeded to hear the case and convicted the Appellants. Fawzi Bey has not been able to call our attention to any evidence before the Magistrate at the preliminary hearing which touched in any way the proceedings before the District Court, and it is remarkable that the evidence of the witness who supported the charge as laid before the Court of trial was a witness who was not called before the Magistrate but was called for the first time before the trial Court.

In our view the information cannot be supported and the conviction is quashed. We would remark that Courts of trial should be careful to see that informations are properly drafted in accordance with the law.

Delivered this 5th day of May, 1938.

Chief Justice.

CIVIL APPEAL NO. 92/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Said Ibn Muhammad Ibn Suleiman Bitar, of Safad — Appellant.

v.

A'ysheh Bint Ibrahim Ibn Ahmad Khalil Hadideh, of Safad, in her personal capacity and on behalf of the heirs of her mother Karma Bint Shebab Ibn Ahmad el-Badrani — Respondent.

Power of attorney ineffective by lapse of time.

L.A. 46/36

Power of attorney prescribed if more than 15 years elapsed without attorney making use of it.

Salah Eddin Abbasi for Appellant.
Jabra Kankar for Respondent.
Appeal from judgment of Land Court, Nablus, dated 8.3.1938.

JUDGMENT.

There is nothing in this appeal. The Land Court found that Appellant was never in possession of the property in dispute, and the transfer of the land took place by a power of attorney which was executed more than fifteen years ago and has been prescribed.

Following the ruling laid down in Land Appeal No. 46/36*) the appeal must be dismissed with costs to include LP.3.— advocate's fees.

Delivered this 17th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 72/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Moshe Kastero — Appellant.

v.

Mathilda Ben-Noon Richter — Respondent.

Hearing of case in absence as if in presence — Points raised on Appeal but not raised in Court below — Application to vary rate of payment of alimony or maintenance.

1. Court of Appeal will not deal with points not raised in Court below (even though Appellant might have raised them at hearing in which latter Court decided to try case in absence as if in presence).

2. In cases of maintenance and alimony either party may, whenever circumstances have changed, apply to Court to vary rate of payment.

Edit. Note:—As to 1. see: C.A. 74/36 Ct.L.R. I. Rep. 6; C.A. 83/37 Ct.L.R. II. 6; C.A. 175/37 Ct.L.R. III. 23; C.A. 250/37 ibid 93.

Nishri for Appellant.
Hershman for Respondent.

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*) Ct.L.R. III. p. 17.

Appeal from judgment of District Court, sitting at Tel-Aviv, dated 16.2.1938.

JUDGMENT.

As regards the objection raised that the appeal is out of time, we feel that the Chief Registrar was right, even supposing that the Registrar of the District Court had no authority to exempt the Appellant from payment of the fees on appeal which question I do not intend to decide, in using his discretion in granting an exemption.

We need not trouble you Mrs. Hershman.

This appeal has no merits whatever. The Appellant appeared on the first day in the Court below, when the case was called upon on the second day he did not appear and he states that he was five minutes late in so doing. All the points he tried to raise here should have been raised in the Court below which he did not do.

The appeal is a frivolous one and should not have been brought.

I may remark here that in cases of maintenance and alimony there is always an opportunity for a party to apply to the Court below to vary the rate of payment if circumstances have changed.

The appeal will be dismissed with costs to include LP. 3.— advocate's fees.

Delivered this 12th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 111/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

1. Salimeh Bint Sheikh Muhammad Sofan
2. Khadijeh Bint Sheikh Muhammad Sofan Appellants.

v.

Hussein Muhammad Duqqa Respondent.

Possession of land by co-heirs — Prescription.

Possession of land by one or more co-heirs is possession on behalf of remaining co-heirs, unless it is proved that it was an adverse possession.

Edit. Note:—See Land Law (Amendment) Ordinance, sec. 2(1); L.A. 121/26 PLR. I. 234; L.A. 36/30 ibid. 630; L.A. 6/33 PLR. II. 25; L.A. 65/27 Rot. 957; L.A. 66/28 Rot. 958.

Bushnaq for Appellants.
Seifi for Respondent.
Appeal from judgment of Land Court, Nablus, dated 26.3.1938.

JUDGMENT.

This case comes before this Court for the second time. The first time it was before this Court it was sent back to the Land Court with a direction to that Court to hear evidence as to possession.*)

It is obvious from the judgment of the Land Court that that Court found that Appellant's father was in possession of the land in dispute up to nearly 22 years ago, and that after his death Appellants' brothers went into possession who, in their turn, sold the land to the Respondent more than nine years ago, but the Court did not state whether this sale was more than ten years ago, which is the time for prescription. As a result of this finding the Court considered the Appellants to have failed in proving their claim for possession and dismissed the Appellants claim.

We hold, following the principle laid down by the Court of Appeal, that the possession of the Appellants' brothers is possession on behalf of the Appellants in respect of the latters' shares in the land, unless it is established and proved that the possession by Appellants' brothers was an adverse possession.

The appeal is allowed, the judgment of the land Court is set aside, and the case remitted to that Court to hear evidence on question of adverse possession, if any, and to give judgment accordingly.

Costs to abide the event.

Delivered this 18th day of May, 1938.

British Puisne Judge.

HIGH COURT NO. 25/38.

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

Before:—Copland, J. and Khayat, J.
In the application of:—
1. Butros Hanna Ghanayem
2. Nicola Hanna Ghanayem
3. Mousa Hanna Ghanayem
4. George Hanna Ghanayem

Petitioners.

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*) C.A. 244/37, Ct.L.R. III. p. 48.

v.

1. Chief Execution Officer, Jerusalem
2. Hanna Jaber — Respondents.

Execution without serving copy of judgment — Service by Execution Office of copy of judgment.

If judgment debtor never served with copy of judgment, Execution Office must serve him with such copy in addition to notice of execution.

Edit. Note:—See Art. 136 of Ott. Code of Civil Proc., Art. 19 of Ott. Execution Law, Art. 41 of Ott. Magistrates' Law.

Ibrahim Kamal for Petitioners.
No appearance for 1st Respondent.
George Salah for 2nd Respondent.

Application for an order to issue to the First Respondent, calling upon him to show cause why his orders dated the 20th December, 1937, and the 25th February, 1938, in Execution File No. 165/38 should not be set aside.

ORDER.

In this case, the rule nisi was issued on the application of four petitioners. The argument in Court had been as to one petitioner — the question of the other three is not now in dispute and the rule as regards them is discharged.

With regard to Butros, the circumstances of his case are different. It does not appear that he was ever served with a copy of the judgment and we think that it is necessary that the Execution Office should serve a copy of the judgment. It is essential they should do so in addition to the notice of execution. With regard to Butros, the rule is made absolute, but no costs.

Given this 16th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 47/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

1. Said Awad

2. Bahiyeh Tawfiq Hakki El Abdallah — Appellant.

v.

Joseph P. Albina — Respondent.

Striking out case on Plaintiff failing to appear — Plaintiff appearing and requesting his case to be struck out provisionally — Implied renouncement of right to cross-examine a witness — Ott. Civil Procedure Code, art. 142; *Judgment by Default (District and Land Courts) Rules Rule* 2(1), 3.

1. A case can be struck out provisionally upon application of Defendant on Plaintiff failing to appear, but if Plaintiff appears and requests his case to be struck out provisionally, Court not bound to do so.

2. Where only matter before Court is cross-examination by Plaintiff of a witness, Court is right in taking Plaintiff's application to strike out case provisionally as an implied refusal to avail himself of right to cross-examine.

George Saleh for Appellants.
Moghannam for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 27.1. 1938.

JUDGMENT.

Frumkin, J.

This case comes before this Court for the second time. On the first occasion it was remitted to the District Court to allow the Respondent to cross-examine a witness heard at the trial of the case.*)

2. The facts of this case are not relevant to the present appeal, the main ground of appeal being the following: On the date fixed for the resumed hearing before the District Court in accordance with the directions of the Court of Appeal, there was an application on behalf of the Appellants to have the case struck out provisionally. The District Court, in the submission of the Appellants, by refusing to grant this application was wrong in law.

3. The Appellants were originally represented before the District Court by three advocates one of whom was Mr. George Salah who now appears before this Court on behalf of the Appellants.

4. From the judgment of the Court below it appears that Mr. Salah submitted the application to strike the case out. Mr. Salah states that he did not submit the application, but he does not deny

*) C.A. 35/37 Ct.L.R. I. Rep. 54.

the fact that such an application was submitted on behalf of the Appellants who were represented in the Court below when this application was submitted. In fact it is his argument, and as I said, his main ground of appeal, that upon the receipt of such an application the Court should have had the case struck out provisionally.

5. I know of no authority under the law applicable whereby a Court is bound to strike out a case provisionally upon the request of a plaintiff.

6. The Appellants rely on Art. 142 of the Ottoman Code of Civil Procedure and Rule 2(1) of the Judgment by Default (District and Land Courts) Rules Vol. III. p. 2339.

7. Art. 142 of the Ottoman Code of Civil Procedure reads as follows:—

> "If the party refusing to appear be the plaintiff, the defendant may apply for and obtain an order by default dismissing the suit provisionally, and shall not be required to reply to the plaintiff's claim.

From this Article it is clear that only upon the Plaintiff failing to appear and upon the application of the Defendant a case can be struck out provisionally, but this Art. does not entitle a Plaintiff to appear and apply for his case to be struck out.

8. Rule 2(1) of the (District and Land Courts) Rules, 1926, reads as follows:—

> "If at any stage of any civil proceedings in first instance before a District Court or Land Court the plaintiff does not appear in person or by a representative, the action shall be forthwith struck out, without prejudice to the plaintiff's right to institute a fresh action upon payment of the prescribed fees."

There is nothing in this rule about an application by the Defendant but it is clear that the case can be struck out provisionally only upon the failure of the Plaintiff to appear in person or by a representative. In the present case the Appellants were represented and in fact one of their advocates, no matter which he was, actually appeared and applied for the striking out of the case.

9. Both Articles 142 and other articles of the Civil Procedure Code and the Rules of 1926 are intended to protect one party against delays caused by the other party. Rule 3 for instance deals with failure of the Defendant to appear when Plaintiff can ask for and obtain judgment by default. Rule 2 on the other hand intends to protect a Defendant upon failure of the Plaintiff to appear.

10. These authorities cannot, to my mind, be so construed so as to allow a plaintiff who for one reason or another does not wish his case to be determined, simply to go to Court and ask for his case to be struck out provisionally with a right to renew it at pleasure.

11. The Court was therefore right in refusing to grant the application to have this case struck out provisionally and as the only matter before it was to cross-examine a witness it was right in coming to a conclusion that the Appellants refused to avail themselves of their right of cross-examination.

12. The judgment of the District Court is therefore confirmed and the appeal dismissed with costs to include LP.5.— advocate's fees.

Delivered this 7th day of April, 1938.

Chief Justice.

HIGH COURT NO. 34/38.

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

Before:—Copland, J. and Frumkin, J.

In the application of:—

Ada Harris — Petitioner.

v.

1. The President of the District Court, Tel-Aviv, in his capacity as Chief Execution Officer — 1st Respondent.
2. "Yachin", Hevra Shitufit Lekablanut Haklait, Ltd. — 2nd Respondent.
3. Mr. B. Rappoport, Receiver of the proceeds of the fruit of Moshe Patt, District Court, Tel-Aviv — 3rd Respondent.

Mortgaging an orange grove together with "all buildings, fixtures, accretions" etc. —Scope of „accretions and benefits" in mortgage deed — Interpretation of agreement.

Where parties go into great detail as to what they mean to be included in mortgage of an orange grove (or orchard) but make no mention to either fruit or crops, the general terms "accretions and benefits" in mortgage deed cannot be held to indicate intention of including fruit or crops.

Edit. Note:—See Mejelle, Art. 711, 715; H.C. 93/36 P.Post 4/12/36.

Sassoon for Petitioner.

Ex parte.

Petition for mandamus to Chief Execution Officer to cancel order given by him on 3.5.38 and to give a new order.

ORDER.

Frumkin, J.

The appellant was the mortgagee of an orange grove which mortgage was foreclosed upon the default of the mortgagor. The mortgagor subsequent to the mortgage of the orange grove to applicant, in May, 1937, pledged the fruit of the same orange grove to the second respondent an Agricultural Co-operative Society.

2. The dispute at present is between the applicant and the second respondent as regards the proceeds of last season's crop of the orange grove, whether it belongs to the applicant as part of his mortgage or to the second respondent under the pledge made to it.

3. The mortgage in favour of applicant contained special conditions of which clause 1(a) enumerated the following items being included in the mortgage in addition to the land, namely:—

> "all buildings, fixtures, accretions, trees, benefits and easements that are now on the land or that shall be during the duration of this mortgage, including any well, water installation, and things on or about the said land or appurtanent thereto or enjoyed therewith."

4. In the said clause the parties went into great detail as to what they meant to be included in he mortgage but no mention was made to either fruit or crops. On behalf of the applicant it has been argued that fruit was included in such general terms as fixtures, accretions and benefits.

5. In my opinion if the intention was to include fruit the parties should have mentioned the baby by its name and not hide it under such general terms as accretions, which might mean anything but fruit.

6. It is therefore not necessary to deal with the general question whether a mortgage of an orange grove includes also the fruit of such grove without mentioning it particularly nor is it relevant at this stage to deal with the question whether by law fruit might be so included in a mortgage.

7. In the circumstances of this case when the parties went to the trouble of mentioning what they intended to include in the mortgage omitting fruit it cannot be held that the fruit was included. There will therefore be no order.

Given this 10th day of May, 1938.

Puisne Judge.

I agree and have nothing to add.

British Puisne Judge.

CIVIL APPEAL NO. 85/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Greene, J. and Abdul Hadi, J.

In the appeal of:—

Haj Ragheb El Khaldi, in his capacity as Mutawalli of Salamieh Waqf, Jerusalem — Appellant.

v.

Shifra, wife of Noah Goldstein — Respondent.

Mutawalli claiming on behalf of Wakf — Heading of Notice of Appeal making no reference to representative capacity of Appellant — Defect examined in light of contents of Notice of Appeal.

L.A. 74/34.

If from contents of Notice of Appeal it is clear that appeal was on behalf of Wakf and that Appellant did not claim in his personal capacity, appeal should not be dismissed for reason only that heading of Notice of Appeal made no reference of representative capacity of Appellant.

Hanna Attalla for Appellant.

Bruchstein by delegation for Respondent.

Appeal from judgment of District Court, Jerusalem, in its appellate capacity, dated 28.2.1938.

JUDGMENT.

This is an appeal, by special leave, from the judgment of the District Court of Jerusalem, dismissing an appeal to it on a technical ground, in that the Appellant was not a party to the proceedings that were before the Magistrate, as the heading of the notice of appeal showed the name of the Appellant without stating his representative capacity.

After hearing counsel for both parties and following the ruling given by the Acting Chief Justice at that time in Land Appeal No. 74 of 1934, which is as follows:—

"The heading to the notice of appeal names the Mamur Awqaf, Hebron, as Respondent, without stating that he is sued as Mutawalli of the Tamimi Waqf.

The contents of the notice of appeal however clearly show that the appeal related to that Waqf, and that it is as Mutawalli thereof that the Mamur Awqaf is sued.

We hold therefore that the appeal is not to be rejected on the ground that the heading is defective, and this objection is overruled".

and whereas from the statement of appeal to the Court below it is clear that the appeal was on behalf of the Waqf and that Appellant did not claim in his personal capacity, we therefore allow the appeal and set aside the judgment of the District Court and remit the case back for them to hear the appeal and to consider the point raised by counsel for the Respondent with regard to the error in addressing the appeal to the wrong Court and to give a fresh judgment.

Costs to abide the event.

Delivered this 11th day of May, 1938.

British Puisne Judge.

CRIMINAL APPEAL NO 44/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Khalil Mohammad Hassan — Appellant.

v.

The Attorney General — Respondent.

Law of evidence now in force — Evidence of single witness in criminal case — Corroboration.

Under law of evidence now in force evidence of one witness, if not an accomplice, sufficient for a conviction, without corroboration.

Edit. Note:—See Cr.A. 160/37 Ct.L.R. III. p. 97, Law of Evidence (Amendment) Ord. as amended sec. 6.

Sidki Dajani for Appellant.

Hogan (*Crown Counsel*) for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 11.4.1938, whereby Appellant was convicted of attempted murder, contrary to Section 222(1) of the Criminal Code Ordinance, 1936, and sentenced to ten years imprisonment with hard labour.

JUDGMENT.

We need not trouble you Mr. Hogan.

In this case the Appellant was charged with the attempted murder of the manager of the German Bank of the German Colony, Jerusalem.

The District Court heard the evidence of the wounded man, believed that evidence when he said that he identified the accused as the one who attacked him and that evidence is sufficient for conviction. The accused was also seen that morning not more than half kilometre away from the scene of crime. Under the new law which is now in force, the evidence of one witness, if believed, is sufficient for a conviction, without corroboration — corroboration is only necessary in certain crimes other than those like the present one, or whether the witness is an accomplice.

It has been argued before us that if one attacks another to commit theft and in course of the commission of the offence he stabs that other with a dagger and wounds him, this is not attempted murder, but it has been not suggested to us what kind of crime it is. But I can say that if one attacks another and stabs him thereby causing him two wounds one 25 cm. long and the other 15 cm. long, one of which being 1 cm off the Carotid artery, this is certainly attempted murder.

As for the sentence of ten years, the Appellant has ten previous convictions other than this determined attack of attempted murder which only narrowly escaped causing death. I do not think that the sentence is one day too much.

There is nothing whatever in this appeal and it must be dismissed. The sentence will run from to-day.

Delivered this 11th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 88/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Mousa Naser el Ja'bour — Appellant.

v.

Hanneh Khalil Abdallah — Respondent.

Service of summons on advocate's clerk — Judgment of Court alleged to have been delivered in absence.

If service of summons in respect of date fixed for delivering of judgment effected on advocate's clerk and Court of trial does not state that it was delivered in absence, period of appeal runs as from date of delivery of judgment.

Shafic Asal for Appellant.
Hanna Atalla for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 20.12. 1937.

JUDGMENT.

We are quite satisfied that the appeal is out of time. The service of the summons in respect of the date fixed for the delivery of the judgment was effected on the clerk of advocate for Appellant on the 17th December, 1937, and the judgment of the Court below was delivered on the 20th December, 1937. Moreover, the Court did not state in its judgment that it was delivered in absence of the Appellant and even Counsel for Appellant has admitted before us that his client was present in Court on the day of the delivery of the judgment but that his presence was in regard to a land case pending between him and the Respondent herself. The Appellant did not file his appeal against the judgment of the Court below until the 2nd April, 1938.

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

Delivered this 10th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 57/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case of:—

Talal Taha el-Ahmad el-Haj — Appellant.

v.

Sheikh Asa'd Kaddoura on behalf of the heirs of his father — Respondent.

Failure to enter appearance in Land Court — Dismissal of opposition against judgment in absence.

C.A. 56/38.

Land Court justified in proceeding with case in absence of defendant who, although duly served, did not put in an appearance during the whole of the proceedings before it.

Edit. Note:—Under the Civil Procedure Rules, Rule 213 the position is different.

M. S. Kassab for Appellant.

S. Abbasi for Respondent.

Appeal from judgment of Land Court, Nablus, dated 9.2.1938.

JUDGMENT.

This case differs from case 56/38*) as in this case Appellant filed an opposition against a judgment given in default against him, whereas in case 56/38 the Appellant is a third party opposer.

It appears from the judgment appealed, that the Appellant in this case raises two points. First that he did not sign the Submission to Arbitration and second that the Land Court was wrong in giving judgment in his absence. As regards the first point, the Land Court was satisfied that Appellant has signed the Submission to Arbitration and dismissed his opposition. As regards the second point we are of opinion that the Court was justified in proceeding with the case in absence of Appellant. Appellant did not put in an appearance during the whole of the proccedings before the Land Court although he was duly served.

We see no reason to interfere with the finding of the Land Court and the appeal is dismissed and the judgment of the Land Court confirmed, with costs to include LP.5.— advocate's fees.

Delivered this 16th day of May, 1938.

British Puisne Judge.

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*) Ct.L.R. III. p. 225.

CIVIL APPEAL NO. 74/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

The Anglo Palestine Bank, Ltd. Appellants.

v.

General Manager, Palestine Railways, on behalf of the Railways Administration Respondent.

Goods represented by documents — Pledge of railway receipts or invoices — Pledge under Palestine Law and under English common Law — Contractual relationship.

Official Assignee of Madras v. Mercantile Bank of India (152 *L.T.R.* 170: (1935) *A.C.* 53).

Mejelle, art. 706, 752.

1. Where goods in custody of a third party are represented by documents, transfer of the documents to pledgee does not render the goods pledged, without notice to and consent of custodier.

2. "Instruction" on back of railway invoices to the effect (inter alia) that "the holder presenting this invoice will be regarded in all cases as the rightful claimant" and that "this invoice must be surrendered to the Railway at the destination station against delivery of the goods to the consignee" do not contain any guarantee or warranty to holder of invoice or any third person out of which one can construct a contractual obligation.

Levin for Appellants.

Salant J. G. A. for Respondent.

Appeal from judgment of District Court, Haifa, dated 23.2.1938.

JUDGMENT.

The appellants are the Anglo Palestine Bank, Ltd., and the respondent is the General Manager Palestine Railways who will be referred to hereafter as the Railways.

The question for determination in this appeal is whether the appellants who were the holders for value though neither consignors nor consignees of certain goods invoices or railway receipts issued by the Railways in respect of goods consigned from Haifa to Rehovot can claim for the value of those goods from the Railways, the goods having

been delivered to persons other than the holders of the railway receipts.

There is no dispute about the facts. A Mr. Bressler was in the habit of consigning wagon loads of manure from Haifa to Rehovot by rail. The railway receipts, in which Bressler was named as consignor, were handed by him to the appellants who advanced sums of money on the security of receipts. The appellants then sent the railway receipts to their agents in Rehovot together with Bills of Exchange drawn to the order of the appellants by Bressler on the consignees, or other persons who desired to purchase the manure, with directions to their agents to hand over the railway receipts against acceptance of the bills or cash payments. On the presentation of the bills to the drawees, the latter refused to accept the bills or to pay their value, and when the appellants came to withdraw the consignments they found that the Railways had delivered the manure to the assignees or to other persons against indemnity without requiring the production and handing over of the railway receipts.

The appellants sued the Railways in the District Court, Haifa, for the sum advanced against the documents to Bressler, and the District Court dismissed their claim holding that there was no contractual relationship between the appellants and the respondent. The appellants have appealed.

Each railway receipt shows the names of consignor, consignee, full particulars relating to the goods, the wagon number and amount and so forth. It contains on the back the following prargraphs headed "Instructions".

> 1. This invoice is not valid unless the goods have actually been surrendered to the Administration".
>
> 2. "This invoice is deemed to be a receipt for the goods (and for the money in the case of prepaid consignments) and is to be transmitted to the consignee who is considered the rightful owner of the Goods. The holder presenting this invoice will be regarded in all cases as the rightful claimant."
>
> 3. "This invoice must be surrendered to the Railway at destination station against delivery of the goods to the consignee."

The Railway recognise a practice of allowing delivery without production of the receipt analoguos to that often followed in the case of bills of lading whereby delivery is made on an indemnity if bills of lading are not forthcoming. There is nothing to show that the Railways had any knowledge of the transaction between Bressler and the appellants or knew that the latter were the holders in fact of the receipts.

The main question (putting aside for the moment consideration of the effect of the "Instructions") is whether the handing over of the railway receipts against advances, in other words whether the pledging of the railway receipts, was a pledge of the goods represented by them, or merely a pledge of the actual documents.

There is nothing in the statute law of Palestine to support this first theory. Under the Mejelle, a pledge is only completed by the handing over of the pledge itself to the pledgee, or its deposit with consent of both parties, and of the bailee, with a bailee. Nowhere can we find that a pledge of the documents is a pledge of the goods represented by them. And the common Law of England is much the same. In Official Assignee of Madra v. Mercantile Bank of India (152 L.T. Rep. 170: (1935) A.C. 53) Lord Wrigth in delivering the judgment of the Judicial Committee summarised the Common Law, and I cannot do better than repeat his words. He said:—

> "At the common law a pledge could not be created except by a delivery of the possession of the thing pledged either actual or constructive. It involved a bailment. If the pledgor had the actual goods in his physical possession he could effect the pledge by actual delivery; in other cases he could give possession by some symbolic act, such as handing over the key of the store in which they were. If, however, the goods were of a third person, who held for the bailor so that in law his possession was that of the bailor, the pledge could be effected by a change of the possession of the third party, that is by an order to him from the pledgor to hold for the pledgee, the change being perfected by the third party attorning to the pledgee, that is acknowledging that he thereupon held for him; there was thus a change of possession and a constructive delivery; the goods in the hands of the third party became by this process in the possession constructively of the pledgee. But where goods were represented by documents the transfer of the documents did not change the possession of the goods, save for one exception, unless the custodier (carrier, warehouseman or such) was notified of the transfer and agreed to hold in future as bailee for the pledgee. The one exception was the case of bills of lading, the transfer of which by the law merchant operated as a transfer of the possession of, as well as the property in, the goods. This exception has been explained on the ground that the goods being at sea the master could not be notified; the true explanation may be that it was a rule of the law merchant, developed in order to facilitate mercantile transactions, whereas the process of pledging goods on land was regulated by the narrower rule of the common law, and the matter remained stereotyped in the form which it had taken before the importance of documents of title in mercantile transactions was realised.

> So things have remained in the English Law: a pledge of documents is not in general to be deemed a pledge of the goods; a pledge of the documents (always excepting a bill of lading) is merely a pledge of the ipsa corpora of them; the common law continued to regard them as merely tokens of an authority to receive possession, though from time to time representations were made by special juries that in the ordinary practice of merchants transfers of documents were understood to pass possession, as for instance in 1815, in Spear v. Travers (4. Camp. 251). The common law rule was stated by the House of Lords in McEvan v. Smith (2 H.L. Cas. 309). The position of the English Law has been fully explained also more recently in Inglis v Robertson and Baxter (79 L.T. Rep. 224; (1898) A.C. 616) and in Dublin City Distillery Limited v. Doherty (111 L.T. Rep. 81; (1914) A.C. 823).

Lord Wrigth then proceeded to deal with the Factors Acts which made an inroad on the common law rule — it is unnecessary to remark that in Palestine there is no legislation of the nature and effect of these Acts. Neither is there in Palestine law any definition of a document of title. I therefore hold that a pledge of the railway receipts is not a pledge of the goods represented by them — the receipts are merely tokens of an authority to receive possession and do not actually pass the possession.

In the case which I have just cited, the Board held that railway receipts were documents of title under Section 103 of the Indian Contract Act, 1872, and that by virtue of section 178 of the same act, a pledge of the documents was a pledge of the goods. There is in Palestine no such statutory authority, as I have already pointed out. But even in the case cited, it was pointed out that a third party, that is someone other than the pledgor or pledgee, holding the goods would not be affected without notice of the pledge. Their Lordships said (at p. 174) "in the same way in the present case though it is true that no third party holding the goods or dealing with them without notice of the respondents' lien, would be affected by that lien, this is a consideration which is irrelevant to the equitable rights constituted as between the respondents and the insolvents." (In that case the respondents and insolvents were the assignees and assignors respectively of documents of title to the goods.)

In just the same way in this present case the Railways cannot be affected by the pledge of the documents given by Bressler to the appellants without notice of that pledge.

The above conclusions are sufficient to dispose of this appeal, but I must deal with the effect of the "Instructions" printed on the back of the receipts.

These "Instructions" are not very clearly or happily worded, and in

fact the first and second halves of paragraph 2 are in a sense contradictory, or at any rate very difficult to reconcile. But I think that their effect is in the nature of safeguard to the Railways, as for example if the railway receipts had been stolen and had been presented by an unauthorised person. Even if their effect be to constitute the railway receipts documents of title, and they may well be documents of title even without the "Instructions", the "Instructions" do not contain any guarantee or warranty by the Railways to the Appellants or any other third person out of which one can construct a contractual obligation.

For these reasons I think that this appeal fails and should be dismissed with costs and LP. 5.— advocate's fees.

Delivered this 12th day of May, 1938.

British Puisne Judge.

CRIMINAL APPEAL NO. 14/38

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:—

George Siman Marina — Appellant.

v.

Attorney General — Respondent.

Statement made "shortly after" offence is alleged to have been committed — Court of Appeal scrutinizing inferences drawn by trial Court — Ruling out defence of accident — Inquiry into whether death was wilfully caused — Verdict by coroner without dissection of body — Provision of Ottoman Law requiring evidence of two witnesses.

Criminal Code Ordinance, sec. 214 (a), (b), 212, 218.

Evidence Ordinance, sec. 8.

Coroners' Ordinance.

1. Meaning of "shortly after" in section 8 of Evidence Ordinance is a question to be determined in light of particular facts of case.

2. Where evidence consists merely of a document and of inferences drawn from facts and no questions arise as to demeanour of witnesses or their credibility, Court of Appeal in dealing with the evidence is in as equally good a position as Court of trial.

3. As murder not the only alternative to accident, and "willful" does not merely mean "non-accidental", Court trying a case of causing death to a person, if it rejects defence of acci-

dent, has to inquire into whether incriminated act (or omission) amounted to manslaughter or to murder.

4. Dissection of dead body — a matter within discretion of medical practitioner; omission to dissect cannot on appeal be made a ground for challenging coroner's verdict.

5. Provision of Ottoman Law requiring evidence of two witnesses must be taken to be repealed as regards criminal cases.

Edit. Note:—As to 1 see Cr.A. 30/27 PLR. I. 150; Cr.A. 9/28 Rot. 547.

As to 2 see Cr.A. 17/38 and cases quoted in editorial note Ct.L.R. III. 199.

As to 5 see Cr.A. 160/37 Ct.L.R. III. 97.

Abcarius for Appellant.

Hogan (*Crown Counsel*) for Respondent.

Appeal from judgment of Court of Criminal Assize sitting at Haifa, dated 17.1.38, whereby Appellant was convicted under sec. 214 of Criminal Code Ordinance, 1936, and sentenced to death.

JUDGMENT.

The Appellant was charged with murder before a Court of Criminal Assize sitting at Haifa. The particulars of the offence as set out in the information were that he, on September, 20th, 1937, with premeditation, caused the death of his mother by burning. The relevant section of the Criminal Code Ordinance is Section 214 which divides murder into four categories. 214(a) says that any person who by any unlawful act or omission wilfully causes the death of his mother etc. is guilty of murder. 214(b) says that any person who with premeditation causes the death of any person is guilty of murder. The other two categories are irrelevant to the facts of the present case. The issue of premeditation was never considered in the Court below and the charge was treated as being one under Section 214(a).

2. The Court below by a majority found the appellant guilty and he was sentenced to death. The facts proved were as follows. On the 20th of September, 1937, between 5 and 6 a.m., the deceased was boiling milk before a fire. She was suddenly heard shouting for help, persons came to her assistance and her clothing was found to be on fire. The fire was estinguished and she was taken to hospital suffering from burns in the hands, the lower part of the abdomen and the lower extremities. While in the hospital at 6.30 a.m. she made a statement to the police in which she alleged that she got burnt because the appellant had come and thrown a tin of some inflammable liquid over the fire. She said "the reason he did so to me is that we want to

sell the house and they intend that I should not take my share in it so that my sons may take it." She died on the 22nd of September, 1937, and the medical evidence showed that the cause of death was heart-failure resulting from the burns on her body. The defence of the appellant was a denial that he had thrown any liquid on the fire. It was suggested that the deceased had kindled too large a fire when boiling the milk and that her clothes had accidentally caught fire. The statement of the deceased shows that the appellant took this attitude from the beginning. She said that he entered the room after the fire had been extinguished and said to her: "What is up with you, Mama? I said to you before not to make such a fire lest you get burnt." He attributed his mother's accusation to the fact that she hated him. No traces of any inflammable liquid were found in any part of the house, including the part which was occupied by the appellant.

3. The first ground of appeal was that the statement of the deceased woman was inadmissible. Section 8 of the Evidence Ordinance makes such a statement admissible if it is made shortly after the alleged act of violence. Abcarius Bey for the Appellant urged that the statement in this case was not made shortly after the alleged act of violence. He said the act was at 5 a.m. and the statement was not made till 6.30 a.m. Further he said the statement was made in answer to inquiries by the police and that the kind of statement contemplated by the section is one made to the persons who are the first to arrive at the scene. It is certainly a curious fact that though several persons turned up immediately after the incident there was no evidence that the deceased made any statement to any of them accusing the appellant of having burnt her. In spite of this I am of opinion that the majority of the Court below were right in deciding that the meaning of the words "shortly after" was a question to be determined in the light of the particular facts of the case. On those facts they decided that the statement was made "shortly after" and I am not prepared to say that they were wrong.

4. The Court below hesitated to convict the appellant on this statement alone. The mother and the son were on bad terms and the defence was that the burning had been an accident, and that the deceased had falsely accused the appellant in order to gratify her spite against him. The Court below sought for other facts in the case from which references might be drawn tending to show the truth of the accusation.

5. It must be made clear that in dealing with the evidence, this Court is in as equally good a position as the Court below. The evi-

dence consisted merely of a document and of inferences drawn from facts. No questions arise as to the demeanour of witnesses or their credibility.

6. The first inference depended on the state of the clothing worn by the deceased at the time of the incident. The majority of the Court below said: "Apart from large patches of burning it is burnt in a number of places in roundish holes of various sizes which we think are consistent with the inflammable liqiuid having bubbled, whiffed and splashed as she described." They came to the conclusion that the state of the clothing supported the statement of the deceased woman. I am unable to see how it supported her statement that it was the appellant who threw the liqiud on the fire. The same results would presumably have followed if she herself or anyone else had thrown the liquid on the fire.

7. Another inference was drawn from a kaileh, i.e. a small can which was was found near the fireplace. It shows marks of burning inside and outside. Without any evidence on the point the majority of the Court said: "We are of opinion that this is the can used by accused." As I have said there was no evidence, and I cannot see how the Court drew this inference. Only one can was found in the house. The deceased in her statement says that she was using a "Kaileh" in which to boil her milk. The presumption as it was this "kaileh" which was found near the fireplace. The fact that no other can was found creates an inference in favour of the appellant.

8. The majority of the Court drew an inference from the evidence that the fire was an unusually large one. This they held also supported the statement of the deceased.

9. Another inference was drawn from the fact that about 6.15 a.m. Zaki a brother of the appellant telephoned from the hospital to the police at his mother's request. The police then went to the house of the appellant in order to arrest him. The only inference that can be drawn from this is that the deceased was anxious to have the appellant charged and arrested. It adds nothing to her statement blaming the appellant for the injuries she had received.

10. It will be seen that from the finding of the can no inference can be drawn one way or the other. Zaki telephoning from the hospital was simply a confirmation of the deceased's statement by the deceased herself. The state of the clothing and the largness of the fire were said by the majority of the Court below to support the deceased's statement. If they meant that these facts supported that part of the deceased's statement which implicated the appellant I think this was a misdirection. These facts were as equally consistent with innocence

as with guilty, that is with the burning being accidental as well as with it being caused by the appellant. I assume, however, that the Court below meant that these facts supported only that part of the deceased's statement which attributed the burning to some inflammable liquid being thrown on the fire. The Court below was entitled to look at the evidence as a whole and to believe the statement of the deceased if part of it was substaniated by some of surrounding circumstances. But in dealing with another part of the evidence the majority of the Court below fell into an error and as it obviously affected the judgment any conviction founded on it cannot stand.

11. In the course of the majority judgment it was said: "It is clear that the woman and her two sons, within a short period all made statements to the police substantially to the same effect. We think that the fact that the sons made statements similar to the mother's although not evidence of their contents in themselves, tends to prove the truth of what she said." The two sons referred to were Zaki and Edmond. They were called by the prosecution and the Court allowed them to be treated as adverse and to be cross-examined by Mr. Hogan, the advocate of the prosecution. They had both made statements to the Police. These statements were not proved. Mr. Hogan admits that they were not put in evidence. The only evidence of what they stated to the police is to be found in their evidence. I shall deal with Edmond's evidence first. The relevant part of what he said was: "I said to the Magistrate. I had said to the Police. I said it out of fear. I told Magistrate it correct but out of fear I said this. The advocates said corroborate the statement you made George. I cannot remember if what I said to Police was true due to lapse of time." This is the only evidence of what he said to the Police and it need hardly be said that it does not bear out the findings in the majority judgment that his statement to the Police was substantially the same or similar to that of the deceased.

12. What Zaki said in evidence on this point was as follows: "I don't remember if what I said to the Police is true. I angry with my brother. I am still angry with my brother. I said I saw my brother throw liquid over my mother. Now I cannot remember if he did that. I said my brother George did wilfully pour. I said it. I cannot now remember if it is true.

13. There are two matters which we are agreed emerge beyond doubt from the statement of the deceased. The first is that she made it clear that she was alone at the time when she says that the Appellant threw the liquid on the fire. It is true that at the end of her statement she gives the names of six witnesses including Zaki and

Edmund but it is obvious that she does not mean they were present when the incident occured. She said Zaki and Edmund came when she shouted out that she was burning. The second matter is that she says the liquid was thrown over the fire and not over her. Zaki contradicted his mother in these two important particulars. When he made his statement to the police he said he saw the incident and that the appellant threw the liquid over the deceased. The statement in the majority judgment that Zaki's statement to the police was substantially the same or similar to that of the deceased was not correct. In general, it may be said that as neither Zaki nor Edmund were present it was impossible that they could have truthfully given statements similar to that of the deceased.

14. The majority judgment concluded with a finding of fact that the appellant threw some inflammable liquid "at his mother". This finding was not warranted by the evidence. The only evidence on the point was the deceased's statement in which she said that the appellant threw the liquid "over the fire", and the majority of the Court below were not justified in drawing from this an inference that he threw the liquid at his mother.

15. Manslaughter is defined in the Criminal Code Ordinance (Sec. 212) as causing death by an unlawful act or omission. The offence of which the appellant was convicted was willfully causing death by an unlawful act or omission. I cannot find in the majority judgment any indication that the judges ever directed their attention to the point whether the death was willfully caused. It rejected the defence of accident, but it did not follow that murder was the only alternative. The circumstances were unusual; an allegation of causing the death of a person near a fire by throwing an inflammable liquid over the fire. It is possible that such an act might be done and that the death might not be said to have beeen willfully caused. Apart from accident there were several possibilities, (a) a degree of negligence not involving any criminal responsibility, (b) a degree of negligence making the offence a misdemeanour under Sec. 218 of the Criminal Code Ordinance, (c) a degree of negligence making the offence a manslaughter, (d) a degree of negligence making the offence murder, (e) a deliberate intention to cause injury. Wilful does not merely mean non-accidental; applied to acts it means acts to which the will is a party, and excludes negligent acts, except acts done by a person with reckless carelessness, not caring what the results of his carelessness may be. Possibilities (a) to (c) above were not explored by the majority of the Court below, possibly because they came to a finding of act, unjustified by the evidence that the appellant had thrown the

liquid at his mother. In the case of Knowles v. the King (46 L.T.R. 276) Viscount Dunedin in delivering the opinion of the Judicial Committee of the Privy Council said: "But the fatal flaw in the judgment is that having set aside Mrs. Knowles' account of the occurence as accident he at once assumed that the only alternative to accident is murder. There is not the slightest inquiry into whether assuming that the shot was fired by the accused, the act amounted to manslaughter and not murder. There is no attempt to face the question whether the standard of proof required to prove murder as against manslaughter has in this case been reached."

16. Lastly, I wish to refer to two points raised by Abcarius Bey. The first was that the evidence showed that the medical witness came to his conclusion as to the cause of death without dissecting the body. The Coroners' Ordinance shows that it is in the discretion of the medical officer as to whether he is to make a dissection or not. It is of course preferable that he should in a case of this kind make a dissection so that there should be no doubt as to the cause of death, but I do not think that the fact he did not so can be made a ground for challenging the verdict. The matter was one for adequate cross-examination in the Court below. The second point was that the Ottoman Law of Evidence must be regarded as the law in force at present and that it requires the evidence of two witnesses before an accused person can be convicted. It has been decided in a recent case*) by this Court that the relevant provision of the Ottoman Law must be taken to be repealed as regards criminal cases and this ground of appeal must therefore be rejected.

17. The majority of the Court below, in convicting the appellant, overlooked important points and overstressed others. Inferences prejudicial to the appellant were drawn which were not justified by the evidence. In particular an erroneous view was taken of the effect of the statements which Zaki and Edmund made to the Police. For these reasons, I think that this appeal should be allowed and that the conviction should be quashed.

Delivered this 26th day of February, 1938.

Senior Puisne Judge.
Puisne Judge.
(*British Puisne Judge dissenting*)

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*) Cr.A. 160/37 Ct.L.R. III. p. 97.

CIVIL APPEAL NO. 73/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Greene, J., Khaldi, J. and Abdul Hadi, J.
In the appeal of:—

Shafic Ka'war — Appellant.

v.

M. Steinberg and Co. — Respondents.

Order not being a judgment of the Court — Leave to appeal and appeal on such an order.

If order of lower Court is not a judgment of the Court subject to appeal, appeal therefrom will be dismissed, inspite of fact that leave to appeal was granted by Presiding Judge.

Fuad Atalla for Appellant.
Gavison (by delegation) for Respondents.

Appeal from order of District Court, Haifa, (CA. D. C. 25/35) dated 7.1.1938.

JUDGMENT.

This is an appeal from an Order of the District Court of Haifa, dated 7th January, 1938.

After hearing Advocate for Appellant we find there is no judgment before us. Although there is an order by the Presiding Judge granting leave to appeal to this Court against the order of the Court below referred to above, we are of opinion that this order is not a judgment of the Court and is not subject to appeal.

Appeal must be dismissed with costs to include LP. 2.— Advocate's fees.

Delivered this 3rd day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 25/35.

IN THE DICTRICT COURT OF HAIFA.

Before:—The President (Sherwell, J.) and Shems, J.
In the application of:—
Messrs. M. Steinberg & Co. Applicant.

ORDER.

We have read the application of the applicant submitted to this Court on 15th November, 1937, and his further application dated the 29th December, 1937, and filed in this Court on 4.1.38.

2. Although the judgment of this Court dated 7th April, 1935, does not mention the name of the Applicant as a second Appellant, in view, however, of the fact that the second Appellant was summoned to appear in this case before the Supreme Court on appeal from this Court, and the Supreme Court cited him as a party in the proceedings, and further, directed and ordered that the case be remitted to the Magistrate's Court to give a fresh judgment in accordance with their ruling, the omission by this Court in not having mentioned the applicant as a party in its said judgment dated 7th April, 1935, would appear to have been rectified by the judgment and said direction of the Supreme Court.

3. There is, therefore, no reason for this Court at this stage to deal further with the appeal of the applicant, because it has been finally disposed of by the Supreme Court in its direction remitting the case to the Magistrate's Court to give a fresh judgment according to the ruling therein set forth.

4. In accordance with such ruling and direction the applicant may appear before the said Magistrate's Court as a party to the said action which has been remitted as abovementioned.

Given this 7th day of December, 1938.

President.

CIVIL APPEAL NO. 93/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J., Frumkin, J. and Khayat,
In the appeal of:—

Abraham Saporta — Appellant.

v.

Yehoshua Wolfsohn — Respondent.

Evidence not called in the Court below — Misapprehension that Court already satisfied by evidence adduced — Asking Court of Appeal to call further evidence.
C.A. 81/33.

Appellant cannot ask Court of Appeal to call further evidence that was available in Court below but was not in fact called, even though he might have been under misapprehension that Court below was satisfied and did not want any more evidence.

Goitein, Luchinsky for Appellant.
Schmetterling for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 8.3. 1938.

JUDGMENT.

This is an appeal from the District Court, Jerusalem, in which they gave judgment against the present Appellant for the sum of LP.2707. 077 mils. It was a long and complicated case and large amount of evidence was heard in the District Court in great detail. The District Court made certain findings of facts and drew inferences from those facts.

In the first place, we think, taking the main claim, that is No. 2, there was ample evidence before the District Court in the finding they made that the agreement made with Reichman for the sale at LP.3.— a dunum was tainted with fraud and was not a genuine transaction. Therefore the appellant was due to account for more than LP.3.— which is the amount that he admits that he is able to account for.

With regard to the other transactions, the subsequent transactions after the Reichman's agreement, it had been argued by the Respondent that the District Court did not believe the evidence of the Ap-

pellant and that the subsequent agreements adduced were not proved and therefore were not evidence. We agree with that contention. They were signed by persons who are not parties to this present action or present appeal. The persons alleged to have been parties to those agreements were not called to prove them as they ought to have been called, and the Respondent very truly says, relying on a judgment of the Court of Appeal, Civil Appeal No. 81 of 1933*), that it is too late now on an appeal to ask the Court to call further evidence that was available in the Court below which was not in fact called. If the Appellant was under the misaprehension that the Court was satisfied and it did not want any more evidence, I am afraid that that is his misfortune.

We therefore come to the conclusion that the District Court was right in its judgment and we see no reasons to upset it.

With regard to the first claim, we agree with the reasons of the District Court and we adopt their arguments and it is not necessary for us to say anything more.

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

Delivered this 12th day of May, 1938.

British Puisne Judge.

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*) P. Post 12.1.34.

CIVIL APPEAL NO. 48/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Tawfic Naser el Daoud — Applicant.

v.

Ezra Hazkiel Zakey — Respondent.

Notice to purchaser of land of an adverse claim — Plea of good faith without notice — Contract made prior to warning by adverse claimant — Title to land obtained from bona fide purchaser — Purchaser's duty to inquire into facts of possession.

1. If purchaser of land was duly warned by notice that there was a definite adverse claim to that land, he must take the consequences, even if he had already made the contract with the vendor before receiving the notice.

2. Rights of a purchaser of land not affected, even though he himself was not a bona fide purchaser without notice, if he can show that his vendor was.

3. Fact that the only registration of a certain land is an old Turkish one must cause purchaser to take extra precaution, and if purchaser of such land takes no adequate steps to make enquiries in the neighbourhood as to actual facts of possession of land, he will not be deemed a bona fide purchaser even if there was a Mukhtars' Certificate re his vendor's possession and even if this vendor has for some years been in actual possession of part of that land, and even if there is no registration whatever in Land Registry of any right of adverse claimant.

Edit. Note:—As to equitable rights see L.A. 102/24, 2 C of J 475.

As to rights of registered purchaser as against equitable rights of purchaser by wakale dawrieh see L.A. 135/23, 4 C of J 1489; L.A. 173/26, 5 C of J 1843; L.A. 96/27, 5 C of J 1740; L.A. 39/32, 5 C of J 1746; L.A. 88/25, 5 C of J 1777.

Sahyoun for Appellant.

Levin for Respondent.

Appeal from the judgment of the Land Court of Haifa sitting as a Court of Appeal dated the 23rd day of December, 1937, and notified to Appellant on 14th February, 1938.

JUDGMENT.

This is an appeal from a judgment of the Haifa Land Court reversing a judgment of the Settlement Officer.

We have already intimated that in our opinion this appeal should be allowed, and we now proceed to give our reasons for that opinion.

The facts of this case are set out in great detail by the Settlement Officer and have been summarised in a shorter form, but none the less adequately by the learned Relieving President. It is not necessary to restate them here. There are two qeustions for us to determine (leaving on one side for the moment the question of equities), namely whether either Mise Abella or the Respondent were bona fide purchasers for value or not. And in the first place we are satisfied that the Settlement Officer was right in finding that the Respondent was not a bona fide purchaser. This view is also supported by Shems, J. in the Land Court, where he said that the Respondent had notice of the claim of the present Appellant "before the land was registered in his name, and as such, he cannot be considered to have become a bona fide purchaser himself".

The Respondent had been served by the Appellant with a Notarial notice before the transfer was effected in which he was definitely informed that the Appellant had purchased the land in dispute by means of an irrevocable power of attorney, the date and number of which were duly set out in the notice, he was warned that the purchase by Miss Abella, his vendor, was in bad faith, as she as well as her father knew that the Appellant was the purchaser and had been in possession for a long time, and he was also warned that he would purchase the land at his own risk.

It makes no difference in our opinion that the Respondent had already made the contract with Miss Abella before he received the notice — he knew that there was a definite adverse claim to this land before registration was effected. He had due notice and must take ready made the contract with Miss Abella before he received the no- the consequence.

The fact, however, of his not being a bona fide purchaser without notice, would not affect him if he could show that his vendor, Miss Abella, was herself a bona fide purchaser, because he would then take her title.

The Land Court, reversing the settlement Officer, came to the conclusion that Miss Abella was a bona fide purchaser without notice, on the ground that the Respondent had failed to take any steps in the Land Registry to have the land registered in his own name, or to enter a caveat, and that there was no evidence that Miss Abella knew that the Certificate of the Mukhtars was false. Also that Miss Abella had taken all reasonable steps as regards enquiries and that since a portion of the land had been ploughed by her vendor, Tahir Haj Ali, she was

entitled to assume that the latter was in possession, in addition to the evidence afforded by the Certificate. We do not, however, think that this is so.

It must be remembered that the only registration of this land was an old Turkish one, and that fact in itself should have caused her to take extra precaution. The Settlement Officer has found as a fact that Taher Haj Ali, her vendor, only entered into possession of the land early in 1934, not by right but arbitrarily, and then only of a small portion of some six dunums. He also found as facts that the Appellant had been in undisturbed possession of this land for at least 14 years prior to 1934, and that the Mukhtars' Certificate re Tahir Haj Ali's possession was false to their (the Mukhtars') knowledge at any rate. He further found that Miss Abella had acquired no valid title to the land, that she had no lawful possession of any of it, and that she could not have made a valid transfer to the Respondent since Miss Abella took no adequate steps as a reasonable and prudent person to enquire into the actual facts of possession of the land which she purchased from Tahir Haj Ali, which for over 14 years had been in the uncontested possession of the Respondent.

We think that it was gross carelessness in this case on the part of Miss Abella not to have made enquiries in the neighbourhood with regard to the true facts of Tahir Haj Ali's alleged possession and we agree with the Settlement Officer that she must be deemed to have had constructive notice of the defect in her vendor's title, since the most superficial enquiries on the spot on her part would have revealed the true state of affairs. She was therefore not a bona fide purchaser without notice and we agree in this respect with the settlement officer.

As to who of Miss Abella and the Respondent has the greater equity, that is, who showed the lesser degree of negligence, we think that the Respondent is the less to blame. After all he had had undisturbed possession for over 14 years and the land had only recently been seized arbitrarily by Tahir Haj Ali, while Miss Abella, relying on the Mukhtars' Certificate, and knowing that the registration was only an old Turkish one, took no steps to make any local enquiries as to the true facts of possession of her vendor.

For these reasons we think that this appeal must be allowed, the judgment of the Land Court quashed, and the judgment of the Settlement Officer restored.

The Appellant will have all costs here and below, and LP.5.— advocate's fees.

Delivered this 27th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 53/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J., Frumkin, J. and Khayat, J.
In the case of:—
Albert Fisher — Appellant.
v.
Michaelis and Baer — Respondents.

Building contract — Extra Work — Waiver in Statement of defence of specific provision in contract — Damages for delay in completing work.

1. If contract has a clear provision that no extra work should be charged for which there was no written reqeust, statement of defence in Court that Defendant would pay for any extra work, if proved not a waiver of the provision.

2. Court is right in disallowing a claim for damages at a certain rate per day fixed in contract for delay in completing work, if on true construction of relevant clause it finds that the commencing day from which damages are payable is not fixed in contract.

Leon Rabinovitch for Appellant.
Gershman for Respondents.

Appeal from the judgment of the District Court sitting in Tel-Aviv, dated 27th January, 1938.

JUDGMENT.

In this appeal from a judgment of the District Court of Tel-Aviv, the first point taken was that, no Architect's Certificate having been produced, the claim for the work done under the contract was premature. The Appellant, however, who was the defendant in the Court below, admitted that the sum of LP. 333.257 was due to the respondent under the contract and this point therefore fails.

2. The second point was that the appellant was not obliged to pay for any additional works other than works executed under the contract because, by clause 8 of the contract, any payment in respect of extra works could only be made if the works done were executed on the written request of the appellant or his agent. That, indeed, is the effect of clause 8, but it has been argued by the respondent that, in

his (the appellant's) statement of defence in the Court below, the appellant said that he would pay for any extra work not included in the contract if it were proved. This statement, it is said, is a waiver of all the provisions of clause 8 of the contract. We do not, however, think that this is so. We do not think that there was any waiver. Clause 8 is one of the few clauses in this contract which at any rate is clear and unambiguous, and the effect of it is that no extra work should be charged unless authorised in writing. The reqeust had to be in writing. It is admitted that there was no written demand or authorisation. In this case the appellant, however, admitted that he was prepared to pay the sum of LP. 77.380 mils for extra work, and he must therefore pay this sum and not the sum of LP. 160.705 mils as found due by the District Court.

3. We turn now to the counterclaim. The counterclaim was for LP.5.— per day for delay in completing the building as from 19th December, 1933. This claim depends upon the true construction of clause 15 of the contract. Clause 15 is extremely badly drawn and vague to a degree, but whatever it may mean, we are quite clear that it does not mean that he must pay LP. 5.— for each day of delay from 19th December, 1933. To our thinking the commencing day from which these damages are payable for delay in the non-completion of the whole wrok is not fixed in this clause. The only fixed commencing day is in respect of delay in the completion of the first storey. The District Court was therefore right in disallowing the counterclaim.

4. The last point is with regard to the confirmation of the provisional attachment with costs. The respondent admits that this was wrong because the provisional atachment was withdrawn by him in the course of the protracted proceedings in the Court below.

5. The result is that this appeal is allowed in part; the sum of LP.83.325 mils must be deducted from the sum found due by the District Court, and judgment must be entered for the respondent for the sum of LP.352.458 mils together with legal interest as from the 9th October, 1934 and the costs of the trial in the District Court. The clause in the judgment with regard to the provisional attachment is to be deleted.

No costs of this appeal, and no advocate's fees on either side here.

Delivered this 17th day of May, 1938.

British Puisne Judge.

HIGH COURT CASE NO. 33/38.

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

Before:—Copland, J. and Khayat, J.
In the application of:—
Aniseh Hassan Hamideh — Petitioner.

v.

1. Chief Execution Officer, Haifa
2. Mohammad Baraday Abbasi
3. Mohammad el Kalla
4. Shidadeh As'ad el Khouri — Respondents.

Allegations against Judge of District Court — Application for change of venue.

Duty of High Court when seized with an application for change of venue to determine not what is necessary to avoid injustice but what is necessary to avoid any appearance of injustice.

Petitioner: In person.
For Respondents: No: 1, no appearance.
Cattan for Nos. 2 to 4.
Application for change of venue.

ORDER.

We do not need to hear the Petitioner.

We have come to the conclusion that this motion should be granted. The duty of the Court, in this matter, is to determine, not what is necessary to avoid injustice, but what is necessary to avoid any appearance of injustice.

Certain allegations have been made against a judge of the District Court of Nablus, who is one of the Respondents. I make no comment uppon them, but it is unfortunate that they should be given such a wide circulation by the opposition to this motion.

It is better, in our opinion, in the interests of both parties, to transfer the case to another Court. The rule nisi for the change of venue is made absolute and the case is ordered to be transferred to Jerusalem.

The Petitioner will have the costs of this petition and LP. 2.— travelling expenses.

Given this 25th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 91/38

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—Copland, J., Frumkin, J. and Khayat, J.
In the appeal of:—

1. Abdel Qader Haj Ismail Barqawi, in his personal capacity.
2. Rashiqa Khadr 'Iqab Barqawi
3. Rafiqa Khadr 'Iqab Barqawi
4. Mariam Khadr 'Iqab Barqawi, on their own behalf and on behalf of the heirs of Khadr 'Iqab Barqawi — Appellants.

v.

1. The Attorney General on behalf of the Government of Palestine
2. Hanotoiah Co. Ltd.
3. Sea-Shore Development Co., Nathania
4. Liquidator of Pardess Hagdud — Respondents.

Security to be given before appeal can be heard — Bond without mortgaging property.

If bond filed on appeal to Supreme Court (under Rule 93 of Civil Procedure Rules, 1935) without properties mentioned therein being mortgaged in Land Registry, appeal will be dismissed.

Mistake or inadvertance — no good cause to grant (under Rule 96) extension of time to remedy defect.

Edit. Note:—See C.A. 82/38, Ct.L.R. III. 228 and editorial note thereto.

Bushnaq for Appellants.
Hogan (*Crown Counsel*) for 1st Respondent.
B. Joseph for 4th Respondent.

Appeal from judgment of Land Court, Nablus, dated 5.3.1938.

JUDGMENT.

In this case again, for about the sixth time within a week, the question comes up as to the sufficiency of the security to be given before the appeal can be heard.

The Appellant can do ane of three things; (1) he can file a duly authenticated bond in form 19 of the Schedule to the Rules; (2) he

can offer to pay a deposit; (3) he can attach his own immovable properties. It is admitted that he did not suffer an attachment nor did he offer to pay a deposit and he elected under Rule 93 to file a bond by a guarantor. The bond filed is in form 19, but form 19 says that the guarantor undertakes to be responsible for the mortgaging of the properties mentioned in the schedule hereunder. Now it is perfectly obvious that that means that the properties must be mortgaged — must be mortgaged in the Land Registry. It is admitted that this has not been done. There being no mortgage, there is no security for the costs of this appeal.

The Appellant asks us to apply, in this case, the provisions of Rule 96 and allow him an extension of time to remedy the defect, but an extension may be allowed by the Court only on good cause being shown. The reason shown for non-compliance with the Rules is the mistake on the part of the Appellant and in not reading the Rules and the Form and that reason is not good cause and the Court cannot allow an extension of time.

The appeal is dismissed with costs and LP.3.— advocate's fees to counsel or each of the Respondent.

It is quite obvious that it would be much simpler for Appellants to pay deposits in Court and to avoid the difficulty of complying with the Rules. In nearly all cases the amount assessed as deposit does not exceed LP.10 to LP.15, and the Appellants by paying such deposits save the fees to be paid by them in respect of attachments or mortgages.

British Puisne Judge.

CRIMINAL APPEAL NO. 51/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

The Attorney General — Appellant.

v.

Fishel Abraham Moskovitz — Respondent.

Interpretation of law — Elements of offence of illegal entry or stay in Palestine — Commencement of prescription of illegal stay in Palestine — Immigration Ordinance, Sec. 12 — *Moran & another v. Jones* (104 *LTR.* 921).

1. Court must interpret the law as it finds it, without speculating on what the intention of the legislature was.
2. Illegal entry in Palestine, by itself, is not an offence.
3. "Is, on being found in Palestine, guilty of an offence" in Sec. 12(2)(b) of Immigration Ordinance means that unless and until found in Palestine no offence has been committed.

Crown Counsel (*J. M. Hogan*) for Appellant.
Argaman for Respondent.

Appeal from judgment of District Court, Haifa, (Cr.A.D.C. 22/38) dated 14.4.1938, whereby the Respondent was convicted under section 12(2)(a) of the Immigration Ordinance and sentenced to two months imprisonment.

JUDGMENT.

The respondent, one Fishel Abraham Moskovitz, a foreigner, was charged before and convicted by the Chief Magistrate, Haifa, under Section 12 (2) (a) of the Immigration Ordinance (Cap. 67) for illegally entering Palestine in April, 1935, and remaining illegally in the country until found by Immigration Officers on 3rd March, 1938. He was sentenced to two months' imprisonment and was recommended for deportation. He appealed to the District Court, Haifa, which quashed the conviction holding that on the facts the offence was prescribed under Section 12(5) of the Ordinance because the offence under Section 12(2) (a) was "entering Palestine", and not "being found in Palestine," that the offence was committed on

entering, and since more than two years had passed since his illegal entry he could now no longer be prosecuted. The Attorney General has now appealed to this Court.

The relevant sections of the Ordinance are:—

"Section 12 (2) Any foreigner who —

(a) enters Palestine in contravention of Section 5, or

(b) having entered Palestine as a traveller or on a transit visa with permission to remain in Palestine for a limited period remains in Palestine after that period has expired without having obtained permission from the Director,

is, on being found in Palestine, guilty of an offence under this Ordinance.

"Section 12(5) No prosecution for an offence under this Ordinance shall be commenced after the expiration of two years next after the commission of the offence."

The facts of this case are not in dispute, and can be stated quite shortly. Moskovitz arrived in Haifa Port on the S.S. Palestina in April, 1935. He was refused permission to land, but escaped from the ship, and was not found by the authorities until the 3rd March, 1938, when he presented himself at an Immigration Office and asked for the return to him of his passport which had remained on the ship as he wished to leave the country.

Mr. Hogan, on behalf of the Attorney General, has argued that there are two constituent elements of the offence set out in Sec. 12(2) (a) — first that the foreigner must have entered the country illegally, and secondly, that he must be found here — that the offence cannot be completed until these two requirements have been satisfied, and that, therefore, in this present case no offence was committed until the respondent had been found on the 3rd March, 1938. If that argument be correct, then the two years mentioned in Sec. 12(5) did not commence to run until 3rd March, 1938.

Counsel for the respondent, on the other hand, has argued that the offence was committed, and completed, in April 1935, when to the knowledge of the Immigration authorities, the respondent entered Palestine. In effect, his argument is that the words "on being found in Palestine" are superfluous and should be disregarded.

No exactly parallel case can be found in any English reports, but there have been brought to our notice certain cases, in which the word "found" has had to be construed — for example the phrase "found committing an offence" has been held to mean that the person must be actually found in the act of commission, and then again, it has been held that to consitute the offence of "being found on enclosed premises for any unlawful purpose" the offender must have been actually found on the premises, that is discovered on them, though, as

Bankes J. (as he then was) pointed out, it was not necessary that he should actually have been arrested on the premises, see Moran and another v. Jones (104 L.T. Rep. 921). From this latter case, it is clear that leaving on one side the question of intent, the offence consists of two parts, being on premises and being found on them, and if this second requirement be not fulfilled, then the offender could not at any rate, be convicted under that particular section of the Larceny Act.

It is useless for us to speculate on what the intention of the legislature was — their intentions can best be gathered from the words used by them, if capable of a reasonable meaning — and it seems to me that the words "is, on being found in Palestine, guilty of an offence," can only mean that unless and until found in Palestine no offence has been committed. These words cannot have been inserted as a safeguard to prevent extradition, because offences under the Immigration Ordinance are not extraditable offences, not being mentioned in the 1st Schedule to the Extradition Ordinance (Cap. 56).

If illegal entry, by itself, were to be an offence, then the words "on being found in Palestine" would be superfluous. In a sense, of course, any person guilty of any offence must be found before he can be prosecuted, but these words in Section 12(2) are not used in this sense, otherwise they would need to be inserted in every penal enactment.

The words have some meaning, and it is our duty to interpret the law as we find it, not as we think it ought to be. It has been argued that this view may cause great hardships in certain cases. If that be so, then the remedy is to alter the law, which is entirely a matter for the Legislature.

I think that this appeal should be allowed, the judgment of the District Court quashed, and the respondent should be convicted of an offence under Section 12(2) (a) of the Ordinance as found by the Chief Magistrate.

With regard to the penalty to be imposed, bearing in mind that there have been a number of conflicting decisions given in the Courts below on various occasions, and that this is the first case of this nature to come before this Court — and is therefore in the nature of a test case, we think that the appropriate penalty will be a fine of LP. 10.— or six weeks imprisonment in default We also recommend that the respondent be deported from this country.

British Puisne Judge.

CIVIL APPEAL NO. 94/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case of:—

Yehezkiel Weniger — Appellant.

v.

1. Moshe Carasso
2. Ernst Brener — Respondents.

Transfer of title under hire-purchase agreement — Purchase of goods from Execution Office — Claiming title to goods sold by Execution Office — Necessary diligence of claimant — Burden of proof as to how sale by public auction was conducted.
Mejelle, art. 365, 378 — *C.A.* 42/36.

1. Hire-purchase does not confer title upon hire-purchaser before all conditions of agreement have been carried out in full.

2. Title of person who has purchased goods from Execution Officer will not be upset, even though goods were not judgment debtor's property, if other person claiming title to such goods had actual knowledge, or could reasonably be assumed to have had knowledge, that his property was about to be sold to cover debt due by another, and had taken no steps to prevent sale.

3. Burden of proof that sale of goods by Execution Office was conducted in prescribed manner and that person claiming title to such goods knew, or could reasonably be assumed to have knowledge, of the sale — upon purchaser.

Edit. Note:—As to 1 see: C.A. 34/31 Pal. Post 12/5/33; C.A. 44/36 Ct.L.R. II. 49; C.A. 98/38 in this issue.
As to 2 see: C.A. 41/33 3 C of J 867.

Dr. Kleinzeller for Appellant.
Gratch for 1st Respondent.
For 2nd Respondent no appearance.

Appeal from judgment of District Court, Tel-Aviv, dated 21.2.1938.

JUDGMENT.

Frumkin, J.

This is the considered judgment of the Court.

The Appellant in this case bought a car in a public auction conducted by the Execution Officer of Tel-Aviv. The car was sold in satisfaction of moneys due from one Ernst Brener to other parties. Brener acquired the car by hire-purchase agreement from the Respondent.

2. The Respondent sued Brener before the Magistrate's Court

claiming alternatively an amount of LP. 50.— still due on the car or the car itself. The present Appellant joined as third party. The respondent failed before the Magistrate and succeeded on appeal to the District Court.

Now the Appellant appeals.

3. He does not seriously maintain that a hire-purchase agreement confers title upon the hire-purchaser before all the conditions of the agreement have been carried out in full. The ownership of the car having remained with the Respondent, Brener himself could not validly have sold the car. This principle was already laid down in Civil Appeal 42/36 where it was held that under Art. 365 and Art. 378 of the Mejelle only a true owner, or his agent may effectively alienate property to another person.

4. The Appellant's stronger point, however, is that he is in a better position than an ordinary purchaser since he bought the car in a public auction from the Execution Officer.

5. In fact both the Execution Law and the Magistrate's Law provided for a certain amount of protection to purchasers of goods from the Execution Officer. An owner of goods attached when in possession of a judgment debtor who is not the owner has to take steps to oppose the sale within prescribed periods. If he takes no steps to oppose the sale in due tim a purchaser from the Execution Officer is entitled to assume that there is no claim on the goods.

6. When goods in possession of a judgment debtor are sold in the manner prescribed in the Execution Law, this Court would certainly not interfere to upset the title of a person who has purchased such goods even if the goods sold were not the property of the judgment debtor, so long as it is satisfied that any person claiming title to such goods had actual knowledge or could reasonably be assumed to have had such knowledge, that his property was about to be sold in satisfaction of a debt due by another, and had taken no steps to prevent such sale.

7. The Appellant neither in this Court nor before the District Court, nor the Magistrate's Court took any pains whatsoever to satisfy the Court that the sale by the Execution Office was conducted in the prescribed manner by publication in the local press and in accordance with other requirements of the law, nor did he prove that the Respondent knew, or could reasonably be assumed to have had knowledge of the sale.

8. The Appellant cannot therefore succeed and this appeal will be dismissed with costs assessed at LP. 5.— and LP. 5.— advocate's fees.

Delivered this 30th day of May, 1938.

CIVIL APPEAL NO. 98/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case of:—

Selim D. Sabty — Appellant.

v.

1. Josephine Kobler
2. Dunamo Novak and Tulchinsky
3. Engineering Corporation of Palestine — Respondents.

Promissory notes given in relation to lease agreement — Plea by lessee of lack of consideration — Transfer of ownership under hire-purchase agreement — Creditor desiring to pay for debtor the remaining instalments for goods taken under hire-purchase agreement.

1. Where promissory notes form part of lease agreement, lessee, when sued upon them, entitled to adduce evidence against lease, and Court has to decide whether or not in law and in fact he is liable to pay the rent instalments expressed in the notes.

2. Hire-purchase agreement does not transfer ownership unless and until all conditions of agreement have been carried out in full.

3. Creditor cannot stand in debtor's place without latter's consent.

4. Creditor of a debtor having in his (debtor's) possession certain goods under a hire-purchase agreement cannot force the owner of the goods to accept the instalments due or to become due from the debtor.

Edit. Note:—See C.A. 94/38 in this issue.

Asfour for Appellant.
Argaman for first Respondent.
Levin for 2nd and 3rd Respondents.

Appeal from judgment of District Court, Haifa, (Appellate Capacity) dated 11.3.1938.

JUDGMENT.

Frumkin, J.

The Appellant in this case is the landlord of premises which he in August, 1936, let to the 1st Respondent allegedly for a period of three years. The 1st Respondnt on the 15th November, 1937, left the premises on the alleged ground that some of the rooms were leak-

ing and thus she could not derive the benefit expected from the lease.

2. As it is usual in this country, promissory notes were given to cover the instalments due under the lease. When the Appellant sued the 1st Respondent before the Magistrate's Court on two promissory notes, the 1st Respondent pleaded lack of considreation and wanted to prove her case by evidence oral and otherwise.

3. The Magistrate refused to allow her to bring such evidence and gave judgment against her for the amounts of the promissory notes with liberty for her to take such steps as she thinks fit on the matter of the defective lease by separate action.

4. During the proceedings before the Magistrate a wireless set and a frigidaire found in possession of the 1st Respondent were attached and the second and third Respondents joined as third parties claiming that the wireless set and frigidaire were let by them respectively to the first Respondent on a hire-purchase agreement and that they still are the owners of those machines and that the 1st Respondent has never acquired ownership.

5. The Appellant then offered to pay to the second and third Respondents the amounts due to them from the 1st Respondent under the hire-purchase agreement and the Magistrate ordered that only upon such sums being paid the attachment will be removed. The second and third Respondents, however, refused to accept these payments.

6. All the three Respondents then appealed to the District Court and were all successful in their appeals. The Respondent now appeals to this Court.

7. To deal first with the appeal as against the 1st Respondent. It is uncontested that the promissory notes were given in relation to a lease agreement between the very same parties. The District Court was therefore right in following the decision of the majority in Civil Appeal 87/1937*) as this was clearly a matter between the immediate parties. I need not emphasize again my own views as to admissibility of oral evidence against documentary evidence expressed in my judgment in that case.

8. In any way the promissory notes forming part and parcel of the lease agreement between the same parties the District Court was right in remitting the case to the Magistrate who should now upon retrial accept such evidence as the 1st Respondent is entitled to bring against the lease and then decide whether or not in law and in fact the 1st Respondent is liable to pay the rent instalments expressed in the promissory notes and give judgment accordingly.

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*) Ct.L.R. Vol. II. p. 19.

9. On the appeal as against the second and third Respondents we might deal with them together as they involve the same points of law. It has been decided on several occasions by this Court, and recently in Civil Appeal 84/38**) that a hire-purchase agreement does not transfer ownership to the hirer unless and until all the conditions of the agreement have been carried out in full. If follows that until all the instalments are paid the hirer acquires no right of ownership and the title remains with the original owner.

10. We need not at the present stage consider whether a hirer could force upon the owner premature instalments and thus acquire title before the time stipulated for the payment of all the instalments. Most probably it will be found that a hirer has such a right.

11. It is less likely that a hirer in default of paying certain instalments may nevertheless force the owner to accept such overdue instalments thus preventing him from making use of the provisions of the hire-purchase agreement. But this point again is not relevant at present.

12. It is not necessary to decide those points because no such offer to pay premature or overdue instalments were ever made by or on behalf of the hirer. The Appellant says that he can step into the shoes of the hirer and make use of such rights as the hirer has, but we know of no authority in law allowing a creditor to stand in the place of a debtor without the consent of the latter. As between the creditor and the owner there is no privity of contract. The appeal against the second and third Respondents must therefore also fall.

13. Nor do we see any ground in interfering with the decision of the District Court as regards costs. If the ownership of goods held by virtue of a hire-purchase agreement remains to be vested in the owner, it remains so vested for all events and purposes including those of attachments and sale and is to be regarded as goods not belonging to the judgment debtor in whose possession they happened to be. If a judgment creditor chooses to attach goods belonging to a stranger, he has to bear the consequences as to costs.

14. It follows that the appeal fails on all points and the judgment of the District Court will be confirmed. The Appellant will pay the costs of all the Respondents assessed at LP. 5.— for each of them and LP. 5.— for each of the two advocates.

Delivered this 3rd day of June, 1938.

British Puisne Judge.

**) p. 268, in this issue.

HIGH COURT NO. 32/38.

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

Before:—Copland, J. and Frumkin, J.
In the application of:—
Hashem Ramadan Abu Khadra — Petitioner.
v.
1. Chief Execution Officer, Jaffa
2. Anglo Palestine Fruit Exports Co. — Respondents.

Points raised against order of Chief Execution Officer — Rejection by Chief Execution Officer of points brought before him — Undue delay in applying to High Court.

1. Person aggrieved by order of Chief Execution Officer must first bring all his points in a clear manner to said Officer's notice.

2. If Chief Execution Officer rejects petitioner's points, latter not to wait until final order of sale has been given, but to apply to High Court without delay.

Edit. Note:—As to 1 see: H.C. 33/35, P.L.R. II, 270: H.C. 60/27 3 C of J, 841; H.C. 74/27, ibid 842.

As to 2 see: H.C. 73/37 Ct.L.R. III, 8; H.C. 68/37 Ct. L.R. II, 200, sec. 115 of Ott. Execution Law.

Habib Homsi for Petitioner.
For 1st Respondent — no appearance.
Seligman for 2nd Respondent.

Application for an order to issue to the First Respondent, directing him to show cause why his order dated the 14th April, 1938, in Execution File No. 4654/38, ordering the final sale of the mortgaged property should not be set aside, and why the sale proceedings should not be cancelled.

JUDGMENT.

A great number of points have been raised in this case, the vast majority of which were not brought to the notice of the Chief Execution Officer, except some of them which were brought to his notice in a very vague manner. The point about the change of the mortgagee is one which definitely will not affect the mortgage. All these points should have been brought to the notice of the Chief Execution Officer, and apart from that, such points that have been brought to

his notice have been rejected by him on the 24th March, 1938. At that time the Petitioner should have come to this Court, he should not have waited until the final order for sale had been given.

In High Court case No. 73 of 1937,*) we held that:—

(1) There must be very strong grounds for asking the High Court to upset a final order for sale and in the present case it could find none.

(2) the judgment-debtors had ample time within which to bring to the notice of the Second Respondent (Chief Execution Officer) the matters which they had raised before the High Court and if his answer were unfavourable to them to apply to the High Court. They had not done so, and it was too late for them to come to the High Court.

That case largely covers the present case and the rule must be discharged with total costs to include advocate's fees, assessed at LP. 5.

Delivered this 27th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 116/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

1. Hassan Atiyeh Abu Khattab
2. Mohammad Atiyeh Abu Khattab — Appellants.

v.

1. Ahmad Yousef Hathat
2. Abdel Qader Yousef Hathat — Respondents.

Appeal by some of defendants from judgment dismissing claim against them and Respondents — Successful defendant appealing because dissatisfied with reasons of judgment.

Nobody can appeal from a judgment dismissing a case against him, because dissatisfied with the reasons given by the Court in their judgment.

Edit. Note:—See C.A. 193/26 PLR. I, 120.

Jamel Husseini for Appellants.

Sa'id Hashem Shawwa for Respodents.

Appeal from judgment of Land Court, Beersheba, dated 7.3.1938.

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*) Ct.L.R. Vol. III. p. 8.

JUDGMENT.

We need not trouble you, Sheikh Sai'd Effendi.

This is an appeal from a judgment which was in favour of the Appellants inasmuch as the claim by some persons against them and the Respondents was dismissed. The reason for the appeal, we think, is because the present Appellants did not like the reasons given by the Land Court in their judgment. Nobody can appeal against a judgment dismissing a case against him. We get plenty of people appealing from judgments given against them, but we cannot allow people to appeal against judgments given in their favour.

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

Delivered this 25th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 100/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Adolf Reiss — Appellant.

v.

1. Hassan Amouri
2. Abdul Fattah Irani — Respondents.

Contract for sale of goods — Goods supplied by vendor but not taken over by purchaser — Claim for price of goods supplied.

Vendor can claim price of goods supplied by him but not taken over by purchaser.

Edit. Note:—See C.A. 108/27 1 C o J 385.

Gavison for Appellant.

Fouad Atalla by delegation for Respondents.

Appeal from judgment of the District Court, Haifa, in its appellate capacity, dated 24.2.1938.

JUDGMENT.

This appeal must be allowed.

We are aware of nothing in the law of Palestine which says that when a contract for sale has been made, the vendor cannot bring a

claim for the price of the goods he supplied, but were not taken over by the purchaser. The case cited in support of the theory, that he cannot, is concerned with damages and the rule as to measuring of damages. There is nothing in this case which says that a man cannot ask for the price of the goods.

The judgment of the District Court is quashed and the judgment of the Magistrate is restored with costs on the lower scale to be taxed by the Chief Registrar and LP. 5.— advocate's fees.

Delivered this 23rd day of May, 1938.

British Puisne Judge.

CIVIL (Leave Application) APPEAL NO. 104/38

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the application of:—

Michael Watikay — Applicant.

v.

Rosa Limansky — Respondent.

Application for leave to appeal from judgment confirming award — Documents locked up and not before arbitrators — Clerical mistake in award.

1. Fact that certain documents were locked up and were not before the arbitrators — no ground for Court of Appeal to grant application for leave to appeal from judgment confirming award, if applicant cannot satisfy Court that at any stage of proceedings before arbitrators had he clearly or impliedly requested to allow him to produce such documents.

2. Clerical mistake appearing on face of award in adding up figures cannot serve a ground to have award set aside.

Applicant in person.

Shwartzman for Respondent.

Application for leave to appeal from the judgment of the District Court, Tel-Aviv, dated 22nd February, 1938, whereby applicant's opposition to the confirmation of an award made by arbitrators was refused.

ORDER.

This is an application for leave to appeal from a judgment of the District Court of Tel-Aviv confirming an award of arbitration in a

dispute between the two parties concerning their relations as partners in a business concern in Tel-Aviv. The applicant submitted several reasons why the judgment of the District Court was wrong and why the award should not be confirmed.

2. There is nothing whatsoever in his claim that the award was uncertain, the award is quite clear. Nor is the award ultra vires. As to the error which appears to be on the face of the award it is clear, as the Court below found it, that it was a clerical mistake in adding up the figures. This error was corrected and it could certainly not serve a ground to have the award set aside.

3. The only point which needs some consideration is the ground submitted by the applicant that certain documents were not before the arbitrators and if they were brought before them, they might have come to a different conclusion.

4. He maintains that the documents were locked up in the business shop. The applicant could however not satisfy us that at any stage of the proceedings before the arbitrators had he clearly or even impliedly requested to allow him to bring such documents to their notice.

5. True the shop was closed by an order of the Court and the arbitrators were appointed receivers, but there was nothing to prevent him from obtaining an order to have the shop opened and produce such documents as he thought fit. There is therefore no reason for granting the application which will be dismissed with costs at LP. 5.-- inclusive of Advocate's fees.

Given this 23rd day of May, 1938.

British Puisne Judge.

HIGH COURT NO. 36/38.

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

Before:—Greene, J. and Frumkin, J.

In the application of:—

1. Ali Sheikh Ahmad Attar
2. Alamieh Sheikh Ahmad Attar — Petitioners.

v.

1. Chief Execution Officer, Magistrate's Court, Ramleh
2. Hafiseh el-Abed el Shafi'e — Respondents.

Confirmation of compromise as to partition of land — Parties disagreeing as regards boundaries of partitioned land — Execution of judgment withheld after having been ordered.

Chief Execution Officer entitled to withhold execution after he had ordered same in an earlier order and generally to reconsider his first order and give a fresh one on its stead.

Edit. Note:—See H.C. 47/35 P.L.R. II. 381; H.C. 11/33 1 C of J 291; H.C. 51/31 3 C of J 853; H.C. 59/37 Ct.L.R. II. 193.

Waseb Anabtawi for Petitioners.

Ex parte.

Application for the issue of an order to the Chief Execution Officer, Magistrate's Court, Ramleh, directing him to show cause why his order dated the 13th April, 1938, should not be set aside and the partition judgment executed.

JUDGMENT.

In this case an application was made by the present Petitioners to the Chief Execution Officer of Ramleh to execute a judgment of the Magistrate's Court, Ramleh, confirming a compromise reached at by the parties regarding the partition of an orange grove. The Chief Execution Officer first ordered execution on the 13th March, 1938, but later when he came to find that the compromise between the parties did not embody consent as regards the boundaries he gave another order dated the 13th April, 1938, whereby he ordered the withholding of execution of the partition judgment. In other words the Chief Execution Officer, upon reconsidering his first order, found that he is not in a position to execute the partition judgment being incomprehensible for the reason that the parties had not given their consent to the boundaries, a matter which is of course of fundamental importance.

In this application the attorney for Petitioners is seeking to move the Court to set aside the second order of the Chief Execution Officer dated the 13th April, 1938, on the sole ground that the Chief Execution Officer is not entitled to withhold execution after he had ordered same in an earlier order, but he cites no authority for the proposition that a Chief Execution Officer could not reconsider his first order and give a fresh one in its stead.

The application is therefore refused.

Delivered this 30th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 101/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J., Khaldi, J. and Abdul Hadi, J.
In the appeal of:—
Nayef Jarjoura el Khoury — Appellant.
v.
Moise Carasso — Respondent.

Notes given in addition to mortgage — Suing the mortgagor on notes.

Mortgage does not prevent mortgagee from suing on notes

Edit. Note:—Vide Mejelle, art. 730.

Jarjoura for Appellant.
Kitay for Respondent.

Appeal from judgment of District Court, Haifa, in its appellate capacity, dated 31.1.1938.

JUDGMENT.

We need not trouble you Mr. Kitay.

We are of opinion that the District Court was perfectly correct in their judgment. There is nothing whatever in this mortgage which prevents the Respondent from suing on the notes which he already holds. The mortgage is a security an the Respondent did not dispense with the notes.

The appeal must be dismissed with costs on the lower scale to be taxed by the Chief Registrar, and LP. 5.— advocate's fees.

Delivered this 23rd day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 108/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Greene, J., Khayat, J. and Abdul Hadi, J.
In the appeal of:—
Jamileh Jahshan — Appellant.
v.
1. Raji Abu Zalaf
2. Carmella Shleiwit — Respondents.

Party suing for return of money advanced — Defendant claiming breach of contract — Decision of Court that unneccessary to hear evidence on certain fact mentioned in statement of claim — Liability to return money received under contract and liberty to claim damages.

1. Court not bound to hear evidence on a certain point mentioned in statement of claim, if it finds it unnecessary.
2. Party who does not wish to execute contract — entitled to recovery of money advanced, though other party at liberty to counterclaim, or bring any action for damages.

Edit. Note:—As to 1 see: C.A. 50/26, P.L.R. I, 131; C.A. 67/38 Ct.L.R. III, 214; C.A. 33/37, Ct.L.R. I, R. 71.

As to 2 see: C.A. 50/26, P.L.R. I, 131; C.A. 31/37 Ct.L.R. I, R. 51; C.A. 253/37 Ct.L.R. III, 119; C.A. 4/38 Ct.L.R. III, 127.

John Asfour for Appellant.
Abcarius for 1st Respondent.
Najib Hakim for 2nd Respondent.

Appeal from judgment of District Court, Haifa (111/37), dated 3.4.1938.

JUDGMENT.

There is nothing in this appeal.

Respondents merely ask for the return of LP. 500.— out of the sum of LP. 525.— which they paid to the Appellant.

Counsel for Appellant argued before us that the Court below should have heard evidence as regards the breach simply because Respondents said in their statement of claim that there was a breach of agreement by the Appellant. The Court decided it was not necessary to hear evidence on this point and with this decision we are in agreement.

As regards the discharge we do not think that it was a valid discharge because the Power of Attorney was not made use of for the reasons stated before us, namely, the existence of an attachment and the Municipal taxes.

As regards the point that the Court below did not allow Appellant sufficient time to file a counterclaim we are satisfied that Appellant had ample time to file a counterclaim and the Court in its judgment gave Appellant the right to bring any action he desires for damages.

The appeal must be dismissed with costs to include LP. 5.— advocate's fees to each of Respondents' advocates.

Delivered this 17th day of May, 1938.

British Puisne Judge.

CIVIL FILE NO. 111/37.

IN THE DISTRICT COURT OF HAIFA.

Before:—Izaat, J. and Shems, J.

In the case of:—

Raji and his wife Carmella Shleiwit — Plaintiffs.

v.

Jamileh bint Sama'n Jahshan — Defendant.

JUDGMENT.

Whereas the Plaintiff has expressly indicated that he does not wish to execute the contract, but only wants to recover the advance specified in his statement of claim, we told that this does not upset the liability of the Defendant to return the amount previously advanced to her by the Plaintiff or estop the Defendant from bringing an action or instituting any proceedings against the Plaintiff. Wherefore the Court unanimously decides that Defendant should return the advanced money to Plaintiff, a sum of LP. 500, and that the provisional attachment be confirmed with costs and interest from the date of action namely, 11/6/1937 until complete payment and LP. 2.— advocate's fees.

Judgment in presence subject to appeal given and delivered on 3.4. 1938.

CIVIL APPEAL NO. 95/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case of:—

1. Albert Cohen
2. David Cohen — Appellants.

v.

Moses Valero Respondent.

Estoppel to claim of Shuf'a by adjacent neighbour — Plan showing proposed road between two plots — Shafi' agreeing to plan prior to sale of plot — Legal interest on sum payable to losing party in action re Shuf'a.

1. If a person prior to sale of plot which he claims by right of Shuf'a signed a plan showing a proposed road between that plot and the plot owned by him and if defendant was aware of existence of that plan and of claimant having signed it and agreed to the proposed road, Plaintiff's action must be dismissed.

2. Defendant losing an action re Shuf'a may be awarded interest on the sum payable to him by Plaintiff as price of property claimed.

Levitsky for Appellants.
Mizrahi for Respondents.

Appeal from judgment of Land Court, Jerusalem, dated 9.3.1938.

JUDGMENT.

This is a second appeal from a judgment of the Land Court Jerusalem in the same matter.

The case concerns a claim for shufa' by the Respondent, who claims that he is the owner of property adjacent to that bought by the Appellants and that he is therefore entitled to have the land purchased by them transferred to him at the price paid by them to their vendor. The Land Court originally gave judgment for the Respondent, but when the case came on appeal before this Court in April, 1935, a plan was produced by the Appellants showing a road dividing the plots owned respectively by the Respondent and the Appellants and bearing the signature of the Respondent. It seemed that this plan had not been produced to the Land Court; this Court therefore allowed the appeal and remitted the case for the Land Court to consider this plan. The Land Court thereupon proceeded to do so, considered the plan, heard further evidence and in fact inspected the area in question. In their second judgment, they state that in their opinion the plan is merely, as it states, a "Proposed Development Scheme", and has no legal bearing on the cause of action, and that the result of the inspection showed that there was no sign of any road and that the area was simply a rubbish heap, and they gave judgment for the second time in favour of the Respondent. The Appellants have again appealed.

The appellants have raised many points before us, and have argued them at inordinate length. We are satisfied that with one exception,

there is nothing in them. Many of them were argued on the first appeal, and cannot now be raised again. The only point that merits any consideration is that of the date of signing of this plan, which is marked C 3. The Appellants have argued that the Respondent is now estopped from claiming shufa, because he had agreed, prior to the sale to Appellants, to a road being constructed between his land and the plot purchased by the Appellants, and that his signature on the plan C 3 is sufficient proof of this agreement.

The sale to the Appellants took place in March, 1933, and the Respondent says that he only heard of the sale in August, 1933, whereupon he immediately filed this action, and he argues further that the plan only contemplates a proposed scheme, and that in fact there is no road existing — that there can be no estoppel until the sale came to his knowledge, and that any waiver or estoppel must take place after and before the sale. He further argues that the Town Planning scheme could not become binding on anyone until approved by the High Commissioner, and that this approval was not given until the 16th January, 1934, — that is — a long time after the sale.

Actions regarding shufa' however, are always regarded strictly as these provisions, however suitable they might have been to a rural community, are totally unsuited to the conditions of modern life in civilized towns.

We think that before this appeal can be satisfactorily determined, that two points must be decided, first, did the Respondent sign the plan C 3 before the date of the sale to the Appellants or not, and secondly, if the Respondent did sign the plan before the date of sale, then were the Appellants at the time of purchase by them aware that a plan, showing a proposed road between the plot purchased by them and that owned by the Respondent, had been agreed to and signed by the Respondent and that the Respondent has agreed to a road being planned between the said two plots. To determine the first point it will be necessary to hear the evidence of the Respondent and to consider it together with that of Mr. Meyuhas who gave evidence in the Court below. If the plan were open to inspection by the public prior to the date of sale. When we think that that would be the presumptive evidence, at any rate, that the Appellants were aware of its existence. There may of course be other evidence of their knowledge. If the Appellants were aware of the existence of this plan, before they completed their purchase, then we think that they will be entitled to judgment, since, seeing that there was a road proposed between the two plots, they may well have been led to the opinion that the Respondent would not be claiming shufa', as by his own act he had

waived any right in that respect that he might have had. If they were not so aware, then the Respondent will be entitled to succeed.

If the Appellants fail on the main grounds of appeal, it has been admitted by the Respondent that the correct price is LP.528, and not LP.400, and the Land Court will then give judgment that the price is LP.528, and we also think that they will be entitled to interest at the legal rate on this sum. This will be in addition to the other items awarded in the judgment now set aside, though we would observe that the phrase "expense incidental to the sale" should be detailed in order to avoid further argument.

The appeal must therefore be allowed, and the judgment appealed from set aside, and the case remitted to the Land Court for the consideration of the points and observations set out above and for a new judgment to be given.

Costs of this appeal will await the result of the retrial.

Delivered this 30th day of May, 1938.

British Puisne Judge.

CRIMINAL APPEAL NO. 54/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Shafiq George Halaby — Appellant.

v.

The Attorney General — Respondent.

Conviction on a charge other than original charge — Attempt of rape — Undecent act —Interpretation of sec. 52 of Criminal Procedure (Trial upon Information) Ordinance — Corroboration of complainant's evidence in sexual offences — Identification of accused and identification of his coat.

Criminal Code Ordinance, sec. 152, 157, *Criminal Procedure (Trial upon Information) Ordinance, sec.* 52.

1. Where the theoretical findings of facts, i.e. not the actual findings of facts in the particular case, include findings necessary to establish a lesser charge, accused can be convicted of that lesser charge.

2. In order to convict of sexual offences the evidence of complainant must be, to some extent, corroborated.

3. Identification by a witness of accused's coat, car or the like — not corroboration of witnesses' evidence.

Edit. Note:—As to 1 see: Cr.A. 13/38, Ct.L.R. III. 70.
As to 3 see: Cr.A. 39/26, P.L.R. I. 90.

Cattan for Appellant.

Crown Counsel (*M. J. Hogan*) for Respondent.

Appeal from judgment of District Court, Jaffa, dated 26.4.1938, whereby Appellant was convicted of committing an indecent act by use of force, contrary to Section 157 of the Criminal Code Ordinance, 1936, and sentenced to eighteen months imprisonment.

JUDGMENT.

This is an appeal from the District Court of Jaffa which convicted the accused, the Appellant, of an indecent assault under Section 157 of the Criminal Code Ordinance.

During the hearing we discussed at considerable length the effect of Section 52 of the Criminal Procedure (Trial Upon Information) Ordinance, Mr. Cattan submitting on behalf of the Appellant that by reason of that Section and the interpretation which was given to it by the Court of Criminal Appeal No. 13/38*) the Court of trial was not justified in convicting the accused, in that he was originally charged with attemps to commit offences under Section 152 and that the Court substituted a conviction under Section 157. The point is of considerable importance. Section 52 of the Criminal Procedure (Trial Upon Information) Ordinance provides:—

> "The Court may find an accused person guilty of an attempt to commit an offence charged, or of being an accomplice or accessory thereto, or may convict him of an offence not set out in the information and without amendment of the information if such offence be covered by the evidence in the case and by the findings of facts necessary to establish an offence charged."

The important words with which we are concerned are: "if such offence be covered by the evidence in the case and by the findings of facts necessary to establish an offence charged". Taken literally, that Section may be said to be ambiguous. It has always been interpreted by the Courts, I think, as meaning that where the theoretical findings of facts, that is, not the actual findings of facts in the particular case, include findings which are necessary to support a lesser charge the accused could be convicted of that lesser charge. Take the most common and simple example, that is, where the accused is charged with murder; it is necessary to have a finding of fact that the accused has killed the deceased. The Courts have taken the view, and so far as I

*) Ct.L.R. Vol. III. p. 70.

am concerned, I think rightly, that the charge may be changed and the accused may be convicted of any lesser offence involving killing. In this particular case, we are of opinion that the theoretical findings of facts necessary to establish a charge under Section 152 cover the facts necessary to establish a charge under section 157, if I may so put it, the greater includes the lesser, and we are of opinion that the Court below was justified, so far as that part of the case is concerned, in doing what it did. The distinction in the case to which I have referred (No. 13/38) is that it was there necessary in order to convict to introduce some finding of fact not merely to bring the case within the findings of fact necessary for the original charge.

It was also argued that there was no sufficient corroboration to justify this conviction. It is quite clear that according to English Law which for this purpose now applies, in order to convict of sexual offences, the evidence of the complainant must be, to some extent, corroborated. It is obvious that, as a matter of safety, this must be so, otherwise charges could be made which it might be very difficult for an innocent person to refute. The only evidence in this case which could possibly be regarded as corroboration is the evidence of a witness, Goldberg, to whom the girl made a statement and the girl's own identification.

> "She told me a man had taken her in his car and had attempted to rape her. She said she would recognise the man if she saw him again. Next morning I took her to the Police Station where she gave a statement."

and he also describes her condition when she came to him as follows:—

> "She came to my house one night. She left us about 10.00 p.m. to go home. At 1.00 a.m. she came back. She was distressed. She had a wound on her eye. Her hair was disordered and she had blood on her hand. Her clothes were all disarranged."

We are of opinion that that is not sufficient to corroborate her story against the accused.

It is also said that she identified the accused and identified the motor-car. This seems to me very much on the same lines as the evidence of Mrs. Arlozoroff in Attorney General v. Stavsky and others, who identified one accused and his coat, and the Court, in that case, took the view that that was one identification and the identification of the coat was not corroboration of the witness' story. In the circumstances, we do not think it would be safe to convict on the evidence in this case. We therefore discharge the accused unless he is detained on any other charge.

Delivered this 30th day of May, 1938.

Chief Justice.

HIGH COURT NO. 28/38.

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:—

Badiah Nicola Kassis of Ramallah — Petitioner.

v.

1. Chief Execution Officer, Jerusalem
2. Khalil Issa Rashed — Respondents.

Execution of judgments of Religious Courts — Enquiry by Chief Execution Officer if matter within jurisdiction of Religious Court, if Court properly constituted etc. — Catholic Melkite Community — Meaning of "alimony" and of "maintenance" — Matter for Special Tribunal.

1. Civil Courts justified in enquiring, before executing judgments of Religious Courts, if matter prima facie within jurisdiction of Religious Court, if Court was properly constituted and if judgment not contrary to natural justice.

2. Melkite (Catholic Church) — one of the recognised Communities contemplated by Order-in-Council.

3. "Alimony" and "Maintenance" in Order-in-Council must be given their english meaning.

4. Where a question arises as to whether matter is one of alimony and so within exclusive jurisdiction of Religious Court or one of mainteance and, in absence of consent of both parties, outside its jurisdiction, it has in first instance to be referred to a Special Tribunal.

Edit. Note:—As to 1 see: C.A. 62/37, Ct.L.R. II, 133; H.C. 49/37 Ct.L.R. II, 112; S.T. 1/28 P.L.R. I, 395;

As to 3 see: C.A. 178/34, P.L.R. II, 282; H.C. 49/32 5 C of J 1610;

As to 4 see: H.C. 52/37 Ct.L.R. II, 138.

Abcarius for Petitioner.

G. Salah & Eliah for 2nd Respondent.

Application for an order to issue to the First Respondent directing him to show cause why his order dated the 8th April, 1938, should not be set aside.

JUDGMENT.

By the Palestine Order in Council certain jurisdiction is vested in certain Religious Courts and by that Order the execution of the judgments of those Courts is effected through the process and offices of the Civil Courts.

In such execution proceedings the Civil Courts have in the past enquired if the matter was, prima facie, within the jurisdiction of the Religious Court, if that Court was properly constituted, and objection

was taken in one case to a judgment which was found to be contrary to natural justice*). In my view, the Civil Courts are justified in enquiring into these matters before executing the judgments of the Religious Courts.

It was argued before us that the Catholic Melkite Church was not one of the Communities contemplated by the Order-in-Council. This point was considered by the Chief Justice in the case of Salim Khayat v. Marie Khayat before the Special Tribunal — Rutenberg, 1244 when after discussing the history of the Community His Honour held —

> "I have no doubt that the Melkite is one of the recognised Communities for the purpose of my present jurisdiction".

We see no reason to disagree with this finding.

The Order-in-Council, in dealing with the jurisdiction of the Courts of the several Christian communities draws a distinction between matters of marriage and divorce, alimony, confirmation of wills and the jurisdiction in other matters of personal status as defined in Article 51. In the latter case they have no jurisdiction unless all the parties consent.

In Civil Appeal No. 62/37*) this Court held that the words "alimony" and "maintenance" in the Order-in-Council should be given their English meaning, and, no doubt having that judgment in mind, the Execution Officer, in the order with which we are concerned, stated, that as the proceedings were in respect of maintenance, the Religious Court had no jurisdiction, and therefore refused to execute the order.

The question, therefore, arises whether the case is one of personal status within the exclusive jurisdiction of a Rligious Court, as it would be if the amount awarded were alimony, or if both parties had consented to the jurisdiction of the Court, or if the case is not within the jurisdiction of such a Court as it might not be if the amount awarded was maintenance, in contradistinction to matters of marriage and divorce, and the parties had not consented to the jurisdiction.

Article 55 of the Order-in-Council provides that when a question arises as to whether or not the matter is one of personal status within the exclusive jurisdiction of the Religious Court it shall be referred to a special tribunal, and in my view the position in this case is the same as in High Court case 52/37;**) where this Court decided that in the first instance the question should be referred to a special tribunal to decide whether the matter was in the circumstances one of such personal status.

In my judgment the rule should be discharged and the matter so referred. Delivered this 7th day of June, 1938.

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*) C.A. 62/37 Ct.L.R. Vol. II. p. 133. **) Ct.L.R. Vol. II. p. 138.

CIVIL APPEAL NO. 20/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Zahra Yehya Akel — Appellant.

v.

Khalil Ibrahim Abu Alayyan — Respondent.

(*Judgment of Trusted, C. J.*)

Reinstating case without fees — Meaning of Art. 111, *Ottoman Civil Procedure Code — Liquidated damages and penalty — Scope of art.* 46 *of Palestine Order-in-Council.*

1. President not entitled to make an order reinstating case without fees.

2. Fact that (by order of President) fees have not been collected does not oust jurisdiction of Court to try case.

3. Art. 111 of Ottoman Civil Procedure Code provides for enforcement not only of liquidated damages in sense of pre-estimated compensation but also of what English Law should regard as a penalty.

4. Where there is an unambiguous provision of Palestinian law, English principles (of common law and of equity) not to be applied. Art. 111 of Ottoman Civil Procedure Code — unambiguous, and cannot be modified by resorting to art. 46 of Palestine Order-in-Council or P.C.A. 1/35.

For Appellant: Her son.

Respondent in person.

Appeal from judgment of District Court, Jerusalem (50/36), dated 25.10.1937.

JUDGMENT.

By a contract in writing dated 3rd November, 1934, El Sitt Zuhra, a Moslem lady, undertook to sell and transfer to Khalil Abu Alayyan certain lands amounting to some 279 dunums, at LP. 750 per dunum. She undertook to hand over the lands, free from disputes, etc., within forty-five days. LP. 650, part of the purchase price, was to be paid in advance, and clause 10 of the agreement provided as follows:—

> "Any of the parties committing a breach of this contract or of any of its provisions he will be liable to pay to the other party the sum of LP. 1500 as calculated damages."

It seems that the LP. 650 and other sums on account of the purchase price were paid, and agreements, as to the effect of which

there was some dispute, were made by the lady "represented by" her son and signed by him, extending the time for completion.

In the result, the property was not transferred and the purchaser brought an action in the District Court to recover the moneys paid on account of the price, amounting to LP. 1331, and LP. 1500 as damages.

Owing to the non-appearance of the Plaintiff or his advocate, the case was struck out on 6th February, 1936. It was re-instated without the payment of fees, the actual order being as follows:—

> "The Court has reached the limit of patience with last minute adjournments and let it be understood that this will be the last occasion any leniency will be exercised. Case may be re-instated without fees."

Several hearings took place in December, 1936, and January, 1937, but owing to the illness of one of the judges the case was adjourned and re-heard by another Court which, on 25th October, 1937, found —

> "The Court is satisfied that Defendant has broken the contract, having failed on his (her) own admission to transfer the land. Moreover, Defendant admits, and it is clear that LP. 1331 were paid by Plaintiff as purchase money. The Court is also satisfied that the amount of the damages payable is the sum stated on the original agreement, viz. LP. 1500.
>
> "The Court therefore gives judgment for Plaintiff for LP. 2831, costs and advocate's fee LP. 8."

The Defendant (that is the vendor) now appeals to this Court.

Unhappily she is not represented by an advocate but is assisted by her son, who argued the case for her. The Respondent also appeared in person.

The grounds of appeal occupy eleven pages and it is not easy to discover exactly what they are, but in my view there are two points of substance; in the circumstances, had the District Court jurisdiction to try the case; and, is the sum of LP. 1500 described in the contract as calculated damages, and in the statement of claim as liquidated damages, recoverable.

As to the first point, Rule 13 of the Court Fees Rules, 1935, provides that when an action is struck out it may be re-instated upon the payment of half fees or full fess, according to the circumstances, or the Court, when ordering an action to be struck out, may order that it may be restored without fees. I do not therefore think the learned President was entitled to make the order which he did reinstating the case without fees. I do not however think that because fees had not been collected the Court had no jurisdiction.

The second question raises several points of importance, which it is desirable should be authoritatively settled.

There is a judgment of this Court, No. 191/1937,[1]) to which I will refer later, which deals with some of them and which I understand is under appeals to the privy Council. I do not know if the present appeal will be carried further, but I will state my views upon the points involved.

Article 111 of the Ottoman Civil Procedure is generally translated as follows:—

> "If the contract contain a clause binding either party in case of non-performance to pay a definite sum to the other party by way of damages, such sum may be awarded as damages, but neither more nor less than such sum."

On first reading it the English lawyer is inclined to enquire, does "damages" mean in the English sense of compensation, a genuine pre-estimate of which will be enforced, or is it wide enough to include what to English law is known as a penalty.

I am told that the word in the Turkish text is "tadminat" which should be given the wider meaning, and it may be interesting to note that in the Turkish commentaries on Article 111 the following example appears:—

> "If a mason undertakes to build a shop in accordance with an agreement, within a period of one month, and if it be provided in the contract that the mason shall pay as "tadmin" the sum of LP. 50, if he does not deliver the shop within the time agreed upon, and if he commits a breach thereof for any reason, he shall be obliged to pay the LP. 50 tadminat, so that if the other party contends that his loss was more than LP. 50 or if the mason contends that the other party's loss is less than LP. 50 no notice shall be taken thereof but the sum of LP. 50 shall be awarded."

There is no doubt that the Turkish Courts and the Courts of this Territory have given the article the wider meaning and enforced penalties. The question has been before this Court on numerous occasions and so far as I am aware this has been done without dissentient voice, examples will be found in Civil Appeals No. 85/26[2]) and 44/27,[3]) 43/28,[4]) 53/32[5]) and 93/32[6]) and I understand that in Civil Appeal 191/37[1]) this Court agreed with that view, subject to the application of the provisions of the Palestine Order in Council.

I am of opinion that the wider meaning is the right meaning of Article 111, and that it provides for the enforcement of what in English law might be a penalty. The question arises therefore, is it to be modified by the Palestine Order in Council.

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[1]) Ct.L.R. II. p. 169. [2]) 1 C of J 377. [3]) 1 C of J 381.
[4]) 4 C of J 1375. [5]) 2 C of J 435. [6]) 5 C of J 1790.

The material article is 46. This lays down that certain laws — within which Article 111 is included — shall apply in Palestine and goes on to provide that — "subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrine of equity in force in England," and there is a proviso as follows:—

> "Provided always that the said common law and doctrine of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary."

To guide the Courts of this Territory in the application of this provision there are two judgments of the Privy Council. The first is Abdullah Chedid v. Tanenbaum P.L.R. 831[7]). That case appears to be authority for the proposition that if any branch of the law, as to which there are certain provisions in the Palestine laws, is in the English sense defective, that defect may be made good by regard being had to English principles. That case dealt with the law of contract, as to which there are provisions in the Mejelle, and the Courts here have in other instances modified or amplified those provisions by English law, e. g. the doctrine of consideration has been introduced, see Civil Appeal No. 9/31, P.L.R. 593.

Similarly the Law of Evidence has been amplified by the introduction of English principles, see Criminal Appeal 19/38,[8]) which deals with confessions, and certain English principles have been applied to bills of exchange

Again the Trade Marks Ordinance contains no definition of "distinctive" and the English definition has been applied. High Court 13/38,[9]) and other instances could be cited.

In Civil Appeal 138/37,[10]) Manning, J. in this Court expressed the view that — "If the Ottoman Law is considered too vague and general to extend and apply to the circumstances of the case, the principles of English law may be resorted to."

Some doubt may have been thrown upon this principle by Civil Appeal 240/37[11]) in which Manning, J. stated — Khayat agreeing —

> "It may be as well that I should state my view on what I conceive to be the effect of Article 46 of the Order-in-Council. So far as the Ottoman Law and local legislation do not extend or apply the jurisdiction of the Courts is exercised in conformity with the common law and the doctrines of equity in force in

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[7]) P.C.A. 47/32.
[8]) Ct.L.R. Vol. III. p. 155.
[9]) Ct.L.R. Vol. III. p. 140.
[10]) Ct.L.R. Vol. II. p. 73.
[11]) Ct.L.R. Vol. III. p. 104.

England. The Law of Equity, as it is known in England, has no counterpart in the Ottoman Law; that is, the doctrines are not collected as one definite part of the substantive law, though some of them may well be present to the minds of judges and others who have to expound the law. In general the Ottoman Law does not extend as to comprise the doctrines of equity in force in England. These doctrines may therefore be applied so far as the circumstances of Palestine and its inhabitants permit; if they already exist in Ottoman Law, well and good; if they do not exist, they may be resorted to. Where, however, there exists an Ottoman Law on particular subjects, such as sale, hire, guarantee or agency, then that law both extends and applies to all questions that have to be determined with reference to these species of contracts. Two things have to be remembered, first, that the law in force is the Ottoman Law as it existed on November 1st, 1914, save in so far as it has been altered by legislation. The second thing is that the Mejelle is not exhaustive. I am in agreement with what Mr. Hooper says at p. 23 of Volume II of his "Civil Law of Palestine and Trans-Jordan" —

> "As regards points where the Code is silent, it is submitted that it is the obvious duty of Courts to examine the sources in order to ascertain what the law is."

In the present case we are dealing with the law of guarantee. The Ottoman Law has its own law of guarantee. It is silent on the doctrine of consideration and it must be concluded that it never occured to the lawgiver to include such an artificial restriction on the freedom to contract. Where there is no Ottoman Law dealing with branches of jurisprudence which are necessary to the ordered life of civilised communities, such as those branches of the law of torts which are concerned with negligence and defamation, then the Courts of Palestine have to consider whether in the circumstances English common law may be resorted to.

"Further the English doctrine of consideration stated in its simplest form is that a promise not under seal cannot be enforced unless there is consideration to support it. The Ottoman Law knows of no such distinction as that between simple contracts and contracts under seal, and it is difficult to see how the English doctrine could ever be applicable in Palestine. When the law as to a contract is covered by the Ottoman Law, then the Ottoman Law on the particular kind of contract has to be studied to see if consideration is necessary . In the judgment of the Court below and in the argument before us local cases were cited in which agreements had been held to be unenforceable because they were not supported by consideration. These agreements were not guarantees and the authorities are therefore not applicable. It must be assumed that the Court in these cases found that consideration was necessary in the particular kinds or contract with which the cases were concerned."

and Frumkin, J. said —

> "It is quite clear therefore that on this point the Mejelleh is exhaustive, and contains no provision that consideration is required in order to make a guarantee binding, and it is therefore not necessary to resort to either Section 46 of the Palestine Order-in-Council or to the sources of the Mejelleh."

With respect I find it difficult to appreciate why the law in the Mejelleh as to guarantees is to be regarded as exhaustive, when other matters dealt with therein are not so regarded, and in so far as this case lays down that regard is not to be had to the English principle of consideration in the case of guarantees it appears to me to be inconsistant with principles followed in the earlier authorities.

These authorities in my judgment lay down the proposition that a lacuna or ambiguity in any branch of the law of this Territory can be made good by resort to English Common Law and Equity, and if this proposition be accepted the question arises — can it be carried further, and an express provision, which is contrary to such English law, be in consequence varied; e. g. Section 5, Partnership Ordinance, Chapter 163, makes certain provision as to infant partners — are these to be modified by English principles? Or, in the terms of the present case — assuming that these Courts were right in the view which they have taken, that Article 111 means that the sum agreed upon will be adjudged notwithstanding that it may amount to what the English law would regard as a penalty, is that express provision to be modified by regard being had to the English distinction between damages and penalty?

The question has recently been considered by another division of this Court in Civil Appeal 191/37, to which I have already referred. As I understand the judgment in that case on this point it lays down that although the Courts in the past have given the meaning to Article 111 which I have indicated, the Judicial Committee of the Privy Council in earlier proceedings between the same parties, P.C. No. 1/35[12]) (the other case before the Privy Council to which I referred) have held that the English principle is to be applied. The actual words of Manning, J.'s judgment are:—

> "I take it that their Lordships have held the distinction between a penalty and liquidated damages forms, and has formed since the date of the Order-in-Council, part of the Law of Palestine."

From their Lordships' judgment it appears that two actual questions were before the Board upon which the case was remitted for determination — one was as to Article 112 of the Ottoman Code of Civil

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[12]) P.L.R. Vol. II. p. 390.

Procedure; the other, whether Article 111 was limited to cases of non-performance of the whole contract. Their Lordships then referred to the Order in Council and went to say —

> "All that it is necessary to say about that is that in exercising any such jurisdiction and in dealing indeed with the present case no doubt the Courts will bear in mind the powers which are vested in them under article 46, subject to the provision of the Ottoman Law and the Order-in-Council and the Ordinances in force, to exercise their jurisdiction "in conformity which the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the peace of England". There is the necessary proviso, of course, "that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit, and subject to such qualification as local circumstances render necessary." All that, of course, has to be very carefully considered; but, subject to all those observations, their Lordships think there can be no doubt that the provisions of the Order-in-Cuncil do enrich the jurisdiction of the Courts in Palestine with all the forms and procedure and all the different remedies that are granted in England in common law and equity and also enrich their jurisdiction with the principles of equity, among other things the well-established distinction between a penalty and liquidated damages. All that their Lordships say is that no doubt the Courts in Palestine when dealing with this question and any other question that arises will bear in mind the provisions of article 46 of the Order-in-Council."

I do not take this to be a decision that Article 111 is to be modified by the English principle but a direction to these Courts to consider carefully whether the English principles, inter alia the one with which we are concerned, apply, or having regard to local circumstances, should be applied.

In my judgment, bearing in mind the provisions of Article 46 of the Order in Council to which I have referred where there is an express unambiguous provision of Palestinian law the English principles are not to be applied, and that provision should be enforced, and in my view Article 111 is such a provision.

It is obvious that the provisio to Article 46 imposed a burden upon the Court and would seem to vest in them some of the functions of a legislature. Having expressed the view which I have, it is unnecessary to consider them in relation to this case. It may be of interest to recall that in the Palestine Gazette of 7th March, 1935, a bill, entitled the Damages Bill, was published modifying article 111 with regard to contracts for the sale of immovable property, and that in the Pales-

tine Post of 15th March, 1935, an article appeared headed: "POLITICS IN LEGISLATION — The Damages Bill 1935", by Bernard Joseph, leading advocate and English barrister. The Article in question was a long attack upon the bill. For reasons for which it is not for me to enquire, the bill has not been promulgated.

I regret that I should differ from another division of this Court and from the other members of this Court, but I feel justified in doing so as I am following a long series of judgments of this Court, and the other decision of this Court from which I differ is, as I have stated, being taken to the Privy Council.

No questions arose in this present case as to mutual obligations nor that the breach did not go to the root of the contract.

In my judgment the appeal should be dismissed, but the other members of this Court think otherwise.

Delivered this 28th day of May, 1938.

Chief Justice.

(*Majority judgment, Khayat, J. and Khaldi, J.*).

1. Art. 111 of Ottoman Civil Procedure Code deals with damages only and does not provide for penalty and its limits.

2. English principles (of common law and of equity) must be applied when Ottoman Laws are silent on point in issue.

3. Courts not precluded from enquiring into, and modifying, sum agreed upon, as damages in cases in which they feel that it is by way of penalty and not damages.

4. If Court finds that sum stipulated in contract as liquidated damages is penalty, it has to require Plaintiff to prove amount of damages he suffered.

Khayat, J.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jerusalem, whereby the Appellant was ordered to return to the Respondent the sum of LP. 1331.— paid by the latter as purchase money together with the sum of LP. 1500.— damages on a breach of agreement by reason of Appellant's failure to transfer the land purchased to the Respondent.

The only important point in this case is the interpretation to be given to Article 111 of the Ottoman Code of Civil Procedure. This Article is stated to have been taken from Article 1152 of the French Civil Law. The latter Article contains provisions dealing with damages, and the Ottoman Legislator did not import from the French Law the provisions dealing with penalty which are to be found under Articles 1226 et seq of that Law. And in spite of the fact that the Turkish Courts, as well as the Palestinian Courts, did not distinguish between penalty and damages, I am of opinion that Article 111 of the Code of Civil Procedure does not provide for penalty and its limits. As to the question whether the restriction provided for in Article 111, "prohibiting the Courts from interfering with the amount agreed upon as liquidated damages," includes penalty or not, and bearing in mind the established principle that when there is a restriction in the law, that law cannot be generalised, I am of the opinion that it is difficult to hold that penalty falls within the ambit of the said Article. If that Article then contains provisions dealing with damages only and prohibits the Courts from enquiring into the amount agreed upon, I can see no other provision in the Ottoman Laws dealing with penalty and, further, the Courts are not precluded from enquiring into, and modifying the sum agreed upon, in cases in which they feel that the amount involved is by way of penalty and not damages.

It is not disputed that most of the contracts entered into in Palestine do not distinguish between damages and penalty, and it frequently happens that what is termed as damages is, in fact, intended to secure the execution of the contract and not the liquidated damages that may result from the non-execution of the contract — the amount stipulated in the contract is in no way proportional to the anticipated damages at the time of making the contract. Is this course in conformity with the principles of justice, or, is it not advisable to apply the English principles of Equity in such cases? Before deciding this point, I find it necessary to consider the provisions of Article 46 of the Palestine Order-in-Council which lay down that the substance of the common law and the doctrines of equity in force in England shall be applied where the Ottoman Laws do not apply or extend to the point arising in a case. In my view, if Article 111 of the Code of Civil Procedure was applied generally and no distinction was ever made between damages and penalty, this is due to the interpretation given thereto by the Turkish Courts, and, as I have already said, there is no provision in the Ottoman Laws, as in the French Civil Law, dealing with penalty.

I am therefore of the opinion, so long as Article 111 of the Civil

Procedure Code deals with damages only and so long as there is no provision in the Ottoman Laws dealing with penalty, that the Courts of Palestine may, if it is established to their satisfaction, from the circumstances of the case before them, that the amount stipulated as being damages, exceeds any damage that may possibly be suffered or that may happen, or that there is no damages at all and that the amount was put in merely as penalty, enquire into the matter and decide whether the amount is by way of damages or by way of penalty, and the determination of such a question is to be left to the Courts below without any condition or restriction. It may be argued that the question of importing the principle of imposing penalty or rejecting it, or estimating and limiting it, in contracts, when there is no clear provision in the Ottoman Laws, is a wide interpretation by the Courts which falls near to legislation and may be taken to mean that the Courts have exceeded their jurisdiction, but as Article 46 of the Palestine Order-in-Council provides clearly that the substance of the common law and the doctrines of equity in force in England shall be applied when there is no clear provision in the Ottoman Laws, or where these Laws do not apply or extend, I am of the opinion that the Courts are covered against any such argument with regard to creating legislation or exceeding jurisdiction, and that the English principles must be applied when the Ottoman Laws are silent on the point in issue. It is also my view that the application of English principles in cases of this sort will not in any way cause confusion in the circumstances of Palestine.

In my view the appeal must be allowed, the judgment of the Court below is set aside and the case remitted to that Court to determine whether the amount stipulated in the agreement is damages or penalty, and, if it is established to the satisfaction of the Court below that that amount is penalty, to require the Respondent to prove the amount of damages he suffered.

As the appeal has been allowed on the point stated above, I do not propose to deal with the other points raised in the appeal which are not of vital importance to this appeal.

Costs to abide the event.

Delivered this 28th day of May, 1938.

Puisne Judge.

Khaldi, J.

JUDGMENT.

I entirely concur in the judgment, the reasons contained therein and the conclusions arrived at by my brother Khayat, J. and this

case is similar to Civil Appeal No. 191/37 in which I laid down the same principle laid down by my brother Khayat, J. in the present appeal.

The appeal must, therefore, be allowed, the judgment of the District Court be set aside and the case remitted to the District Court to determine whether the amount stipulated in the agreement is damages or penalty and if it be established that that amount is penalty to require the Respondent to prove the damages he suffered.

Costs to abide the event.

Delivered this 28th day of May, 1938.

Puisne Judge.

CIVIL APPEAL NO. 6/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Nathan Sheinkar — Appellant.

v.

Dov Segalovitch — Respondent.

Application and opposition re confirmation of award — Setting aside award without application to that effect — Refusal of Court to enforce award.

Court cannot set aside award if no application before it to that effect but when there is an application to enforce award and an opposition thereto, it can refuse then application to enforce the award.

Fellman for Appellant.

Hamburger for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated 14.10. 1937.

JUDGMENT.

This is an appeal from the judgment of the District Court of Tel-Aviv coming to us by way of leave to appeal on the ground that the District Court could not set aside an award by the arbitrators when there was no application before it to that effect. The Appellant had applied for leave to enforce the award and the Respondent filed an opposition thereto.

It is obvious that the District Court on hearing the case rejected the original application for the enforcement of the award. Therefore, the judgment of the District Court will be amended, to the effect that they refuse to enforce the award.

The appeal will be dismissed without costs.

Delivered this 25th day of May, 1938.

British Puisne Judge.

Frumkin, J.

JUDGMENT.

Leave to appeal in this case was granted on the ground that the Respondent in opposing, in the Court below, the application for the enforcement of the Arbitration Award, did not formally ask the Court that the Award be set aside nor did he pay the necessary fees for such application. The Court not being moved, could not set the award aside on its own motion.

On the evidence before it, however, the Court below could certainly come to the conclusion that they could not enforce the award.

The judgment of the District Court will therefore be amended to the effect that the application for the enforcement of the Award be refused. The appeal is dismissed without costs.

Delivered this 25th day of May, 1938.

Puisne Judge.

CAUSE LIST.
(Supreme Court).

1. January, 1938 — 30. April, 1938.

NOTE:

1. Pages refer to Ct.L.R. Vol. III.
2. Remarks: * under Editor's consideration.
— withdrawal or striking out of appeal; settlement by parties; no point of law involved.
P appeal pending.

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CORRIGENDA:

p. 174 line 7 bottom, *read*: No. 23/38 for No. 22/38.
p. 145 line 7 top, *read*: ending for enduing.
p. 145 line 8 bottom, *read*: consistant for consisted.

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COORIGENDA.

The first eight pages in No. 20 dated 20.5.1938 of this Volume have been numbered by mistake 225—232 instead of 233—240. These eight pages beginning with C.A. 56/38 have therefore to be numbered 225a, etc. to 232a.

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The first eight pages in No. 20 dated 20.5.1938 of this Volume have been numbered by mistake 225—232 instead of 233—240. These eight pages beginning with C.A. 56/38 have therefore to be numbered 225a, etc. to 232a.