Current Law Reports

Editor: M, LEVANON, Advocate, Central Bldg. Jerusalem

VOLUME IV

(1st July, 1938 — 31st December 1938)

Weiss Press, Jerusalem

HIGH COURT NO. 39/38.

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

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

In the application of:—

Abraham Trainin — Petitioner.

v.

1. Chief Execution Officer, Tel-Aviv.
2. Bank Haolim Eretz Israel Polania Ltd. — Respondents.

Interim stay of execution — Attached properties required from custodian and not available — Custodian liable for judgment debt or for value of attached goods? — Liability in case of two or more custodians — Points not raised before Chief Execution Officer — Revision by Chief Execution Officer of his previous decision.

1. High Court will not grant order nisi in a matter of execution on points not raised before Chief Execution Officer, which the petitioner has still opportunity to put before him.

2. Chief Execution Officer may, if he finds it fit, revise his decision on new points being put before him.

Edit. Note:—As to 1 see: H.C. 32/38 3 CtLR 273 and Edit. Note thereto.

As to 2 see: H.C. 36/38 3 Ct.L.R 277 and Edit. Note thereto.

P. Goldberg for Petitioner.

Ex-parte.

Application for an order to issue to the 1st Respondent directing him to show cause why his order dated 30th May, 1938, should not be set aside, and for an interim order to stay execution.

ORDER.

We refuse to issue an order nisi in this petition.

The gist of this application is that the petitioner undertook to keep under his safe custody certain attached properties, and when they were required from him they were not available. He was liable for their safe custody and as such he is considered a third party.

There are two other points which might have some substance i.e. (a) whether the petitioner is liable for the judgment debt or for the value of the goods attached, and (b) whether he is liable for the whole amount or for the half of it, as, it is alleged, there was another person who also undertook to keep the goods attached in safe custody.

These points were not raised before the Chief Execution Officer, and the Petitioner has still the opportunity of putting them before him, and should the Chief Execution Officer find it fit, he may revise his decision.

For the above reasons the order nisi is refused with costs.

Given this 8th day of June, 1938.

Acting Chief Justice.

HIGH COURT NO. 44/38.

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

Before:—The Acting Chief Justice (Copland, A. C. J.) and Khayat, J.

In the application of:—

Shlomo A. Beibe — Petitioner.

v.

1. Chief Execution Officer, Tel-Aviv
2. Rachel Beibe — Respondents.

Execution of judgment of Rabbinical Court — Burden of proof when party claims to be a foreigner — Implied consent to jurisdiction of Religious Court — Claim of maintenance before Religious Court.

1. Person claiming to be foreigner must prove it.
2. Appearing and arguing before Religious Court must be considered as consent to its jurisdiction.

Edit. Note:—As to 1 see: A.A. 15/27 2 C of J 491 (presumption that person in Palestine is Palestinian);

As to 2 see: C.A. 12/37 1 Ct.L.R. R. 44. H.C. 34/35 2 P.L.R. 345; H.C. 29/30 1 P.L.R. 462; C.A. 127/26 1 P.L.R. 109; H.C. 70/28 1 P.L.R. 342; C.A. 163/33 5 C of J 1614; H.C. 5/30 1 C of J 131.

Felman for Petitioner.

Ex parte.

Application for an order to issue to the first Respondent directing him to show cause why his order dated the 6th May, 1938, in Execution File No. 17568/37, Tel-Aviv, whereby he ordered the execution of the judgment of the Rabbinical Court, dated the 14th November, 1937, should not be set aside and why the execution of the said judgment should not be stopped; and that the Execution Officer, Tel-Aviv, be ordered to forward the Execution File No. 17568/37 to the

High Court to form part of these proceedings as petitioner has no money to make certified copies of the contents of the said file; and that the execution proceedings be stayed pending the determination of this petition.

ORDER.

This application is dismissed on the following grounds:—

(*a*) When a person says he is foreigner he must produce his proof that he is a foreigner;

(*b*) When he appears before a Religious Court and argues before it he must be considered to have consented to its jurisdiction; and

(*c*) Maintenance is one of these matters to which consent could be given to come within the jurisdiction of the Religious Court.

The Application is therefore refused.

Given this 21st day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 115/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

1. Mohammad Hussein Khattab,
   on his behalf and on behalf of his son,
   Ahmad Mohammad Hussein
2. Salemah Hussein Khattab
3. Fatmeh Hussein Khattab — Appellants.

v.

1. Ahmad el Haj Yousef Hathat
2. Abdel Qader Haj Yousef Hathat — Respondents.

Possession of land — Admission by party as to possession — Record not containing any statement supporting finding of Court.

If finding of trial Court is based on an admission by party and record does not contain any statement supporting that finding, case will go back for evidence to be heard.

Edit. Note:—See C.A. 129/36 1 Ct.L.R. R. 45; C.A. 196/37 2 Ct.L.R. 187; C.A. 36/29 1 C of J 10.

Farajallah for Appellants.

Sa'id Hashem Shawa for Respondents.

Appeal from judgment of Land Court of Beersheba, dated 7.3. 1938.

JUDGMENT.

We have come to the conclusion that this appeal must be allowed.

The important point, it seems to us, on which the case will really hinge, is the question of possession. The Land Court, it is true, said in their judgment that the Plaintiffs, the present Appellants, admitted that the Defendants were in possession of the lands in dispute; in the record, however, we are unable to find any statement that the Respondents were in possession for the period of prescription. It is true that the Appellants in the Court below stated that they could prove their possession by evidence unfortunately, however, that evidence was not heard.

The judgment of the Land Court must be quashed and the case remitted to that Court to hear evidence re possession of both parties and to give a fresh judgment.

Costs to abide the event.

Delivered this 25th day of May, 1938.

British Puisne Judge.

P.C.L.A. (CIVIL APPEAL) NO. 134/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the application of:—

1. Amneh Mustafa Luswi
2. Mohammad Khalil Shihab el Din
3. Shafiqa Ali Jiha etc.
4. As'ad Khalil Shihab el Din
5. Safieh Khalil Shihab el Din

Applicants.

v.

1. Mohammad el Jurf, etc.
2. Miriam Mustafa el Jurf, etc.
3. Shafioya Ali Jiha etc.
4. Ahmad Hussein el Jurf, etc.
5. Abdul Aziz Abbas Mahmoud Farawi, etc.

Respondents.

Attachment of land to secure costs for Appeal to Privy Council — Strictness of requirements of bank guarantee.

When a bank guarantee is required by Court, no other form of security can be accepted.

Elia for Applicants.
Ankar for Respondents.

Application for leave to file a bond by a third person, suffering attachment of his property, in lieu of a Bank guarantee for LP.300.— as security for costs of the appeal.

ORDER.

This is an application for the substitution of a bank guarantee for the sum of LP. 300.— by an attachment of land to secure the costs for an appeal to the Privy Council. It has been laid down on previous occasions that when a bank guarantee is required by the Court, no other form of security can be accepted. We are not therefore prepared to vary the previous order of the Court, and the application is refused. The Respondents to have LP. 2.— as costs and advocate's fees.

Given this 24th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 127/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Elias Kuteit — Appellant.

v.

Dr. Ya'coub Khalil Zu'rub — Respondent.

Receipt and general discharge — Letters containing admission of debt later in date than general discharge — Inadmissibility of documentary evidence before appellate Court not produced in trial Court — Non interference of appellate Court with findings of fact of trial Court.

1. Findings of fact made by trial Court cannot be interfered with by appellate Court unless there is no evidence to support them or they are utterly unreasonable.

2. No documents admissible in evidence on appeal without proof that they were not available when case tried in Court below.

Edit. Note:— As to 1 see: C.A. 135/35 1 Ct.L.R. R. 17; C.A. 129/35 2 Ct.L.R. 14; C.A. 22/37. 2 Ct.L.R. 145; P.C.A. 38/28 1 P.L.R. 474.

As to 2 see:—OCCP Art. 192; L.A. 112/26 2 C of J 720; C.A. 100/24 2 C of J 771; C.A. 124/31 C of J 795.

Sahyoun for Appellant.

Fouad Atalla for Respondent.

Appeal from judgment of District Court, Haifa, in its appellate capacity, dated 14.4.1938.

JUDGMENT.

When this case was before the Magistrate's Court, the Magistrate, on the ground of the production by the Defendant of a receipt which purported to be a general discharge of all debts existing at its date between the parties, and on the admission by the Defendant that it bore his signature, dissmissed the claim of the then Plaintiff.

The defeated Plaintiff appealed to the District Court, who reversed the Magistrate's decision, holding that the receipt did not constitute a general release and also on the ground that the two letters which were produced to the District Court, and which were not produced in the Court below (Magistrate's Court) contained an admission by the Appellant that he owes money to the Respondent.

The present Appellant obtained leave to appeal to this Court. We do not think that the District Court had any right to interfere with these clear findings of fact made by he Magistrate, which there was ample evidence to support. The District Court can only interfere with findings of fact, when there is no evidence to support them, or if the findings are so unreasonable that no reasonable Court could have come to the conclusion to which it arrived. Neither of these essentials apply in this case.

The letters which were produced should not have been taken in evidence before the District Court without proof that they were not available at the time the case was tried before the Magistrate.

For these reasons this appeal must be allowed, the judgment of the District Court quashed and the judgment of the Magistrate restored.

The Appellant will have his costs on the lower scale fixed at LP. 10.— together with LP. 5.— fees for attending the hearing of this appeal.

Delivered this 15th day of June, 1938.

Acting Chief Justice.

HIGH COURT NO. 57 of 1938.

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

Before:—Acting Chief Justice (Copland, J.) and Frumkin, J.

In the appeal of:—

Henry Scharf — Appellant.

v.

Director of Medical Services — Respondent.

Application for licence to practise dentistry — Discretion of Director of Medical Services to grant or to refuse application — Discretion exercised reasonably — Dentists' Ordinance.

Director of Medical Services has complete discretion in dealing with applications for permits to practise dentisrty, and Court will not interfere if discretion exercised reasonably.

Edit. Note:—See H.C. 9/38 3 Ct.L.R. 111; H.C. of 1925 3 C of J 1188; H.C. 88/32 1 P.L.R 826.

Gavison for Appellant.

Crown Counsel (*Bell*) for Respondent.

Appeal under Section 6 of Dentists Ordinance (Cap. 49) from the refusal of the Respondents to grant the appellant a licence to practise dentistry in Palestine.

JUDGMENT.

This appeal fails. The reason for that is that the Director of Medical Services has under the Dentists' Ordinance complete discretion in dealing with applications for permits to practise dentistry.

The reasons why the Director refused to grant the appellant the permit is that he is the holder of a certificate from a French Institution which does not entitle him to practise in France. Under such circumstances no power can compel the Director to issue the permit.

For the above reasons the appeal is dismissed with costs fixed at LP. 5.—

Delivered this 8th day of June, 1938.

Acting Chief Justice.

Frumkin, J.

I concur with the judgment and the appeal must be dismissed as I do not think that the Director Medical Services has unreasonably exercised his discretion.

Puisne Judge.

CIVIL APPEAL NO. 59/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Greene, J. and Khayat, J.
In the appeal of:—
Kalman Schwartz — Appellant.
v.
Leo Zeidel — Respondent.

Appeal from Magistrate's Court without bond to cover Repondent's losses — Judgment on same matter and between same parties, yet not res judicata — C.A. 68/36 — C.A. 92/37.

1. On appeal from Magistrate's Court to District Court no bond to cover Respondent's costs necessary under Ottoman Civil Procedure Code.
2. Judgment of Court of Appeal on same matter and between same parties does not affect subsequent appeal, if first one may be treated as a mere application.

Pevsner for Appellant.
Zilberg for Respondent.

Appeal from judgment of District Court, Jaffa, in its appellate capacity, dated 30.6.1936, and delivered on 20.7.1936.

JUDGMENT.

We allow this appeal.

The question whether under the old Ottoman Code of Civil Procedure, on an appeal from a judgment of the Magistrate's Court to the District Court it was necessary for an appellant to produce a bond to cover the costs of the respondent, has been already decided by this Court in Civil Appeal No. 68/36*). In this case the Court held:—

> "So far it has not been the general practise to require such a guarantee to be produced, and there is no provision of law which requires it."

As to the point of "res judicata" raised by the respondent we do not think that the judgment of this Court in Civil Appeal No. 92/37**) on the very same matter and between the same parties, may be considered

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*) Ct.L.R. Vol. I. Rep. 46.

**) Edit. Note: In this case the Court of Appeal decided:—
"There is no appeal properly before us as leave was not granted by the judicial authority as laid down by law.
The appeal as it stands (there being no leave) must be dismissed" etc.

as affecting the present appeal. That one may be treated as a mere application.

The appeal is therefore allowed, the judgment of the District Court set aside and the case remitted to that Court to give a decision on the merits of the case.

Appellant to have LP. 2.— as cost including advocate's fees.

Delivered this 27th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 129/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Omar Yousef Farran — Appellant.

v.

1. Joseph Shabatai Ginsburg
2. Noah Ginsburg — Respondents.

Points not raised before Court — Divisibility of a party's evidence — Evidence in part an admission and in part an allegation.

1. District Court in its appellate capacity under no obligation to deal with points not raised by Appellant.

2. If party giving evidence admits facts establishing his liability and alleges other facts discharging him (wholly or partly) from his liability, onus is on him to prove his allegations.

Edit. Note:—In this case defendant was summoned by plaintiff to give evidence.

As to 1 see: C.A. 72/38 3 Ct.L.R. 229 and Edit. Note thereto.

G. Salah for Appellant.

Levin for Respondents.

Appeal from judgment of District Court, Haifa, in its appellate capacity, dated 14.4.1938.

JUDGMENT.

We need not trouble you Mr. Levin.

In this appeal three points have been raised before us, none of them of any substance.

The first point is that the cause of action was changed; nothing of the kind occured, because part of the original claim was for rent, the balance, not for rent, was dropped by the Plaintiff in the original action.

With regard to the claim that only LP. 122 should be awarded, while the Magistrate actually gave judgment for LP. 165, this point was not raised before the District Court and that Court was under no obligation to deal with points except those raised by the Appellant.

The third point is that the Plaintiff could not divide Defendant's evidence; the Defendant admitted in Court that he was to pay rent at the rate of LP. 7.500 per month and did not deny the period during which he remained on the premises. He alleges that he made certain payments on account of rent and the onus is on him to prove if he made such payments.

The appeal is dismissed with costs on the lower scale fixed at LP. 10.— and LP. 5.— fees for attending the hearing of this appeal.

Delivered this 15th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 148/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.) Khaldi, J. and Abdul Hadi, J.

In the appeal of:—

1. Najin Majdalani
2. Zareefeh Majdalani — Applicants.

v.

Marie (Majdalani) Kussina — Respondent.

President District Court refusing to grant leave to appeal from that Court's judgment in its appellate capacity — Application to Supreme Court for leave to appeal under Rule 317 of Civil Procedure Rules — Inapplicability of rules 313 to 333 to appeals to District and Land Courts — Civil Procedure Rules, Rules 313-335.

1. Rules 313 to 333 of Civil Procedure Rules do not apply to appeals to District and Land Courts, rules 334 to 353 do.
2. Supreme Court cannot grant application for leave to appeal from order of President, District Court, refusing to grant leave to appeal against judgment of that Court in its appellate capacity.

Asfour for Appellants.
Najib Hakeam for Respondents.

Application for leave to appeal against the order of President of the District Court, Haifa, dated 24.5.1938, refusing to grant the Appellants leave to appeal to the Supreme Court against the judgment of the District Court, in its appellate capacity, dated 28.4.1938.

JUDGMENT.

We need not trouble you Mr. Hakeam.

This is an application for leave to appeal against an order of the President of the District Court refusing to grant leave to appeal.

This application is made under Rule 317 in Part XXXI of the Civil Procedure Rules, 1938. Rule 334 which is also in Part XXXI reads as follows:—

> "The following Rule of this Part shall apply to appeals to the Supreme Court and to appeals to the District and Land Courts when they are heard in open Court, and shall also extend so far as they are applicable to all other appeals to the District and Land Courts."

that is to say, Rules 334 and onwards to the end of the Part apply to appeals to District and Land Courts. This, as we see it, means that Rules 313 to 335 of Part XXXI do not apply to District and Land Courts and therefore Rule 317 does not apply in the cases of appeals to the District and Land Courts, and there is therefore no power, under the Rules or elsewhere, to grant the application which Mr. Asfour, with his usual force and vigour, has tried to convince us so to do.

The application is dismissed with costs fixed at LP. 5.— and LP. 5.— fees for attending the hearing.

Delivered this 30th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 122/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.), Khaldi, J. and Abdul Hadi, J.

In the appeal of:—

Sadiqa bint Abdul Ghani el Jardaneh — Appellant.

v.

1. 'Aatef Khammash
2. Haj Mohammad Yousef Kan'eer — Respondents.

Land claimed by priority — Claim that customarily water rights are included in sale — Claimant of priority seeking to get more rights than purchaser got.

1. In an action of priority Plaintiff cannot get more rights than Defendant got when he purchased the land.
2. Court when dealing with an action of priority cannot alter the terms of the Kushan with regard to the extent of the property transferred.

Hassan Khammash for Appellant.
For first Respondent: no appearance.
Adel Zu'eiter for 2nd Respondent.
Appeal from judgment of Land Court, Nablus, dated 2.4.1938.

JUDGMENT.

This is an appeal from the decision of the Land Court of Nablus in a claim for priority — the only point which concerns us is whether water rigths are or are not included in the sale.

Now it is important to note that in this priority case, the water does not originate in the land, but is led into the land by means of a channel.

The Land Court found against the Appellant who now comes to this Court. The Appellant alleges that water rights were included in the sale, that it is the custom with regard to all sales in Nablus that water rights are included in the sale, even though they are not included in the Kushan.

The 2nd Respondent replies that in no case can the Appellant get more rights than he, the Respondent, got, and since the Respondent did not get the rights to the water when he purchased he land, the Appellant therefore cannot get them either, and we think that this contention by the Respondent is correct.

What the Appellant is, in effect, asking us to do is to alter the registration and to vary the terms of a kushan with regard to the extent of the property transferred, and it is obvious that, in an action of priority, we can do no such thing. If the appellant thinks he has a right to that water he can bring an action against whomsoever and in whatever form he likes, claiming his specific rights.

The appeal must therefore be dismissed and the judgment of the Land Court confirmed, with costs fixed at LP. 10.— and LP. 5.— fees for attending the hearing of this appeal, to the 2nd Respondent.

Delivered this 13th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 135/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Avia Ratner — Appellant.

v.

Eliezer Goldhamer — Respondent.

Fixed sum agreed upon as liquidated damages in contract for sale of land — English principles distinguishing between penalty and liquidated damages — Intention of parties when making the contract — Farougui v Ayoub (C.A. 191/37) — *Dunlop Pneumatic Tyre Co. Ltd., v. New Garage and Motor Co., Ltd.* (1915 *A.C.* 79).

1. Appellate Court may reverse finding of Court of trial which is partly one of law and partly one of fact (*semble*).

2. Duty of Court in interpreting a contract is to ascertain intention of parties when contract was made, not when breach occured.

3. Where Court thinks that sum stipulated in contract is in fact penalty and not liquidated damages, it has to assess the actual damages suffered by claimant.

Edit Note:—As to 1 see C.A. 127/38 4 Ct.L.R. 7-8;
As to 3 see: C.A. 20/38 3 Ct.L.R. 289/299 and remarks thereto.

Olshan for Appellant.
Lebel for Respondent.

Appeal from judgment of District Court, sitting at Tel-Aviv, dated 16.2.1938.

JUDGMENT.

This is an appeal from a judgment of the District Court sitting in Tel-Aviv where it was found that the sum mentioned in the contract was liquidated damages and not a penalty. This is the only point raised in the appeal. The sum of LP. 1236,576 mils was paid to the vendor on account of the purchase price of a certain plot of land. In clause 3 of the contract the price was said to be payable by instalments and interest was due on any overdue instalments. By clause 6 the obligation was laid on the vendor to remove any claims that might be on the land in question and by clause 10 the sum of LP. 850 was made payable as liquidated damages for a breach of the contract or any part thereof.

Various defences were raised, but the only one referred to us is whether this sum of LP. 850 was one of liquidated damages or penalty. This Court, in the case of Sheikh Suliman el Farouqui v. Michel Habib Ayoub (C.A. 191/37)*) quoting from the English case of Dunlop Pneumatic Tyre Co., Ltd., v. New Garage and Motor Co., Ltd. (1915 A.C. 79), laid down the principles of English Law on the subject of what constituted a penalty, these principles are:—

(*a*) The question whether a clause in a contract is penalty or damages is a question of construction to be decided by the Court upon the terms and inherent circumstances of each particular contract judged of as at the time of the making of the contract not at the time of breach.

(*b*) It will be hold to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid.

(*c*) There is a presumption that it is penalty when a single lump sum is made payable by way of compensation on the occurence of one or more of several events some of which may occasion serious and others but trifling damages.

The District Court held that the sum of LP. 850 was liquidated damages because the Plaintiff, the present Respondent, had paid in cash a substantial sum of money, viz., LP. 1236,567 mils without any security, that interest was due on this amount for nearly three years, and that the sum was not excessive taking into consideration the risks inherent in all land transactions in this country. But it must be remembered that this sum was payable in respect of any breach of the contract and it is not correct to say, as the District Court held, that the only obligation incumbant on the Defendant under the terms of the contract was to transfer land. He was equally under the obligation to pay the instalments. The duty of a Court in interpreting a contract is to ascertain the intention of the parties when the contract was made, not when the breach occured. The point therefore that three years' interest is now due on the sum advanced on account of the price, is thus irrelevant. We think that in the circumstance of this case, the sum of LP. 850 is a penalty and not liquidated damages. The appeal must, therefore be allowed and the judgment of the District Court set aside and the case remitted to them to assess the actual damages suffered by the Respondent.

The Appelant will have the costs of this appeal assessed at LP. 10, and advocate's fees LP. 5, in any event.

Delivered this 29th day of June, 1938.

Acting Chief Justice.

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*) Ct.L.R. III. p. 169.

CIVIL APPEAL NO. 110/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

Milian Daniel — Appellant.

v.

Hans Epstein — Respondent.

Claim of commission on turnover and of bonus on sale of business — Admission of claim by one of two partners — Application of law and custom of country where agreement was made and carried out — Allegation of custom killed by admission of fact deviating from alleged custom.

Admission of actual employment of a person without written agreement — fatal to argument that under prevailing custom agreements of that nature are made in writing and cannot therefore be proved by oral evidence.

Landau for Appellant.
Amdour for Respondent.

Appeal from judgment of District Court, Jerusalem, sitting in its appellate capacity dated 31.3.1938, whereby the judgment of the Chief Magistrate dated 3.1.1938 was confirmed.

JUDGMENT.

Frumkin, J.

The Respondent in this case was engaged as assistant manager of a firm in Germany. He claims that the terms of his renumeration as such included a monthly salary, commission on the turn-over of the business and a bonus when the business is sold. He received apparently his salary in accordance with the terms of the agreement, but sued the present appellant and another partner of the business for his commission and bonus, the business having been sold.

2. The other partner of the business who is not a party to this appeal admitted the claim of the respondent. The present appellant however, contested it and judgment was given against him by the Chief Magistrate and was confirmed by the District Court.

3. The present appeal has been lodged on one ground only and that is that under the custom prevailing at the particular place in Germany where this agreement was entered into, agreements of this nature are customarily reduced into writing and that under article 80 of the Ottoman Code of Civil Procedure oral evidence is inadmissible.

4. It seems that both parties to this appeal agree that in settling the relations between the parties German Law and custom is to be applied and while on behalf of the respondent it is maintained that the judgment of the Magistrate's Court is not entirely based on oral evidence, but that there was also a certain amount of written evidence, Counsel for Respondent seems to agree that if the custom in Germany were that agreements of this nature are customarily and exclusively reduced into writing oral evidence would not be admissible. He strongly denies, however, that such a custom prevails.

5. The appellant relies on a alleged custom that agreements between an employer and employee are reduced into writing. At the same time he maintains that in the present case there was no such agreement in writing, yet he does not deny the actual employment of the Appellant by the firm of which he was a partner. This admitted fact, however, is fatal to his argument. It cannot be said that a firm may employ an assistant manager by an oral agreement, but when it comes to fixing the terms of such employment it has to reduce it into writing.

6. It is therefore not necessary to examine any further the matter of the existence or otherwise of a custom in the particular place to reduce agreements of that sort into writing and whether even in the existence of such a custom oral evidence would not be admissible. From appellant's own words there is nothing to support his argument that in the particular place in Germany employment of staff by firms is customarily done only in writing so as to exclude any possibility of appointment by oral agreement.

7. The Appeal must therefore fail and the judgment of the District Court confirming the judgment of the Magistrate's Court will be upheld. The appellant will pay the costs of the respondent assessed at LP. 10.— to include advocate's fees.

Delivered this 7th day of June, 1938.

British Puisne Judge.

CRIMINAL APPEAL NO. 58/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.), Greene, J. and Khayat, J.

In the appeal of:—

Izzat Abdul Fattah Kefafi — Appelant.

v.

The Attorney General — Respondent.

Sentence of detention under Young Offenders Ordinance — Appeal without statutory provision giving right to it.

1. Appeal — entirely a statutory right; unless it is given by law there can be no right of appeal.
2. No appeal as of right from sentence of detention under Young Offenders Ordinance.

Edit. Note:—As to 1 see: C.A. 98/ 33 2 PLR 68; Civil Leave Appl. 8/33 ibid 73; C.L.A. 7/34 and remarks thereto, ibid, 230; see also Civil Procedure Rules, Rule 317.

Suleiman Abu Ghazaleh for Appellant.
Crown Counsel (M. J. Hogan) for Respondent.

Appeal from judgment of District Court, Jaffa, sitting in its appellate capacity, dated 16.5.1938, whereby Appellant was convicted of seditious conspiracy and libel, contrary to Sections 59(c) and 12 of the Criminal Code Ordinance, 1936, and sentenced to one year's detention in a Reformatory School.

JUDGMENT.

We need not trouble you Mr. Hogan.

This appeal depends upon the point whether a sentence of detention under the Young Offenders Ordinance is appealable under Section 5(1) of the Magistrates' Courts Jurisdiction Ordinance, 1935. In the first place, we must again remark that an appeal is entirely a statutory right given by the law, and unless it is given by law there can be no right of appeal.

Now it is quite clear from the Young Offenders Ordinance that detention is an alternative punishment to imprisonment. Cases have been quoted to us from the English Law to the effect that such sentences as preventive detention are appealable, but these cases depend upon the statute law.

We are quite satisfied there is no statutory provision in this country which enables a person sentenced to detention or for punishment which is a fine not exceeding LP. 10 or imprisonment not exceeding seven days, to appeal against such punishment as of right. No such person has any such right of appeal. His remedy, if he feels aggrieved, would appear to be to apply for leave to appeal under section 5(5) of the Magistrates Courts Jurisdiction Ordinance, 1935, but, as this point is not definitely before us at the moment, I do not bind myself as to whether this Section can be invoked or not.

The appeal is therefore dismissed — in the circumstances, the period of detention will commence to run from the date of the original conviction.

Delivered this 27th day of June, 1938.

Acting Chief Justice.

MISCELLANEOUS APPLICATION NO. 38/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the application of:—

Salamander Aktiengesellschaft — Applicant.

v.

Dan Gabrieli — **Respondent.**

Notice of appeal accompanied by copy of judgment instead of copy of decree.

Chief Registrar not to refuse to accept appeal on ground only that appellant filed copy of judgment instead of copy of decree.

Jacoby for Applicant.

DECISION.

In my opinion, and in this I am supported by a judgment of the Supreme Court in Abu Assi v. Abu Assi (C.A. 149/38)*), if appellant

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*) See next page. Ed.

chooses to file a copy of a judgment, which is a more expensive document to obtain than a copy of a decree, the appeal should be accepted, because a decree contains nothing that is not found in the judgment on which it is based. The Chief Registrar's decision must be overruled.

CIVIL APPEAL NO. 149/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.), Khaldi, J. and Abdul Hadi, J.

In the appeal of:—

1. Atalla Hassan Abu 'Assi
2. Ibrahim Hassan Abu 'Assi — Apppellants.

v.

1. Suleiman Hassan Abu 'Assi
2. Labeebeh Hassan Abu 'Assi
3. Rasheedeh Hassan Abu 'Assi
4. Abed Ali Hassan Abu 'Assi
   in his capacity as curator on his father's property
5. 'Abdoulah Aleiweh el Jirjawi
   in his capacity as one of the heirs of his wife, Feheameh Hassan Abu 'Aasi — Respondents.

Appellant filing copy of judgment instead of copy of decree — Court of Appeal ordering deposit of money in addition to guarantee authenticated by Notary Public and attachment made in Land Registry — Necessity of very careful drafting of statements of claim.

1. Appellant at liberty to file copy of judgment instead of copy of decree.

2. Court may, if they think fit, call upon appellant to pay a deposit, although there is a guarantee authenticated by Notary Public and an attachment duly entered in Land Registry to that effect.

Edit. Note:—As to 1 see: Misc. Appl. 38/38 4 CtLR 20. As to 2 see: C.A. 91/38 and Edit. Note thereto, 3 CtLR 263.

Sa'id Zein Eddin for Appellants.
George Elia for Respondents.

Appeal from judgment of Land Court, Beersheba, dated 17. 5.1938.

JUDGMENT.

Two preliminary objections were raised by Counsel for Respondents.

The first is that a copy of the judgment has been filed and not a copy of the decree as is required by Rule 326 of the Civil Procedue Rules, 1938.

The second is that the bond is not in conformity with Rule 325 of the Civil Procedure Rules ,1938, and Form 31 made thereunder.

With regard to the first objection, we are of opinion that if a party goes to expense of filing a lengthy judgment instead of a decree, it is his look-out, and this objection is rejected. A decree contains nothing more than is to be found in the judgment on which it is based.

As regards the second objection, the bond of guarantee has been authenticated by the Notary Public, Gaza, and further an attachment has been ordered by the Magistrate and an entry of such attachment has been entered in the Land Registry Registers to that effect. In the circumstances, the Court has decided to call upon the apellants to pay the sum of LP. 10.— as deposit, and as this sum has been paid now, the objection is also overruled.

This appeal, I am afraid, has nothing in it. We have heard Said Eff. Eddin, but his arguments have failed to convince us.

The main point is, of course, to be found when one looks through the statement of claim to the Land Court. In that statement Apellants claimed to be owners of this land by virtue of a sanad, admittedly stated to be made in the year 1922. That sanad, of course, is of no use whatsoever — it is no more than a waste piece of paper and the Land Court were right, therefore, in rejecting it.

This case shows the necessity for the very careful drafting of statements of claim.

We are of opinion that the judgment of the Land Court, though short, is correct.

The appeal must, therefore be dismissed with costs fixed at LP. 5.— and LP. 5.— fees for attending the hearing of this appeal.

Delivered this 29th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 142/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the application of:—

Steelo Awad — Applicant.

v.

1. T. Dounie
2. B. Katinka
3. Joseph P. Albina — Respondents.

Application for leave to appeal from order of District Court regarding award — Application to Supreme Court after one made to, and refused by, District Court — Point raised against long line of decisions relating to practice and procedure.

It is very difficult to upset a long line of decisions relating to practice and procedure.

Court of appeal will not reject application for leave to appeal (from order of District Court regarding award) for reason only that such application was made to, and rejected by, District Court.

Edit. Note:—See: C.A. 96/36 1 CtLR Rep. 39.
H.C. 65/37 3 CtLR p. 36.
H.C. 4/38 3 CtLR p. 72.
C.A. 20/38 3 CtLR p. 296.

Eliash for Applicant.
Goitein for Respondents, by delegation.

Application for leave to appeale from judgment of District Court, Jerusalem, dated 14.4.1938.

JUDGMENT.

Two preliminary objections have been raised, by Mr. Goitein.

The first point is that the Applicant cannot come to the Court of Appeal and apply for leave to appeal when his application for leave was refused by the District Court — he can either come to the District Court or to the Court of Appeal.

The second point is that this case is of the type of cases for which leave is not necessary, as the order of the District Court is for remitting the case and not setting aside the award of the Arbitration, and therefore leave to appeal against the order of remission is not necessary.

As regards the first point, we have decided to reject it, because it is very difficult to upset a long line of decisions relating to practice and procedure.

With regard to the second point, we have decided to overrule it, because the appeal is against an order refusing to set aside the award, not against an order of remission.

As regards the application for leave, we have decided to refuse it, as we think that the District Court were right in remitting on the point stated by them.

The District Court did not deal with the question of interest. When the case comes before them again, after remission and the issue of a new award, they should make their ruling on it, — the present applicant will be entitled to raise this point of interest again before the District Court when enforcement is applied for.

The Appellant will pay to the Respondents costs fixed at LP. 5.— and LP. 5.— fees for attending the hearing of this application

Delivered this 21st day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 132/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

The Syndicus in the Bankruptcy of the Firm S. N. Khoury — Appellants.

v.

Wolf Slavouski — Respondent.

Remedy of specific performance in Palestine — Equitable doctrine of difference between penalty and liquidated damages — Provisions of art. 111 *of Ottoman Civil Procedure Code nullified by two judgments recognising distinction between penalty and damages — Important safeguard against repudiation of contracts — No control of Director of Lands over dispositions ordered by Court — Palestine Order-in-Council, Art.* 46 *— Ottoman Code of Civil Procedure, Art.* 108, 111 *— Cultivators (Protection) Ord. — Taxes Collection Ord. — Land Transfer Ord. sec.* 11 *— Land Courts Ord. sec.* 8(1), *Ottoman Land Code, Art.* 36; *Mejelle Art.* 262 *— L.A.* 1/36, *C.A.* 15/38, *C.A.* 191/37, *C.A.* 28/38, *C.A.* 43/28, *L.A.* 58/25, *C.A.* 20/38.

(*Copland A. C. J., Greene, J.*)

1. Courts of Palestine empowered to grant an order for specific performance of a contract or an option for the sale of land.

2. Specific performance is an alternative remedy and is only granted where damages would not be adequate compensation.

3. Payment of money by a party to a contract to sell land — not payment in respect of a void disposition within meaning of sec. 11 of Land Transfer Ordinance.

Edit. Note:—As to 1 and 2 see: L.A. 1/36 P. Post 30/10/36 & seq. C.A. 15/38 3 CtLR 149; C.A. 43/28 4 C of J 1375;

As to 3 see: C.A. 31/37 1 CtLR R. 5; C.A. 253/37 3 CtLR 118; C.A. 147/26 1 PLR 116.

Sanders & F. Atalla for Appellants.

Shapiro for Respondent.

Appeal from judgment of Land Court, Haifa, dated 14.4.1938.

JUDGMENT.

This case raises the important and diffcult point whether the Courts of Palestine are empowered to grant an order for the specific performance of a contract to sell land, and it is further complicated by

the fact that there has recently been a considerable difference of judicial opinion in this country on the matter. It has been argued before us very well and fully by the advocates of both sides.

The facts of the case, at this stage, are irrelevant since the case comes before us on one agreed issue of law, which, if decided in favour of the respondent, will put an end to the case, or if decided in the appellants' avour will necessitate sending the case back to the Land Court to determine the remaining issue.

The District Court held that the remedy of specific performance was not available in Palestine. I will deal with their reasons for so holding later.

Before us, the appellant bases his case principally upon two recent judgments given by this Court — Haj Hassan Hammad v. Latin Patriarch (L.A. 1/36)*) and Mohammad Said el Kassem and others v. Younes Daoud el Younes, (C.A. 15/38)**). In each of these cases, however, this Court was evenly divided, and the matter therefore remains open, so far as these cases are concerned, and the appellant in effect relies upon the dicta of one member of the Court in each of them. In Hammad's case (supra) Manning, J. reviewed all the past judgments of this Court and dealt very fully with the application of the provision of Art. 46 of the Palestine Order-in-Council, 1922, and came to the conclusion that the remedy of specific performance was available in Palestine.

In the case of Mohammad Said el Kassem and others v. Younes Daoud el Younes, in which I was sitting, I adopted Manning J.'s reasoning, but perhaps went a littel further, then, than I had intended when I said that I adopted his conclusions in toto. I was referring only to the case then before me where the point was whether a purchaser, who had been let into possession of land, had paid all the purchase price, and had been in possession for many years, though not for the full period of prescription, had acquired a good equitable title as against his vendor. Both Manning J. and I decided that he had, and that the vendors' actions for recovery of possession must fail.

The point in the past has come before this Court on many occasions — in each case the gist of the decisions has been that there was no law in Palestine (I stress the word "law") by which specific performance of an agreement for the sale of land could be enforced. Whenever Art. 46 of the Order-in-Council was referred to, the Courts refused to apply it, holding that it was not applicable. The position has, however, recently been altered. In two cases, Sheikh Suleiman Taji El Farouki v. Michael Habib Raji Ayyoub and 3 others (C.A.

*) P. Post 30/10/1936 ÷ seq. **) 3 CtLR 149.

191)*) and Anis Busteni v. Joseph Ben Hanania (C.A.28/38)**) this Court has laid down the principle that the equitable doctrine of the difference between a penalty and liquidated damages is one which is recognised in Palestine. In the past all contracts for the sale of land have contained a clause stipulating that on breach a sum of money should be payable by the defaulting party as liquidated damages, reliance being placed on the provisions of Art. 111 of the Civil Procedure Code, which says that when a definite sum is stated to be damages, that sum shall be payable and neither more nor less.

The effect of these two judgments is to nullify the provisions of Art. 111, and the whole basis of the present form of contracts for the sale of land has been cut away. Heavy damages on default were common form in all contracts, the object being to compel observance of the contracts so far as was possible. Since now, however, damages must be assessed, if the sum stated is deemed to be a penalty, it will be seen that the whole position has been radically altered, and this important safeguard has been taken away.

The Land Court based its judgment on several grounds, with which I will now deal.

The first is that following the Palestine Mercantile Bank v. Jacob Fryman and another, (C.A. 240/37)***) where there is an Ottoman Law available, Art. 46 of the Order-in-Council cannot be resorted to, and that here there is an Ottoman Law, namely, Art 108 of the Civil Procedure Code which says that damages may be awarded against a defaulting party, and that the judgment in C.A. 191/37 and C.A. 28/38 still give the right to an injured party to receive damages.

It must however be remembered that specific performance is an alternative remedy, and is only granted where damages would not be adequate compensation.

The second reason is that if specific performance were granted the control of the Director of Lands over dispositions of immovable properties would be weakened. But the Director of lands excercices his control of the Director of Lands over dispositions of immovable prodispositions, ordered by the Court, such as sales of mortgaged property, sales in execution, or in actions for preemption. And if the law as interpreted by the Courts does not suit Government policy, the remedy is to amend the law by legislation.

I do not think that the provisions of the Cultivators (Protecion) Ordinance (Cap. 40) would prevent the application of specific performance, as the Land Court apparently thought it would. In the first place, as pointed out by the appellant, the property in this case

*) 2 CtLR 169. **) 3 CtLR 84. ***) 3 CtLR 104.

is urban property, and in any case a purchaser will get his vendor's title, and takes the property subject to any equities attaching to it. Neither would the Taxes Collection Ordinance (Cap. 137) necessarily prove a fatal bar in every case.

Finally the Land Court held that non-mutuality would always prevent the application of the doctrine, since S. 11 of the Land Transfer Ordinance (Cap. 81) enables a person who has paid money in respect of a void disposition to recover it.

A contract to sell, however, is not a void disposition. It is quite true, probably, that in many, perhaps in a large proportion of cases, specific performance could not be enforced. Difficulty of enforcement is no argument against the doctrine being held to be in force.

In conclusion it seems to me that once the equitable rule of the difference between a penalty and liquidated damages is recognised, it follows of necessity that the equitable doctrine of specific performance must be brought in. There is nothing, in my view, in the circumstances of Palestine or its inhabitants to render it undesirable or inapplicable. In fact it will tend to uphold the sanctity of contracts, which will be all to the good, and will prevent these constant repudiations by vendors, when the value of land has risen — and repudiation by purchasers when it has fallen.

I think that this appeal should be allowed, and the judgment of the Land Court set aside, on the ground that the Courts of Palestine are empowered to grant an order for the specific performance of a contract or an option for the sale of land. The case should go back to the Land Court for the determination of the other issues raised.

Costs to await result.

Delivered this 30th day of June, 1938.

I concur in toto. *Acting Chief Justice.*

British Puisne Judge.

Frumkin, J.

1. Art. 111 of Ott. Civil Procedure Code clear and unambiguous, under its terms any sum, and no more and no less, must be paid which has been stipulated by parties as compensation or liquidated damages in case of breach of contract (regardless of fact that in English law such payment might be a penalty).

2. Where vendor under agreement for sale of land fails to carry out his obligation to effect transaction in Land Registry, purchaser may apply to Court for specific performance.

3. Doctrine of specific performance (in substitution of liquidated damages mutually agreed upon) will in most cases prove inadequate under circumstances prevailing in Palestine to compel parties to honour their pledges in contracts.

Frumkin, J.

JUDGMENT.

It is high time that the question of specific performance should come up before ths Couirt for a final decision. This matter has occupied the mind of the legal profession of this country for years, but so much was the prevailing opinion against the existence in this country of such a remedy that very seldom, and then only indirectly, was the matter brought up for consideration. Without having the matter fully argued before them, Judges have now and then, in recent years expressed themselves that there is no Law of specific performance or that there is no possibility for specific performance in this country. But in most cases this point was dealt with indirectly, inter alia, to lay force on the necessity of enforcing a penalty clause.

In Pinhasewitz v. Litwinsky (L.A. 58/25) where Corrie J. held that — "There is no law whereby specific performance of a contract can be enforced in Palestine" — the land claimed by way of specific performance was already transferred to others in the Land Registry before the action was lodged.

In Sudki Kamal and others vs. Yousef Rokach and others, (C.A. 43/28)*) I expressed the opinion that: "It has been the common practice in this country to put a penalty clause in every contract relating to the sale of land. Such a stipulation is necessary because there is no possibility of specific performance of contracts relating to land".

The issue in that case was whether an agent authorised to sell land has the right to include a penalty clause in the contract of sale on behalf of his principal.

It was only in recent years that advocates felt encouraged to apply directly for specific performance, and I think that it was for the first time that the matter was fully argued before Mr. Justice Manning in Hadj Hassan Hammad vs. The Latin Patriarch (L.A. 1/36) resulting in his considered judgment covering practically the whole ground on the subject. His conclusions that the remedy of specific performance applies in this country were followed to a certain extent by Mr. Justice Copland in Kassam and others v. Younes (C.A. 15/38). But as pointed out by the learned Acting Chief Justice in each of these cases this Court was evenly divided and there is no binding decision, and the matter therefore stands open.

The necessity of introducing the doctrine of specific performance into the legal system of this country has been urged on account of the recent drastic change in the jurisprudence of this country whereby

*) 4 C of J 1375.

the distinction between penalty and damages, (well known in English Law), has been introduced for the first time in Faruqi vs. Ayoub (C. A. 191/37) and followed, I understand, in other cases.

I have had since the issue of that judgment no opportunity of expressing my own opinion on this very important question, which changes a practice invariably acted upon by this Court since the Occupation. I might, therefore, take this opportunity of stating my view on the subject, which with all due respect, differs from the view adopted by my learned colleagues on the bench of this Court, with the exception only, I think, of the Chief Justice.

The second part of Article 46 of the Palestine Order-in-Council is subject to the first part of it. What I mean is shortly this: The jurisdiction of the Civil Courts is exercised in conformity with the substance of the English common law etc., only in so far as it cannot be exercised in conformity with the Ottoman Law in force in Palestine on November 1st, 1914, etc. Where the first part does not extend or apply the second part comes in.

So for instance when the Ottoman Law, in the Mejelle deals exhaustively with guarantee, and imposes an unqualified duty on a guarantor to honour his guarantee, without according him the right of defence of non-consideration, it was held that on the point of consideration for a gurantee the Ottoman Law extends and applies, and Article 46 of the Order-in-Council could not be resorted to. (The Palestine Mercantile Bank v. Fryman and others, C.A. 230/37). But where the Ottoman Law and the other sources enumerated in the first part of Article 46 do not extend or apply to a particular point, in dealing with it the Civil Courts will exercise their jurisdiction in conformity with the substance of the English common law and other sources enumerated in the second part of the Article.

The question is therefore, does Article 111 of the Ottoman Code of Civil Procedure extend or apply to penalties or not? It has always been my opinion that it does. It, in clear and unambiguous terms, imposes a duty on a party to pay whatever sum he has undertaken to pay as compensation (which word is to my mind the nearest equivalent of the word "Tadminat" used in the Turkish text). The argument used by Khayat, J. in C. A. 20/38,*) that the French Civil Law from which the Ottoman Law was borrowed, does contain special provisions as regards penalties, which provisions were not incorporated in the Ottoman Law, to my mind, with respect, supports a conclusion different from the one which he reached and goes to prove that the distinc-

*) 3 CtLR 289.

tion was present to the mind of the Ottoman Legislators, and yet it was ruled that whatever sum has been stipulated as compensation, and we could safely add, whether damages or a penalty, but no more and no less, must be paid.

I most respectfully take exception to the opinion of Manning, J in C.A. 191/37, that just as equity came in England to give relief in a proper case, so here Article 46 came to Palestine. If, as I have no doubt it did, Article 111 did intend to allow the enforcement of a penalty, that Article does extend and apply, and the relief granted by Article 46 of the Order-in-Council is not available, by the clear provision of the said Article in its first part.

But whatever be my opinion, under the law as it at present stands the Courts would not enforce a penalty. If it is thought however that the doctrine of specific performance will serve as a remedy to compel parties to honour their pledges in contracts, I must say it will be a very poor remedy. In most cases of agreements of sale of land, matters are very complicated, and the removal of difficulties very often depends on the good-will of the vendor. Sometimes things in the nature of personal services are involved, sometimes the consent of outsiders is to be obtained, so that even if the Court would have the power to order specific performance, in a great number of cases it would be unable to use its power.

I am stating all this simply in order to indicate that I am approaching the problem of the possibility or otherwise of ordering specific performance not under any pressure of necessity to create a remedy, but on its own merits. In the present case there is certainly nothing to prevent the Court from ordering specific performance if it will be found that it has power so to do.

The Law of Palestine including the Ottoman Law in force in November, 1914, and all other sources enumerated in Article 46 of the Palestine Order-in-Council contain no provision one way or the other as regards the doctrine of specific performance of contracts. The law is therefore silent, and does not extend or apply to specific performance. In view of what I have said above, the Court must exercise its jurisdiction in conformity with the substance of common law and doctrine of Equity in force in England, as enumerated in the second part of Article 46 of the Palestine Order-in-Council.

In resorting to such doctrines, however, regard must be taken to the last part of Article 46, which reads as follows:—

> "Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His

Majesty's jursidiction permit and subject to such qualification as local circumstances render necessary".

To my mind there is nothing in the circumstances of Palestine and its inhabitants to disallow the enforcement in Palestine of the said common law and doctrines of equity in so far as they relate to specific performance.

In contracts relating to movable property, for instance, I have expressed an opinion elsewhere as early as 1920 that a remedy clearly resembling the remedy of specific performance not only is not inconsistant with the Mejelle but that there is very much in it to support such remedy. Article 262 of the Mejelle lays down the rule that after a sale has been concluded the vendor is under an obligation to deliver the goods sold to the purchaser. There is therefore nothing to prevent a Court in this country from maintaining an action for the delivery of chattels, and although such an action differs from an action for specific performance, since it is based on an allegation not that a contract to deliver has not been performed, but that the chattel is the property of the plaintiff and is being wrongfully detained by the defendant, under English authorities the remedy closely resembles the remedy of specific performance. See Halsbury, Vol. XXVII, p. 4.

The matter is more difficult when it comes to contracts relating to land. Neither in the arguments advanced in this case nor in all the judgments referred to above, was any mention made of the Ottoman Land Law. There is no doubt that under the Ottoman Land Code there was no possibility of enforcing a sale of land made outside the Tabu. Article 36 of the Land Code is quite clear on this point. It contains the following passage:—

"Transfer of all kinds of Miri land shall be invalid without the consent and the knowledge of the Mamour (Official). The right of possession (Tasseruf) to the Land acquired by the transferee depends in any case upon the consent of the Mamour. If the transferee dies before obtaining the consent of the Mamour, the transferor can have possession as before. If the transferor dies the land passes to his heirs entitled to Intikal of Miri land if he has such heirs", etc.

Article 9 of the Ottoman Law of 1331 regulating the right to dispose of immovable property is no less explicit. The relevant parts of it read as follows (from the Baghdad Translation);

"Every kind of disposition of Miri and mauqufe land must be made only in the Tabu Registry and a formal title-deed shall be delivered for every disposition. A disposition, without receiving a formal title-deed is not allowed. In places where under the new cadastral law the new cadastral system has been carried out, the Civil and Sharia Courts will not hear any case, nor will the Administrative authorities allow any dealings with

regard to land for which no formal deed is produced.

This provision also applied to all Mulk land and Mustaghilalat and Musaqqafat land of 'Waqf Madbutah' and Waqf Mulhaqa and Waqf Mustathna".

These provisions have been modified by the Land Court Ordinance Cap. 75) Section 8(1) of which reads as follows:—

"A land court shall apply the Ottoman Law in force at the date of the British occupation by any Ordinance or rules of court issued since the occupation:

Provided that the court shall have regard to equitable as well as to legal rights to land and shall not be bound by any rule of the Ottoman Law prohibiting the courts from hearing actions based on unregistered documents".

It follows from the latter part of the proviso that under the Ottoman Law alone there would be nothing to prevent the Court from ordering specific performance of contracts relating to the sale of land. But before the promulgation of the Land Courts Ordinance, 1921, the Land Transfer Ordinance introduced provisions similar to those of the Ottoman Land Law declaring as null and void dispositions made without the consent of the Director. Such dispositions although not illegal are unlawful in so far as they are contrary to statues regulating transactions of that sort and the question which presents itself for an answer is this: can a party to such a transaction avail himself of the remedy of specific performance?

Manning, J. in Land Appeal 1/36 seems to have overcome this difficulty by helding that an agreement for sale is not a disposition. An agreement for sale is therefore not unlawful. At first sight it appeared to me that this does not solve the difficulty, because what in fact the plaintiff seeks to do is to obtain the help of the Court in converting such an agreement into a disposition. The fact that in certain cases, like partition, execution and enforcement of mortgage, the Court orders transfer without the previous consent of the Director is also not conclusive, because in those cases it is done by operation of law under express statutory provision.

But on examining the matter further I find that an agreement for sale is not contrary to law and this Court always gave legal effect to such agreements. It is part of the obligations, express or implied, of a vendor under such an agreement to obtain the consent of the Director to convert the agreement into a disposition, and upon the failure of the vendor to comply with this obligation the purchaser may apply to the Court for specific performance. The Court granting such relief may do so, subject to the consent of the Director of Land being obtained.

In most cases it may be assumed that the Director will not, upon

an order of the Court, withhold his consent, which is now nothing more than a matter of formality in order to exercise a control over land transactions for the benefit of the public.

As regards the objections taken that the Cultivators (Protection) Ordinance (Cap. 40) and the Tax Collection Ordinance (Cap. 137) would prevent the application of specific performance, I share the view expressed by the Acting Chieg Justice.

In conclusion I think that judgment should be given in the terms of the last paragraph of the Judgment of my learned brother the Acting Chief Justice.

Delivered this 30th day of June, 1938.

Puisne Judge.

CIVIL APPEAL NO. 126/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice(Copland, J.), Khaldi, J. and Abdul Hadi, J.

In the appeal of:—

Sa'adiah Paz — Appellant.

v.

Salim Mustafa el Zeidan and others — Respondents.

Penalty and liquidated damages — When sum stipulated in contract will be held to be penalty — Manner of calculating damages — Injured party claiming loss of expected profits, though not alleging bad faith on part of defaulting party — Inapplicability in Palestine of English rule as to damages.

1. Every Court bound to follow recent decisions of Supreme Court that there is a distinction in Palestine between penalty and liquidated damages.

2. Where sum stated in contract to be liquidated damages is much larger than contract price, Court will as a rule hold that it was a penalty and not damages.

3. English rule that where any damages are stipulated in a contract the measure of damages is the difference between contract price and price obtainable at time of breach — not applicable in Palestine.

Where no agreement for damages and no bad faith on part of defaulting party, only actual loss suffered is payable, but not difference between agreed price and estimated market price at time when contract was broken.

Edit. Note:—As to 1 see: C.A. 142/38 4 CtLR 23 and Edit. Note thereto.

As to 2 and 3 see: C.A. 135/38 4 CtLR 15 and Edit. Note thereto; C.A. 20/38 3 CtLR 289 and remarks; C.A. 54/38 3 CtLR 17 and Edit. Note thereto.

Eliash & Feiglin for Appellants.
Elias Koussa for Respondents.

Appeal from judgment of District Court, Haifa, dated 29.3.1938.

JUDGMENT.

This is an interesting case of some difficulty, but we have been much assisted in its solution by the excellent manner in which it has been argued by counsel on both sides. It is an appeal from a judgment of the District Court, Haifa, in which the appellant, who was then plaintiff, did not succeed in his claim against the respondent for the sum of LP. 300.— stated to be liquidated damages in the contract between them, but only succeeded in obtaining judgment for some smaller sums, being the actual amounts expended by him in respect of the contract.

When this case was previously before this Court*) there had been a disagreement between the two judges in the District Court, one holding that the action was premature. This Court sent the case back for retrial holding it was properly brought.

The Appellant has made a formal point that there is no distinction in Ottoman Law between a penalty and liquidated damages but very properly has not attempted to argue this point. It could not very well now be argued because two cases — C.A. 191/37**) Farouki v. Ayyoub followed by Zahra Y. Akel v. Khalil Ibrahim Abu Alayyen (C.A. 20/38)***) have recently been decided by this Court in which it has been held that this distinction does exist in this country, and that must be the Law of this country now until it is set aside by a higher authority. Whatever the poinion of individual judges may be— and though I did not sit on either of these appeals, I am far from saying that I disagree with them — every Court is now bound to follow these judgments and we see nothing to justify us in not following these decisions.

The second point taken by the appellant is that in this case the amount claimed was in fact liquidated damages and not a penalty. The District Court held that it was a penalty on the ground that this sum of LP. 300.— was payable if the legal costs and the Werko and bedl il misl were not paid. To our minds the deciding factor is that the sum of LP. 300.— is more than three times the contract

*) C.A. 118/36, CtLR Vol. II, p. 36.
) 2 CtLR 169. *) 3 CtLR 289.

price for the sale of the land and we do not think that it was in the contemplation of the parties that the land would rise in value to such an extent within so short time because, if such an excessive rise had been anticipated, then we have little doubt that the price would have been very much higher.

The Appellant, however, argues that if it is a penalty then the English Law as to the damages should apply. This rule is that where any damages are stipulated in a contract then the measure of damages is the difference between the contract price and the price obtainable at the time of breach. He goes on to say that if the English Law is not applicable then, even under the Civil Procedure Code, he can claim damages for consequentlial loss. It may be convenient here to set out the provisions of the Code on this point:—

> *Article* 108:—Damages may be awarded against a contracting party for non-performance or delay in the performance of a condition of the contract even though he have not acted in bad faith. Provided that, if such non-performance or delay was due to causes outside his control, damages shall not be awarded against him.
>
> *Article* 109:—If the non-performance of an obligation be not due to bad faith on the part of the person bound to perform it, the damages awarded against him shall be equivalent only to the direct and determinate loss suffered by the other party owing to such non-performance.
>
> *Article* 110:—If the non-performance of the obligation be due to fraud or bad faith on the part of the person bound to perform it, he shall be liable to pay damages which shall include both direct loss caused to the other party by such non-performance and also profits of which he may have been deprived owing to such non-performance.

Article 46 of the Palestine Order-in-Council 1922 states that if there is no Ottoman Law on the subject then the Courts of Palestine shall apply the principles of English common law and equity. Here, however, there is an Ottoman Law and the manner of calculating damages is not really an equitable rule, and it does not follow in our opinion that because the Law of this country recognised a distinction between a penalty and liquidated damages then necessarily the English rule of assessment must follow — they are two totally different principles and we think therefore that the Ottoman Law in this respect has not been superseded by English principles as to the measure of damages.

Now to obtain damages for any expected profits under the Otto-

man Law there must be bad faith on the part of the party committing the breach. Here the District Court had found that there was no allegation of bad faith made by the plaintiff. This is a finding of fact and we are not prepared to interfere with it.

There is however one case decided some years ago by this Court which has been quoted to us: Zeidi v. Alcalai (C.A. No. 147/26).*) In that judgment this Court held that if a contract for the sale of land is broken the party injured has a right in the absence of any agreement for damages, to be compensated in damages, and the measure would be the difference between the agreed price and the estimated market price of the land at the time when the contract was broken. We have read the Judges' notes of the hearing of this case and it was somewhat sketchily argued in Courts; it appears that no reference was made to articles 109 and 110 of the Civil Procedure Code. If reference had been so made, then we think that the result might well have been different. In our opinion this case must now be considered as no longer good law. In the result we think that only the actual loss suffered is payable and not profits which might have been made if the contract had not been broken. We think that the District Court arrived at a correct result in its judgment and the appeal must be dismissed.

With regard to the costs the Appellant has argued that, in any case, owing to the disagreement in the first trial in the District Court, he had to appeal, and therefore that in any case he should get his costs of the first appeal. The respondent replies that the appellant did not ask for appeal costs in the District Court, and, secondly, that he lost most of his claim there. In our first appeal judgment we made an order: "Costs to follow the result". We think that there is nothing to cause us to alter the usual rule which is that the losing party pays the costs. The appellant will get the costs allowed to him by the District Court in respect of the second trial there but will pay the costs of this appeal in this Court assessed at LP. 10.— together with LP.— 5.— advocate's fees. These costs to be set off one against the other. Delivered this 29th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 130/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.) and Greene, J.
In the appeal of:—

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*) 1 PLR 116.

Meir Moshe Meir — Appellant.

v.

Halimeh Ahmad Sheikh Ali and 8 others — Respondents.

Allegation that part of mortgage debt already paid — Mortgagor pleading usurious interest — Assignment of mortgage — Order of Chief Execution Officer for payment of undisputed amount — Allegation of fraud on the part of assignee in collusion with assignor's agent — Evidence against admission in Land Registry and in a letter written some years later — Assignee's rights to execution costs.

1. When fraud is alleged, evidence admissible even against admission in Land Registry, and a letter written some years after transaction — of no more value as an estoppel than the admission in the Land Registry.

2. Rule that as between maker of negotiable instrument and assignee amount of consideration given by assignee to assignor is immaterial does not apply where fraud alleged on part of assignee acting in collusion with assignor or his agent.

3. Assignee of a mortgage entitled to execution costs on amount of mortgage admitted to be due, but not to costs in connection with assignment of mrtgage.

Edit. Note:—As to 1 see: C.A. 2/38 3 CtLR 122 and cases cited there.

Eliash for Appellant.

Cattan for Respondents Nos. 1-8.

Ibrahim Nijem for Respondent No. 9.

Appeal from judgment of District Court, Jaffa, dated 3.5.1938.

JUDGMENT.

This is an appeal from a judgment of the District Court, Jaffa, dismissing the appellant's claim. The facts shortly are as follows:—

On the 13th August, 1929, the first seven respondents executed a mortgage on their property in favour of the Union Geneva Life and Accident Insurance Co., "or Order" to secure a loan of £ 7000.— together with interest thereon at 9 per cent. The eigthth and nineth respondents jointly and severally guaranteed the payment of the mortgage debt and interest. On the 11th September, 1933, the mortgage was transferred by the mortgagees to the appellant. The mortgage debt, not being paid, the appellant applied to the Chief Execution Officer, Jaffa, for the sale of the mortgaged properties, and, on the respondents alleging that a part of the mortgage debt had already been paid to the insurance Co. leaving, only £. 5015.— due on the capital amount, secondly, that the appellant had only paid £ 5015.— to the Insurance Co. and not LP. 7000.— and thirdly, that the sum of LP.

1985.—, the balance of the LP. 7000.— represented usurious interest, the Chief Execution Officer ordered that payment of the undisputed amount should be made to the appellant, and told the appellant that he must institute an action in the appropriate Court for the disputed balance. The respondents then paid to the appellant the sum of £. 5660.840 mls. and deposited the balance of £. 2390.740 mls. with the Execution Office.

The appellant then entered an action against the respondents for this latter sum.

The respondents pleaded fraud on the part of the appellant, and also that this sum represented excessive interest. The District Court heard the evidence of the appellant, and that of other witnesses, including the agent of the Insurance Co. who had arranged the transfer, and came to the conclusion that it did not believe the appellant when he swore that he had paid £. 7000.— to the Insurance Co. but that it was satisfied that the actual amount paid was only £. 5015.—. The Court also found that the appellant when he took the transfer of the mortgage was fully aware of the true position but that, acting in collusion with one Jacob Bechor, the agent of the respondents, and with the agent of the Insurance Co., the amount shewn in the transfer was deliberately wrongly stated, and that the balance represented usurious interest charged by the appellant for taking the transfer, and thereupon the Court dismissed the action.

The first point raised in this appeal is that the defence of usurious interest was only raised at the second hearing in the District Court, and should therefore have been rejected. This, however, is not so, for the plea was distinctly raised in the written defence filed on the 11th February, 1937, within one week of the action being instituted.

The main arguments for the appellant are that evidence against an admission made in the Land Registry is not admissible that the respondents are estopped from alleging fraud because in a letter signed by their agents, dated the 11th September, 1933, they admitted that the sum due was £. 7000.— and assented to the transfer on that basis. that at any rate, as between the mortgagors and the assignee of the mortgage, the amount of consideration given by the assignee to the assignor was immaterial, and that, even if the facts as stated by the respondents were true, there was no evidence of usurious interest, since the appellant was merely giving what he considered to be the market value of the mortgage.

With these contentions we cannot agree. In Zvi Gaber v. "Migdal" Insurance Co. (C.A. 2/38)*) it has been held that, when fraud

*) 3 CtLR 122.

is alleged, evidence is admissible even against an admission in the Land Registry, and the Usurious Loans Ordinance, 1934, also allows evidence to show the real nature of the transaction, and we do not think that the letter of the 11th Sebtember, 1933, makes any difference: it is of no more value as an estoppel than the admission in the Land Registry. There was ample evidence before the District Court, in particular that of Mr. Aboulafia, the agent of the Insurance Co., to support its finding that there was fraud on the part of the appellant and that the true nature of the transaction was that it was an attempt to conceal the fact that this sum of £. 1985.— was usurious interest, and to justify the Court in disbelieving the appellant's claim that he was merely giving the market value of the mortgage. He knew that the capital sum remaining due on the mortgage was only £. 5015.—. The principle laid down in Mohd Ali Rida el Dajani on behalf of Naziha Ali Abu el Muwaheb el Dajani v. Yonina Shlomo Shlank, (C.A. 161/32) that as between the maker of a negotiable instrument and assignee, the amount of consideration given by the assignee to the assignor is immaterial, cannot apply in such a case as the present, where fraud has been proved on the part of the assignee, acting in collusion with the agent of the assignor.

There is only one further point with which it is necessary to deal and that is the claim of the appellant, that in any event he is entitled to the sum of £. 138.080 mls. included in the Execution Office account as collection fees on the amount of the mortgage admitted to be due, and also to a sum of £. 95.— being his costs in connection with the assignment of the mortgage. With regard to the first item, we think that he is clearly entitled to the execution costs, and the District Court must be varied to this effect. We do not however think that he is entitled to the costs in connection with the assignment, because the assignment was made between the appellant and the Insuurance Co., and the respondents were not a party to it, and in any case, it has been proved that there was fraud on the appellant's part.

With this variation, the appeal must be dismissed. The 9th respondent has been discharged at the instance of the appellant, and he will have LP. 4.— costs of attending the hearing.

The Appellant will pay the costs of the remaining respondents assessed at LP. 15.— together with advocate's fees. LP. 10.—. The provisional attachment is confirmed on the sum of LP. 138.080 mls. and released on the remainder of the deposit in the Execution Office.

Delivered this 4th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 128/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Shabatai Drory — Appellant.

v.

1. Solel Boneh, Ltd., Haifa
2. Aguda Haddadith "Geulim", Baith Meshutaph, Hadar Hacarmel Ltd., Haifa — Respondents.

Action on promissory notes given in payment of construction of building — Defence of failure of consideration — Notes withdrawn and indorsed to third person — Indorsee suing on dishonoured notes — Indorsing in circumstances amounting to fraud — Holder for value but with notice — Defective title. Bills of Exchange Ordinance, sec. 28, 35(2) *— Chalmers on Bills of Exchange — Byles on Bills.*

1. Withdrawing a bill while knowing that defence of failure of consideration had been raised and negotiating the instrument when overdue amounts to fraud within meaning of sec. 28(2) of Bills of Exchange Ordinance.

2. Where a bill is negotiated in circumstances amounting to fraud, title of person negotiating it becomes defective.

3. Holder who takes a bill after maturity is a holder with notice, against whom failure of consideration is a defence, even if he is a holder for value.

Edit. Note:—See C.A. 126/31, 1 C of J 238; C.A. 141/31, 1 C of J 252.

Agranat for Appellant.
Shapira for Respondents.

Appeal from judgment of District Court, Haifa, in its appellate capacity, dated 14.4.1938.

JUDGMENT.

This is a difficult case, as indeed most cases under the Bills of Exchange Ordinance, are, but it has been very well argued by Counsel on both sides, and their arguments have been of much assistance to us.

The facts are complicated, but the following is a sufficient resume of them. The appellant had signed as maker four promissory notes which were guaranteed by the second respondents, to the order of Missrad Kablani Co-operative Poalei Haifa Ltd., (hereinafter called the Indorsers). These notes were not met on maturity and the Indorsers entered an action on them against the appellant and the second respondents in the Magistrate's Court.

During the hearing of the action, the defence raised, amongst other items, the point that a buliding in payment of the construction of which the promissory notes had been given, had not been completed, and that therefore there was a failure of consideration and that they were not liable on the notes. The Indorsers thereupon withdrew their case, and indorsed the notes to the first respondents, who in their turns entered a fresh action in the Magistrate's Court on these same notes against the same defendants, who raised the same defence as in the first action against them, as well as the defence of collusion between the first respondents and the Indorsers.

The Magistrate, basing himself on Section 35(2) of the Bills of Exchange Ordinance (Cap. 10) found in favour of the defence, and dismissed the claim.

On appeal to the District Court that Court allowed the appeal, saying that if Solel Boneh, the 1st Respondent were holders for value, the defence of lack of consideration between the present appellant and the Indorsers was not available against Solel Boneh — that no defects of title as set out in Section 28(2) of the Bills of Exchange Ordinance were alleged by the present appellant, and that the main question was whether the present appellant had proved that Solel Boneh were not holders for value. The District Court further commented on the fact that the Magistrate had not made any findings of fact with regard to the allegation of collusion between Solel Boneh and the Indorsers, but went on to say that there was no evidence of collusion on the record. Finally the District Court stated that "in the circumstances the defence of lack of consideration raised by the respondent" (the present appellant) "does not apply to "Solel Boneh", and the Magistrate erred in dealing with the question of lack of consideration as between the respondent" (the present appellant) "and the payee" (the Indorsers) "before first finding that the appellant was not a holder for value". The District Court thereupon set aside the Magistrate's judgment, and entered judgment in favour of the present first respondent, against the present appellant and his guarantor the present second respondents. Hence this appeal by leave of the District Court to this Court.

The relevant Sections of the Bills of Exchange Ordinance to which reference must be made are as follows:—

"S. 28. (1) A holder in due course is a holder who has taken a bill complete and regular on the face of it, under the following conditions, namely:—

(a) that he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact;

(b) that he took the bill in good faith and for value and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

(2) In particular the title of a person who negotiates a bill is defective within the meaning of this Ordinance, when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

(3) A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder".

"S. 35 (2) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title, affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had."

It is not disputed that the notes were endorsed by the Indorsers to the first respondents after maturity.

Before us the appellant has repeated the same arguments as he advanced in the Courts below. He has urged that since the building has been wrongly constructed, there is a failure of consideration, and that the negotiation of the notes by the Indorsers after maturity to the first respondents was a negotiation in circumstances amounting to fraud, since the Indorsers knew that the defence of failure of consideration had been pleaded and that therefore, by Section 28(2) there was a defect in title, and he is not liable to the first respondents. The first respondents reply that by Section 35(2) only a defect in title can affect them, that they are holders for value and absence or failure of consideration is not an equity attaching to a note, and that the consideration was the part construction of the building and that the notes were given for payments due before the completion of the building.

We find it a little difficult to understand the judgment of the District Court when it says that no defects in title such as are set out in Section 28(2) of the Bills of Exchange Ordinance were alleged

by the present appellant, Drory. All through the arguments, that would seem to have been one of the main defences. Neither does it seem to us correct to say that the main question was whether the present appellant had proved that the first respondents were not holders for value. In our opinion the case turns on the question whether the negotiation of the notes by the Indorsers was in circumstances amounting to fraud; and it seems to us that since the Indorsers, knowing that the defence of failure of consideration had been raised, and thereupon withdrawing the notes, and negotiating them after maturity, did so in circumstances amounting to fraud. And in doing so the Indorsers' title became defective, within the meaning of Section 28(2) and consequently under Section 35(2) the first respondents did not acquire any better title. We are supported in this view by two passages in Chalmers on Bills of Exchange, 10th Ed. at pp. 118 and 142.

> "Failure of consideration, it seems, *is a defence against a remote holder for value with notice.* The reason probably is that it is in the nature of a fraud to negotiate a bill when the holder knows that the consideration on which he received it has failed."
>
> "The position of a holder who takes a bill when overdue is this: he is a holder with notice. He may or may not be a holder for value, and his rights will be regulated accordingly. He is a holder with notice for this reason: he takes a bill which, on the face of it, ought to have got home and to have been paid."

Whilst it is true that in Byles on Bills this opinion is not followed, we prefer the opinion expressed in Chalmers.

We think therefore that this appeal must be allowed, and judgment of the District Court quashed.

The case is remitted to the District Court to deal with the main point on which the judgment of the Magistrate's Court was based, namely, that there was a failure of consideration and then to give a fresh judgment.

Costs to await result of retrial.

Delivered this 29th day of June, 1938.

Acting Chief Justice.

CIVIL APPEA NO. 160/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case of:—

Jam'iyat El-Shark El-Ta'awoniya.
Lilnakl Ltd. Appellants.

v.

The Motor Trading Co. Respondents.

Finding of court of trial reversed by appellate Court.

Appellate Court always entitled to say there is no evidence to support particular contention, even if court of trial said there was such evidence.

Edit. Note:—See C.A. 127/38 4 CtLR 7 and Edit. Note thereto.

Hanna Nakkara — by delegation for Appellants.
No appearance for Respondents.

Appeal from decree of District Court, Haifa, sitting in its appellate capacity dated 19.5.1938.

JUDGMENT.

There is nothing in this appeal.

The point that the Appellate Court made a finding of fact which the Magistrate has not done is of no weight, because an appellate court is always entitled to say that there is no evidence to support a particular contention, even if the Magistrate said that there was such evidence.

There is nothing in this particular appeal and it is therefore dismissed.

As there is no appearance by or on behalf of the Respondents, no costs are awarded.

Delivered this 6th day of July, 1938.

Puisne Judge *Puisne Judge* *Acting Chief Judge.*

CIVIL APPEAL NO. 124/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.), Frumkin, J. Khayat, J.

In the appeal of:—

Sh. Cohen Appellant.

v.

E. Ajashvilli Respondent.

Entering opposition in a court other than that which gave original judgment — Extent of validity of Judgment by Default Rules — Right of opposition and mode in which it should be exercised.

1. Rule 4(1) of Judgment by Default (Magistrates Courts) Rules, 1928 deals solely with a matter of practice and procedure, not with substantive law; therefore valid.

2. Opposition (to default judgment) can only be brought before Court which gave original judgment.

Edit. Note:—See: C.A. 130/36 2 CtLR 166; see also sec. 4 of Civil Procedure Ordinance.

Frank for Appellant.

Bithan for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 28.2. 1938.

JUDGMENT.

We need not trouble you Mr. Bithan.

This appeal fails — the only point first to be determined is whether under the Judgment by Default (Magistrates Courts) Rules of 1928, an opposer is limited to entering his opposition in the Court which gave the original judgment.

The validity of the Judgment by Default (District and Land Courts) Rules was equally in question in a recent case, Civil Appeal No. 130 of 1936*). In this case, this Court held that unless the rules dealt with matters of practice and procedure only they could not alter the substantive law. Therefore the success of this appeal depends on whether this Rule 4(1) regulates a matter of practice or procedure or not, and we are of opinion that it deals solely with a matter of practice and procedure. The right of opposition has in no way been affected — merely the mode in which that right should be exercised. That being so, we are of opinion that this case is distinguishable from the one quoted to us, Civil Appeal No. 130 of 1936, and this appeal, as I have said, fails.

The appeal must be dismissed with costs and fees for attending the hearing for the Respondent which we fix at an inclusive figure of LP. 5.—.

Delivered this 3rd day of June, 1938.

Acting Chief Justice.

CRIMINAL APPEAL NO. 62/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

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*) 2 CtLR 166.

The Attorney General — Appellant.

v.

Alexander Aharon Reich — Respondent.

Remaining in Palestine illegally — Elements of offence of illegal entry or stay in Palestine — Commencement of prescription of illegal stay in Palestine.

"Being found in Palestine" — an element of the offence of remaining in Palestine illegally; offence is a continuing one and not prescribed until offender actually found in Palestine.

Edit. Note:—See Cr.A. 51/38, 3 CtLR 265.

Crown Counsel (*Hogan*) for Appellant.

Kaddouri for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated 24. 5.1938, whereby the Respondent was acquitted of the charge brought against him under Section 12(2) of the Immigration Ordinance.

JUDGMENT.

This appeal is allowed.

Two grounds were raised by the Crown Counsel. Firstly, that this offence under Section 12(2)(b) of the Immigration Ordinance, is a continuing offence in that the offence, or part of the offence, is "remaining" in Palestine, and "remaining" connotes an offence which takes place every day if one remains in Palestine. Secondly, that this offence is not prescribed until the person remaining in Palestine is actually found in Palestine.

As we stated in a previous case,*) the offence consists of two elements: (1) the remaining, and (2) being found in Palestine, and it is unnecessary for me to repeat the remarks made on this subject. That was our judgment and remains our judgment now and will continue to be our judgment, and we agree that remaining in Palestine is a continuing offence and that a person commits the offence during every day on which he remains in Palestine illegally.

For these reasons, the appeal must be allowed. Both the Magistrate and the District Court were wrong and their judgments must be set aside. The Respondent must be convicted of an offence under Section 12(2)(b) of the Immigration Ordinance; and in the circumstances, the judgment of this Court will be a fine of LP. 10 or six weeks imprisonment in default of payment of the fine. We also re-recommend him for deportation from the country. The Respondent is given seven days from today to pay the fine.

Delivered this 28th day of June, 1938.

Acting Chief Justice.

*) Cr.A. 51/38 3 CtLR 265.

CIVIL APPEAL NO. 147/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Farha Elias Awayyed — Appellant.

v.

1. Najib Awkal
2. Adeeb Yousef Sroujy
3. Amin Yousef Sroujy
4. Nakhleh Sroujy
5. Salim Sroujy

Hanna Shaheen — Respondents.

Notice of appeal without decree — Appeal before decree was issued — Civil Procedure Rules, Rule 330.

No appeal if decree not attached to notice of appeal.

Edit. Note:—The notice of appeal was accompanied by a certified copy of judgment.

See Misc. Appl. 38/38, 4 CtLR 20; C.A. 149/38 4 CtLR 21.

Abcarius for Appellant.

1st Respondent — no appearance.

Asfour and *Cattan* for Respondents No. 2-6.

Appeal from judgment of District Court, Nablus, dated 7.5. 1938.

JUDGMENT.

A preliminary objection has been taken that no decree was attached to the notice of appeal. This fact was agreed to by Counsel for Appellant.

Under Rule 330 of the Civil Procedure Rules, 1938, the appeal should not have been accepted for filing, and there is therefore no appeal before us. Counsel for Appellant says that no decree has been issued as yet, and, if an appeal is lodged again after the issue of the decree, we will then consider the question of the fees.

The order is therefore that there is no appeal proper before this Court at present. Respondents to have their costs fixed at LP. 12.— to include fees for attending the hearing.

Delivered this 30th day of June, 1938.

British Puisne Judges

CIVIL APPEAL NO. 105/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

Emmanuel Vorchheimer — Appellant.

v.

Trust and Transfer Office "Haavara" Ldt. — Respondent.

Construction of agreement — Discretion given to one party to decide certain matters — Claim that discretion was exercised in fraudulent or arbitrary way — Failure of action in absence of alternative claim for taking an account.

1. Where contract gives a party discretion to decide certain matters, it is open to other party to prove that such discretion was not exercised properly.

2. If plaintiff denies defendant's right to charge certain expenses he must put in alternative claim for the taking of an account; in default of a clear and specific demand to that effect his action will fail on Court deciding against him on first point.

Edit. Note:—As to 2 see: C.A. 236/37 3 CtLR 29; C.A. 46/23 1 C of J 14;
Civil Procedure Rules, 1938, Rules 7(1)(h), 14, 52(3).

Benyamini and *Dr. Vorchheimer* for Appellant.
Dr. Rosenblueth and *Dr. Smoira* for Respondent.

JUDGMENT.

Frumkin, J.

The Appellant in this case is one of many Jews of German origin who entered into contractual relations with the Respondent, known in this country as "Haavara", a body established to assist people of the class of Appellant to transfer their capital or part of their capital from Germany into Palestine. This was done by the Haavara acting as a sort of intermediary between importers in this country and exporters in Germany by paying for the goods imported into Palestine with the capital of the "payers", as the capitalists are called, with whom the Respondent entered into agreements of the nature entered into with the present Appellant.

2. The agreement entered into between the Appellant and the Haavara on the 14th August, 1934, is one of the typical agreements

of this sort and makes it clear that in transfering marks from Germany the Haavara were concerned not merely with the transfer of the money of a particular payor but its main object was to accelerate the transfer of the capital of all other payors. The Appellant agreed to these terms.

3. The gist of this action is that in addition to 6% which the Haavara was entitled to charge as transfer costs under the second part of clause 2 of the agreement, it deducted a further sum of LP. 574.510, which sum the Appellant is claiming. The District Court decided against the Appellant, and hence this appeal.

4. The rights of the parties in this case entirely depend on the proper construction of the last part of clause 2 of the agreement, which reads as follows:—

> "Should a situation occur by which in the interest of the payors extraordinary measures become necessary for accelerating the transfer, then the Haavara shall be entitled to claim the extra expenses arising through this and to charge it to those payors to whom up to that date their money has not yet been paid out."

5. It is the Haavara's contention that the amount claimed by the Appellant represents his share in the extra expenses, which arose through the extraordinary measures, which became necessary for accelerating the transfer in the interest of the payors.

6. We hold that the construction put upon the said clause by the District Court was, in its essence, a proper construction, and it follows that it was within the discretion of the Haavara to decide if and when a situation occured necessitating extraordinary measures, and to take such measures when necessary. It was open to the Appellant to prove that the Haavara did not exercise its discretion properly, or to put it in the words of the District Court, that the Haavara exercised its discretion in a fraudulent or arbitrary way, but he did not avail himself of this opportunity. His appeal on this point therefore fails.

7. The fact, however, that the Haavara is entitled to decide when extraordinary measures are to be taken, and to charge the payor his share in expenses thus incurred, does not relieve the Haavara of its duty to render accounts proving what was the total amount of the extra expenses and the share of the payor in this expense.

8. It at first occured to us that the case would have to go back for that purpose, but after further consideration it appeared that never during all the protracted proceedings before the Court of trial nor before this Court was there any clear and specific demand for the taking of an account. On the contrary the Appellant based his

action on the ground that the Haavara was not entitled at all to charge the extra expense, but never did he put in an alternative claim that if the Haavara was entitled to do so it should render an account how the figure deducted from his account was arrived at. In fact it is our impression that the Appellant does not seriously allege that there was any over-charge in case the charge was justified. We therefore see no need to remit the case.

9. The judgment of the District Court is confirmed and the appeal dismissed with costs assessed at LP. 10.—, and LP. 10.— advocate's fees.

Delivered this 11th day of July, 1938.

Puisne Judge.

I concur in toto.

British Puisne Judge.

I concur

Puisne Judge.

CIVIL APPEAL NO. 171/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.), Khaldi, J. and Abdul Hadi, J.

In the appeal of:—

Beni D. Haddad — Appellant.

v.

Elias Wasef Mansour — Respondent.

Notes given in settlement of all claims of father in connection with breaking off engagement to his daughter — Notes in favour of daughter at request of her father and of maker himself — Defence against indorsee of defect in title with notice — Estoppel from setting up defence of non-consideration.

If notes the consideration of which were given by B are drawn in favour of C at maker's own request and at request of B, maker estopped from setting up defence of non-consideration, as consideration must be deemed to have shifted by mutual consent from between B and maker to between C and maker.

Edit. Note:—See C.A. 162/32 1 C of J 263.

H. Asfour for Appellant.

J. Sahyoun for Respondent.

Appeal from decree of District Court, Haifa, in its appellate capacity, dated 23.5.1938.

JUDGMENT.

We need not trouble you Mr. Sahyoun.

In this case the Appellant was engaged to a certain lady in Haifa. The engagement was broken off and the father of the lady, Ibrahim Haddad, told the Appellant that he considered that a certain sum of money was due to him for expenses to which he had put in connection with the engagement.

The claim was for a sum of LP. 500.— but as a result of the mediation of a friend, one Elias Sama'an Mansour, the sum was eventually reduced to LP. 200.—, and it was mutually agreed that this sum of LP. 200.— be paid by the Appellant in full settlement of any claim which the father or the daughter might have against him. This compromise was found by the Courts below to be founded on a perfectly good consideration and could not be upset. Three bills were thereupon drawn up and signed by the Appellant. These bills were drawn in favour of Miss Haddad, as she then was, and it has been stated and not contradicted that they were drawn in favour of the daughter at the request of the Appellant himself and the father, Ibrahim Haddad. I should say that the Respondent was present during these negotiations, had full knowledge of the negotiations and is stated to have negotiated the bills himself, when they were endorsed by the daughter to him, and the Magistrate finds, and it has not been denied, that the indorsee had given value therefor. The bills were not met and the Respondent, as indorsee, sued the Appellant as maker. The Magistrate, in the course of a very long and able judgment in many respects, found that there was consideration for the compromise, that no consideration actually passed from the payee to the present Respondent, and that being so, he found that there being no consideration and the Respondent being fully aware of all the facts connected with the case, he was not a holder in due course and that he had notice of a defect in title of Miss Haddad and could not sue on the bills.

When the case came up before the District Court they confirmed the Magistrate's finding that there was no consideration as between the payee and the Respondent, but held that the Appellant was in a similar position to that of an accomodation party and that the title of the payee was not defective within the meaning of Section 28(2) of the Bills of Exchange Ordinance.

Now it seems to us that both Courts have wrongly appreciated the

essential facts of this case. The fact that these notes were drawn in favour of the daughter at the request of the Appellant himself and at the request of the daughter's father, in our opinion, absolutely estops the present Appellant from setting up the defence of non-consideration. There was consideration between the father and the Appellant, and since the notes were drawn in this way, the consideration must be deemed to have shifted by mutual consent from between the father and the Appellant to between the daughter and the Appellant. That being so, the question of good faith does not arise the defence of no consideration not being open here and the case quoted to us from the English Law does not apply.

We think that the District Court came to a correct conclusion but that their reasons were wrong. The appeal must be dismissed with costs, to include hearing fees, fixed at LP. 15.— and disbursements.

Delivered this 20th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 167/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Hilaneh Saleh Jiries Barakeh — Appellant.

v.

Habeebeh Elias Barakeh — Respondent.

Denial of signature and seal on document — Experts appointed to verify authenticity of document — Court considering what documents suitable for comparison — Court refusing to hear oral evidence as to authenticity of document in dispute — Ott. Code of Civil Proc. Art. 99, 103.

Where signature on document denied Court right in considering what documents were suitable for production for comparison and verification by experts and also in refusing to hear evidence as to authenticity of documents in dispute.

Edit. Note:—See L.A. 42/33 2 PLR 201.
C.A. 107/29 1 PLR 519.
L.A. 100/24 4 C of J 1288.

Cattan for Appellant.

Sh. Assal for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 30. 3.1938.

JUDGMENT.

We do not wish to hear you Mr. Assal.

This is an appeal from the judgment of the District Court of Jerusalem dismissing Appellant's claim for a sum of LP. 307.692 mls. which she alleges to have paid to Hanna Issa Barakeh, father of the Respondent in accordance with a document alleged to be signed and sealed by the said Hanna.

This case was filed in the District Court in 1931 and came up for hearing on the 13th March, 1933. At that hearing the Respondent denied the document and the alleged signature and seal thereon. The Appellant thereupon applied for the appointment of experts to verify the authenticity of the document and added that she will search for documents with which to make comparison. The Appellant failed to produce any documents and the case was adjourned again to different dates for the same purpose, and finally, in 1937, when the case came before the Court, the Appellant produced all documents which she wished to submit to the experts for verification. The Court held that these documents were not of the class of documents mentioned in Article 99 of thte Civil Procedure Code, and refused to refer them to the experts and made an order to that effect.

Mr. Cattan submits that the Court had no right to look at the documents and that his client was deprived from producing any documents that she might have been in a position to produce. We think that the Court were right in considering what documents were suitable for production for verification. On this point the appeal fails.

Another point was raised, that is, that the Court disregarded an application under Article 103 of the Civil Procedure Code, to hear evidence. Article 103 deals with "statements of persons who saw the documents in dispute written, or who saw the defendant seal or sign the documents or who have knowledge of circumsances which may elucidate the matter." We think that the Court were right in refusing to hear evidence on this point.

These are the only points before us, and we think that the District Court were right in holding that the Appellant has failed to produce any evidence as to the genuiness of the signature.

The appeal must be dismissed with costs fixed at LP. 5.— and LP. 5.— hearing fees.

Delivered this 12th day of July, 1938.

British Puisne Judge.

HIGH COURT NO. 48/38.

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

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

In the application of:—

1. The Ozar Mif'alei Yam Beeravon
2. Mogbal The Marine Trust Limited — Petitioners.

v.

1. Dr. Moshe Cohen
2. Abraham Cahana
3. Dr. Aaron Rubinstein
4. Itzhak Kourland
5. Joseph Katzenellenson — Respondents.

Application for change of place of trial on ground of public security — Change of place of trial in same District.

Litigants cannot be allowed to choose their own judges, and convenience in itself not a sufficient ground for change of venue, but High Court may for the due administration of justice grant an application for change of venue, even if it is for change of place of trial from one place in the District to another place in same District.

Edit. Note:—See H.C. 33/38 3 CtLR 262.
H.C. 32/34 2 PLR 79.

Horowitz for Petitioners.
Seligman for Respondents.
Application for change of venue.

ORDER.

This is a return to an order nisi granted and directed against the Respondents, who are plaintiffs in a certain action in the District Court of Jaffa, to show cause why the place of trial of the action should not be changed from Jaffa to Tel Aviv.

In the first place, I would like to say, and my brother Frumkin agrees with me, that we both very much regret that it was ever necessary that this application should be made to us. In our opinion, it is eminently a matter susceptible of mutual arrangement between the two British Judges who sit in the District Court, Jaffa. Be that as it may, the application has been made to us and it is therefore our duty to determine it.

This petition is perhaps unique, inasmuch as it differs from the ordinary type of application for change of venue, because the application is for the change of the place of trial from one place in the District to another place in the same District, and not, as is usual, to the jurisdiction of another District Court.

The counsel for the Respondents has appeared and has stated that he has no objection to the hearing taking place in Tel-Aviv, and then proceeded to argue that the application is misconceived.

There are no English precedents to guide us, and there could not very well be, because venue does not exist any longer in England in the trial of civil actions.

Convenience by itself is not a sufficient ground for the change of venue. In this case, the application is made not only on the ground of convenience, but also on the ground of public security, inasmuch as in the present state of insecurity on the borders of Jaffa and Tel-Aviv, it would be dangerous for the parties, their advocates and their witnesses who are all Jews, to appear in the District Court sitting in Jaffa.

We think that for the due adminsitration of Justice, and that is the ground on which we decide this application, it is better that the locality of the trial should be in Tel-Aviv.

I most carefully refrain from saying that the action should be tried by the Chamber of the District Court sitting in Tel-Aviv. That would be an order which I hope this Court would never make, because litigants cannot be allowed to choose their own judges. That question, of course, does not arise here, because the petitioner made it quite clear that this it not the basis of his application — he merely asks for the change of the place of trial.

We therefore make the rule absolute and direct that the locality of trial shall be in Tel-Aviv. It is thus open for the Senior President to make such arrangements as will comply with this order, I presume, in consideration with the other judges of the Jaffa District Court.

The rule is made absolute and the petitioner will have his costs fixed at LP. 10.— and LP. 5.— hearing fees.

Given this 8th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 170/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Yehuda Mashat — Appellant.

v.

"Hamumche" Aguda Shitufit Lekol Minei Ta'asiyot Melet Mozaika, Ltd. — Respondent.

Application to restrain cooperative society from using a certain name in this title — Jurisdiction in matters of injunction against cooperative societies — Meaning of "court" in Companies Ordinance and Cooperative Societies Ordinance — Court proceeding to deal with matter after coming to conclusion that they had no *jurisdiction — Registration of company subject to risk of being restrained from using their registered title.*

Cooperative Societies Ordinance, sec. 9(2).

Companies Ordinance, sec. 22(2), 24, 2.

1. Claim to restrain a cooperative society from using a certain name in their title can be entertained by a District Court (and a District Court only) and not by Registrar of Cooperative Societies.

2. Court has power to grant injunction, even against a company (or cooperative society) which has already been registered, not to use a certain title, if Court satisfied that an injunction is the proper remedy.

3. When Court comes to conclusion that they have no jurisdiction, they have to stop at that point and not to proceed to deal with the matter any further.

Ph. Joseph for Appellant.

Krongold for Respondent.

Appeal from decree of District Court, Haifa, dated 27.5.1938.

JUDGMENT.

This is an appeeal from the District Court of Haifa which, in an application by the Appellant to restrain the Respondent from using the name "Hamumche" in their title, the Court, in the first part of their judgment, said that they had no jurisdiction to deal with the claim. They based themselves upon these grounds: Section 9(2) of the Cooperative Societies Ordinance incorporates the provisions of Section 22(2) with which we are not here concerned, and Section 24 of the Companies Ordinance in the Cooperative Societies Ordinance by saying that these sections "shall apply to a society applying for registration under this Ordinance as if the word 'company' included a cooperative society, and the words 'registrar of companies' included

the registrar of cooperative societies."

The District Court then referred to the definition of 'Court' appearing in Section 2 of the Companies Ordinance, that is —

> "Court . . . . means the court having jurisdiction to wind up the company.

Referring back again to the Cooperative Societies Ordinance, they found that the only person having authority to wind up a cooperative society is the registrar, and by a process of reasoning, which is a little hard to follow, they then determined that the word 'court' in Section 24(4) of the Companies Ordinance really meant the registrar of Cooperative Societies.

Now, in this interpretation, we think they were wrong. It must be remembered that at the time the Companies Ordinance came into force, in that Ordinance the only Court having jurisdiction to wind up a company was the District Court of Jerusalem. Any application to the Court, therefore, under the Companies Ordinance had to be limited to the Court having jurisdiction in winding up. Throughout the whole of the Companies Ordinance, 'Court' means a 'court' and does not and cannot possibly mean, the 'registrar of companies', and it seems clear to us that when Section 24(4) of the Companies Ordinance is incorporated in the Cooperative Societies Ordinance the word 'court' must retain its original meaning as in the Companies Ordinance, that is, 'a Distrcit Court'.

The first part of the judgment of the District Court of Haifa is, therefore, wrong. The District Court has jurisdiction to entertain such a claim.

The District Court, having come to the conclusion that they had no jurisdiction, should have stopped at that point. They did not, however, do so, but proceeded to deal with the matter, as they say, looking at it from another angle. That angle, I am afraid, is just as inaccurate as the first angle which they took. They say that they "cannot grant an injunction against the exercise of legally and properly acquired title", but Section 24(4) of the Companies Ordinance gives the Court power to grant such an injunction if they are satisfied, on the merits of the case, that an injunction is the proper remedy. The effect that the Company has been already registered is, to our minds, immaterial. As Dr. Joseph remarked, the Company is registered subject to the risk of being restrained from using its registered title if it is found that somebody else is entitled to that title.

The appeal must be allowed, the judgment of the District Court set aside, and the case remitted to that Cour to deal with it on its merits.

Costs to await the result.

Delivered this 19th day of July, 1938.

HIGH COURT NO. 47/38.

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

Before:—The Acting Chief Justice (Copland, J.) and Frumkin, J.
In the application of:—

Yehoshua Hankin — Petitioner.

v.

1. Chief Execution Officer, Jaffa
2. Mohammad Ahmad Salahi, the Mutawalli of Wakf Salahi
3. Ahmad Salahi — Respondents.

Registrar dealing with application and signing as Chief Execution Officer — Application to Chief Execution Officer against order of Registrar — Act done by Registrar without jurisdiction — Proper Court to apply to by party aggrieved by Registrar's desion — Registrars Ordinance, 1936, *sec.* 6, 7 *and* 8.

Decision of Registrar can be taken objection from to District Court, hence High Court not proper Court to come to, even if petitioner says decision was made without jurisdiction.

Edit. Note:—See H.C. 14/38 3 CtLR 169.

Olshan for Petitioner.
Cattan for the 2nd Respondent.
3rd Respondent in person.

Application for an order to issue directing the first Respondent to show cause why he should not proceed to deal with the applications of Petitioner dated 11.1.1938 and 27.3.1938, in Execution File No. 3389/30, Jaffa.

JUDGMENT.

In this case, the Petitioner has come to the High Court asking us to direct the Chief Execution Officer to deal with an application made by him against an order of the Registrar, which order of the Registrar, the petitioner says was made without jurisdiction.

Now, the Registrar's duties are laid down in the Registrars Ordinance of 1936. In this case, as the Chief Execution Officer remarked, it is perhaps a little difficult to say under what particular section the Registrar purported to act, but that it must be under Section 6 since there was no other section — not a very sound argument, but

possibly good enough. By Section 7 the Registrar, for the purposes of the preceding Sections, is deemed to exercise the powers of a Court. By Section 8,

> "Any peron aggrieved by anything done or ordered by a Registrar other than under Section 6(b), or paragraph (2), 4, 5, 7, 8, 9, 10, or 12 of Section 6(e), or for the issue of notices to show cause, may apply within seven days on summons, supported by affidavit, to the Court to which such Registrar is attached to have the act, order or ruling complained of set aside, and the Court may give such directions or make such order thereon as it shall think fit."

It has been argued by the Petitioner that where an act is done without jurisdiction, this High Court is the proper Court to come to, and he has instanced cases where the Religious Courts acted without jurisdiction. The position here is somewhat different — in this case there is a Court to which objection could be taken from a decision of a Registrar. The fact that in dealing with the application the Registrar signed as Chief Execution Officer, in our opinion, does not affect the position at all. The Petitioner has come to the wrong Court, he should have gone to the District Court and advanced to that Court the arguments he advanced to us, as to the nullity of the Registrar's Order.

The rule must be discharged with costs fixed at LP. 10.— to include hearing fees.

Delivered this 18th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 145/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

M. Calamaro, acting on behalf of the heirs of Charles Schamash — Appellant.

v.

Muhammad Abdallah — Respondent.

Scope of Foreign Judgments Rules — Grant of exequatur on foreign judgment — Jurisdiction of District Court in matters of foreign judgments — Rule, Ordinance, Order-in-Council — Action on foreign judgment — Conclusivness of foreign judgment — Judgments (Reciprocal Enforcement) Ordinance — Judg-

ments (Reciprocal Enforcement-Egypt) Ordinance — Palestine Order-in-Council, Art. 39, 40.

1. In absence of a supporting Ordinance, Treaty or Convention a party cannot apply for an exequatur on a foreign judgment.

Only cases in which an exequatur can be issued are under Judgments (Reciprocal Enforcement) Ordinance for judgments emanating from United Kingdom or British Empire and under Judgments (Reciprocal Enforcement-Egypt) Ordinance for judgments coming from Egypt.

2. A Rule of Court cannot amend an Ordinance unless specific authority to that effect is given.

An Order-in-Council overrides everything else and cannot be challenged.

3. Enforcement of foreign judgment within exclusive jurisdiction of District Court, whatever the amount involved may be.

4. In an action on a foreign judgment the judgment cannot be queried on its merits; it is conclusive and unimpeachable as regards amount of debt and fact that it is owed by defendant. defendant.

Edit. Note:—As to 1 see: C.A. 20/31 1 PLR 719; C.A. 65/35 2 CtLR 90; C.A. 121/30 3 C of J 918;

As to 2 see: C.A. 4/37 2 CtLR 146; P.C.A. 98/25 1 PRL 71.

As to 3 see: C.A. 68/32 1 PLR 781.

Goitein for Appellant.

Y. *Papo* for Respondent.

Appeal from judgment of District Court, Jaffa, dated 4.5.1938.

JUDGMENT.

In this appeal from the District Court of Jaffa there are two judgments to be considered, first an Interlocutory Judgment which deals with the question of the issue of an exequatur, and the second with the question of an action on a judgment.

As to the first judgment, and in order to allay any doubts which may exist, we are of opinion that the principles laid down in Jaffa Civil Case No. 239/32 — Katz v. Katz,*) correctly state the law. In that judgment the District Court held that in the absence of a supporting ordinance a party cannot apply in the District Court for an exequatur on a foreign judgment. The Foreign Judgments Rules apply to those foreign judgments which are made enforceable in Palestine by an Ordinance, Treaty or Convention having the force of a Treaty, but in the absence of such Ordinance or Treaty or Convention they have no application and cannot by themselves make a foreign

*) 3 C of J 922.

judgment enforceable. Their only function is to lay down a procedure for enforcing a foreign judgment that is enforceable in Palestine. In this present case, the District Court, following the case of Katz v. Katz, came to the same conclusion. In that we think they were right, and that the only case in which exequatur can be issued are under the Judgments (Reciprocal Enforcement) Ordinance, for judgments emanating from the United Kingdom or the British Empire, and under the Judgments (Reciprocal Enforcement) Egypt Ordinance, for judgments coming from Egypt.

As regards the second judgment, we must consider the effect of the Palestine Order-in-Council, 1922. Article 39 says that Magistrates Courts shall have the jurisdiction assigned to them by the Ottoman Magistrates Law of 1913 as amended, altered or extended by any subsequent law or ordinance or rule for the time being in force. Article 40 says that District Courts shall exercise jurisdiction, amongst other things, as a Court of First Instance in all civil matters not within the jurisdiction of the Magistrates Courts. The general rule is of course that a rule cannot amend an ordinance unless specific authority to that effect is given. In our opinion Article 39 of the Order-in-Council gives such authority, and it must be remembered that an Order-in-Council overrides everything else and cannot be challenged.

The Magistrates Courts Jurisdiction Ordinance, 1935, gives jurisdiction to Magistrates to try all civil actions in which the amount in dispute does not exceed LP. 250. Rule 3 of the Foreign Judgments Rules (page 2332, Vol. 3, Laws of Palestine) says that "A foreign judgment may be made executory in Palestine either by action thereon before a District Court, or by the grant of an exequatur issued by the District Court." It is true that an action on a foreign judgment is a civil action since the foreign judgment establishes the amount of the debt and the fact that it is owed by the Defendant, and the foreign judgment cannot be queried on its merits. In such matters it is conclusive and unimpeacheable. But it is a civil action just the same, though certain special defences only are open to a Defendant.

We think that Article 39 of the Order-in-Council as amended, allows the jurisdiction of Magistrates Courts to be varied by ordinance or by rule and the Foreign Judgments Rules, therefore, confer exclusive jurisdiction on the District Court to hear an action on a foreign judgment, whatever the amount involved may be.

If we think it out this is a wise provision, because a question of foreign law may arise and the District Court is obviously a more suitable and competent Court to try such question than a Magistrate Court.

Questions also of foreign exchange are frequently involved which can be most complicated as is shown in several judgments in recent years of the House of Lords and of the Privy Council.

Though the greater part of the two judgments of the District Court is unimpeacheable, we think that the District Court misdirected themselves in law on the question of jurisdiction, and that they did not fully appreciate the effect of Article 39 of the Order-in-Council.

The judgment of the District Court must therefore be set aside and the case remitted to be tried on its merits.

Costs will await the result of the retrial.

Delivered this 25th day of July, 1938.

Acting Chief Justice

CIVIL APPEAL NO. 176/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Municipal Corporation of Jaffa — Appellant.

v.

Shlomo Zion — Respondent.

Power of attorney by old Municipal Council — Institution of action after constitution of new Municipal Corporation — Absence of express or implied ratification of action.

1. Powers of attorney given by old Municipal Councils lapsed when new Municipal Corporations were constituted under. Municipal Corporations Ordinance, 1934.

2. Power of attorney given after institution of case — of no effect, unless there is either an express or an implied ratification of the institution of the original plaint.

Cattan for Appellant.

Horowitz for Respondent.

Appeal from judgment of District Court, Jaffa, in its appellate capacity, dated 7.6.1938, setting aside the judgment of the Magistrate.

JUDGMENT.

We need not trouble you Mr. Horovitz.

This appeal fails. It fails on one point and we do not propose to

deal with the second point raised, that is it fails on the question of the power of attorney. It is admitted that the only power of attorney in existence at the time this action was instituted was one that was given before the Municipal Corporations Ordinance, 1934, came into effect. We think that when the new Municipal Corporation of Jaffa was constituted, the power of attorney given by the old Municipal Council lapsed, and therefore when this action was instiuted, and instituting means the filing of the plaint, a fresh power or authorisation was required. We do not think that the power of attorney which was given to Mr. Cattan and Amin Eff. Akel, after the institution of this case, is either an express or an implied ratification of the action of Amin Eff. Akel in instituting the original plaint.

For these reasons, therefore, the appeal must fail and must be dismissed.

We do not propose to deal with the second point, since it is not really necessary for our decision. There might have been certain difficulties in dealing with it, but we leave it to be determined when it is necessary so to do.

The appeal is dismissed with costs, including hearing fees, fixed at LP. 15.— and disbursements.

Delivered this 14th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 138/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Zwirnerei- und Naehfadenfabrik A. G. Appellant.

v.

Leib Katzmann Respondent.

Claim for money due on an account for goods supplied — Meaning of "payment to be by bill" — Conditional and absolute payment by bill — Defence of prescription — Case remitted for administration of oath — Examination on oath of defendant setting up defence of prescription.

1. Stipulation in a contract "payment to be by bill" shows intention of parties — rebutting the presumption that payment by bill is conditional — that bill should be in absolute and complete settlement of account.

2. Where bill was given in absolute payment for goods supplied, vendor cannot sue for value of the goods after bill is prescribed.

3. If Court finds that absolute payment had been made by bill and that bill is prescribed, plaintiff not entitled to examine defendant on oath, only entitled to administer (decisive) oath, and oath must be so worded as not to nullify defence of prescription.

Lindermann for Appellant.
Kaddouri for Respondent.

Appeal from judgment of District Court sitting at Tel-Aviv, in its appellate capacity, dated 14.4.1938.

JUDGMENT.

This unfortunate case, which has already been four times on appeal before the District Court, now comes to us by leave. Its previous and chequered history is fully set out in the last judgment of the District Court and it is not necessary to repeat it here, but proceedings have been most unduly protracted, due to the persistence of the appellant and the reluctance of the Magistrate to follow the instructions issued by the District Court.

The Claim of the appellant was for money due on an account for

goods supplied to the respondent. The District Court decided that this claim could not succeed because payment had been made by bill, that that payment was absolute and not conditional, and therefore that the appellant could not now sue on the account. They held that, since the bill was now prescribed, the Appellant's only remedy was to administer an oath to the respondent in the terms of Art. 146 of the Commercial Code. The appellant refused to administer the oath and his claim was therefore dismissed.

I think that the District Court was right in holding that the bill was given and accepted in absolute payment and not conditional payment. It is true that the presumption is that payment by bill is conditional but this can be rebutted by the intention of the parties. In this case the invoices were endorsed "payment to be by bill" and this to my mind shows that it was the intention of the parties that the bill should be in complete settlement of the account, and the first Magistrate's judgment that it was only condiional payment was contrary to the evidence. It was a stipulation in the contract between the parties that payment was to be by bill.

I do not agree that the District Court on the fourth appeal should have heard the whole appeal de novo. All arguments had been dealt with in the previous appeals, and the only point before it on the last occasion was this question of the oath. Neither was the Magistrate bound to hear the case again from the beginning, his only duty was to administer the oath in the form set out in the third District Court judgment, and the case has been remitted to him solely for that purpose.

With regard to the argument that the appellant should have been allowed to call the respondent and examine him on oath I do not think that in this case he was so entitled, because the defence was that absolute payment had been made by bill and that the bill was now prescribed. Prescription is a defence given by law and to have allowed the examination of the respondent on oath would have completely nullified that defence. The morality of a defence of prescription is another matter — the law allows it, and, as I have so often had occasion to remark, we must administer the law as we find it not as we think it ougth to be, and the form of the oath must be so worded as not to nullify this defence.

For these reasons, in spite of the able persuasive arguments of Mr. Lindermann, I think that this appeal fails and should be dismissed with costs LP. 15.— and disbursements.

Dated this 25th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 179/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Hans Gutmann — Appellant.

v.

Palestine Buliding Syndicate Ltd. — Respondent.

Appeal to Supreme Court from interlocutory order of District Court — Meaning of "judgment" in art. 43 of Palestine Order-in-Council.

Rule 317 of Civil Procedure Rules, 1938, not ultra vires art 43 of Palestine Order-in-Council, 1922, as "judgment" in this article is used in wide sense of judicial decision including interlocutory order.

Edit. Note:—See H.C. 80/27 1 PLR 192; H.C. 16/24 3 C of J 971.

Frank for Appellant.

Smoira for Respondent.

Appeal from order of District Court, Haifa (C.C. 207/37), dated 23.5.1938.

JUDGMENT.

In this appeal a preliminary objection has been raised to the effect that Rule 317 of the Civil Procedure Rules, 1938, is ultra vires Article 43 of the Palestine Order-in-Council, 1922, in that the Supreme Court sitting as a Court of Appeal has jurisdiction to hear appeals subject to the provisions of any Ordinance from all judgments given by a District Court in first instance or by the Court of Criminal Assize or by a Land Court. We think that this preliminary point is not a sound one and in our opinion the word "judgment" as used in Article 43 of the Order-in-Council is used in a wide sense including any judicial decision and includes an interlocutory order and a final judgment. The objection is therefore overruled.

We now proceed to hear the case on its merits.

In this case, we are of opinion that this appeal must be allowed. I am informed that the Hebrew in which the statement of claim is put is very bad and the English translation thereof is weak, but there was an alternative claim. The main claim was for rent at a certain amount. In the alternative he asked the experts be appointed to find out what

the reasonable rent was. That being so, the District Court did not enter into the question of reasonable rent.

The appeal must therefore be allowed, the order of the District Court set aside, and the case remitted to that Court to deal with the points raised and any other points that may arise.

Costs to await the result of the retrial.

Delivered this 28th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 180/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.) Khaldi, J. and Abdul Hadi, J.

In the appeal of:—

Salamander Co. Ltd. — Appellant.

v.

Dan Gabrieli — Respondent.

Findings of fact as to absence of agreement to pay interest — Contract made in Palestine with agent of foreign company — Payment to be made in Germany — Claim of interest although no agreement to that effect and no notarial notice — Lex loci contractus and lex fori.

1. Rule of Civil Procedure Code dealing with notarial notices — a rule of procedure.

2. Where a contract made in Palestine provides that payment be made in a foreign country, that country's law governs payment, but in matters of procedure lex fori applicable, hence no interest payable in absence of agreement and of notarial notice.

Edit. Note:—As to 2 see C.A. 45/24 4 C of J 1228.

Jacobi for Appellant.

For Respondent: no appearance.

Appeal from judgment of District Court, Haifa, in its appellate capacity, dated 29.4.1938.

JUDGMENT.

In spite of the very able arguments of the advocate for the Appellant, we think that this appeal fails.

We are in agreement with the Courts below. There was no agreement, either express or implied, to pay interest. The Magistrate's Court found that there was no express agreement and the District Court, on appeal, found that there was no implied agreement to pay interest. That being so, we cannot interfere with theses findings of fact.

We agree with the District Court that the lex loci contractus was Palestine, because the contract was made in Palestine between the Respondent and an agent of the Appellant Company. It is true that payment was to be made in Germany, and it would also seem, according to the rules of international law, that the law of the place of payment would govern the payment, but in this country before any claim for interest could be made, where there has been no express agreement to that effect, a notarial notice must be served on the other side by the person asking for interest, and we are of opinion that that rule of the Civil Procedure Code dealing with notarial notices is a rule of procedure, and therefore the lex fori is applicable.

For these reasons, the appeal must be dismissed with costs fixed at LP. 10.—.

Delivered this 27th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 173/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.), Khaldi, J. and Abdul Hadi, J.

In the appeal of:—

Prince George Lotfallah — Appellant.

v.

1. Sami Abdel Ghani Quabbani
2. Fauzi Abdel Ghani Qabbani
3. Suleiman Abdel Ghani Qabbani
4. Khairi Abdel Qabbani
5. Shafiq Abdel Ghani Qabbani
6. Khairieh, wife of Abdel Ghani Qabbani

In their pesonal capacity and in their capacity as heirs of the late Hashem Qabbani — Respondents.

Land Registrar, Tulkarem — Third party.

Notice of appeal served on each of Respondents — Copies of decrees and bond served on advocate representing the Respon-

dents — Appeal accepted by Registrar — Judgment issued from Mixed Court in Egypt — Exequatur granted in Syria — Judgment creditor applying in Palestine for an exequatur on foreign exequatur.

1. Where copies of grounds of appeal, decrees and bond in respect of each of Respondents were served on advocate who represents all of them, and appeal was already accepted by Registrar, preliminary objection that copies ought to be served on each of Respondents will fail.

2. An exequatur given abroad on a foreign judgment cannot be enforced in Palestine either by applying for an exequatur on it or by entering an action on it.

Avniel for Appellant.
Osman Bushnaq for Respondents.
Appeal from decree of District Court, Nablus, dated 30.5.1938.

JUDGMENT.

A preliminary objection has been raised to the effect that the Appelland has not complied with the provisions of Rule 326 of the Civil Pro cedure Rules, 1938, in that he did not serve copies of the decrees and of the bond on each of the Respondents when the notice and grounds of appeal were so served, instead of serving them on the advocate for the Respondents. In fact copies of the grounds of appeal, of the decrees and of the bond in respect of each of the Respondents were served on the advocate who represents them. In the circumstances of this particular case, since the advocate for the Respondents did represent them all ,we do not think it was necessary for the Appellant to serve copies on each of the Respondents. In any case the appeal was already accepted under Rule 330 of the Civil Procedure Rules, 1938, by the Registrar and this is sufficient. The objection is therefore overruled.

In this case the Appellant originally took a judgment from the Tribunal Mixte in Cairo. He then produced this judgment to a Court in Beirut and the Beirut Court issued an exequatur on it. He then takes that Beirut Exequatur and comes to Palestine and tries either to get an exequatur on it or to enter an action on it.

The District Court at Nablus dismissed his claim holding that:

> "the Foreign Judgments Rules made no provision for the enforcement of an exequatur — it not being a foreign judgment or order in the meaning of Section 2 of the said Rules."

and we agree with them. The Appellant's proper course would have been to take the Cairo judgment and execute it in Palestine, but he

cannot succeed in enforcing an exequatur given on a judgment, as an exequatur is a writ of execution.

That being so, the appeal must therefore be dismissed with costs fixed at LP. 15.— together with disbursements. The LP. 15.— is to include the sum of LP. 5, already awarded for costs of the adjournment.

Delivered this 28th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 146/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case of:—

1. Selim Najia
2. Mirza Jalal — Appellants.

v.

Abdel Raouf Bitar — Respondent.

Case brought before District Court and struck out on account of non-appearance — Re-institution of case in Magistrate's Court in view of change of jurisdiction — Lapse of time between first occurence of cause of action and filing of case in Magistrate's Court — Renewal of action not a fresh case — Bills of Exchange Ord. sec. 96(1).

Action lodged in a Court in view of change of jurisdiction after it was brought in another Court (having at that time jurisdiction) and was struck out on account of non-appearance — not to be regarded as a fresh case but merely as renewal of original action; hence action in new Court not barred by lapse of time if original action was not so.

H. Atalla for Appellants.

Ya'coub Hanna for Respondent.

Appeal from judgment of District Court, Jaffa, sitting in its appellate capacity, dated 3.5.1938.

JUDGMENT.

This is an appeal by way of leave from judgment of the District Court of Jaffa dismissing an appeal from the judgment of the Chief Magistrate, Jaffa.

Originally the Appellant sued the Respondent on a bill of exchange in the District Court, and the said Court found in favour of the Appellant. The appeal was lodged and the Supreme Court remitted the case on a formal point with certain directions to be followed by the District Court.

When the case had been started for the second time in the District Court the strike began at Jaffa and the parties not appearing the case was accordingly struck out. Appellant later re-entered the case in the Magistrate's Court, the Magistrate's Courts Jurisdiction (Amendment) Ordinance, 1935, having been enacted in the meanwhile, by virtue of which the jurisdiction to hear a claim of LP. 200 was transferred from the District Court to the Chief Magistrate.

The Chief Magistrate dismissed the action, and the District Court confirmed his decision, on the ground that the action was prescribed under Section 96(1) of the Bills of Exchange Ordinance; more than five years having elapsed since the cause of action had first occured. It is clear that both Courts regarded the case, when lodged in the Chief Magistrate's Court, as a fresh one. We unanimously agree that this case rests solely on the point whether the action, when lodged in the Magistrate's Court, was a fresh one or was merely a renewal of the original action brought in the District Court. This matter can be best tested in the following way: Supposing that the jurisdiction of the Courts had not been changed and supposing that the action was re-entered in the District Court instead of the Magistrate's Court, would the action then be regarded as a new one? The answer to that is certainly in the negative.

We are of opinion that the action, when lodged in the Magistrate's Court, was not a fresh one in view of the change of jurisdiction, but was e renewal of the original action brought in the District Court.

The appeal is therefore allowed, the judgments of the District Court and of the Chief Magistrate are set aside and thte case is remitted to the Chief Magistrate in order to hear it on the merits.

The Appellants will have the costs of this appeal fixed at LP. 10.— and LP. 5.— hearing fees, in any event.

Delivered this 5th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 177/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.), Frumkin, J. Khayat, J.

In the appeal of:—

1. Moses Doukhan
2. Bernard Joseph
   Joint Liquidators of the Phoenix Life Insurance Company, Vienna — Appellants.

v.

Kurt Drucker — Respondent.

Rejection by liquidators of company of proof of debt advanced by a creditor — District Court allowing appeal and reversing liquidator's decision — Liquidators appealing to Supreme Court from judgment of District Court — Jurisdiction of Supreme Court under art. 43 of Palestine Order-in-Council — Companies Winding-Up Rules, Rules 87, 90, 93 — C.A. 71/33.

1. Judgment given by District Court reversing liquidator's decision and admitting proof rejected by him — not a first instance judgment but an appeal judgment.
2. Supreme Court has no jurisdiction to hear appeals from District Court in its appellate capacity.

Edit. Note:—See C.A. 71/33 2 PLR 34; C.A. 4/37 2 CtLR 146; C.A. 33/36 P. Post 5 & 7.2.1937; C.A. 145/38 4 CtLR 60.

Dr. Joseph for Appellants.
Dr. Frank and *Goitein* for Respondent.

Appeal from the decree of District Court, Jerusalem, dated 16.6.1938.

JUDGMENT.

In this appeal a preliminary point has been taken of a far reaching importance. It concerns the construction of Article 43 of the Palestine Order-in-Council, 1922. Article 43 says:—

> "There shall be established a Court to be called the Supreme Court of which the constitution shall be prescribed by Ordinance. The Supreme Court sitting as a Court of Appeal shall have jurisdiction subject to the provisions of any Ordinance to hear appeals from all judgments given by a District Court in first instance or by the Court of Criminal Assize or by a Land Court."

In the appeal now before us, the liquidators of the Phoenix Life Insurance Company of Vienna rejected a proof of debt advanced by a creditor. The creditor appealed to the District Court in accordance with Rule 87 of the Companies Winding-Up Rules, 1936, and

the District Court reversed the liquidators' decision and admitted the proof. The liquidators, being dissatisfied with that decision, have now sought to appeal to this court. Now it all depends whether this judgment of the District Court is a judgment given in first instance or not.

Mr. Goitein has cited to us a case under the Stamp Duty Ordinance, Civil Appeal No. 71/33, in which this Court held that where there was an appeal from a decision of the Stamp Duty Commissioners to the District Court, the judgment of the District Court was not a judgment given in first instance. Rule 87, Rule 90, and Rule 93 of the Companies Winding-Up Rules support the contention that the judgment of the District Court given in the case of applications to reverse the orders of liquidators in Companies Winding-Up, would not be a first instance judgment but an appeal judgment; for example, Rule 87 allows an application by a creditor to the District Court "to reverse or vary a decision" of a liquidator; Rule 90 says that any decision by the Official Receiver shall be subject to the "like appeal"; Rule 93 talks about a liquidator who shall, within three days after receiving notice from a creditor of his intention to "appeal" against a decision rejecting a proof, file such proof with the Court, with a memorandum thereon of his disallowance thereof. The English Law, as cited in Palmers Companies Precedents, also refers to appeals by a Rule which corresponds with our Rule 87.

It seems to us quite clear that a judgment in such circumstances given by a District Court is not a judgment in first instance but is a judgment on appeal.

Article 43 of the Order-in-Council gives the Court of appeal jurisdiction subject to the provisions of any Ordinance to hear appeals from all judgments given by a District Court in first instance or by the Court of Criminal Assize or by a Land Court. We do not think that the words "subject to the provisions of any ordinance" can possibly enlarge that jurisdiction by giving this Court jurisdiction to hear appeals from judgments given by the District Court on appeal. The words "subject to the provisions of any ordinance", in our opinion, refer to the manner in which such appeals shall be brought, such as imposing a limit of penalty below which an appeal does not lie, imposing a definite period for appealing, ordering that in any particular class of cases appeals shall only be by leave, and such like matters, but cannot extend the jurisdiction of the Supreme Court to allow it to hear appeals from the District Court in its appellate capacity.

It is perhaps unfortunate this point has not been raised before, but many points have, in English Courts, suddenly come to light.

That being so, we are satisfied that we have no jurisdiction to entertain this appeal and it must be dismissed with costs fixed at LP. 10.— together with disbursements.

Delivered this 28th day of July, 1938.

Acting Chief Justice.

Frumkin, J.

In concur and I must say not without a certain amount of reluctance in view of the effect of this judgment on the established practice. But I can see no alternative. No rule and no ordinance can override an Order-in-Council. Article 43 of the Order-in-Council confers jurisdiction on this Court to hear appeals from the judgments of the District Court only in first instance and I have no doubt at all that this judgment it not a judgment given in first instance. On this point, I fully agree with the judgment of my learned brother the Acting Chief Justice that this is a judgment given on appeal.

Puine Judge.

Khayat, J.

I concur.

Puine Judge.

CIVIL APPEAL NO. 161/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.), Greene, J. and Khayat, J.

In the appeal of:—

Charles Anwar Bekhor — Appellant.

v.

1. Jacob Japhet & Co. Ltd.
2. The Continental Commercial Corporation — Respondents.

Dismissal of case against second defendant — "Interlocutory judgment" in the nature of a final one — Chief Registrar refusing to accept appeal because accompanied by copy of judgment instead of decree — Delay caused by Chief Registrar's refusal

to accept appeal — Appeal considered by Court of Appeal as lodged in time — Construction placed upon correspondence between parties — Principal and agent — Third person credited upon request of principal — Civil Procedure Rules, 1935, Rule 91 — Ottoman Code of Civil Procedure, Art. 66 — Civil Procedure Rules, 1938, Rule 330.

1. Where judgment of Court trying case is a final determination of all rights between plaintiff and defendant in that case it is (for purpose of ascertaining whether appeal was lodged in time or not) a final judgment, no matter how it was termed by Court below.

2. Decision of Chief Registrar can in no way oust jurisdiction of Court, who can always decide point if raised before it.

If Court of appeal finds that Chief Registrar was wrong in declining to accept appeal, it may consider appeal as lodged in time even thoug Chief Registrar's request was complied with by appellant only after expiry of period of appeal and even though appellant could upon Registrar's refusal have applied for the matter to be determined by a British Judge.

3. Fact that letter of credit or bill was made in name of person other than defendant does not in itself show that latter was not principal but acted merely as agent for that person.

Edit. Note:—As to 1 see C.A. 219/26 1 C of J 147; C.A. 38/33 1 PLR 869; Civil Procedure Rules, 1938, Rule 317.

As to 2 see: Misc. Appl. 38/38 4 CtLR 20; C.A. 149/38 4 CtLR 21; C.A. 147/38 4 CtLR 48.

Abcarius for Appellant.
Dr. B. Joseph for 1st Respondent.
Schwartz for 2nd Respondent.

Appeal from decree of District Court, Jerusalem, dated 17.5.1938.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jerusalem. In the case before the District Court the Appellant sued the first Respondents, Jacob Japhet & Co., Ltd., and the second Respondents, The Continental Corporation Ltd., for damages for breach of contract for the supply of 250 Zeiss Field glasses.

The District Court, on the 24th March, 1938, in a judgment which they termed "Interlocutory Judgment", dismissed the second Respondents from the action on the ground that no cause of action was disclosed against them in the statement of claim.

On the 17th May, 1938, the District Court dismissed the Appellant's action against the first Respondents on the ground that the first Respondents were agents for the second Respondents, the Continental Commercial Corporation.

It is a little difficult perhaps to reconcile these two judgments. Fortunately we are not called upon to do so.

Preliminary points were raised by both Respondents in the appeal before us to the effect that the respective appeals against them were out of time. With regard to the second Respondents, we have already stated our opinion, but I will repeat it for the purpose of this judgment. The judgment of the 24th March, 1938, dismissing them from the action and which was termed an "Interlocutory judgment" was in its nature a final judgment inasmuch as it was a final determination of all rights between the Appellant and the second Respondents so far as this case is concerned. That being so, whatever it was called does not matter. The appeal was not lodged until June the 18th., and therefore both under Article 66 of the Ottoman Code of Civil Procedure and Rule 91 of the Civil Procedure Rules, 1935, that appeal against the second Respondents must be out of time.

With regard to the appeal against the first Respondents, the last day for filing it was June the 16th. The Appellant lodged an appeal with the Chief Registrar on that day, but the Chief Registrar declined to accept it on the ground that the appellant proposed to file a copy of the judgment and not a copy of the decree. It is true that the Appellant could then have applied for the matter to be determined by a British Judge under Rule 330. He did not, however, do so, but apparently procured a copy of the decree, served it on himself, and thereupon, on June the 18th., lodged the appeal with the decree and the appeal was then duly accepted by the Chief Registrar. Now actually, the presentation of a copy of a judgment instead of a decree has been held by me*), in a reference under Rule 330, to be sufficient. The Chief Registrar was therefore wrong on June the 16th., in refusing to accept the appeal. The Chief Registrar's duties are, in the main, of a formal nature: such as dealing with such matters as sufficiency of security, whether the appeal is in time, whether the necessary documents are attached, but the decision of the Chief Registrar can in no way oust the jurisdiction of the Court, and if the Appellant did not come to a judge under Rule 330, the Court can always decide the point if it is raised before it. We think, for these reasons, that the appeal as aginst the first Respondents when presented

*) C.A. 149/38 4 CtLR 21.

on June the 16th should have been accepted and must therefore be considered as lodged in time.

To turn now to the merits of appeal. This depends entirely upon the construction to be placed upon the voluminous correspondence exchanged between the parties. The first letter which contains any mention of Zeiss Field Glasses is one of the 5th April, 1936, Exhibit D. 8, in which the Appellant wrote to the first Respondents that he thinks that he can get an order from the Ministry of Defence of Iraq for 100 Zeiss Field Glasses. Negotiaitnos continued and then by a letter dated the 27th July, 1936, Exhibit P. 14, the first Respondents wrote to the Appelant saying that they are in a position to offer 250 Zeiss Field Glasses, and stated as follows:—

> "Please note that this offer is without any obligation on our part and subject to confirmation from Zeiss."

Further letters were exchanged until we come to what I would call the critical letter of the 25th August, 1936, Exhibit P. 18. In our opinion, the whole case hinges upon the construction to be placed upon this letter. In it, the first Respondents give a firm quotation for 250 Zeiss Field Glasses. They go on to say:—

> "Regarding the terms of payment we have to draw your attention to the fact that we can produce the documents in Palestine only, as the goods must for special reasons be shipped via Palestinian Port and transshipped to Bagdad. Under these circumstances we suggest that you open a confirmed and irrevocable letter of credit with the Ottoman Bank, Jerusalem, in favour of the Continental Commercial Corporation Ltd., Jerusalem, P.O.B. 897. This letter of credit should also be opened before the 5th October and confirmed to the Continental Commercial Corporation Ltd.
>
> We recommend that you do not mention the fact that the goods are delivered or purchased via Palestine to the parties connected with the transaction in order to avoid difficulties which may arise. Please do not mention our name in connection with this transaction as we as Bankers generally do not handle any strictly commercial business which is led through our affiliated Company, the Continental Commercial Corporation Ltd., and we would ask you to give the name of this Company if you should be obliged to mention the Company delivering the goods."

Now, if the word "generally" had been omitted from that letter, the answer would have been a different one, but it is quite clear to our minds that when they say: "as we as Bankers generally do not handle any strictly commercial business", that in this particular business they were handling commercial business, and the fact that the Continen-

tal Commercial Corporation is mentioned is to disguise the fact that the first Respondents were handling the business.

Contrary to the view expressed by the District Court, we do not think that it is possible to consider this letter as a disclosure by the first Respondents that they merely were acting as agents for their principals, the second Respondents.

A series of letters follows in September, but it is not necessary to repeat them all, and there is no mention of the Continental Commercial Corporation in them and their general tenure is that it is the first Respondents who are the persons handling this business. Now there is a letter of the 6th October, 1936, Exhibit D. 29, which confirms the view that it was the first Respondents who were handling the business themselves, because they say to the Appellant:—

> "We received yesterday the confirmation from the Ottoman Bank, Jerusalem, to the effect that they have opened a credit in our favour for £stg. 1.157.10/—."

That credit was opened in the name of the Continental Commercial Corporation. The first Respondents, from this letter, regarded it as a credit in their own favour. If it had been the second Respondents who were the principals, the first Respondents would not have considered it as in their favour.

It is true that there are two letters at the beginning of the correspondence to which objection was raised in the District Court that they were inadmissible in evidence. The District Court rightly held that they were inadmissible. These letters are those of the 9th February, and the 18th February, 1936, Exhibits D. 6 and 7. In the letter of the 9th February, 1936, Exhibit D. 6, the first Respondents said to the Appellant:—

> "We would like, however, to make it quite clear to you that we are Bankers and specially interested in the financial part of the business, while we are not doing transactions in good ourselves".

That position was accepted by the Appellant in his letter of the 18th February, 1936, Exhibit D. 7. The letter from the Appellant of the 5th April, 1936, Exhibit D. 8, again talks about the German correspondents of the first Respondents, but sometime between this letter and the 25th August, 1936, the position would seem to have been altered because the first Respondents would seem to have made up their minds to take up this business themselves. We quite agree that it is not necessary in every letter to mention the principals, but the

wording of the letter of the 25th August, 1936, makes it quite clear that the first Respondents were in fact the principals and there is nothing in all the correspondence to show that the second Respondents were the principals of the first Respondents.

One point was taken by the first Respondents about the letter of credit being made in the name of the second Respondents. The reasons for that, as it is quite clear from the letter of 25th August, 1936, are for the purpose of disguising the fact that the first Respondents were handling the business and the Appellant confirmed the letter of the second Respondents, because he had been requested to do so by the first Respondents in their letter of the 25th August, 1936, Exhibit P. 18.

For these reasons, we are of opinion that the appeal must be allowed, the judgment of the District Court set aside, and the case will have to go back to the District Court to try it on its merits.

The second Respondents will have costs fixed at LP. 5.— and LP. 5.— hearing fees.

Other costs to await the result of the re-trial.

Delivered this 11th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 178/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Yehoshua Hankin — Appellant.

v.

1. Mohammad Amin Salah
2. Hamdan Mustafa Ibrahim Abu Zmiro
3. Abdul Rahim Mustafa Ibrahim Abu Zmiro
4. Ali Mustafa Ibrahim Abu Zmiro
5. Su'aad Mustafa Ibrahim Abu Zmiro
6. Kamleh Mustafa Ibrahim Abu Zmiro
7. Khadra Mustafa Ibrahim Abu Zmiro
8. Khadra Ibrahim Abu Shah
9. Khadijeh Mohammad Mustafa Ibrahim Abu Zmiro
10. 'Aisheh Mohammad Mustafa Ibrahim Abu Zmiro
11. Zahiyeh Mohammad Mustafa Ibrahim Abu Zmiro
12. Halimeh Sa'id Mustafa Abu Zmiro
13. Abdul Rahman Kaid el Ahmad — Respondents.

Fees for appeal received by clerk not authorised so to do — Appeal from Magistrate's Court lodged on 9th day — Claim that no time limit for appeal from Magistrates' Courts — Rule fixing time for appeal to equal time for cassation in Ottoman Magistrates' Law omitted in Laws of Palestine (Dratyon) — Practice, supported by legislation, for nearly 20 years — Rules of Court, 1938.

Period for appeal from Magistrate's Court to District Court or Land Court — 8 days (as it has been the practice, supported by legislation, for nearly 20 years).

Edit. Note:—See C.A.2/36 2 CtLR 64: C.A. 33/36 P. Post 5 & 7.2.37; C.A. 75/38 3 CtLR 222; L.A. 21/33 3 C of J 1146.

Kehaty for Appellant.

Cattan for Respondents.

Appeal from the decree of Land Court, Nablus, in its appellate capacity, dated 30.5.1938.

JUDGMENT.

Frumkin, J.

When this appeal came before this Court for the first time*), it was remitted on one point only, namely, whether the appeal from the Magistrate's Court to the Land Court was lodged in due time. This would depend upon the fact whether a certain clerk who received the fees for the appeal was authorised so to do. The Court below tried this issue and came to the conclusion that the clerk was not authorised to receive fees, and therefore the appeal was held to be lodged out of time and was dismissed.

The then Respondent is not appealing. He is not contesting the fact that the appeal was lodged on the 9th day and that the clerk who received the fees was not authorised to receive fees. The Appellant's main ground of appeal is that, as the law stands at present, there is no time limit at all for an appeal from the Magistrate' Courts to the District Court or the Land Court. In order to convince us, he took us into the development of the Ottoman Magistrates Law from the early days of the Occupation until the present day, showing that the right of cassation granted under the Ottoman Magistrates Law was abolished and substituted by a right of appeal to the District Court allowing the same period as the period previously allowed for cassation. This was done by the Rules of Court, 1918. When these Rules were reproduced in the Laws of Palestine, Drayton, this particular Rule fixing the time for appeal to equal the time for cassation was not embodied and the Appellant wants us to hold on that ground that there is no period of appeal at all.

With this we cannot agree.

We do not think that in other circumstances this Court would assume upon itself, by way of analogy or otherwise, the function of fixing a period of appeal when the legislature has not done so, but for nearly 20 years it has been the practice, supported by legislation, that the period of appeal was fixed and accepted, and we can only think that it was by mere inadvertance that this period was not included in the Revised Edition of the Laws of Palestine.

Under these circumstances we think that the old period of appeal still exists and it follows that the appeal, from the Magistrate's Court to the Land Court was lodged out of time, and that Court was right in dismissing this appeal. The present appeal must therefore also fail and is dismissed with costs fixed at LP. 15.— and disbursements.

Delivered this 27th day of July, 1938.

Puisne Judge.

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*) C.A. 36/38 3 CtLR 177.

I agree, and I want only to add that it is unfortunate for the present Appellant to lose the appeal on a point of this nature. Steps will be taken to remedy the lapse in the administration of the District Court by arranging, when that Court is open, that there should be some clerk responsible and authorised to accept appeals.

Acting Chief Justice.

I concur,

Puisne Judge.
(Khayat, J.)

HIGH COURT NO. 58/38.

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

Before:—The Acting Chief Justice (Copland, J.) and Frumkin, J.
In the application of:—
Abdel Fattah Abdel Aziz — Petitioner.
v.
1. Chief Execution Officer, Jerusalem
2. The Arab Agricultural Bank, Jerusalem — Respondents.

Application to set aside order of Chief Execution Officer — Non-interference of High Court if discretion not wrongly exercised.

High Court will not interfere with order of Chief Execution Officer if not satisfied that he has wrongly exercised discretion conferred upon him by law or has not directed his mind judicially to the matter before him.

Edit. Note:—See H.C. 1/29 1 PLR 345; H.C. 76/30 1 PLR 505; H.C. 39/33 1 PLR 848; H.C. 65/33 3 C of J 869; H.C. 59/37 2 CtLR 193.

S. Abu Gazaleh for Petitioner.
Ex parte.

Application for an order to issue to the First Respondent directing him to show cause why his order dated 2.7.1938, in Execution File No. 1656/38, Jerusalem, should not be set aside and his first order in the same file, dated 4.6.1938, restored. And it is further prayed that the first Respondent be ordered to apply the provisions of Article 91 of the Execution Law, section 14 of the Land Transfer (Amendment) Ordinance, 1938, and section 3 of the Civil Procedure

Ordinance, 1938. And it is further prayed that execution proceedings be stayed pending the determination of this petition.

ORDER.

We do not think that in this case we should grant the order applied for. The Petitioner has not satisfied us that he has a bona fide case, nor has he satisfied us that the Chief Execution Officer has wrongly exercised the discretion conferred on him by law, which is an essential thing for the Petitioner to do.

We are reluctant always to interfere with orders of the Chief Execution Officers, and we have to be satisfied that the discretion has been wrongly exercised, or that the Chief Execution Officer has not directed his mind judicially to the matter before him.

We are not satisfied that these matters exist in this present application. The application for a rule nisi must therefore be refused.

Given this 3rd day of August, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 123/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case of:—

Yeshua Khankin — Appellant.

v.

Aref Abdallah Samara and 13 others — Respondents.

Agreement for sale of land — Receipt of part of purchase price and execution of an irrevocable power of attorney in favour of payor — Clause of mutual discharge — Power of attorney not acted upon for many years — Repudiation of the power and return of money by vendor — Claim of damages — Point argued on appeal but not mentioned in judgment remitting case for retrial — Party to agreement of sale held to be merely a broker or agent of vendor.

1. If no mention is made of a point (which was argued on appeal) in a judgment remitting a case for retrial, it does not follow that that point must be taken to have been overruled.

2. If party to an agreement for sale of land, who (after paying part of purchase money) was given by vendor an irrecovable Power of Attorney to convey the land to any purchaser he may find, is held by Court to be merely a broker or agent of vendor, and if agreement contains a clause of mutual release of any claim concerning transfer, sale and price of the land, no damages can be claimed by either party in case of repudiation of agreement.

Edit. Note:—As to 1 see C.A. 76/38 3 CtLR 219.

Eliash for Appellant.
Cattan for Respondents.

Appeal from judgment of District Court, Nablus, sitting at Tulkarem, dated 26.1.1938.

JUDGMENT.

This appeal from the District Court of Nablus raises a short but interesting point for our determination.

In 1914 the Respondents and the Appellant concluded an agreement for the sale of certain lands. The Appellant paid to the Respondents 1000 Napoleons on signing, and undertook to pay the balance on transfer. At the same time the Respondents executed a Power-of-Attorney in favour of the Appellant, to convey the land to any purchaser whom he, the Appellant, might find. Nothing was done under the power for many years, until in 1928 the Respondents repudiated the power, and returned the 1000 Napoleons to the Appellant. Litigation then began of a protracted nature — this is, in fact, the third appeal to this Court — but with most of its details we are not here concerned, with one exception, which will be referred to later in this judgment.

The whole appeal turns on the true construction of clause 11 of the contract of 1914, which is in these terms:—

> "Agreement is hereby entered on the said proceeding transaction and each of the contracting parties has discharged the other of any right of claim concerned with this transfer, sale and price. This discharge by each was given independently and they both accepted it. After the parties had approved the contents of this agreement the latter was drawn up in duplicate, each copy to be retained by one of the contracting parties".

The District Court held that this clause barred the claim for damages which the Appellant had brought, and held that damages could not be claimed, and dismissed the action. Hence this appeal.

I will first deal with the last point raised by the Appellant in his arguments before us. He says that the question of the true construction of clause 11 was argued before this Court on the second appeal here, and that since this Court made no mention of it in its judgment

it must be taken to have disregarded the point as of no value, and that it must have rejected it. I do not think that this is so. The second appeal turned on the point of prescription of the Power-of-Attorney, and it does not follow that because no mention is made of a point in a judgment remitting a case for retrial, that point must be taken to have been overruled. Indeed the case of Politis vs. Calmy (L.A. 43/36) is an authority to the contrary.

The Appellant's main arguments on clause 11 of the agreement are that it can only mean that all claims are discharged that existed prior to the agreement — that the clause is a usual form of discharge, to be found in all old Turkish deeds — that the District Court's view that it excluded a claim for damages is unreasonable, because it would mean tearing up the agreement — and finally, that whilst it is true that there is no specific clause for damages eo nomine in the agreement, yet if the agreement is repudiated the injured party obviously has a right of redress.

The Respondent replies that the clause constitutes a mutual release, and that it must relate to future events, since at the date of the agreement, transfer and sale has not yet taken place. He goes on to say that there had been no previous disputes or relations between the parties (which is admitted) to which this clause could refer, and that since it has been found by a judgment of the High Court in Mahmoud Abdallah Samara and others vs. Registrar of Lands and another (H.C. 40/28) that the Appellant was merely acting as an agent or broker, it was only reasonable and natural that he should not be compelled personally to take the land, and that it was for this reason that the parties mutually excluded damages.

The Respondent's arguments commended themselves to the District Court, and after careful consideration they equally commend themselves to me. Whether or not clause 11 is a form which was commonly used in old Turkish sale deeds, I cannot of course say. All that I can say is that after a lengthy judicial experience in this country, in the early years of which some considerable number of these old contracts has come before me, I do not remember ever having seen this particular form of clause before, and my brother Khayat tells me that it is equally unknown to him. But even if it were common form in Turkish deeds, I do not think that it can be regarded as meaningless, and parties must be bound by the words that they use. I cannot see what other meaning the clause can have, for damages are very obviously a claim that would arise out of the transfer and sale, if these were repudiated. The agreement was made before the war, when no one but an Ottoman subject could hold land in the Ottoman

Empire, and since the Appellant was merely a broker it would indeed be natural that damages would be excluded if he found himself unable to find a purchaser, and such exclusion would have to be mutual.

For these reasons I myself think that the judgment of the District Court was right, and would dismiss this appeal.

The appeal is by a majority dismissed with costs LP. 10.— and advocate's fees LP. 5.—.

Delivered this 30th day of June, 1938.

Puisne Judge *Acting Chief Justice.*
(*Khayat, J.*)

JUDGMENT.

Frumkin, J.

The judgment of the Court below is based on what I consider a misconstruction of clause 11 of the contract entered into between the parties.

Whatever be the meaning of that clause, it could certainly not mean that by the very same instrument the parties intended to discharge each other from any liability to conform with the terms of the same instrument. I don't think even the ingenuity of Mr. Cattan will carry him so far as to say that the vendor would, under clause 11, be precluded from claiming the balance of the price, had the transfer taken place under the Irrevocable Power-of-Attorney, or that the purchaser would, under clause 11, be unable to claim the return of the thousand French pounds paid on account of the price, had the Power-of-Attorney been revoked without returning that sum. And yet, under clause 11, each party discharged the other of any right of claim concerned with the Transfer, Sale and Price.

Clauses of this sort in pre-war Arabic drafting meant to keep the parties to the agreement, with no right to claim anything outside the agreement.

I therefore do not think that clause 11 prevents either party from suing the other party for any right arising out of the agreement, and hence they can also sue for damages for any breach of any of the terms of the agreement.

On the merits I fail to see what the damages of the Appellant are, since he was held to be an agent, and all losses and profits would therefore fall to his principal, whom he is suing. But that is a matter for the District Court to deal with and decide.

It is therefore my opinion that the judgment of the District Court should be set aside and the case remitted for completion.

Delivered this 30th day of June, 1938.

Puisne Judge.

HIGH COURT NO. 53/38.

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

Before:—The Acting Chief Justice (Copland, J.) and Khayat, J.
In the application of:—

The Arab Alcohol Agency, (Sahag M. Sahaghian & Khalel Abdel Latif) Petitioners.

v.

1. The Attorney General, on behalf of the Government of Palestine
2. The Director, Department of Customs, Trade and Excise Respondents.

Agreement between Palestine and Syria — Goods that may be imported into Palestine exempt from custom duty — Government prohibiting importation into Palestine of certain goods.

Government not precluded by agreement between Palestine and Syria relating to customs duty from prohibiting certain goods from being imported into Palestine.

G. Elia for Petitioners.
Ex parte.

Application for an order to issue to the Respondent directing them to show cause, if any, why the Petitioners should not be allowed to import into Palestine, Mineralised Methylated Spirits, manufactured in Syria and imported therefrom.

ORDER.

We both think that this application for an order nisi will have to be refused.

Your possible remedy, if there be a remedy, may be an action for damages against Government, and certainly not an application to this Court. The agreement between Palestine and Syria, which has been quoted to us, enumerates the items of goods that may be imported into Palestine exempt from customs duty. There is nothing in that agreement which precludes Government from prohibiting such goods from being imported into Palestine, nor is there any guarantee that any goods may be imported. The agreement related to the exemption from customs duty and not to the importation of the goods.

The application is therefore refused.

Given this 23rd day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 165/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.), Khaldi, J. and Abdul Hadi, J.

In the appeal of:—

Ni'meh Anton Abees — Appellant.

v.

As'ad Mansour Abdel Nour — Respondent.

Document showing werko assessment in A's name as owner and signed by R who claims ownership — Evidence as to who built on the land — Findings based on oral evidence contradicting implied admission in document.

Finding based on oral evidence that R (and not A with R's consent) built the house on the land registered in his name outweighs any admission that might be taken to have been made in a document of werko assessment signed by R in which A's name is put in as owner of the property.

Kehaty for Appellant.

Moghannam for Respondent.

Appeal from decree of Land Court, Jerusalem, dated 25.5.1938.

JUDGMENT.

The appeal in this case turns upon whether the document showing the werko assessment, in which the name of the Appellant is put in as an owner of the property, and signed by the Respondent, can be taken as an admission of ownership by the Respondent to Appellant's title or not.

The case was orignially in this Court and was sent back to the Land Court to hear evidence that the Appellant had, with the consent of the Respondent, built this house herself on the land registered in the Respondent's name. The Land Court heard that evidence; they heard evidence brought by and on behalf of the Appellant they heard evidence tendered by the Respondent and they came to the conclusion that they did not believe the Appellant's evidence and they believed the Respondent's evidence that he built this house on his property.

It seems to us, therefore, clear, in view of these findings, that the weight of this evidence contradicts any admission that might be taken to have been made in this document of assessment of werko.

The appeal must therefore be dismissed with costs fixed at LP. 10.-- to include advocate's fees and disbursements.

Delivered this 11th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 169/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.), Khaldi, J .and Abdul Hadi, J.

In the appeal of:—

1. Mahmoud Atallah Seruri
2. Khalil Badr el Ansary — Appellants.

v.

Hajjeh Mahboubeh bint Nur Eddanaf — Respondent.

Claim to certain share in land — Judgment without stating any reasons — Remitting case to trial Court to decide claim.

Court must give reasons when dismissing a claim.

Edit. Note:—L.A. 5/35 P. Post 6.12..35; C.A. 128/33 ibid 21.5.34.

Appellants in person.

Rasheed Eddanaf for Respondent.

Appeal from decree of Land Court, Jerusalem, dated 28.5.1938.

JUDGMENT.

In this case, the appeal of the second Appellant must be dismissed, because it is quite clear that he was opposing as Mutawalli of the Waqf of Sheikh Abdallah el Daoudi Ed Danaf, and it was found and admitted as a fact that the house in question is not part of that waqf. The second Appellant will pay costs fixed at LP. 1.— to the Respondent.

With regard to the appeal of the first Appellant, the Land Court, in giving their judgment, would not appear to have dealt with his claim. It is a claim to his share in five kirats mulk. All that the Land Court said is as follows:—

"Opposers claim and third party are dismissed with costs.

It seems to us that this is not very satisfactory as there are no reasons given for dissmissing his claim.

The appeal therefore of the first Appellant must be allowed, the judgment of the Land Court affecting the rights of the first Appellant is set aside, and the case remitted to the Land Court to decide the claim of the first Appellant as to his share in the five kirats mulk and to give a fresh judgment.

Costs to await the result.

Delivered this 11th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 139/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.), Khaldi, J. and Abdul Hadi, J.

In the appeal of:—

Jamil Hanna Shomar — Appellant.

v.

Mary Hanna Shomar — Respondent.

Judgment not based on evidence — Proof of Canon Law — Signing of judgment by assessor.

1. Canon Law (when applied in a civil Court) must be proved by evidence.

2. If assessor summoned to sit in a case, he must not sign judgment, otherwise judgment liable to be set aside.

Edit. Note:—As to 1 see: H.C. 43/28 1 C of J 299; C.A. 42/37 CtLR 38.

Cattan for Appellant.

S. Asal for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 29.3.1938.

JUDGMENT.

This appeal must be allowed.

The judgment of the District Court was based, so far as I can see, on no evidence whatsoever, but apparently upon what the assessor told them what the law was during the deliberation. No judgment

can be given except upon evidence and the Canon Law must be proved by evidence.

The Appeal must be allowed, the judgment of the District Court quashed and the case remitted to that Court to hear evidence as to what the Canon Law is. I also would call attention to this, if the assessor is again summoned, that he must not sign the judgment because he is not a judge, otherwise the judgment will also be liable to be set aside.

Costs to await the result.

Delivered this 29th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 107/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.), Khaldi, J. and Abdul Hadi. J.

In the appeal of:—

Amer el 'Aloul — Appellant.

v.

1. Hasna bint Mohammad Sayed Ahmed, on behalf of the estate of Mohammad Suleiman el Barbary
2. Mahmoud Suleiman el Barbary
3. Mustafa Suleiman el Barbary — Respondents.

Claim of ownership based on forged deed of purchase — Land Court hearing evidence against deed — Appellant asking case to be remitted so that other evidence may be heard.

1. Case based upon a deed which has been found by a competent Court to be forged cannot be entertained.

2. Court of Appeal will not remit case for other evidence to be heard, if appellant had ample opportunity to produce the evidence which was within his power to produce.

Elit. Note:—As to 2 see: C.A. 81/33 P. Post 12.1'34. C.A. 93/38 3 CtLR 255; C.A. 40/38 ibid 161; C.A. 67/38 ibid 213.

Cattan for Appellant.
Germanus for Respondents.

Appeal from judgment of Land Court, Jaffa, dated 26.3.1938.

JUDGMENT.

We need not trouble you Mr. Germanus.

The Appellant's case is based upon a deed of purchase which has been found by a competent Court to be forged. When the case came before the Land Court, for some reason which I am unable to follow, they proceeded to hear evidence against this deed. I can only assume that they did not appreciate that it had already been found to be forged. The Land Court came to certain conclusions about the deed and dismissed the Appellant's case. The appeal must equally be dismissed because it is an incredible thing, that anybody should come with a forged document and try to prove his right of ownership with it.

The Appellant asks that, in any case, this case should be remitted so that other evidence may be heard. We are agreed that in these circumstances, Appellant had ample opportunity to produce the evidence which was within his power to produce, when the case was before the Court below.

The appeal must be dismissed with costs fixed at LP. 10.— and LP. 5.— fees for attending the hearing.

Delivered this 30th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 121/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.), Khaldi, J. and Abdul Hadi. J.

In the appeal of:—

Saleh bin Deeb Osman — Appellant.

v.

1. Sheikh As'ad Mohammad el Haj Yousef Kaddoura
2. Osman bin Deeb Osman
3. Government of Palestine — Respondents.

Court rejecting opposition against arbitration award — Effect of award upon rights of strangers to submission — Alleged difference between opposition award and opposition against judgment enforcing award.
Ottoman Civil Procedure Code, art. 162 — *L.A.* 80/29.

No third party opposition admissible against award or against award or against judgment of Court confining award'
Edit. Note:—See L.A. 80/29 1 PLR 524.
C.A. 56/38 3 CtLR 225 and Edit. Note thereto.

Elia Koussa for Appellant.
Rashed Haddad for first Respondent.
For second Respondent no appearance.
Omar Wa'ri (*J.G.A.*) for third Respondent.
Appeal from Judgment of Land Court, Nablus, dated 6.4.1938.

JUDGMENT.

This is an appeal from a decision of the Land Court of Nablus in which they rejected an opposition made by the present Appellant who sought to oppose an arbitration award given in respect of a dispute between two other parties. The Land Court dismissed the opposition on the ground that "an award does not affect in the least the rights of strangers to the submission, and such rigths must be protected by a different form of action than by asking for an award to be set set aside." They also said that on the strength of Article 162 of the Code of Civil Procedure which provides as follows:—

> "Art. 162 — Opposition by a third party may be made against any kind of judgment or order given by a Court of First Instance or a Court of Appeal. Provided that inasmuch as the awards of arbitration are inoperative except as against the parties who nominated the arbitrators, there shall be no right of opposition by a third party against such awards".

no third party opposition against an arbitration award is admissible.

Now it has been argued by the Appellant that this is a third party opposition not against the award but against the judgment enforcing the award. If we look at the substance of the opposition, it is quite clear that the opposition is against the award itself and this view is supported by a decision of this Court in Land Appeal No. 80/29,*) in which it was held that no third party opposition was admissible in an appeal against the confirmation by a Land Court of an arbitrator's award.

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*) 1 PLR 524.

So far as the majority of the Court is concerned, we feel that that case is decisive and we see no reason not to follow it. By majority, therefore, the appeal is dismissed and the judgment of the Land Court confirmed, with costs on the lower scale fixed at LP. 10.— and LP. 5.— fees for attending the hearing of this appeal. No costs to Government.

Delivered this 13th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 154/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.), Greene, J. and Khayat, J.

In the appeal of:—

1. 'Ata Skeek
2. Tharqat Skeek
3. Bahjat Skeek — Appellants.

v.

Tewfiq Mohammad es-Zibbeh — Respondent.

Damage caused to two storey house held in common — Scope of art. 1315 of Mejelle — Court apportioning damage caused by percolation of water from upper storey W.C. etc.

Application of art. 1315 of Mejelle (entitling owner of upper storey to restore by leave of Court whole building if burnt or fallen down and owner of lower storey refuses to rebuild his part) not restricted to cases of complete and total destruction, partial destruction sufficient to involve that article.

Ibrahim Kamal for Appellants.
Najib Tayyeb for Respondents.

Appeal from decree of District Court, Jaffa, dated 15.5.1938.

JUDGMENT.

We need not trouble the Respondent.

This appeal fails — there is nothing in it whatsoever. We do not think that Article 1315 of the Mejelle does not become applicable until complete and total destruction takes place — partial destruction is sufficient to involve that Article.

It is clear from the expert's report that the damage was caused not only by water from the upper storey W.C. but also by the percolation of water from the cesspit and from the rains into the foundations. That being so we think that the District Court fairly apportioned the damage.

The appeal is therefore dismissed with costs fixed at LP. 10.— and LP. 5.— hearing fees.

Delivered this 7th day of July, 1938.

Acting Chief Justice.

HIGH COURT NO. 46/38.

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

Before:—The Acting Chief Justice (Copland, J.) and Greene, J.
In the application of:—

Shlomo Ben Yossef — Petitioner.

v.

Superintendent of Prison, Acre — Respondent.

Order nisi application to stay execution of judgment passed by Military Court — Defence Regulations neither proclaimed nor published for one month and approved by Advisory Council — Unattackableness of judgments etc. of Military Courts by or before Civil Courts.

1. Regulations made under Palestine (Defence) Order-in-Council, 1937, need not be proclaimed or published for one month or approved by Advisory Council.
2. No judgment, order or proceeding of a Military Court can be called in question by any Civil Court.

S. Felman for Petitioner.
Ex parte.

Petition for an order nisi to stay proceedings of execution of a death sentence passed by Military Court, Haifa.

JUDGMENT.

This is an application on behalf of one, Shlomo Ben Yossef, asking for an order nisi directed to the Superintendent Central Prison, Acre, to stay proceedings of execution of a sentence of death passed upon the applicant by the Military Court of Haifa.

The Palestine (Defence) Order in Council, 1937, Part II thereof, was brought into force on the 24th March, by proclamation by the then High Commissioner, in accordance with Article 3 of the Order in Council.

Art. 6 (1) empowers the High Commissioner to make such regulations (called in the Order "Defence Regulations") as appear to him in his unfettered discretion to be necessary or expedient for, amongst other things, securing the public safety, the maintenance of public order, and the suppression of mutiny, rebellion and riot.

By subsection 2 of this Article, without prejudice to the generality of the powers conferred by the preceding subjection, Defence Regulations may — "(g) provide—

> (iii) for the trial by such military courts as may be established by Defence Regulations, of persons committing offences against Defence Regulations either before or after the date of the establishment of such courts, and of persons committing offences under any other law after that date;
>
> (iv) for the imposition . . . by any military court established as aforesaid, of such punishments as may be prescribed, in the case of offences against the Defence Regulations, by Defence Regulations.
>
> (viii) that judgments, orders and proceedings of such military courts shall not be called in question, whether by writ or otherwise, or challenged in any manner whatever by or before any court, otherwise than by way of appeal provided for by Defence Regulations."

Subsection 4 of Article 6 is:—

> "A Defence Regulation or any order, rule or by-law made in pursuance of such regulation shall have effect notwithstanding anything inconsistent therewith contained in any law, and any provision of a law which may be inconsistent with any Defence Regulation, or any such order, rule or by-law shall, whether that provision shall or shall not have been amended, notified or suspended in its operation under this Section, to the extent of such inconsitency have no effect so long as such Regulation, order, rule of by-law shall remain in force."

and by Article 2 of the Order, "law" includes any order of His Majesty in Council, and any ordinance, Ottoman Law, order, rule, regulation, by-law or other law for the time being in force in Palestine.

Article 12 of the Order provides:—

> "12. Any document purporting to be an instrument (whether legislative or executive) made or issued in pursuance of, or for the purpose of
>
> (1) this order, the Order of 1931, the Order of 1936, or
>
> (2) any provision contained in, or having effect by virtue

of Defence Regulations, or any Regulations made under the Order of 1931, or the Order of 1936,

shall be deemed to be an instrument validly made or issued as aforesaid, and the validity of the provision contianed in the document shall not be called in question in any court, or in any other manner whatsoever."

On the 11th November, 1937, the Defence (Military Courts) Regulations 1937, were issued, under Arts. 6 and 10 of the Order-in-Council, setting up Military Courts for the trial of certain offences specified in the Regulations.

On the 17th November, 1937, Defence (Military Courts) (Amendment) Regulations were issued, Regulation 9(a) of which states:—

"9(a). No judgment, order or proceeding of a military court shall be called in question, whether by writ or otherwise or challenged in any manner whatever by or before any Court."

It is argued that Regulations must be proclaimed. We do not agree, as there is nothing in the Order-in-Council which says so.

It has been further argued that the Regulations must be published for one moth and approved by the Advisory Council. Again, we do not agree for Article 12 of the Order-in-Council effectively disposes of this argument. Any Regulation is deemed to be validly made and issued.

And the Order-in-Council is a legislative act by His Majestys in Council and is not an act of the legislature of Palestine.

It is quite clear that by the Palestine (Defence) Order-in-Council, 1937, and by the Regulations made thereunder, no judgment, order or proceeding of a Military Court can be called in question by any Civil Court whatever.

The application for an order nisi is therefore refused.

Given this 28th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 133/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

1. Constandi Habib Hawa
2. Jalileh Habib Hawa
3. Nassibeh Habib Hawa
4. Hassan Habib Hawa — Appellants.

v.

1. Raja S. Rayyes, in his personal capacity and

on behalf of the heirs of his father Selim Rayyes

2. Administrators of the estate of Iskander Kassab Respondents.

Sale of land by means of an irrevocable power of attorney — Endeavour to exercise irrevocable power of attorney given some 20 years ago — Ineffectiveness of irrevocable power of attorney by lapse of 15 years — Action for refund of money lodged 20 years after date of irrevocable power of attorney — Commencement of prescription — Failure of consideration caused entirely and exclusively by plaintiff's default — Estoppel by sleeping on rights for long period.

1. Prescription does not begin to run against plaintiff until time when he can sue.

Where an irrevocable power of attorney was given for effecting sale of land, purchaser cannot sue for refund of money before power becomes ineffective by lapse of 15 years.

2. If failure of consideration was caused entirely by default of purchaser, there being no act or default on part of vendor, purchaser cannot sue for refund of money paid by him, particularly after long lapse of time (20 or 30 years).

3. Court awards advocate's fees, not to advocate, but to his client.

Edit. Note:—As to 1 see: C.A. 92/38 3 CtLR 228; L.A. 46/36 ibid 17.

As to 2 see: C.A. 132/28 4 CtLR 25 and Edit. Note thereto.

Abcarius for 1-3 Appellants.

4th Appellant in person.

Olshan for Respondent.

Appeal from judgment of District Court, Haifa (CADC 96/38) dated 14.4.1938.

JUDGMENT.

This is an appeal by leave from a judgment of the District Court, Haifa, confirming a judgment of the Magistrate's Court.

The facts are as follows:—

In the year 1327, the ancestor of the present Appellants and others agreed by means of an irrevocable Power of Attorney, to sell to the late Selim Rayyes and the late Iskander Kassab certain shares in lands duly described in the Power of Attorny, in consideration of the sum of 47.600 Turkish piastres, which amount was duly paid and received. Some twenty years later the holders of the power endeavoured to exercise it, but after protracted litigation involving three successive

appeals to this Court, it was held that the power was prescribed after fifteen years from its date, and became void and ineffective.

The representatives of the late Selim Rayyes and Iskander Kassab thereupon entered an action in the Magistrate's Court against the present appellants, claiming from them the sum of LP. 71.397 mls. being their shares of the purchase price received by their ancestor. The Magistrate gave judgment in favour of the present Respondents, holding that prescription on the debt only began to run fifteen years after the date of the Power of Attorney, that is to say, from 1342 fiscal year, or 1345 Hejira, and since fifteen years from this latter date had not expired the action was maintainable. The District Court confirmed this view, but gave leave to appeal to this Court.

Many points were raised in the notice of appeal, but with the exception of one, namely prescription, they have all been dropped.

Abcarius Bey for the Appellants admits all the facts but argues that prescription began to run from the date of the power, and that now they cannot be sued. He says that the Appellants were left in undisturbed possession of the land, that they had done all that the Respondents have been guilty of negligence in that they did nothing for all these years and slept on their rights for this period. He says, truly, that the Respondents could have got the land at once, and since they are suing on an admission in a document, time begins to run from the date of the admission. And finally he argues that the Respondents never had any right to recover the money from the Appellants since the latter had committed no default, and had not in any way prevented the Respondents from exercising their rights.

Mr. Olshan for the Respondents replies that they could only claim the money when the contract was abandoned or became ineffective, that their claim is not based on the Power of Attorney but is a claim for money had and received that if they had sued before the expiration of fifteen years they would have lost on the ground that there was still a good contract existing, and it was not until there was a total failure of consideration that a cause of action arose, that is, not until the power became prescribed. Article 1667 of the Mejelle states that prescription starts from the date when one can claim.

This is not an easy question, but after consideration we think that the Respondents' arguments are correct, and that prescription did not begin to run against them until the time when they could sue, and that they could not sue until the power became ineffective by lapse of time. Their claim therefore was not prescribed.

But this does not dispose of the case. There was a failure of consideration, but that failure was caused entirely by default of the Re-

spondents, and it seems to us that they are estopped from setting up their own default as a ground for the recovery of the money paid by them. There is no act or default on the part of the Appellants which can support this claim, and particularly after this long lapse of time. We think that the Respondents never had any right to sue.

Holding this view the judgments of the Courts below cannot be supported. The Appeal of the first three Appellants must be allowed, the judgments of the Magistrate's Court and the District Court set aside, and judgment entered for those Appellants, the claim of the Respondents being dismissed. The Respondents must pay to the Appellants all costs both here and below assessed at LP. 10.—, together with LP. 5.— advocates's fees. The provisional attachment must be released.

With regard to the appeal of the 4th Appellant, this was in regard to a claim by him that a sum of LP. 30 awarded to him as advocate's fees in the previous hearings of the land case between these parties, and attached by the Respondents in this action, should not have been attached and should be released. As already intimated to him, his appeal fails on the ground that the advocate's fees were awarded by the judgment, not to him, but to his clients, and are a debt due to the clients. His appeal is dismissed but without costs, since his intervention occasioned no extra costs to the Respondents, and in any case the point is now academic, the provisional attachment being released on the allowing of the main appeal.

Delivered this 28th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 97/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

1. Isaac Zvi Rachovsky
2. Abraham Epstein — Appellants.

v.

Joseph Danon — Respondent.

Written amendments modifying agreement for sale of a house — Alleged verbal agreement for extension of time to transfer in Land Registry — Claim of damages for breach of contract and refund of money paid and bills given — Denial of verbal agreement regarding extension of time — Court going back

on its ruling to hear evidence of parties — Oral evidence against written contract — Right to call other party as witness to prove case or defence — Desirability of determining claim and counter-claim together.

1. Neither under English Law nor under Ottoman Law can a variation of written terms of a contract be proved by oral evidence.

2. Party should always be given opportunity to call other party as a witness from whom he may obtain an admission proving his case or defence.

3. It is always safer and in interests of acceleration of matters to determine all claims and counterclaims as they arise.*)

Edit. Note:—As to 1 & 2 see: C.A. 215/37 3 CtLR 73; C.A. 87/37 2 CtLR 19; C.A. 102/36 1 CtLR Rep. 30.

Levitzky for Appellants.
Salomon for Respondents.

Appeal from judgment of District Court, Haifa, dated 24.2.1938.

JUDGMENT.

Frumkin, J.

There was much talk and confusion but little clarity in this case as put on behalf of the Appellant both here and in the Court below; but it seems that the facts are not very complicated after all, nor is there any obscurity in so far as the Law is concerned.

2. The Respondent entered into an agreement in writing to sell a house to the Appellant, fixing the time for the transfer in the Land Registry. The agreement was, time after time, varied by written amendments, and at last the transfer was fixed to take place on the 14th December, 1936. The Appellant alleges that the period was again extended to the 18th of December, this time by verbal agreement. He, he alleges, was ready to accept the transfer on that date but the Respondent committed a breach by failing to effect the transfer on that date. He further alleges that even if he committed a breach on the 14th there was a waiver on the part of the Respondent by appearing in the Land Registry on the 18th. On this basis of breach by the Respondent the Appellant instituted the present action claiming damages under the contract plus the refund of money paid and promissory notes given under it.

3. The Respondent having denied the extension of time to the 18th of December, the Court below first decided to hear the evidence of the parties as to the alleged extension, but later went back on its ru-

*) Edit. Note:—where, *semble*, counterclaim arises from same subject matter or circumstances as original claim.

ling in view of the judgment meanwhile issued by the Supreme Court in Civil Appeal 87/37, Israel Blumenfeld vs. The Imperial Chemical Industries,*) and left to the Appellant the only remedy of administering the oath on the Respondent that such an extension did not take place, with no right of cross-examining the Respondent. Appellant refused to take (sic!) the oath, and judgment was given against him both as regards the damages and the refund of the money and promissory notes.

4. The judgment on the latter point was based on the ground that the Appellant sued the refund on the ground of the breach committed by the Respondent, which breach however, he failed to prove. The Court relied on Civil Appeal 50/26, Elieser Berger and Yekhiel Eibinder vs. Oriental Touring and Shipping Agency, (P.L.R. p. 131), in which it was held that —

> "It is not open to the Appellants to vary the nature of their claim in this manner. The action was based on breach of contract and must be decided on that ground".

The Court below, however, gave liberty to the Appellants to sue for the refund by separate action.

5. Dealing with the counterclaim lodged by the Respondent in which he sued for damages on the ground of a breach committed by the Appelant, the Court below advised the Respondent to withdraw his counterclaim with right to re-instate it without payment of fees after the determination of his appeal. The Respondent has done so and there is no Appeal on his behalf. The only appeal before us is that of the Appellant.

6. The main ground of appeal is that the Appellant was entitled to prove by oral evidence the extension of the time of transfer to the 18th of December. In order to succeed the Appellant once alleged that the agreement, fixing the time of transfer to the 24th, was rescinded, and then said that there was a forebearance on the part of the Respondent; but what he was, in fact, trying to prove was a variation of the written terms of a contract which could not be proved by oral evidence, neither under English Law, where parol evidence is inadmissible to contradict a document or to vary its terms as appear on its face, nor under Article 80 of the Ottoman Code of Civil Procedure, where no parol evidence is admissible against a written document. In so far as the Court refused to hear oral evidence other then the parties in the case, the judgment must be dismissed.

7. In considering, however, Article 80 of the Ottoman Code of Civil Procedure, it will appear that documentary evidence is not the only way to prove a defence against a document. As more fully

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*) 2 CtLR 19.

pointed out in my judgment in Civil Appeal 87/37, Israel Blumenfeld vs. The Imperial Chemical Industries, in its second part Article 80 provides for two other means to prove such defences, namely the admission of the opponent and his books.

8. On this point the Evidence Ordinance, Cap. 54, is very useful as it gives the party an opportunity to abstract an admission from the other side by calling him as a witness. It is for this reason that this Court was always in favour of giving any opportunity to a party to call the other party as a witness so as to give them a chance of proving their case or defence by admission, in which case judgment would be given based not on oral evidence but on the admission of the other side.

9. For this reason we hold that the case must go back to the District Court to allow the Appellant to call the Respondent as a witness, and if, as the result of the evidence given by the Respondent it will appear that he consented to the extension of time, the Court will reconsider the case on its merits in the light of what took place on the 18th of December. If, however, no such extension will be proved by the admission of the Respondent the judgment of the District Court will stand.

10. The claim for the refund is connected with the counterclaim of the Respondent, because if the Appellant committed the breach alleged by the Respondent, the Appellant will of course not be entitled to any refund. We do not approve of the method adopted by the District Court to allow the counterclaim to stand over for a later period. Apart from the difficulty which might arise in case the Appellant fails in his appeal, when the Court below will be faced with the anomalous situation of having to deal with a counterclaim, with no claim before it, it is always safer and in the interest of the acceleration of matters to determine all claims and counterclaims as they arise. We therefore hold that if the Court below comes to the conclusion that there was an extension of time it should also deal with the counterclaim and the claim for the refund.

11. The result is that the appeal is allowed, the judgment of the District Court set aside, and the case remitted in order to hear the evidence of the Respondent and complete the case according to the result of such evidence. Costs will follow the event.

Delivered this 4th day of July, 1938.

Puisne Judge.

I concur and have nothing to add.

Acting Chief Justice.

I concur.

Puisne Judge.

HIGH COURT NO. 40/38.

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

Before:—The Acting Chief Justice (Copland, J.) and Frumkin, J.
In the Petition of:—

Shimon Slutzki — Petitioner.

v.

1. The President, Local Council of Ramat Gan
2. The Electoral Committee of the Local Council of Ramat Gan
3. The Returning Officer for the Forthcoming Elections of the Local Council of Ramat Gan — Respondents.

Order nisi to show cause why names of certain voters should not be excluded from register of voters — Objection without stating any grounds — Words "contrary to law" in notices of objection crossed out — Statutory duties of Electoral Committee — Conclusion of Court at variance with opinion enunciated in a previous case — Effect of point, argument and authorities not mentioned in earlier case.

1. Court may on arguments and authorities quoted to them come to a conclusion contrary to opinion expressed in another case of same nature, if no argument took place in that case on particular point, which has only been raised in case before them.

2. Where it is prescribed by law that Electoral Committee is to consider objections in writing lodged with them (and there is no special provision as to procedure of considering such objectons) no duty upon them to grant a hearing, particularly where no grounds shown in written objection.

:Edit. Note:—As to 1 see 126/38 4 CtLR 34.

Smoira for Petitioner.
Ph. Joseph for Respondents.

Application for an order to issue to the Respondents directing them to show cause why the names of Israeli Malka and eighty others as appear in this petition should not be excluded from the register of voters for the forthcoming election of members of the Local Concil of Ramat Gan.

ORDER.

This is a return to an order nisi directed against the President of the Local Council of Ramat Gan, the Electoral Committee of the Local Council of Ramat Gan, and the Returning Officer of the Local Council of Ramat Gan, to show cause why the names of a large number of voters should not be excluded from the Register of Voters.

Many arguments today on a preliminary point have been taken by the Respondents to the effect that a petitioner, when making an objection, must state the grounds of his objection.

Regulation 4, sub-paragraph 4, of the schedule to the Local Councils (Ramat Gan) Order, dated the 16th March, 1926, is in these words:—

> "(4) Any person who is, or claims to be, entitled to have his name included on the register may, within the said period of seven days (the period during which a copy of the register is posted at several places) but not later, lodge with the committee an objection in writing that a name has been imporperly included in, or excluded from, the register, and the electoral committee shall, within three days of its presentation, consider every such objection and, if the objection is well founded, shall amend the register accordingly".

A copy of the objection which is said to be typical of all objections filed in respect of these numerous names has been produced to us. It it noteworthy that the words "contrary to law", which were typed in the original notices, have been crossed out. In the first place, I would remark that an objection to be well founded must relate to something which is contrary to Law. If the objection has the words "contrary to law" crossed out, on the face of it the objection is not well founded on something contrary to law. In Short and Mellor's Practice of the Crown Office, page 205, it is stated:—

> "A mandamus will not be issued against an officer whose office and duty are prescribed by statute, although it may be highly convenient and desirable that such an act should be done by him;

Now, when we look at the Regulation in the Schedule, the only duty imposed upon the Electoral Committee is the duty to consider objections in writing lodged with them. There is no duty imposed upon the Electoral Committee to grant a hearing to anybody. The Law would therefore appear to be quite clear, but a case has been quoted to us, High Court Case No. 64/35, Eliasha Levin v. Local Council of Rishon-le-Zion and others,*) in which a contrary opinion to the one that we have just enunciated has been expressed by the High Court. We have looked through the notes of the Presiding Judge and it would ap-

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*) Hitherto not reported.

pear from these notes that no argument took place upon this particular ground which was taken by the Respondents in this case and none of the authorities have been quoted in the previous case which have been quoted to us today. If they had been quoted to that Court, it is quite possible that the conclusion might have been a different one.

In the case before us we have no doubt, on the arguments and authorities quoted to us, that it is obvious that the only duty imposed upon the Electoral Committee is to consider objections in writing lodged with them. There is no duty imposed on them to grant a hearing. For this reason, we are of opinion that an order for mandamus will not lie. I would add that there is nothing in the written objection showing what grounds the objector was relying upon — he merely states that he objects to the inclusion of the name in the register of voters.

The rule nisi for mandamus muust therefore be discharged and the Petitioner will pay to the Respondents costs fixed at LP. 10.— together with LP. 5.— advocate's fees.

Given this 20th day of June, 1938.

Acting Chief Justice.

Edit' Note:—(Same order was given in H.C. 41/38)

CIVIL APPEAL NO. 155/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.), Khaldi, J. and Abdul Hadi, J.

In the appeal of:—

1. Abdel Rahman Ramadan
2. Philip el Jada'. — Appellants.

v.

Jabbour Hanna el Katteh and Bros. — Respondents.

Refusal of Chief Registrar to accept appeal — Certified copy of judgment instead of decree — Order of extension of time made ex parte — Ante-dating an agreement — Renewing an action without paying fees.

1. Chief Registrar not to refuse to accept appeal on ground that certified copies of decree, and not of judgment, should be filed.

2. An order for extension of time should not be made ex parte and without notice to other side, except in most exceptional circumstances.

3. There is nothing which prevents ante-dating an agreement.

4. Non-payment of Court fees does not deprive Court of its jurisdiction.

Edit. Note:—As to 1 see: Misc. Appl. 38/38 4 CtLR 20
C.A. 149/38 " 21
C.A. 147/38 " 48
C.A. 161/38 " 77
As to 2 see: L.A. 68/27 1 PLR 225.
As to 4 see: C.A. 20/38 3 CtLR 289.

Fouad Atalla for 1st Appellant.
Sidki Dajani for the 2nd Appellant.
Cattan for Respondent.

Appeal from decree of District Court, Jaffa (C.C. 113/37), dated 14.5.1938.

JUDGMENT.

One preliminary point has been raised to the effect that this appeal is out of time. The grounds of appeal together with certified copies of the judgment were presented on the 13th June, 1938 to the Chief Registrar, who declined to accept them on the ground that certified copies of the decree, and not of the judgment, should be filed. On the following day an application for extension of time was filed in the Supreme Court Registry and an order was made by the Chief Registrar ex parte extending the time for appeal. In view of the recent ruling made on this point,*) we are of opinion that the appeal should have been accepted on the 13th June, and that being so, the appeal was therefore lodged in time. At the same time, we would like to call attention to this fact that when the Chief Registrar is acting under Rule 324 of the Civil Procedure Rules of 1938, he must comply with the provisions of Rule 306. An order for extension of time should not be made ex parte and without notice to the other side, except in most exceptional circumstances. The objection is therefore overruled. In spite of the strenuous efforts of the first and second Appellants to escape liability in respect of this commercial transaction, their appeal fail.

We are in entire agreement with the judgment of the District Court which, in our opinion, correctly states the facts, correctly draws the proper inferences from them and is correct in law. There is very little that one can usefully add to it.

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*) C.A. 149/38 4 CtLR 21.

But there are other points which were argued before us and with which we propose to deal.

It has been argued that the contract was not signed until after the 27th November, 1934, whereas the promissory notes were given on the 19th November. The contract bears date the 17th November, and that must be taken to be the date on which it came into force, and as I have said in the course of argument, there is nothing in the world which prevents ante-dating an agreement.

With regards to the claim for commission, this is a claim in respect of other cars and for which a fresh action should have been brought.

The cancellation of the agreement does not absolve the Appellants from liability contracted under the agreement whilst it is in force.

The retirement of the second Appellant from the partnership in no way affects his liability to the Respondents for acts done during existence of the partnership. He may possibly have a right of recourse against the first Appellant, but we should not be taken as an authority on this point.

With regard to the point that the fees were not paid when the action was renewed we think that this does not affect the case. Following the judgment of the Chief Justice in Civil Appeal No. 20 of 1938,*) the non-payment of the fees does not deprive the District Court from its jurisdiction.

For these reasons and for those given by the District Court, this appeal fails and must be dismissed with costs, to include hearing fees, fixed at LP. 15.— together with disbursements.

Delivered this 23rd day of July, 1938.

Acting Chief Justice.

CIVIL CASE NO. 113/37.

IN THE DISTRICT COURT OF JAFFA.

Before:—Nessib, J. and Said Toqan, J.

1. Evidence given by partners (in an action in which they are a party) must be considered as a single one and cannot be accepted unless corroborated by some other evidence.

2. If A guarantees value of goods supplied by B to C and also signs as indorser on bills given for those goods to B his liability as guarantor remains even if on account of failure to present or to protest the bills he cannot be sued on them.

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*) 3 CtLR 289.

JUDGMENT.

(Translation into English by Court Interpreter).

The Plaintiff, Kutteh Bros. Company claim that it agreed with the Defendants, Abdul Rahman Ramadan and Philip Jada' both of Haifa, vide per contract dated 17th November, 34, that the Defendants in their capacity as second party in the contract to be the sole distributors of cars in Palestine and Transjordan. These cars are Graham and Stewart and Indiana trucks with all their pieces and necessaries. By virtue of this contract the said second party received from the first party Plaintiff several cars, of which he sold a Stewart car to Amin Shoblak and Mohammad Hussein el Sheikh Hussein according to promissory notes. He sold as well a Graham car to the engineer Ibrahim Hajjar for a certain price and under promissory notes which became matured but not paid. The said second party is responsible for the value of these bills according to clause 11 of the agreement, aforementioned, in his capacity as guarantor.

The second party also sold to Amin Shoblak and Hussein el Sheikh Hussein car pieces as well as it sent to the Plaintiff the car of the said Amin Shoblak and Hussein el Sheikh Hussein for repairs. The value of these pieces and the costs of the repairs amount to LP. 17. 830 mls,. and so if this sum is added to the value of these bills, the claim of the Plaintiff from the Defendants by way of guarantee would be LP. 405 and 378 mls. He asks for judgment against them with costs, fees etc.

As a result of the present case which was held in presence of the parties, it appeared from the pleadings of both parties, from the produced documents and from the evidence heard that the said Defendants are indebted to the Plaintiff, according to clauses 10 and 11 of the agreement, in the sum of LP. 205 and 380 mls. for the car that was sold to Amin Shoblak and Mohammad Hussein el Sheikh Hussein according to 12 bills. In the same manner, they are indebted to the Plaintiff, under clause 11 of the agreement, in the sum of 162 pounds and 954 mls. for the car of Ibrahim Hajja according to 10 promissory note.

Therefore, the Defendants are jointly and severally adjudged to pay to Plaintiff the above mentioned two sums the total of which is LP. 368.334 mls. The attachment laid upon the properties of the Defendant Philip is confirmed. The Defendans are to bear the costs, fees and LP. Advocate fees.

As regards Plaintiff's claim against the Defendants for LP. 17. 830 mls. being the value of the bill dated 25.10.35, No. 1529, and in view of the fact that this bill was written directly to the order of the

Plaintiff, and the Defendants had no connections with it and the guarantee provided for in clauses 10 and 11 of the agreement does not include it, for it is the value of car pieces, and nothing is found in the said two clauses to indicate that the Defendants had guaranteed the value of such goods, but the guarantee is restricted for the value of the cars only, therefore Plaintiff's case is dismissed from this point.

As regards Plaintiff's claim against Defendants for LP. 25.214 mls. which was corrected by him in the course of trial to LP. 24.074 mls. being the price o fgoods drawn under invoices, the Court also finds that the Defendants are not responsible for this amount too, in view the fact that the invoices are not found to be signed by them as well as the Plaintiff failed to prove their responsibilty by any other evidence. Therefore his case is also dismissed from this aspect.

As regards the contenion of one of the Defendants Abdul Dahman Ramadan that the Plaintiff accepted the assignment to the aforementioned Ibrahim Hajjar in the sum of LP. 64, according to a judgment of the Magistrate's Court dated 23.4.35, No. 2096, whereby judgment was delivered in favour Ramadan and Jada' Co.,

and also as to the claim of the Defendant the said Abdul Rahman that the Plaintiff recovered the car of Amin Shoblak and his friend;

and also as to the claim of the second Defendant Philip Jada' that he is not responsible for the debts in claim or for the said contract because his partnership with Abdul Rahman Ramadan was dissolved and the Plaintiff accepted that, the Court finds that the Defendant Abdul Rahman Ramadan did not prove the acceptance of the assignment as well as he did not prove the recovery of the car from Shoblak and Mohammad Hussein el Sheikh Hussein, because all what he submitted in this regard was his evidence, that of Philip Jada', that of Amin Shoblak, that of Mohammad Hussein el Sheikh Hussein and that of the Plaintiff Jabbour Kutteh. The evidence of Mohammaed Hussein el Sheikh Hussein and that of Amin Shoblak did not clearly support that recovery. There remained the evidence of Abdul Rahman Ramadan and that of Philip Jada' the Defendants. This evidence is a single one in view of their capacities in this action and was not corroborated. The contention of Philip that the Plaintiff accepted the dissolution of the company, was also not corroborated by any evidence except by his evidence and that of Abdul Rahman Ramadan which are considered a single evidence as above mentioned in view of their capacities in the case.

The letters upon which he relied, do not clearly indicate the acceptance of the Plaintiff for the exclusion of Philip's responsibilty for the said company.

As to the contention of the Defendants in respect of prescription upon the bills in claim, the court finds no need to deal with this, because the responsibility of the Defendants for the value of these bills is due to two questions, the first is their capacities as indorsers for each other, and the second is their capacities as ordinary guarantors for their value according to the contract. Assuming that there is prescription for reason of the indorsement or other causes as not protesting or not submitting for payment, they cannot escape from their responsibility which evolved by way of ordinary guarantee under the contract considering that the period of prescription upon this guarantee is 15 years, and this period did not elapse until the present time. Their defence on this point is also dismissed.

As to the plea of one of them namely Abdul Rahman Ramadan in respect of LP. 91.965 mls. being the value of the commission, the said Defendant did not claim this by way of counterclaim nor did he pay any fee whatsoever in its respect. The Court therefore finds no need to discuss this point. He has the option, however, to sue the Plaintiff company in whatever he claims of commission before the competent Court through a separate suit.

As regards the request of the second Defendant Philip Jada', namely to give him the right to go back on Abdul Rahman Ramadan in whatever he may be adjudged in this action, the Court also finds that nothing was forwarded against Abdul Rahman during the course of trial in this respect, and he did not pay the fees for this request, and thus it cannot deal in any thing of this regard at the present time, due to the fact that there is no case before it on this point. But this does not prevent him from suing Abdul Rahman in whatever right he finds by which he can refer to him before the competent Court through a separate action.

Judgment in presence in respect of Philip, and by default as if in presence in respect of Abdul Rahman, subject to appeal.

Delivered this 14th day of May, 1938.

CIVIL APPEAL NO. 174/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the application of:—

1. Eliezer Sirkis
2. Haim Posnerson — Appellants.

v.

David Moshe Levy — Respondent.

Extension of time for completion of contract — Contradictory evidence as to scope of enlargement of time — Extension of time and provisions of contract as to notarial notice — Necessity of fixing a date for completion of contract.

1. Where a fixed time for completion is stipulated in contract, any extension of time — not a new contract in strict sense of word; hence no notarial notice necessary if notarial or other notices are dispensed with in contract.

2. Where there is an extension of time for completion of contract some indication must be given of a definite date for completion, otherwise any action in connection with non-performance premature.

Edit. Note:—As to 2 see 97/38 4 CtLR 101 and Edit. Note; C.A. 118/36 2 CtLR 37.

Dr. Amdur for Appellants.
Eisenberg for Respondent.

Appeal from decree of District Court, Jerusalem, dated 30.5.1938.

JUDGMENT.

In this case, by a contract between the parties dated the 20th February, 1936, clause 5 gave the Respondent three days to file a parcellation plan of the property, that is to say, the parcellation plan was due to be filed on the 23rd February, 1936. It was not settled on that date, and it was alleged that an extension of time in respect of the date of filing was given. Evidence was heard on this point — one of the Appellants said that he gave a few days, the attorney for the Appellants, who was attorney for both Appellants and Respondent, says

that he gave an extension of three months. That brings the date up to the 23rd May, 1936.

On the 5th April, 1936, however, and again on a later date in April, the Appellants wrote letters to the Respondent giving him in the first case three days to come and settle the matter and in the second case 24 hours to settle. The matter, needless to say, was not settled. Hence this action.

I should mention that in clause 15 of the contract notarial or any other notices are dispensed with. The first point then arises was a notarial notice necessary? We are satisfied that it was not, and that here there was an extension of the time of the contract — it was not a new contract in the strict sense of he word, it was a mutual extension of time and therefore no notice was required, but it was nevertheless necessary to give some indication of a definite date on which to comply with the contract. If the letters of April had not been sent, then the three months' period during which the parcellation plan had to be filed would have expired on the 23rd May, 1936. When these letters were sent in April, they introduced a considerable amount of doubt in the mind of anyone as to what the total extension was and what was the last date on which to perform the contract. We therefore think that, from this point of view, the action would be premature, inasmuch as no definite date of completion had been fixed. This, however, does not dispose of the case. This disposes of the particular point on which this appeal was brought, but there are various other arguments, which were raised, such as, the point that it was not necessary to fix any date at all, because there was anticipatory breach and the contract was impossible of fulfilment and so on.

We think therefore that the best plan would be to allow this appeal and remit the case to the District Court to deal with the various points raised by both parties and to give a fresh judgmen.t

Costs to await the result of the re-trial.

Delivered this 20th day of July, 1938.

Acting Chief Justice.

CRIMINAL APPEAL NO. 56/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.), Greene, J. and Khayat, J.

In the appeal of:—

Abdel Rahman Nageeb — Appellant.

v.

The Attorney-General Respondent.

Accused sentenced to imprisonment escaping from custody — Advocate appearing on appeal for escaping appellant — Appeal deemed to have been abandoned.

If appellant has escaped from custody he must be deemed to have abandoned his appeal (notwithstanding fact that he is represented by an advocate).

Kamleh for Appellant.
Crown Counsel (*Hogan*) for Respondent.

Appeal from judgment of District Court, Nablus, dated 18.5.1938, whereby Appellant was convicted of:—

1. Obtaining money by false pretences, contrary to Section 301 of the Criminal Code Ordinance, 1938;
2. Stealing property entrusted to him, contrary to Section 276(6) of the Criminal Code Ordinance, 1938;

and sentenced to four years' imprisonment on each count, term to run concurrently.

JUDGMENT.

In this case, the appellant has escaped from custody, and in these circumstances, he must, I think, be deemed to have abandoned his appeal.

The appeal is therefore dismissed.

Delivered this 27th day of June, 1938.

Acting Chief Justice.

CRIMINAL APPEAL NO. 68/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Yehezkiel Khadouri Sourani Appellant.

v.

The Attorney General Respondent.

Cheating and uttering a false document — Accused or the advocate on his behalf pleading guilty — Sentence of imprisonment

and recommendation for deportation from the country — Court of Appeal quashing recommendation on ground that prisoner is a Palestinian citizen.

Palestinian citizen (even if convicted of several offences) cannot be deported from Palestine and recommendation of Court for his deportation cannot stand.

Edit. Note:—See 1 PLR 170.

Appellant in person.
Hogan (*Crown Counsel*) for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 15. 6.1938, whereby Appellant was convicted of: (1) Cheating and (2) Uttering a false document, contrary to Sections 303, 340 and 336 of the Criminal Code Ordinance, 1936, in respect of three offences, and sentenced to five years' inprisonment to run concurrently with any sentenced to five years' imprisonment to run concurrently with any sentence Appellant might be serving at present.

JUDGMENT.

It is quite clear from the record, in this case, that the Appellant pleaded guilty in the Court below, or his advocate pleaded guilty on his behalf and the Court proceeded on that footing.

In view of the other convictions — five convictions in cases of forgery or attempting to obtain money by fraud, four in this year and one in 1934 — the sentence of five years is not one day too much.

In view of the fact that you are a Palestinian Citizen and you cannot be deported from this country, the recommendation of the Court below for your deportation will have to go.

With this variation only, the appeal is dismissed and the conviction and sentence confirmed.

Delivered this 13th day of July, 1938.

Acting Chief Justice.

HIGH COURT NO. 42/38.

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

Before:—The Acting Chief Justice (Copland, J.) and Abdul Hadi, J.

In the application of:—

Asma el Jamai — Petitioner.

v.

1. The Chief Execution Officer, Jerusalem
2. The Arab Agricultural Bank, Jerusalem Respondents.

Application to High Court with a view to have execution proceedings cancelled and reopened and to obtain interim order of stay — Allegation of a large number of irregularities in proceeddings of sale of petitioner's property — Affidavit sworn to by petitioner in support of his allegations — Failure to submit copies of official documents found in Execution Office.

Where a number of irregularities in execution proceedings are alleged before High Court it is not enough to file an affidavit sworn to by petitioner without copies of official documents found in Execution Office.

Cattan for Petitioner.

Ex parte.

Application for an order to be issued to the 1st Respondent directing him to show cause why his order dated 8th June, 1938, should not be set aside, and why the Execution proceedings in Execution file, Jerusalem No. 1073/35 should not be cancelled and carried out anew according to law, and for an interim order of stay of execution.

JUDGMENT.

In this case, I am tempted to make a remark which I made with regard to a High Court case that was before this Court last week in which I said:—

"The application has no merits and the less said about it the better".

but in this case I will differ from what I have said in the above case, as I will say a few words about this present application.

The Petitioner has alleged a large number of irregularities to have occured at various stages in the proceedings in respect of the sale of her property. In support of these allegations, her Counsel has filed an affidavit sworn to by his client, and has not filed in this Court one single copy of any official document found in the Execution Office. That is not the manner in which to come to this Court and expect a favourable judgment. As a matter of fact, we do not think that this application has any merits.

The Rule nisi is discharged with costs fixed at LP. 5.— and LP. 5.— fees for attending the hearing.

Delivered this 30th day of June, 1938.

Acting Chief Justice.

HIGH COURT NO. 50/38.

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

Before:—The Acting Chief Justice (Copland, J.) and Frumkin, J.
In the application of:—

Szyja Biderman — Petitioner.

v.

1. Chief Execution Officer, Tel-Aviv
2. Yehoshua Helligman
3. Rachel Helligman — Respondents.

Extension of auction for a further period of one month in the sale of mortgaged property — Application to High Court to set aside order of extension made by Chief Execution Officer — Chief Execution Officers presumed to know much more of conditions in their Districts than High Court can know — High Court reluctant to interfere with orders of Chief Execution Officers.

Orders made by Chief Execution Officers extending for a further period the auction of mortgaged property will as a rule not be interfered with by High Court.

Edit. Note:—See H.C. 59/37 2 CtLR 193.

Goldberg for Petitioner.

Ex parte.

Application for an order to issue to the first Respondent, directing him to show cause why the order ordering the extension of the auction for a further period of one month in the sale of the mortgaged property of the 2nd and 3rd Respondents should not be set aside and why the transfer of the mortgaged property should not be effected in favour of the highest bidder.

ORDER.

In this case, the application for a rule nisi is refused. This Court is always reluctant to interfere with the orders of the Chief Execution Officers who know much more of the conditions in their Districts than this Court can know.

In this case the Chief Execution Officer did not act unreasonably. The order nisi must be refused.

Given this 18th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 79/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

Suleiman Cotran — Appellant.

v.

1. Raji El-Eissa
2. Bahjat El-Eissa — Respondents.

Claim of money based on bills stated to have been lost — Dismissal of case upon defendant's sworn denial of indebtedness to plaintiff — Fresh action for same amount now claimed as a loan — Res judicata.

After action for value of promissory notes stated to have been lost has been dismissed upon defendant denying on oath that he was indebted for amount claimed, a fresh action by same plaintiff against same defendant for same amount claimed as a loan cannot be heard.

Edit. Note:—See C.A. 12/36 1 CtLR R 47; C.A. 59/38 4 CtLR 10; C.A. 206/35 2 CtLR 89.

Eliash for Appellant.
Siaky Dajani for Respondents.

Appeal from judgment of District Court, Haifa (CADC 29/38) dated 31.1.1938.

JUDGMENT.

Greene, J.

In this case, the Appellant was the Defendant in an action on two promissory notes in the sum of LP. 40 in proceedings before the Magistrate's Court. The Plaintiffs, the present Respondents, stated that the promissory notes were lost and called the Defendant, the present Appellant, as a winess. The Appellant was put into the witness box and denied on oath that he was indebted for the amount, and the Magistrate dismissed Plaintiffs' claim. The Respondents took a separate action alleging that this amount was a loan and the Magistrate held that it was the same amount and that it became res judicata. The Respondents appealed to the District Court and that Court held that the matter is not res judicata and remitted the case to the Magistrate to hear it on its merits.

In our opinion, the matter is the same, the amount is the same, and the Magistrate has heard that cause of action and decided it.

The appeal is therefore allowed, the judgment of the District Court is set aside, and the Magistrate's judgment is restored, with costs fixed at LP. 5 and LP. 5 fees for attending the hearing of this appeal.

Delivered this 7th day of June, 1938.

Frumkin, J.

I agree in the result that the appeal must be allowed, the judgment of the District Court set aside and the judgment of the Magistrate restored. I would like to add that the present case is distinguishable from Civil Appeal No. 12 of 1936,*) in which case the Court of Appeal held that where promissory notes were not accepted in evidence before the Court below for the reason that they were insufficiently stamped, an action on the Debt represented in the notes might nevertheless be heard, because there was previously no decision on the merits.

In the present case, however, the promissory notes were not produced at all and the action was heard on its merits, and it was found that there is no debt due by the Defendant to the present Appellant on these notes. The new action was merely an attempt to re-open the case in another way, but that cannot be allowed.

Delivered this 7th day of June, 1938.

Khayat, J.

I concur with the judgment of Greene, J.

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*) 1 CtLR R. 47.

CIVIL APPEAL NO. 119/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the Appeal of:—

Keren Kayemeth Leisrael Ltd. — Appellant.

v.

Mahmoud El Haj Naser and 56 others — Respondents.

Land claimed by right of priority (awlawiye) — Judgment in favour of inhabitants of village within whose boundaries land situated — Experts assessing equivalent value (bedl misl) of adjudicated land — Judgment determining value of land and reserving decision as to value of improvements effected by defendant — Appeal against second judgment of Land Court dismissed on a preliminary objection — Land Court giving (third) judgment regarding value of improvements — Appeal against all three judgments together — Question as to whether second judgment an interlocutory or a final one.

Land Code, art. 45, Ottoman Code of Civil Procedure, Art. 66.

Where a decision given by a Court of first instance has been appealed from by a party who elected to treat the dispute as having been finally decided considering a certain matter left over as one not seriously affecting the main issues, such decision has to be regarded as a final judgment, and no further appeal against it — brought together with an appeal against the judgment determining the said matter — can be entertained (although originally the decision might have been treated only as an interlocutory one).

Edit. Note:—See C.A. 179/38 4 CtLR 67 and Edit. Note; see also Civil Procedure Rules, Rule 317.

Eliash for Appellant.

Bushnak for Respondents.

Appeal from judgment of Land Court, Nablus, (10/32), dated 2.3.1937.

JUDGMENT.

In this case a preliminary point has arisen as to what judgment is being appealed from. The facts were that Saleh Salah El Hamdan sold certain land to the Appellant Company and the land was registered in the name of the Company on the 11th of May, 1931. The respondents took an action under article 45 of the Land Code before the Land Court of Nablus. This article reads as follows:—

> "If the possessor by title-deed of land lying within the boundaries of a village has transferred it to an inhabitant of another village the inhabitants of the former place who are in need of (zarouret) land have, for one year, the right to have the land adjudged to them at its equivalent value (bedl misl)".

Judgment was given on the 28th of June, 1933, and it was decided that the respondents had a right to have the land adjudged to them at its equivalent value and the parties were ordered to nominate experts and assess this value. The parties appointed experts and an expert was also appointed by the Court. The Court considered the report of the experts and heard evidence on the 21st of June, 1934. It delivered judgment assessing the value at 8,400 pounds. The Company had contended that they were due a further sum for certain improvements which had been effected on the land, and the Court reserved decision as to the value of these improvements and ordered the experts to make a further investigation. The Company appealed from this decision and on the 20th of June, 1935, the appeal was dismissed. With regard to the improvements, the experts again submitted a report, evidence was heard and on the 2nd March, 1937, the Court of Nablus delivered a further judgment assessing the value of these improvements at LP. 140.

The Company has appealed and Mr. Eliash on its behalf says that he has the right to appeal against the three judgments, namely: the judgment delivered on the 28th June, 1933, the judgment delivered on the 21st June of 1934, and the judgment delivered on the 2nd March, 1937. He refers to article 66 of the Ottoman Code of Civil Procedure which reads as follows:—

> "No decision delivered by a Court shall be subject to appeal except with an appeal against the final judgment in the suit. If the suit include more heads than one, no one head may be isolated for purposes of appeal before the delivery of the final order".

He says that the judgment delivered on the 2nd March, 1937, was the final judgment in the action and that is the only judgment from which an appeal can be made. He says that the other two judgments are merely interlocutory judgments and that when he appeals

against the last judgment he is entitled to argue against the correctness of the two previous judgments. With regard to the previous appeal he says that the Company lodged it by mistake and that therefore it should be disregarded as having any effect on his argument.

On the other hand Osman Eff. Bushnak for the respondents says that the judgment delivered on the 21st June, 1934, must be regarded as a final judgment and that an appeal against that judgment having been dismissed the Company is now precluded from submitting a further appeal against it.

Having carefully considered the point, we have come to the conclusion that the contention of Osman Eff. Bushnak is right. When the case came before the Land Court of Nablus there were two points to be decided. Firstly, whether the respondents had a right to have the land adjudged to them, and secondly, the value which should be placed on the land and paid to the Company. The first point was decided in favour of the respondents in the first judgment; the second point was substantially decided in the second judgment ,only a small matter being left over to be decided. After the delivery of the second judgment the appellant company elected to treat the dispute as having been finally decided, there can be no doubt that they considered the matter left over as one not seriously affecting the main issues between them and the respondents. They decided to appeal, but they unfortunately made a mistake in procedure and the appeal was dismissed on a preliminary objection. The present position is that the main issues have been decided against the company by the appropriate Court of first instance and that the decision of that Court has remained unreversed on appeal. It is clear that after a second judgment the company took no steps to have the amount assessed for the improvements, but it decided there and then to treat the case as at an end, and to appeal from the decision as it then stood. This being so we have come to the conclusion that the judgment delivered on the 21st June, 1934, was a final judgment. It has already been appealed from and no further appeal against it can be entertained by this Court. It is a moot point whether in the circumstances the last judgment awarding LP. 140 as compensation for improvements can be appealed from, but we have decided to hear the appellants on this point.

Delivered this 9th day of March, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 187/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.), Frumkin, J. and Abdul Hadi, J.

In the Appeal of:—

Mohammad Ali Ass'ad Dajani — Appellant.

v.

Rateb el Ja'ouni, deceased, represented by his widow, Nazha, bint Ali Shaker Dajani, on behalf of the estate — Respondent.

Allegation that Court below was functus officio — Point not raised in statement of appeal.

Point that Court below was functus officio will not, without good cause shown, be dealt with by Court of Appeal, if not raised in statement of appeal.

Goitein for Appellant.
Hanna Atalla for Respondent.

Appeal from judgment of Land Court, Jerusalem, dated 16.6.1938.

JUDGMENT.

We need not trouble you Mr. Atalla.

This appeal fails on the ground that the Appellant has got his quarter of the estate — and is not entitled to more than his quarter. If his sister likes to give away a part of her quarter, it is her concern, and her concern only. The Appellant is not representing his sister nor is he representing any of the heirs.

As regards the last point, namely, that the Court below was functus officio, this point was not raised in the statement of appeal, and it can only be raised on appeal on good cause being shown. No good cause having been shown this point also fails.

The appeal is therefore dismissed with costs fixed at LP. 15 together with disbursements.

Delivered this 12th day of September, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 189/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the Appeal of:—

1 Bahiya el Khazindar
2. Zakiya Minawi
3. Salem Lulu
4. Ibrahim Lulu
5. Zaki Abu Marek — Appellants.

v.

Waqf Administration of Gaza — Respondent.

Possessory action brought by Wakf Administration — Right of Wakf Department to bring an action for a claim to possession of land.

No difference between a Wakf Department and a private individual as regards rights to bring an action for recovery of possession of land.

Aziz Shedadeh for Appellants.
Muhiddin Mallah for Respondent.

Appeal from judgment of Land Court, Jaffa, in its appellate capacity, dated 26.6.1938.

JUDGMENT.

We need not trouble you Sheikh Muhiddin Eff.

This appeal fails. It is a possessory action and the only question for us to determine is that of possession — the question of ownership does not arise in these proceedings.

The Magistrate heard evidence. He had before him oral evidence and documentary evidence and he came to the conclusion that the present Respondent had made out his claim and gave judgment accordingly. There was ample evidence to support that finding, and it is not for a Court of Appeal to interfere with it.

We are unable to understand the point that a Waqf Department, for some reason or other, cannot bring an action for a claim to possession of land. We can see no difference in this connection between a Waqf Department and a private individual.

The appeal must therefore be dismissed with costs fixed at LP. 15, together with disbursements.

Delivered this 13th day of September, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 131/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.) and Greene, J.
In the appeal of:—

1. Daoud Yasmini
2. Hanna Ishaq
3. Elias Kronfeld
4. Manuel Bandak — Appellants.

v.

1. Michel Haddad
2. Christian Messerle — Respondents.

Court of Appeal finding from evidence before trial Court that both parties to agreement were in default — No damages available where both sides defaulting.

Where on evidence before Court both parties to agreement were in default, damages not available and question of measure of damages does not arise.

Edit. Note:—C.A. 161/35 1 CtLR R 3; C.A. 18/36 2 CtLR 62; C.A. 51/36 2 CtLR 88.

Cattan for Appellants.
Buxbaum for Respondents.

Appeal from the judgment of District Court, Jerusalem, dated 14.4.1938.

JUDGMENT.

We are of opinion that this appeal must be allowed.

From the evidence before the District Court, we think the correct judgment should have been that both sides were in default — the Appellants were in default because they should have taken gravel at the place where it was crushed; the Respondents were in default because they did not supply the gravel at the times is was demanded.

That being so, damages are not available, and the question of the measure of damages does not arise.

The appeal is therefore allowed, the judgment of the District Court is set aside, judgment is entered for the Appellants, and Respondents' claim dismissed. The Respondents will pay the Appellants costs fixed at LP. 10.— and LP. 5.— fees for attending the hearing of this appeal.

Delivered this 23rd day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 210/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.), Frumkin, J. and Khaldi, J.

In the appeal of:—

Hussein Mohammad Ed-Dakka — Appellant.

v.

1. Salimeh, bint Sheikh Mohammad Soufan
2. Khadijeh, bint Sheikh Mohammad Soufan

Respondents.

Appeal entirely turning on evidence laid before Court below — File of court below lost — Court of appeal formally allowing appeal and remitting case for re-hearing of evidence and fresh judgment.

If appeal entirely turns on evidence laid before Court below and file has been lost, case will be remitted to Court below to re-hear the evidence and give a fresh judgment.

Salah for Appellant.

Bushnaq for Respondents.

Appeal from judgment of Land Court, Nablus, dated 21.7.1938.

JUDGMENT.

This appeal entirely turns on the evidence laid before the Court below. As the file of the Court below has been lost, this Court cannot deal with the appeal.

The appeal is therefore formally allowed and the case remitted to the Court below for the evidence to be re-heard and a fresh judgment to be given.

Delivered this 12th day of September, 1938.

Acting Chief Justice.

CRIMINAL APPEAL NO. 55/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.), Greene, J. and Khayat, J.

In the appeal of:—

Ya'coub el Jamal — Appellant.

v.

The Attorney General — Respondent.

Constructing rooms in contravention of Town Planning Ordinance — Order of demolition — Fuller description by prosecution

of rooms to enable execution of order — Allegation of amendment of charge.

1. A further description by prosecution of rooms built in contravention of Town Planning Ordinance — not an amendment of the charge.

2. Person found to have been engaged in construction of rooms contrary to provisions of Town Planning Ordinance — right person to be sued.

Hassan Hawa for Appellant.

Amin Akel for Respondent.

Appeal from the judgment of the District Court of Jaffa, sitting in its appellate capacity, dated 30.4.1938, whereby Appellant was convicted under Section 38 of the Town Planning Ordinance, and ordered to demolish the two rooms he built on the western side of his house.

JUDGMENT.

Three points have been raised in this appeal.

The first is that the prosecution have no power to amend the charge once the trial began before the Magistrate. The case was originally sent back because the two rooms which the Magistrate has ordered to be demolished were not sufficiently described to enable execution to issue. The second time the case came before the Magistrate, the description of the property was given more fully. We do not consider this an amendment — it is merely by way of further description.

The second point is that Section 38 of the Town Planning Ordinance has been wrongly applied in view of the fact that the High Court in H.C. 40/30*) Rivka Aaronson and another vs. The Director of Lands held that that Section only applied in person am and not in rem. If, however, we turn to the judgment of Mr. Bourke which was adopted by the learned Magistrate when the case came back for retrial, we find that he states there as a fact:— "I find as a fact that the accused was engaged in the construcion of the two rooms". It is clear therefore that the present Appellant was the person rightly sued.

The third point, I am afraid, is not very clear and it really depends on the successful fate of the second point, if the second point, fails, the third point also fails, and it therefore does not arise.

The appeal is dismissed.

Delivered this 27th day of June, 1938.

Acting Chief Justice.

*) Edit. Note: The case referred to by the Appellant was H.C. 84/30 Abraham Elk v. Chairman of the Local Town Planning Commission of Jerusalem.

CRIMINAL APPEAL NO. 77/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

The Attorney General — Appellant.

v.

'Atef Kamel Irani — Respondent.

Conviction for stealing electric current — Appeal by Attorney General against too lenient sentence — Court of Appeal proceeding to hear appeal in absence of Respondent.

Court of Appeal may in a criminal case proceed to hear appeal of Attorney General in Respondent's absence, if it is of opinion that no injustice is thereby caused to him.

Crown Counsel (*Hogan*) for Appellant.

No appearance for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 11.6. 1938, whereby Respondent was convicted of Conversion of power, contrary to Sections 285(i) and 23 of the Criminal Code Ordinance, 1936, and sentenced to one pound fine or, in default, ten days' imprisonment.

JUDGMENT.

This is an appeal by the Attorney General against a conviction for stealing electric current. It was before this Court on an earlier occasion and was adjourned at the request of the Respondent who was not present in Court on that occasion. He is again absent and requests a further adjournment. We see no reason why a further adjournment should be granted. The appeal by the Attorney General is against sentence only and in the circumstances no question arises as to the facts or the guilt of the Respondent — these questions having been decided by the District Court, and as a result of the conviction a penalty of LP. 1.— or, in default, ten days' imprisonment was imposed. We are therefore of opinion that no injustice would be caused to the Respondent in proceeding to hear the appeal in his absence. His

argument would be that the Court below considered the evidence and came to the conclusion to which it came. If the Respondent desired to have his case put fully before us, he should have appeared, or as he is a man of position — a director of a school — he could have obtained the services of an advocate to represent him.

Mr. Hogan has indicated the serious nature of this offence and the serious view of it taken by the legislator and he submits that the punishment should be a deterrent one.

Having regard to all the circumstances of the case and to the position occupied by the Respondent, we feel that the sentence was too lenient. We propose to increase it to a fine of LP. 3.—.

It certainly should be made known that stealing electricity in this country is more serious than ordinary stealing and persons stealing electricity may find themselves condemned to imprisonment.

Delivered this 15th day of September, 1938.

Chief Justice.

HIGH COURT NO. 56/38.

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

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

In the application of:—

Shabatay Levy — Applicant.

v.

1. Chief Execution Officer, Haifa
2. Nadim Dalal — Respondents.

Attachment of land alleged to belong to judgment-debtor — Application by third person to cancel attachment and stay sale of his shares in the Land) — Chief Execution Officer refusing application and referring applicant to competent Court.*

Person claiming that property attached and under sale is his and not judgment debtor's may be ordered by Chief Execution Officer to go to competent Court there to establish his rights.

Levin for Applicant

Ex parte.

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*) Edit. Note. The Petitioner appeared to be the registered owner of the shares in question.

Application for an order to issue to the First Respondent commanding him to cancel the attachment and to stay the sale of Applicant's shares (24/96) in the land seized under Execution File No. 3247/34, Haifa.

ORDER.

In spite of the persuasive eloquence of Mr. Levin, we think that this case is not so simple as he wanted us to believe. It appears to us, after reading the papers and hearing the arguments, that it is an extremely complicated matter, which the Chief Execution Officer was incapable of deciding as Chief Execution Officer. If he was incapable of deciding it as Chief Execution Officer, we are equally as a Court of Appeal from him incapable of deciding it.

The Petitioner must go, as the Chief Execution Officer directed him so to do on the 8th July last, to a competent Court. In view of the circumstances, we refuse to grant an order nisi, but grant the Petitioner 14 days during which to apply to a competent Court. We are fortified in this view we take by the judgment of my brother Manning and my brother Khaldi, in High Court Case No. 65 of 1937, Gedaliah Fein v. Relieving President, District Court, Jerusalem, and others.*) Subject to this extension of time the application must be refused.

Given this 17th day of August, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 193/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Ibrahim El-Natour — Appellant.

v.

Mohammad El-Husseini — Respondent.

Leave to appeal to Supreme Court from judgment of District Court in its appellate capacity — Question of jurisdiction of Sup-

*) 3 CtLR 34.

reme Court to hear appeal — Application for leave to appeal submitted after lapse of ten days from delivery of judgment in presence of appellant.

If application for leave to appeal to Supreme Court out of time (i.e. not within ten days of delivery of judgment in presence) leave cannot be granted and if granted — of no effect.

Muwaqqi for Appellant.

Shehadeh for Respondent.

Appeal from judgment of District Court, Jaffa, in its appellate capacity, dated 11.6.1938.

JUDGMENT.

Two preliminary points have been raised in this appeal. The first point is that the Supreme Court, sitting as a Court of Appeal has no jurisdiction to hear appeals from judgments of a District Court sitting in its appellate capacity. It has only jurisdiction to hear appeals from judgment of a District Court in first instance as is provided under Article 43 of the Palestine Order-in-Council, 1922. The second point is that the application for leave to appeal to the Supreme Court is out of time, in that the judgment of the District Court was delivered in the presence of the Appellant on the 11th June, 1938, and that the application for leave to appeal was filed in the District Court on the 22nd June, 1938.

As regards the second objection, Section 7 of the Magistrates' Courts Jurisdiction Ordinance, 1935, lays down that application for leave to appeal against a judgment under Sections 5 and 6 of this Ordinance, shall be made in writing within ten days of the delivery of the judgment in presence. Judgment in this case was delivered in presence on the 11th June, 1938, the application for leave to appeal was not filed in the District Court until the 22nd June, 1938. The application for leave to appeal was therefore clearly out of time and leave to appeal was therefore wrongly granted.

There is no need for us in these circumstances to discuss the first point, as on the second point the appeal is dismissed.

The appeal must therefore be dismissed with costs fixed at LP. 15.— together with disbursements.

Delivered this 14th day of September, 1938.

British Puisne Judge.

HIGH COURT NO. 62/38.

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

Before:—Copland, J. and Frumkin, J.

In the application of:—

1. Tawfik Abdel Rahman Abu Ghaidah
2. Mohammad Ahmad Shiblac — Applicants.

v.

1. Attorney General of the Government of Palestine
2. District Commissioner, Haifa and Samaria Districts
3. The Superindentent of the Central Prison, Acre — Respondents.

Renewal by District Commissioner of warrant of detention — Application for writ of habeas corpus.

Civil Courts have no right to enquire into validity of any act or document made under authority of Emergency Regulations.

Edit. Note:—See H.C. 46/38 4 CtLR 96.

J. Asfour and *H. Cattan* for Applicants.

Ex parte.

Application for a writ of Habeas Corpus.

ORDER.

There is nothing in Regulation 15(B)(1) which prevents a District Commissioner from renewing any such warrant at the expiry of the period prescribed therein. This warrant is certainly an instrument which purports to be an executive act made under the Emergency Regulations. Under Section 12 of the Palestine (Defence) Order-in-Council, 1937, the Civil Courts are denied the right of enquiring into the validity of any act or document which is, or purports to be, made under the authority of the Emergency Regulations.

The application is therefore refused.

Delivered this 19th day of September, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 196/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

Sara Michael Yeffet — Appellant.

v.

1. E. Massouda
2. Rosa Levy — Respondents.

Appeal resting entirely on questions of fact — Conflicting evidence before trial Court — Competence of trial Court to say which of conflicting evidence it chooses to believe.

Fact that evidence was conflicting no ground for Court of Appeal to interfere with findings of fact reached by Court of trial on basis of sufficient evidence.

Ben-Aaron for Appellant.
Hassan Budeiri for Respondents.

Appeal from judgment of District Court, Jerusalem, dated 30.6.1938.

JUDGMENT.

In the judgment of the District Court the facts of the case are dealt with carefully and at considerable length. The Court below have prepared a very careful, elaborate and detailed judgment, and we have nothing to add thereto. We do not propose to interfere with the said judgment in view of the fact that the appeal entirely rests on questions of fact. It is true that the evidence before the Court was conflicting, but in such circumstances it is for the trial Court to say which of such evidence is chooses to believe. The District Court has done so, and there is ample evidence to support the findings reached by the said Court.

The appeal is therefore dismissed with costs fixed at LP. 10.—, together with disbursements to be paid out of the Wakf funds.

Delivered this 20th day of September, 1938.

British Puisne Judge.

P.C.L.A. NO. 11/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J., Frumkin, J. and Khayat, J.
In the application of:—
The Palestine Building Syndicate Ltd.,
Tel-Aviv — Applicant.

v.

Hans Gutman — Respondent.

Appeal from interlocutory order of District Court — Application for leave to appeal to Privy Council from judgment of Supreme Court.

Leave to appeal to Privy Council will not be granted if judgment of Supreme Court (in respect of which such leave is sought) not final and case has no point of public importance.*

Edit. Note:—See C.A. 179/38 4 CtLR 67.

Smoira for Appellant.
Frank for Respondent.

Application for leave to appeal to His Majesty in Council from the judgment of the Supreme Court sitting as a Court of Appeal delivered on the 28th day of July, 1938, in Civil Appeal No. 179/38.*)

ORDER.

We unanimously agree that this application should fail. In the first place the judgment of the Supreme Court in respect of which leave to appeal to the Privy Council is sought is not final, the order of the District Court being merely an interlocutory one, and most of the points in the case have not yet been decided. In the second place we cannot find, even with the most powerful microscope, a point of vital public importance in this case on which an appeal should lie to His Majesty in Council.

The application is therefore refused with costs assessed at LP. 10.— and disbursements.

Delivered this 19th day of September, 1938.

British Puisne Judge.

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*) 4 CtLR p. 67.

HIGH COURT NO. 57/38.

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

Before:—Copland, J. and Frumkin, J.

In the application of:—

Abraham Teicher — Petitioner.

v.

1. Registrar of Partnerships, Jerusalem — Respondent.
1. Pessah Bonstein
2. David Bigar
3. Leib Moses
4. Yona Moses
5. Shalom Lucacz — Third Parties.

Registration of change in particulars of partnership — Application to remove change from Register and restore original registration.

High Court cannot order Registrar of Partnerships to do something which he is under no legal obligation to do.

Dr. Weinshall and *Toister* for Petitioner.

Ex parte.

Application for an order directing the Registrar of Partnerships to remove from the register "of change in particulars" of the partnership published in the Palestine Gazette No. 792 dated 30.6.1938 p. 744 relating to the Partnership Botmol (Bonstein, Teicher and Co., Moses Bros. and Lucacz), to restore the original registration and to cause a notice to that effect to be published in the Palestine Gazette.

ORDER.

We both agree that the present application must be refused. We cannot order the Registrar of Partnerships to do something which he is under no legal obligation to do. The effect of this application is to make the Registrar of partnerships refrain from doing something which he has already done.

The application is therefore dismissed.

Delivered this 19th day of September, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 203/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

El Haj Ahmad Khalil Hussein Mutter — Appellant.

v.

1. Ismail Hassan el Ashqar
2. Ahmad Hassan el Ashqar
3. Selim Hassan el Ashqar
4. Nejiba bint Hassan el Ashqar — Respondents

Signature on deed produced in Court previously admitted in another Court — Proving an admission made in another Court — Deed embodying transaction of sale outside Land Registry.

1. Party claiming that there was an admission by other party in another Court must produce a certified copy of such admission.

2. Deed embodying sale of land outside Land Registry — void.

Muhtadi for Appellant.

Respondent in person.

Appeal from judgment of Land Court, Jaffa, dated 12.7.1938.

JUDGMENT.

We are of opinion that this appeal fails.

With regard to the signature, it appears that no certified copy of the admission in the Magistrate's Court that the signature on the deed produced to that Court is that of the first Respondent was ever produced before the Court below, and even if the Appellant could prove the signatures of the Respondents or one of them, the deed of 1921 produced by the Appellant is void, as it is a transaction of sale outside the Land Registry. Moreover it seems clear clear that the Land Court was not satisfied that there was a transaction of sale between the Appellant and his sister, the testator of the present Respondents, during the war.

For these reasons, the appeal must be dismissed. Each of the Respondents will have 500 mls. costs.

Delivered this 26th day of Sebtember, 1938.

Chief Justice.

CIVIL APPEAL NO. 207/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Mansour Abu Is'eilik — Appellant.

v.

Abdallah Hassan Abu Mughannam — Respondent.

Judgment not wholly in conformity with Civil Procedure Rules, 1938 — Non-interference of Court of Appeal where judgment only defective in form — Civil Procedure Rules, 1938.

Court of Appeal will not interfere with judgment of Court below for reason only that it is not wholly in conformity with Civil Procedure Rules, 1938.

Edit. Note:—See Civil Procedure Rules, Rule 205.

Farajallah for Appellant.

Muhiddin el Mallah for Respondent.

Appeal from judgment of Land Court, Jerusalem, sitting at Beersheba, dated 19.7.1938.

JUDGMENT.

The question involved in this appeal depends entirely on fact. There was evidence before the Court below and it appears that they have believed it.

It is true that the judgment is not in a very satisfactory form, in that it is not wholly in conformity with the Civil Procedure Rules, 1938, but it clearly settles the question in issue on the evidence and we feel that by reason of its want of form we need not interfere with it.

The appeal must therefore be dismissed with costs fixed at LP. 10.

Delivered this 26th day of September, 1938.

Chief Justice.

CIVIL APPEAL NO. 64/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Greene, J. and Abdul Hadi, J.

In the appeal of:—

Ribhi Dajani — Appellant.

v.

Daoud Omar Dajani Respondent.

Denial in Magistrate's Court of signature on document — Report of experts on question of verification of signature — Refusal to accept experts report — Magistrate hearing and believing eye witnesses of signature.

If Magistrate hears and believes witnesses that they had seen party sign the document he may refuse to accept report of experts on question of verification of signature.

Edit. Note:—See C.A. 167/38 4 CtLR 53 and Edit. Note thereto.

Abcarius for Appellant.

Sidky Dajani for Respondent.

Appeal from judgment of District Court (CADC 227/37), Jerusalem, dated 27.1.1938.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jerusalem sitting as a Court of Appeal dated the 27th day of January, 1938. The matter involved is simple. The District Court held that the Chief Magistrate was wrong in refusing to accept the report of the experts on the question of verification of the signature, and remitted the case to him for a fresh judgment to be given. In cases of disputed signature it is for the Magistrate to decide the dispute, and the District Court was wrong on both occasions in remitting the case to the Chief Magistrate on a pure question of fact. Article 37 of the Magistrates' Law is clear on this point. The Chief Magistrate heard and believed the witnesses who testified that they had seen the Respondent sign the promissory note, and having satisfied himself on this question of fact the District Court was wrong in interfering with his judgment.

The appeal is therefore allowed the judgment of the District Court is set aside and the judgment of the Chief Magistrate dated the 4th November, 1937, is restored.

Delivered this 13th day of April, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 214/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

The Attorney General on behalf of the Department of Customs Excise and Trade,

Jerusalem — Appellant.

v.

1. Suleiman el Burqan
2. Hilal el Obeid
3. Zaal es Salman
4. Salman el Rahil — Respondents.

Customs Officials detaining camels suspected to have been used in smuggling of salt — Crown action brought with consent of High Commissioner — Renewal of case after it has been struck out — Detention of means of conveyance without proof that some offence was committed connected with their use — Crown Actions Ordinance, Salt Ordinance.

1. Fresh consent of High Commissioner not necessary on renewing a Crown action which was struck out.

2. Means of conveyance seized in connection with an offence cannot be detained unless it is proved that some offence had been committed connected with their use.

Edit. Note:—See H.C. 21/38 3 CtLR 209.

Naim Toukan for Appellant.

Musa Omran Dajani for Respondents.

Appeal from judgment of District Court, Nablus, dated 20.7.1938.

JUDGMENT.

This case has been well argued by Na'im Eff. Toukan on behalf of the Attorney General, but he finds himself in considerable difficulty.

We are of opinion that the appeal cannot succed.

The first point raised on appeal is that the consent of the High Commissioner which was necessary to the Plaintiffs' action under the Crown Actions Ordinance was not obtained. The Plaintiffs (Respondents here) sued for the return of their camels which were detained by the Customs Officials who suspected the Plaintiffs of using them in the smuggling of salt. The action was brought in the District Court, Nablus, with the consent of His Excellency. On the day fixed for the hearing, the Plaintiffs did not appear and the case was struck out. Later they renewed it without fresh consent from the High Commissioner, and it is now contended before us that the second action is not the same as the original action.

We are of opinion that the claim in the second action was substantially the same as in the original action, and as I have already said, the object of the Crown Actions Ordinance is not to prevent people from bringing actions against the Government — the High Commissioner would be the last person to wish to do so — but its object is to prevent vexatious or frivolous actions being brought. We

think that the requisite consent was obtained and this point fails.

As I have stated the camels were being detained by reason of some offence alleged to have been committed contrary to the Salt Ordinance. It seems to me, that although by the law a Plaintiff may be called upon to sue for the return of the means of conveyance, confiscated in connection with an offence, the Defendants to succeed must show that an offence has been committed. It is quite clear that at no stage of these proceedings was there any proof that an offence against the Salt Ordinance has been committed. Unless some offence had been committed connected with their use, there was no lawful justification for detaining the camels. It is not suggested that any proceedings in connection with this offence had been taken in any Court, except these proceedings. The Attorney General, against whom the action was brought, could have taken steps to bring an officer of the Customs Department, to give evidence or taken steps to obtain the presence of some members of the Trans-Jordan Frontier Force if they were required, but no evidence of an offence was produced.

In the circumstances, we think that this appeal should be dismissed with costs fixed at LP. 5.—.

Delivered this 27th day of September, 1938.

Chief Justice.

CIVIL APPEAL NO. 194/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case of:—

Anna Zaboura — Appellant.

v.

1. Aniseh Zaboura
2. Tawfiq Zaboura — Respondents.

Action for recovery of possession — Party taking possession of part of land while action regarding ownership pending in Land Court — Claim to be a co-owner and therefore entitled to take and remain in possession — Ottoman Magistrates Law, Art. 24, 26.

If a party claiming to be a co-owner of land regarding which an action is pending in Land Court between him and others takes possession of part of the land without consent of opponent, Magistrate is right in ordering dispossession.

Edit. Note:—The Appellant holds a title-deed. See the dissenting judgment of Khayat, J.

Goitein for Appellant.
Machlis for Respondents.

Appeal form decree of District Court, Jaffa, dated 6.7.1938.

JUDGMENT.

Frumkin, J.

While proceedings were pending before the Land Court of Jaffa, in an action for ownership between the parties to this appeal, relating to a certain house in Jaffa, the Appellant, who was never in possession of the house before, purporting to be a co-owner of the said house, without awaiting the result of the action before the Land Court, — took possession of a part of the said house, to say the least, without the knowledge and consent of her opponents.

The Respondents then instituted an action before the Magistrate for the recovery of possession, and succeeded. The Appellant appealed to the Land Court and failed. She got leave to appeal to this Court, and hence this appeal.

The Appellant relied originally on Article 24 of the Ottoman Magistrate's Law, and as an after-thought on Article 26 of the said Law, being as she alleges, a co-owner.

It is true that there are cases under the articles of the Magistrate's Law quoted whereby a person can, in certain circumstances, remain in possession of land, occupied without the consent of the person previously in possession.

This was allowed in order to provide a temporary remedy to a party, pending the determination by a proper Court of the ownership of the property in dispute. The grant of such remedy was warranted by the fact that the party might otherwise have to wait years before his action for ownership would be determined. Nowadays, when one can have a case of ownership heard and determined by a Land Court within a reasonable time, the Courts should not, to my mind encourage applications for temporary relief, which relief does not determine the matter disputed between the parties, and means therefore only duplication of litigation.

But apart from this, in the present case the matter was before a Court competent to deal with and decide, once and for all, the rights of the parties. The Appellant, instead of awaiting the result of such proceedings, took the law in her own hands, and took possession of property pendente lite. Such steps should certainly not be tolerated, and the person taking this course cannot expect any relief from the Court.

On this ground alone the Judgments of both the Magistrate's and District Courts must be affirmed and the Appeal dismissed with

costs in include LP. 15.— advocates fees and disbursements.

Delivered this 28th day of September, 1938.

Puisne Judge.

I agree and have nothing to add.

British Puisne Judge.

Khayat, J.

This is an appeal from the judgment of the Land Court of Jaffa, in its appellate capacity, confirming the judgment of the Magistrate whereby the Appellant was dispossessed of part of the house she co-owns with the Respondents.

In my opinion, the Magistrate has no power to dispossess a co-owner who holds a title-deed, unless and until it is established before a Land Court that that title-deed is a nullity. Accordingly, the disposession proceedings in the Magistrate's Court should, either have been post-poned until the question of ownership of the Respondents (Plaintiffs in the Land Court) to the house in dispute has been determined by that Court and then the provisions of Article 24 of the Ottoman Magistrate's Law could be applied, or that the Appellant and Respondents should have remained in joint-possession in accordance with the provisions of Article 26 of the said Law which Article can only be applied in cases of this sort, as it is clear from the provisions of the previous Articles that is, Articles 24 and 26.

The appeal must therefore be allowed be allowed, the judgments of both the Land Court and the Magistrate set aside, and Respondents' action for dispossession dismissed.

Delivered the 28th day of September, 1938.

Puisne Judge.

CIVIL APPEAL NO. 209/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

1. El Haj Odeh Abu Hidaiweh
2. Jaddouh Abu Hidaiweh
3. Salem El Tawabteh — Appellants.

v.

1. El Haj Gaith Ibn Mukait
2. Suleiman Ibn Haj Mukait — Respondents.

Judgment of Land Court non in conformity with Rule 205 of Civil Procedure Rules, 1938 — Land Court ordering Defendant

to refrain from using Plaintiff's land as a public way.

1. Judgments of District Courts and Land Courts should be in form laid down in Rule 205 of Civil Procedure Rules, 1938, so that it could be known precisely what they decided and why they so decided.

2. Court of Appeal may confirm judgment of District Court (or Land Court) notwithstanding fact that it is not very satisfactory in form and does not contain all that is indicated in Rule 205 of Civil Procedure Rules, 1938.

Edit. Note:—See C.A. 207/38 4 CtLR 138.

Shedadeh for Appellants.

Eddin for Respondents.

Appeal from judgment of Land Court, Jerusalem, sitting at Beersheba, dated 21.6.1938.

JUDGMENT.

It is clear that the judgment of the Land Court is not very satisfactory in form, particularly having regard to Rule 205 of the Civil Procedure Rules, 1938, which indicates what judgments should contain. The object of that Rule is that the parties and this Court should be in a position to know precisely what the Court decided and why it so decided. I would call the attention of District Courts and Land Courts to this Rule.

The Land Court made it clear in effect from their judgment, that there is no public way. In their judgment they stated as follows:—

> "Defendant must refrain from using Plaintiffs's land as a public way".

If the Appellants (Defendants in the Court below) cannot use the land as a public way, no one else can so use it moreover it is not contended before us that there is a public way, no one else can so use it moreover it is not contended before us that there is a public way.

The question therefore is not whether one party is entitled to pass through the land of another in his capacity as a member of the public, but whether he is entitled to pass through the land of another in his capacity as an adjacent owner. The Court below found:—

> "That there may be a private occasional track, which the Plaintiff is entitled to control and Defendant cannot use this without permission of Plaintiffs".

This we take to mean that the Defendants have no right to pass through the Plaintiffs' land without permission of the Plaintiffs, and on the facts we think the Court was justified in so finding.

The appeal will be dismissed with costs fixed at LP. 10.

Delivered this 27th day of September, 1938.

Chief Justice.

CIVIL APPEAL NO. 208/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J. and Frumkin, J.

In the application of:—

L'Union Fire, Accident and General Insurance Co. Ltd. of Paris — Applicants.

v.

1. J. Pravda
2. Aron Rojansky — Respondents.

Application for order to arbitrator to state a case — Arbitrator functus officio after giving his decision — Non-interference by Court of Appeal.

Court of Appeal cannot interfere with judgment of Court below regarding an application for an order to an arbitrator to state a case, if arbitrator has already given his decision.

Aboulafia for Applicants.
Levitsky for Respondents.

Application for leave to appeal against the judgment of the District Court of Tel-Aviv dated 11.5.1938.

JUDGMENT.

This application for leave to appeal from the judgment of the District Court of Tel-Aviv must be dismissed. It originates from an application to that Court for an order to an arbitrator to state a case, and we are told that the said arbitrator has already given his decision, and therefore this Court cannot now interfere. The arbitrator would now be functus officio.

But we wish to make it quite clear that we do not express any opinion on the question whether it is a matter of arbitration or assessment. This question is entirely left for future discussion and decision.

Leave to appeal is refused, but we think that in the circumstances of this case no costs should be allowed.

Delivered this 7th day of October, 1938.

British Puisne Judge.

HIGH COURT NO. 63/38.

IN THE SUPREME COURT SITTING AS A HIGH COURT

ORDER.

Before:—Copland, J., and Frumkin, J.

In the application of:—

Moshe Joseph Flint — Petitioner.

v.

1. The A/Chief Execution Officer District Court, Jerusalem
2. Shifra Flint — Respondents.

Judgment given by "Great Rabbinical Court of the Ashkenazi Community — Claim that Religious Court not a proper Court under Religious Communities (Organisation) Ord. 1926 — *Authentication of judgment by Chief Rabbinate — Execution by Chief Execution Officer of judgment of Religious Court duly authenticated by Chief Rabbinate.*

If Chief Rabbinate authenticates and endorses a judgment signed by persons holding themselves out to be members of a Religious Court, Chief Execution Officer may accept and act upon such instrument as a judgment of a Court of one of the outhorised Religious Communities.

Levitsky for Petitioner.

Ex parte.

Application for an order to issue to the first Respondent directing him to show cause why his order dated 12.7.38 in Execution Office File No. 955/38 should not be set aside.

ORDER.

Frumkin, J.

This is an application for an order to issue to the Chief Execution Officer directing him not to execute a judgment purporting to have been given by the "Great Rabbinical Court of the Ashkenazi Community" of Jerusalem, signed by three Rabbis whose signatures have been authenticated by the Chief Rabbi of Palestine, the General Secretary to the Chief Rabbinate and endorsed with the seal of the Chief Rabbinate.

It has been argued on behalf of the petitioner that the three Rabbis who have signed this judgment do not constitute a proper Court under the Religious Communities (Organisation) Ordinance, 1926.

We do not think that it is the duty of the Chief Execution Officer to enquire into the warrants of appointment of Rabbis.

There is nobody more concerned with disallowing the function of unauthorised Rabbinical Courts than the supreme Rabbinical authority of the country. We know of no authority conferring upon the Chief Rabbinate any Notarial power. This body is certainly under no obligation to authenticate instruments which in their view have been improperly issued. So that if the Chief Rabbinate chooses to authenticate the signature of persons holding themselves out to be members of a religious Court and further endorses a judgment signed by such persons with the official seal of the Chief Rabbinate, this must be considered sufficient authority for the Chief Execution Officer to act upon it and accept that instrument as a judgment of a Court of one of the authorised Religious communities.

For this reason we are not prepared to grant the order.

Given this 7th of October, 1938.

Puisne Judge.

I agree and have nothing to add.

British Puisne Judge.

CRIMINAL APPEAL NO. 78/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Hussein Hassan Harb El 'Anced — Appellant.

v.

The Attorney General — Respondent.

Trial Court failing to indicate to convicted person his right of appeal.

Court trying criminal action upon Information should, in compliance with provisions of law, indicate to convicted person his right of appeal.

Edit. Note:—See sec. 50, Crim. Proc. (Trial upon Information) Ordinance.

Sidqi Dajani for Appellant.

Crown Counsel (*Hogan*) for Respondent.

Appeal from the judgment of the District Court of Jerusalem, dated 13.9.1938, whereby appellant was convicted of manslaughter contrary to Sections 212 & 213 of the Criminal Code Ordinance, 1936, and sentenced to 8 years' imprisonment.

JUDGMENT.

We find no record in the proceedings that the Court below indicated to the convicted person his right to appeal. I have said in this Court before and I say again that the provisions of the law are to be complied with and that Courts should be first to comply with such provisions.

So far as this particular case is concerned no injustice has been done to the Appellant as his case has been presented to this Court adequately by Hassan Sidqi Dajani. As to the facts the same argument which is put before us was put before the Court below and they rejected it. It appears that there was evidence on which they convicted and we cannot intervene.

As to the sentence we see no reason to interfere.

The appeal must be dismissed.

PLR. 5 p. 472

Delivered this 11th day of October, 1938.

Chief Justice.

HIGH COURT NO. 54/38.

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

Before:—Copland, J. and Khayat, J.

In the application of:—

Michel Jarjuy'i — Petitioner.

v.

1. Chief Execution Officer, Jerusalem
2. Najibeh Jarjuy'i — Respondents.

Application for an order to Chief Execution Officer to refrain from executing two judgments of Orth. Eccl. Court and of Orth. Eccl. Court of the Appeal — Constitution of Orth. Eccl. Court in Jerusalem — Constitution of Orth. Ecc. Court of Appeal.

1. Fact that Patriarch in Synod has from time to time filled vacancies in membership caused by death or otherwise — not a change in constitution of Orthodox Ecclesiastical Court in Jerusalem.

2. Orthodox Ecclesiastical Court of Appeal properly constituted by special regulation of Patriarchate of Jerusalem in accordance with art. 344 of Byzantine Law (which has not been repealed by art. 57 of Palestine Order-in-Council, 1922).

Cattan for Petitioner.

No apperance for first Respondent.

Shafik Asal for 2nd Respondent.

Application for an order to issue to the First Respondent, directing him to show cause why he should not be ordered to refrain from executing the two judgments produced in Execution File No. 1716/37,

Jerusalem, the first dated the 13/26.3.1937, purporting to be a judgment of the Orthodox Ecclesiastical Court of Jerusalem, and the second dated 9.10.1937, purporting to be a judgment of the Orthodox Ecclesiastical Court of Appeal. And it is prayed that execution proceedings be stayed pending the final determination of this petition and that the Execution File No. 1716/37 be produced at the hearing of this petition.

ORDER.

This is an application for an order to issue to the Chief Execution Officer, Jerusalem, to refrain from executing two judgments of the Orthodox Ecclesiastical Court and of the Orthodox Ecclesiastical Court of Appeal.

In a detailed and very able judgment the Assistant Chief Execution Officer ordered execution. With the major part of that order and of the reasons given in support by the Assistant Chief Execution Officer we find ourselves in entire agreement. With regard to the Court of First Instance there was evidence that the Court in Jerusalem, as distinct from the Courts in other places such as Jaffa and Haifa, sat without lay assessors and was composed of clerical members only, the quorum being three, and that this had been the practice from before the date when the Palestine Order-in-Council 1922 came into force. The fact that the Patriarch in Synod has from time to time filled vacancies in the membership caused by death or otherwise is not, as the Assistant Chief Execution Officer rightly held, a change in the constitution of the Court.

With regard to the Ecclesiastical Court of Appeal, there was equally evidence that from time immemorial the Holy Synod did exercise jurisdiction as a Court of Appeal from judgments of Courts of First Instance, in accordance with established practice and rules of other Orthodox Patriarchates. On the 23rd November, 1923 (10th November, 1923, Old Style) the Holy Synod passed a resolution or regulation constituting a Court of Appeal to be composed of five members by name of the Holy Synod, and at intervals, as occasion required, other names have been substituted for those of the original members. All members of the Court though have been or are members of the Holy Synod.

It seems to us that this question is disposed of by the judgment of this Court in Jahshan v. Chief Execution Officer, Jerusalem and another. H.C. 55/33, where the very same question was raised, namely that this Ecclesiastical Court of Appeal was not constituted in accordance with the Law of the Orthodox Church. It was pointed out then by this Court, that Art. 333 of the Byzantine Law only app-

lied to the Patriarchate of Constantinople, and that Art. 344 was the one applicable to the Patriarchate of Jerusalem. That Article provides that the Ecclesiastical Courts of Patriachates other than that of Constantinople "are constituted conformably to their special regulations and customs." Special regulations of whom? Obviously of the Holy Synod of the Jerusalem Patriarchate in this instance.

Under Art. 344 of the Byzantine Law the Holy Synod was entitled to issue its regulation of the 23rd November, 1923, and the present Ecclesiastical Court of Appeal is constituted in accordance with that regulation. We do not think that any question of delegation arises in reality for in our view the Ecclestiastical Court of Appeal is one constituted in accordance with the special regulation of the Patriachate of Jerusalem.

We agree with the Assistant Chief Execution Officer that Article 57 of the Palestine Order-in-Council, 1922, is merely premissive, — it does not have the effect of repealing Art 344 of the Byzantine Law. It may well have been thought that there might be difficulties in the Palestine Government altering the Byzantine Law if it wished to do so without some such provision in the Order-in-Council.

For these reasons we order that the rule nisi be discharged with costs fixed at LP. 10 plus disbursements.

Dated this 12th day of October, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 201/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case of:—

Stawri Sliheit — Appellant.

v.

The Orthodox Patriarchate, Jerusalem — Respondents.

Contract of lease reciting that area leased bounded on 3 sides by lessor's land — Lessee claiming ownership to part of lessor's lands and alleging prescriptive possession — Estoppel by admission contained in contract of lease — Finding of prescriptive possession made by Magistrate — Alleged wrong form of judgment given by Land Court — Appeal citing as Respondent a person different from that for whom judgment appealed from was given.

Rule 230 of Civil Procedure Rules.

1. Recital in contract of lease that the area leased is bounded on 3 sides by lessor's lands operates as an admission by lessee that these lands belonged to lessor, and Land Court right in refusing to hear evidence of prescriptive possession in support of lessee's claim that a part of these lands was his.

2. Magistrate has no power to decide any question of prescriptive possession; a finding made by him as to this cannot bind Land Court in an action for ownership.

3. Judgment of Land Court ordering Defendant to refrain from interfering with Plaintiff's enjoyment of the land in dispute cannot be said to be wrong in form.

4. Parties to appeal may apply to Court of Appeal for amendment of Respondent's name.

Kehaty for Appellant.

Goitein for Respondents.

Appeal from judgment of Land Court, Jerusalem, dated 21.7.1938.

JUDGMENT.

Copland, J.

We have already intimated that in our opinions this appeal failed, and the following are our reasons for so holding.

Apart from a preliminary point taken by the Respondents with which we will deal later, three points were taken in this appeal by the Appellant.

The Appellant was the lessee of certain land belonging to the Respondents. In the contracts by which this land was leased, (Ex. A.W. 2 and A.W. 12) it was recited that the area leased was bounded on three sides by lands of the Respondents. The Land Court held that this operated as an admission by the Appellant that these lands belonged to the Respondents, and that he could not claim now that a part of these lands was his because he had been in possession of them for a period exceeding the period of prescription, and the Court therefore refused to hear evidence of possession. The Appellant contends that the statement in the contracts is not an admission by him. We think that the Land Court was right in holding that it was an admission, and, having admitted in 1925 and 1933 that the Respondents were owners of the land which he is now claiming, the Appellant cannot now go back on that admission.

The second point is that in a possessory action regarding the land now in dispute brought by the present Respondents against the present Appellant, the Chief Magistrate made a finding that the Appellant had been in possession of it for a period of 18 years. The only question before the Chief Magistrate was who was entitled to possession of the land, and whether the possession of the Respondents had been

interfered with by the Appellant. The Chief Magistrate had no power to decide any question of ownership or of prescriptive possession, and his finding that the Appellant had been in possession of the land in dispute for 18 years was not necessary for his judgment, and was superfluous. That finding can in no way bind the Land Court in an action for ownership. Only the Land Court can make a finding of that nature in such an action.

The third point is regarding the form of the judgment. It is said that it was wrong to order the Appellant to refrain from interfering with the Respondents' enjoyment of the land in dispute. We can see nothing in this point, and the form of words cited in the judgment is a very common one. The appeal therefore fails on the merits.

The preliminary point taken by the Respondents was that the appeal was wrongly headed in that the Respondents were wrongly described therein.

The action was correctly brought by the Commission on the Finance of the Orthodox Patriarchate, Jerusalem. Judgment was given by the Land Court on thte 12th July, 1938. The Commission was dissolved by order of the High Commissioner on the 14th July, 1938, and the present appeal was entered on the 1st August, 1938, citing the Patriarchate as Respondents. On that date the Commission was no longer in existence.

Since the appeal in any case has failed on its merits we do not think that any useful purpose would be served by deciding this somewhat intricate question. It may however be that there are or will be appeals now pending or to be filed in which the Commission on the Finance of the Orthodox Patriarchate were or may be named as one of the parties. It may possibly be that the Order of the 14th July, 1938, does give power for an action to be continued without change of name, but parties cannot at any rate be wrong in following the provisions of the Civil Procedure Rules, and if there be any such appeals, parties would do well to follow those Rules, and if necessary to apply to this Court under Rule 230 for the necessary amendment, in order that they may not be prejudiced.

For the above reasons we think that this appeal fails, and that it must be dismissed with costs fixed at LP. 15.— to include advocates' fees.

Dated this 20th day of October, 1938.

British Puisne Judge.

I concur

Chief Judge.

I concur

Puisne Judge.

MISC. APPLICATION 53/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.) and Khayat, J.
In the application of:—

1. Benzion Khojahinoff
2. Mordekhay Khojahinoff — Applicants.

v.

1. Hubert Walter Norden
2. Abraham Haim Khojahinoff — Respondents.

Application to Chief Registrar for leave to lodge appeal in forma pauperis — Chief Registrar refusing application and directing it to be put in the judges list — Application in Supreme Court for amendment of heading of application for exemption of payment of fees on appeal — Civil Procedure Rules contemplating the right to grant exemption from fees but vesting no Court with such power — Civil Procedure Rules, Rules 323, 328 — *Court fees Rules,* 1935.

Court of Appeal has no power to order exemtpion from payment of fees on appeal.

Edit. Note:—See also Misc. Appl. 41/38 and 48/38 below.

Scharf for Applicants.
Goitein for first Respondent.
For Second Respondent no appearance.

ORDER.

This case raises an interesting point. It appears that an application was made to the Chief Registrar for leave to proceed by way of appeal to the Supreme Court without payment of fees. The Chief Registrar, for reasons which he set out in other proceedings, took the view that he had no power to grant the application and to give the exemption which was asked for, and he directed that the application should be put in the Judges' list. That having been done the present applicants filed on the 30th September, 1938, a document in the Supreme Court "Misc. App. No. 53/38" in which they said:—

"Whereas the Chief Registrar has on 21.9.38 expressed the opinion that he has no jurisdiction to entertain appellants' application for exemption from payment of fees on appeal, and

> Whereas he has directed that the case be put in the Judges' list, application is hereby made in accordance with Rule 359 of the Civil Procedure Rules, 1938, that the heading of the application of appellants for exemption of fees dated 2.8.38 be amended so as to read in the Supreme Court sitting as a Court of Appeal.

The effect therefore would seem to be that this is an application to us to order the exemption of these applicants from the payment of fees. It is clear from Rules 323 and 328 of the Civil Procedure Rules, 1938, that the Rules contemplate that someone has the right to order exemption from payment of Court fees. It is also clear that in two other cases this Court has assumed jurisdiction and has granted in one of these cases exemption from payment of fees and refused the application in the other, but no argument such as is now submitted to this Court was put forward in the two cases to which I have referred.

The short answer to the present application is that the applicants being unable to call our attention to any rule or provision of law vesting in this Court the power to order exemption from payment of fees, this application must be refused.

As to the general question, we have had the benefit of an exhaustive argument dealing with the position which exists as to the exemption from payment of Court fees and the practice which has been so far followed in granting such exemption and our attention has been called to the various provisions in the Rules of Court (Court Fees) Rules 1935. It is unnecessary for us to make any pronouncement on this point but I may say that I propose to take steps to make the position clearer.

The result is that this application is refused with costs fixed at LP.5.

Given on 7th day of October, 1938.

Chief Justice.

MISC. APPL. 41/38.

IN THE SUPREME COURT OF PALESTINE.

Before:—The Chief Registrar (L.W.Orr.)

In the application of:—

Mohammed Ali Sheikh Ali — Applicant.

v.

1. Meyer Moshe Meyer
2. Ali Ahmed Sheikh Ali
3. Jacob Bechor — Respondents.

Goitein for Applicant.
Kehaty for 1st Respondent.
Respondent 2 said at hearing that he did not require to be served.

Application for exemption from Court Fees under Rule 19(1) of the Court Fees Rules, 1935, on Appeal to the Supreme Court sitting as a Court of Appeal, from the decree of the District Court Jaffa dated 2.6.1938.

ORDER.

I am satisfied from the evidence before me that the applicant it not possessed of ready cash or a steady *regular* income but it is admitted that he is the owner of substantial holdings of orange land — all of which are mortgaged with the exemption of a very small piece of land. He is also the owner of a house which stands on the mortgaged land. He owns a 4 gear motorcar which he uses for going to and from his orange groves and which he claims is a neccessity for his business as an orange grower. He admits that his orange trees are breaing fruit and usually produce 6000 to 7000 boxes of oranges per annum, but says that merchants or brokers are reluctant to purchase the future crops of orange trees at this time of year and admits that he has not, in the circumstances, made any attempt to sell the young fruit at present on his trees as it is customary for purchasers to approach the grower rather than for the grower to look for purchasers. He states that he is unable to increase the mortgage on his land and that he has tried to borrow LP. 50 for Court Fees from banks and friends without success.

Mr. Goitein for the Applicant argues that the real question is a postponement of the payment of Court fees as the applicant will very likely have the money later in the year.

Mr. Kehaty for respondent No. 1 strongly opposes the application.

I propose, firstly, to deal with Mr. Goitein's point that I am really being asked to postpone the payment of Court Fees. It is clear that I cannot act on this contention as Rule 19(1) of the Court Fees Rules, 1935, gives me no power of postponement. I have under that rule to decide what proportion (if any) of the Court fees the applicant can pay and certify accordingly on the case file. This clearly means that proportion of the fees (if any) the applicant is capable of paying to-day as a notice of Appeal may not be accepted unless

(1) the fees thereon are paid, *or*
(2) An order under rule 19(1) of the Court Fees Rules is made.

I am therefore left to decide whether or not the allegation of poverty is true.

There are not any local precedents to guide me in deciding whether or not a person of property, who is in debt, but who has an asset which could be realised, probably with an ultimate loss of profit (I refer to the fruit on the orange tree) can be regarded as a person entitled to whole or partial exemption from Court Fees under Rule 19(1) aforesaid. I propose therefore to rely upon the general principles of English Law on the subject.

In the judgment in Ridgway vs. Edwards (1874) 29 L.T. 906; it was held that a farming tenant who has valuable crops on his farm, but no other property, will not be permitted to defend in forma pauperis, although he has in the suit been restrained from selling or removing the crops.

In the present case the applicant has valuable crops on his land and he is *not* restrained from selling them — admittedly the crops are not yet ripe and would be valueless if removed, but they do, I am convinced, represent an asset at the present time.

I am furthermore of opinion that the applicant is good for the amount of the fees — I use the expression "good for" in the same sense as it is used in the judgment of Buckley L.J. in Kydd v. Liverpool watch Committee 1908, 24 T.L.R. 257. what I mean by this, is, that if the applicant has an asset which is capable of realisation he cannot be regarded as being unable to pay Court Fees as he is clearly worth the amount which can now be realised.

The applicant has in his evidence admitted that he has not made any effort at all to *realise* this Asset, his reason apparently being that he expects to make a greater profit if he retains ownership of his crops until they ripen when he expects buyers to approach him. This in effect means that he wishes to "borrow" the amount of the Court Fees from Public Revenue interest free in order that he may stand the chance of a profit on his "borrowings". In other words the applicant wishes to be allowed to file his notice of appeal without payment of fees leaving the Court to recover the fees under Rule 19(2) of the Court Fees Rules, 1935, when the applicant has been successful in selling his ripened fruit, the Public Revenue being apparently left with the possibility of standing the loss if the fruit or the orange trees should be in the meantime wholly or partially destroyed by any agency natural or otherwise.

For the reasons above stated I refuse the application. I have been asked for costs by either of the respondents who appeared and I therefore make no order for costs.

Given this 1st day of August, 1938.

Chief Registrar.

MISC. APPLICATION NO. 48/38.

IN THE SUPREME COURT OF PALESTINE.

Before:—The Chief Registrar (L.W.Orr).

In the application of:—

Abdel Raouf Mohammed Shahin,
in his personal capacity and on behalf of the
heirs of Mohammed Jaber Shahin — Applicant.

v.

Yehuda Blum — Respondent.

Shehadeh for Applicant.

Wilner and *Olshan* for Respondent.

Application for leave to appeal to the Court of Appeal in forma pauperis.

ORDER.

I have listened to the arguments advanced by Mr. Wilner and Mr. Olshan and to Mr. Mr. Shehadeh's reply with interest. Agreement was reached towards the end of the arguments to the effect that the question resolved itself into one as to whether or not the expression "sue in forma pauperis" in Section 6(e) (2) of the Registrars Ordinanc includes appeal in forma pauperis.

Mr. Shehadeh refers me to the Annual Practice 1937, p. 2447, to the effect that a suit includes an action and to rule 2 of the Civil Procedure Rules, 1938, which defines an action as including all civil proceeings and argues therefrom that as an appeal is included in the civil proceedings under the 1938 Rules, it follows that the expression "sue in forma pauperis" would extend to an appeal.

Mr. Olshan in reply points out that certain other sub-sections of Section 6 of the Registrars Ordinance expressly make provision for appellate matters and if it was intended that sub-section (2) was to cover appeals it would have stated as much in express terms. He refers me particularly to sub-section (9) of Section 6(e) of the Registrars Ordinance which refers to 'action, proceedings or appeal'.

It is clear that a Chief Registrar or for that matter a Registrar cannot exercise powers other than those given to him by the Registrars Ordinance and no jurisdiction in excess of that given him by the Registrars Ordinance may be conferred by rule, otherwise it might have been argued that the use of the word "proceeding" in Rule 19 of the Court Fees Rules, 1935, would include appeal and by the application of Section 2 of the Registrars Ordinance, the Chief Registrar would have had jurisdiction.

I am persuaded that the argument of Mr. Wilner and Mr. Olshan is correct and that I have no power to grant this application. There is no need for me to give any reasons for this decision. Mr. Olshan's remarks referred to above, with which I agree, are sufficient. It will rest with Mr. Shehadeh if he wishes, to apply to the Supreme Court for exemption in whole or in part from the payment of Court fees on appeal, as it would appear that the Court may have power to hear the application in view of rule 323 of the Civil Procedure Rules, 1938, which makes reference to orders exempting persons from payment of fees on appeal.

Application dismissed.

Given this 12th day of September, 1938.

Chief Registrar.

CIVIL APPEAL NO. 211/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case of:—

Khalil Mustafa Abu Sirriya — Appellant.

v.

1. Sakina Hasan Warrad El Ghazawi
2. Halima Hasan Warrad El Ghazawi
3. El'Azar Eliashar
4. Ali Mohammad Mustaqim
5. Mustafa Mohammad Abu Sa'ad
6. Mohammad Hussein Abu 'Eita
7. Sa'ad Mohammad Al Khuzundar — Respondents.

Appeal to Land Court from Land Settlement Officer — Application that appeal should be heard in open Court — Record not showing that Appellant was given opportunity of putting forward his case — Court of Appeal remitting case to Land Court for fuller inquiry.

Rule 348 *of Civil Procedure Rules.*

Where there is an application to Land Court in its appellate capacity for appeal to be heard in open Court, either party must be given opportunity of putting forward his case.

Cattan for Appellant.

Machlis for Respondents Nos. 1 & 2.

Respondents Nos. 3-7 — no appearance, duly served.

Appeal from judgment of Land Court, Jaffa, sitting as a Court of Appeal, dated 30.7.1938.

JUDGMENT.

This is an appeal from the Land Court, Jaffa, sitting as an appellate Court from the Land Settlement Officer. Unfortunately, it is by no means clear what took place before the Land Court.

It seems that the Appellant before us asked that the appeal should be heard in open Court, and that the Court sat and indicated that there was only one point on which it wished to hear Counsel, and that His Honour Judge Said Bey Touqan would ask Counsel to elucidate that point.

Unfortunately, we can find no trace in the record as to what that point was. It seems that various submissions were made to the Court by Mr. Moyal, representing the Respondents, but it is not clear that the Appellant was ever given an opportunity of putting forward his case. The Court eventually, on the 30th July, 1938, gave judgment dismissing the appeal, stating it to be unanimously agreed upon, but not going into the matter in any further detail.

A suggestion was made before us, although the advocates appearing do not agree as to what was done, that the Land Court, some time before the date of its judgment, pronounced another different judgment, and to some extent that suggestion seems to be borne out by an application by the Respondent for a copy of the judgment and the record, dated three days after the termination of the hearing and some considerable time before the date of the judgment. If no judgment had been given it certainly seems strange that this application should have been made, but we are not in a position to express any opinion on this point.

In the circumstances we feel that we have no alternative but to set aside the judgment and return the case to the Land Court with an intimation that the parties should be heard if they wish, and that judgment in accordance with Rule 348 of the Civil Procedure Rules should be given.

We desire to make it clear that we express no opinion as to the judgment of the Land Court which has already been given or the judgment of the Settlement Officer, but that we remit this case in order that it may be more fully inquired into by the Land Court.

Costs to abide the event.

Delivered this 11th day of October, 1938.

Chief Justice.

CRIMINAL APPEAL NO. 81/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Muhammad Ibrahim Jabr — Appellant.

v.

The Attorney General

Appellant applying that Court of Appeal may appoint an advocate to defend him.

Application by accused person that an advocate be assigned to defend him — to be made to trial Court and not to Court of Appeal.

Appellant in person.

Crown Counsel (*Hogan*) for Respondent.

Appeal from judgment of Criminal Assize Court, sitting at Jaffa, dated 21.9.1938, whereby appellant was convicted of manslaugter contrary to Section 212 of the Criminal Code Ordinance, 1936, and sentenced to 12 years' imprisonment.

JUDGMENT.

The appellant in this case has applied that an advocate be assigned by this Court to defend him on appeal. Such an application should have been made to the President of the Court of Trial and not to this Court.

We have read the proceedings in this case. The Court below dealt with the facts, and there was evidence to justify it in coming to the findings to which it came.

That being so, we are satisfied that there are no grounds on which we can interfere.

The appeal must be dismissed and the conviction and sentence confirmed.

Delivered this 13th day of October, 1938.

Chief Justice.

CIVIL APPEAL NO. 219/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

The Administrators of the late Shaul Levy — Appellants.

v.

Nathan Levy — Respondent.

Balance sheet signed and sworn to by three executors containing a debt due by one of them to the estate — Books of testator showing sum due to him from one of his sons now an executor of his will — Claim that statement in balance sheet was made under pressure and merely for purpose of obtaining probate and is not admission — Executor sued by co-executor for money due from him to estate — Undue influence and constraint — Finding made by trial Court contrary to weight of evidence.

1. No matter of personal status being involved Religious Law has no application in a claim by an executor against a co-executor for moneys due from latter to estate.

2. Nothing (in English Law) to prevent an executor being sued by his co-executors in respect of a debt owing by him to the estate.

3. Supplications of relatives to sign a document containing an admission of a debt cannot be held to be pressure amounting to undue influence or constraint.

4. Court of Appeal may upset finding of trial Court made contrary to an unqualified statement in a document produced and sworn to by defendant in legal proceedings, especially where statement corroborated by other evidence.

Olshan and *King* for Appellants.

Fellman for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated 29.7. 1938.

JUDGMENT.

Copland, J.

The Appellants and the Respondent are the three executors of the will of the late Shaul Levy. The claim was made by the Appellants against the Respondent for the sum of LP. 1292.250 said to be owing by the Respondent to the estate. In support of that claim the Appellants produced a balance sheet signed by themselves and the Respondent and sworn to by all the three executors, which was filed in

the District Court of Jaffa, together with an application for probate of the will. In that statement of account this item of LP. 1292.250 is shown as a debt due by the Respondent to the estate.

The Appellants further produced the books of the deceased, which show in the account of the Respondent this sum, and the manner in which it is made up. The Respondent argued in the District Court that the balance sheet is not an admission of a debt due by him — that he signed solely as an executor and did so only for the purposes of obtaining probate. He denied that in fact he owed any money to the estate, and that he only signed under pressure of his aged mother and other relatives.

The District Court found that the Respondent categorically refused to acknowledge the debt and that he signed the balance sheet as executor and not as a debtor, owing to pressure exercised upon him by his mother and other heirs for the purpose of obtaining probate and distributing the estate, and that being so they held that the balance sheet was not an admission in writing within the meaning of Art. 1609 of the Mejelle, and could not be a basis for an action. It also held that since this debt was not mentioned in the will, it was probable that the deceased did not mean to claim back this sum from the Respondent.

It therefore dismissed the claim. Hence this appeal.

Before us it has been argued that two executors cannot sue a third executor. From the authorities in English Law which have been cited to us, we are satisfied that this argument is wrong, and that there is nothing to prevent an executor being sued by his co-executors in respect of a debt owing by him to the estate, especially here where any two executors are empowered by the will, after taking the opinion of the remeaining two brothers, to act by themselves.

We also think that Jenkins v. Jenkins, 155 L.T. Rep. p. 119, has no application here, since it really is in regard to procedure. In law, when a debtor to an estate is made executor the debt is deemed to be extinguished, but in equity the executor is deemed to hold the money as executor on behalf of the estate, and can be sued in an administration action in the Chancery Division; in this country there is no separate chancery division. We therefore think that the action was properly brought. But the District Court held that there was nothing in Jewish Law which prevented one executor from suing another executor. In this it was clearly wrong, for Jewish Law has nothing whatever to do with it, since no matter of personal status is involved.

We are unable to support the finding of the District Court on the question of undue influence or constraint. Neither under the Me-

jelle nor in English Law is such a contention proved in this case. The Respondent is a grown man, and the supplications of his mother and sisters cannot possibly be held to be pressure amounting to undue influence or constraint, in this case, which concerns a debt owing by him to his late father's estate.

We also cannot support the District Court's finding that the balance sheet does not constitute an admission. That finding is contrary to the weight of the evidence. The balance sheet containing this statement that this sum was a debt due by Respondent to the estate was produced in legal proceedings and its accuracy was duly sworn to by the Respondent and the Appellants. There is no qualification in it by the Respondent. The existence of the debt is also proved by the books of the deceased which corroborate the balance sheet. And lastly, there is nothing to support the expression of opinion by the District Court that the deceased "probably" did not mean to claim back this sum, from the Respondent, his son. If it were a gift, then it was for the Respondent to prove it — there is not a scrap of evidence in this regard.

In the result, the appeal must be allowed, the judgment of the District Court set aside, and judgment entered for the Appellants against the Respondent in the sum of LP. 1292.250 mls. together with interest at nine per cent per annum from date of action.

The Appellants will have their costs of this appeal assessed at LP. 15.— (to include advocate's fees) and their costs in the District Court assessed at LP. 10.— (to include advocate's fees) together with disbursements.

Delivered this 31st day of October, 1938.

British Puisne Judge.

I concur

Puisne Judge.

I concur

Puisne Judge.

CIVIL APPEAL NO. 192/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Dr. Paul Berg — Appellant.

v.

1. Dr. Itzhak Karokes

2. Israel Avivi Respondents.

Claim of deposit advanced in connection with purchase of land — No appearance on behalf of Appellant — Telephone message that advocate prevented from being present because road stopped by military — Hearing of appeal in absence of appellant.

Unproved allegation (in a telephone message) that advocate prevented from being present because road to Jerusalem stopped by military — no good cause to grant adjournment of appeal.

No appearance for Appellant.

Zeiger for Respondent No. 1.

Goddard for Respondent No. 2.

Appeal from judgment of District Court, Tel-Aviv, dated 8.7. 1938.

JUDGMENT.

The Appellant in this case had claimed before the District Court of Tel-Aviv a sum of LP. 320, a deposit which he had advanced in connection with the purchase of land. The District Court decided against the Appellant, giving reasons for its decision. The Appellant appealed to this Court. The appeal was fixed for hearing to-day, but, when the case was called there was no appearance on behalf of the appellant. A telephone message had been received stating that the appellant's advocate was prevented from from being present in Jerusalem to argue the appeal, because the road from Tel-Aviv to Jerusalem had been stopped by orders of the military. The two advocates for the respondents appeared in Court and both objected to an adjournment of the appeal. They said that they both had left Tel-Aviv this morning for the purpose of attending this hearing and neither of them had experienced any difficulty in travelling from Tel-Aviv to Jerusalem. The Court decided to refuse any adjournment. Later in the hearing a Mr. Launar made an apperance on behalf of the appellant to make a similar application for an adjournment on similar grounds. He was not prepared to argue the appeal and the Court decided that it would not alter its previous decision to refuse an adjournment. In accordance with the Rules of Court, the Court than heard the advocates for the respondents on the written grounds of appeal which had been filed by the appellant. The Court saw no reason to assume otherwise than that the judgment of the Court below was correct. The appeal is therefore dismissed and the respondents will have the costs to include LP. 10 advocate's fees for each advocate.

Delivered this 31st day of October, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 218/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

1. Joseph Rubinstein
2. Zeev Turner
3. Jona Hurwitz — Appellants.

v.

1. Karolina Weinberg
2. Regina Herman — Respondents.

Part of land registered in name of purchaser used by vendor as passage — Allegation of notice that passage was bought from purchaser's predecessors in title by unregistered sale — Alternative plea of right of way after plea of ownership — Relief sought on ground of necessity.

1. Alternative plea of being entitled to use a strip of land by right of way — not contradictory to original plea of ownership.

2. Person using a passage on Mulk land for less than 15 years can neither rely on prescription nor on a right of way by time immemorial.

Levin for Appellants.

Bachrach for Respondents.

Appeal from the decree of Land Court, Tel-Aviv, dated 29.7.1938.

JUDGMENT.

Frumkin, J.

Some time in 1932 the Respondents had, by registered title, acquired a plot of land with given boundaries and a given area. They later discovered that a part of their plot forming a strip of land to the width of one metre and separated from the plot by a fence, was occupied by the Appellants and used by them as a passage giving access to their respective houses.

The Respondent then lodged the present action asking for an order directing the Appellants not to interfere with what they considered to be their property, and succeeded in their atcion. Hence this appeal by the Appellants.

The Appellants to not contest the fact that the strip of land forms part of the registered title of the Respondents. They maintain, however, that many years ago, in 1921, they purchased that strip from the predecessors in title of the Respondents by unregistered sale, and whereas the Respondents, on purchasing their plot, had notice of their

rights over that strip of land, they had, as against the Respondents, acquired an equitable right.

The Appellants having failed to prove that the Respondents had notice of their rights over the strip of land, it is not necessary to discuss the question of equitable title, nor is it necessary to deal with the purchase of the strip, which, if at all, took place outside the Land Registry at a time when such transactions were of no legal effect.

The Appellants alternatively claimed that even if they are not entitled to continue to use the strip of land by ownership they are entitled to use it by an acquired right of way.

We do not agree with the Respondents that such a plea is contradictory to the original plea of ownership, but the Appellants failed to prove also the existence of such right. In so far as they can rely on prescription, they used the passage only for twelve years, and the land is Mulk. Furthermore this period is certainly insufficient to establish a right of way by time immemorial.

The Appellants further claimed that they should be granted relief on the grounds of necessity, as they had no other access to their houses. This point, however, was not taken in the written pleadings but only mentioned in the final address of Counsel for Appellant. While we think that nevertheless the Court should have made a finding on that point, we are not prepared to remit the case on that ground, especially as the Court has itself inspected the place, and we assume that it did not think that such necessity existed. In fact there was evidence that the Appellants had other access to their houses.

The appeal must therefore fail. The Respondents will have their costs to include LP. 15 advocate's fees.

Delivered this 26th day of October, 1938.

Puisne Judge.

I concur

Senior Puisne Judge.

I concur

British Puisne Judge.

CRIMINAL APPEAL NO. 79/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Mahmoud Odeh Esh-Sheikh Khalil — Appellant.

v.

The Attorney General — Respondent.

Conviction of unlawful sexual intercourse with a girl aged 7 years ——Unsworn evidence of child corroborated only by unsworn evidence of another child — Crown Counsel stating that he could not support conviction.

Conviction based on unsworn evidence of a child corroborated only by evidence of another unsworn child cannot stand.

Fouad Atala for Appellant.

Crown Counsel (*Hogan*) for Respondent.

Appeal from judgment of District Court, Haifa, dated 19.9.1938, whereby appellant was convicted of having unlawful sexual intercourse with a girl under the age of sixteen years, contrary to Section 152(1)(c) of the Criminal Code Ordinance, 1936, and sentenced to seven years' imprisonment.

JUDGMENT.

The Appellant was convicted by the District Court, Haifa, of having unlawful sexual intercourse with a child aged seven years.

The evidence of that child, which was given unsworn, was corroborated only by the evidence of another unsworn child. On this becoming clear the Crown Counsel rightly stated that he could not support the conviction.

The appeal therefore is allowed and the Appellant discharged — unless he is detained on any other charge.

It is a matter of regret that the Court of trial did not comply more fully with section 51 of the Criminal Procedure (Trial Upon Information) Ordinance, Cap. 36.

Delivered this 11th day of October, 1938.

Chief Justice.

CIVIL APPEAL NO. 216/38.

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:—

Jonina Shlank — Appellant.

v.

Mahmoud Muhammad Abu Namous — Respondent.

Appeal to Land Court from Land Settlement Officer — Allegation of fraud in obtaining registration — Burden of proof shifted — Remitting case to Land Court to hear further evidence on issue of fraud.

Land (Settlement of Title) Ord., sec. 66.

1. Onus of proof in proceedings before Land Court to upset registration of land — upon person asking the relief.

2. Party who did not call further witnesses because of an interlocutory ruling that onus of proof shifted to his adversary may do so on case being remitted to trial Court.

Eliash for Appellant.

Subhi Ayyoubi for Respondent.

Appeal from judgment of Land Court, Jaffa, dated 30.7.1938.

JUDGMENT.

Copland, J.

We think that this appeal will have to be allowed. The essence of the Respondent's case in the Court below was that there was fraud on the part of the Appellant. The onus of proof was therefore on the Respondent who was the then Plaintiff to prove his allegation, since, for proceedings under Section 66 of the Land (Settlement of Title) Ordinance Cap. 80, fraud is one of the grounds upon which a settlement registration may be upset. It seems to us that at the sitting of the Land Court on 14th April 1937, this point was appreciated but that it was lost sight of by the reconstituted Court when proceedings were resumed and the interlocutory ruling given on 24th March, 1938, that the onus of proof had shifted to the Defendant (now Appellant) was not right.

The Respondent has stated that he had further witnesses available, but that in view of the ruling of 24th March, 1938, he did not call them.

We think that the most satisfactory course will be to allow this appeal and set aside the judgment of the Court below, and remit the case to it to hear such further evidence on the issue of fraud as may be tendered by the parties. We think that it is a matter of regret that at the trial when the Assistant Settlement Officer gave evidence he was not asked if he could recognise the Plaintiff — the latter should certainly have been produced for identification if possible.

Costs to await result of retrial.

Delivered this day of October, 1938.

British Puisne Judge.

I concur

Chief Justice.

I concur

Puisne Judge.

CIVIL APPEAL NO. 158/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case of:—

The Municipal Corporation of Jerusalem — Appellants.

v.

Nakhleh Cattan — Respondent.

Saba Said for Appellants.

Cattan for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 19.5.1938.

(*Majority Judgment*: (*Trusted, C. J.*) *Frumkin, J. and Abdul Hadi, J.*

Interpretation of words "subject to provisions of any ordinance" in art. 43 of Palestine Order in Council — Question of validity of sec. 6 of Magistrates' Courts Jurisdiction Ordinance — Court taking into consideration interpretation acted upon over a long period of time — Precedents of various divisions of Supreme Court — Conflicting judgments of Court of Appeal — Palestine Order-in-Council, 1922, Art. 17, 43, 49 — Magistrates Courts Jurisdiction Ordinance, 1935, sec. 5, 6 — Stamp Duty Ordinance, Sec. 15(1) — Companies Ordinance, sec. 195.

1. Supreme Court has jurisdiction to hear appeals from District Courts in their appellate capacity.

2. If words in an article of law are not free from doubt, Supreme Court entitled to take into consideration the interpretation given to these words over a long period of time.

3. Courts of Appeal should generally follow their own precedents and those of other divisions of same Court.

4. Where there are, or may be thought to be, conflicting judgments Courts of Appeal must enquire into whole question and are not necessarily bound by latest judgment.

Edit. Note:—See C.A. 177/38 4 CtLR 73, C.A. 71/33 2 PLR 34; C.A. 33/36 P. Post 5 & 7.2.1937; C.A. 145/38 and Edit. Note thereto, 4 CtLR 60.

JUDGMENT.

Trusted, C. J.

This is an appeal from a judgment of the District Court, Jerusalem,

given in its capacity as an appellate Court from the Chief Magistrate, Jerusalem.

The Respondent submits that this Court has no jurisdiction to hear this appeal. The question turns on the interpretation of part V. of the Palestine Order-in-Council, 1922, particularly Article 43, the first part of which provides:—

> "The Supreme Court, sitting as a Court of Appeal shall have jurisdiction, subject to the provisions of any ordinance to hear appeals from all judgments given by a District Court in first instance, or by the Court of Criminal Assize, or by a Land Court."

The material words being "subject to the provisions of any Ordinance", and whether section 6 of the Magistrates Courts Jurisdiction Ordinance, 1935, which provides:—

> "The decision of the District or Land Court in any appeal from a Magistrate's Court shall be final, but the presiding judge of the court may, if he considers it proper so to do, grant leave to appeal to the Supreme Court on a point of law."

is validly enacted thereunder, I am of opinion that this submission is not well founded for the following reasons.

How far, if at all, the jurisdiction of this Court, as laid down in the Article, can be restricted or enlarged by Ordinance, has been considered by this Court in three cases.

In Civil Appeal No. 71/33*) it was decided that there was no appeal to this Court from a decision of the District Court given under Section 15(1) of the Stamp Duty Ordinance, No. 31 of 1927, now Chapter 133, but it should be noted that that section provides for an appeal to the District Court, Jerusalem, but makes no further provision for an appeal to this Court.

In Civil Appeal No. 33/36**) it was held that an appeal lay to this Court from a decision of the President of a District Court exercising the special jurisdiction conferred upon him by the Third Schedule to the Workmen's Compensation Ordinance, now Chapter 154. It should be noted that the third paragraph of that schedule expressly provides for such an appeal.

In Civil Appeal No. 177/38***), the question arose whether an appeal lay to this Court from the decision of a District Court exercising its jurisdiction under Section 195 of the Companies Ordinance, Chapter 22 which also provides for an appeal to this Court. In that case this Court held —

> "The word 'subject to the provisions of any ordinance',

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*) 2 PLR 34. **) P. Post 5 & 7.2.1937. ***) 4 CtLR 73.

> in our opinion, refer to the manner in which such appeals shall be brought, such as imposing a limit of penalty below which an appeal does not lie, imposing a definite period for appealing, ordering that in any particular class of cases appeals shall only be by leave, and such like matters, but cannot extend the jurisdiction of the Supreme Court to allow it to hear appeals from the District Court in its appellate capacity."

It is clear from the Article that the words "subject to the provisions of any ordinance" do not apply to the constitution of the Court, as that is dealt with earlier in the Article. They do not, in my opinion, apply to matters of practice and procedure, as there are special provisions in Article 49 of the Order-in-Council for Rules of Court to deal with these matters. I can see no distinction between enlarging the jurisdiction generally so as to give this Court jurisdiction to hear appeals from Courts other than the three mentioned in the Article, and enlarging the jurisdiction of this Court to hear an appeal from the District Court not sitting in first instance. I see no reason why the words should apply only to limit the jurisdiction of this Court, and in my opinion under them an ordinance may limit and also enlarge that jurisdiction.

If, however, I am wrong as to this, it cannot be said that the meaning of the Article is free from doubt. That being so, in my opinion this Court is entitled to take into consideration the interpretation which has been given to these words over a long period of time and the fact that during that period the Order-in-Council has been amended. The dates are as follows:—

In 1924 the Magistrates' Courts Jurisdiction Ordinance was passed, section 4 of which provided that an appeal should lie from the decision of a District Court sitting in its appellate capacity by leave to the Supreme Court on a point of law.

So far as I am aware that provision was frequently acted upon until 1935, when the Order-in-Council was amended by the Palestine (Amendment) Order-in-Council, 1935. That amending Order-in-Council mainly dealt with the Jurisdiction of the Courts but it did not amend Article 43.

In 1935, the Magistrates' Courts Jurisdiction Ordinance was re-enacted, and the old section 4 became the new section 6 in substantially the same form. From that date until now, so far as I am aware, the provision has been acted upon, and its legality has not been challenged.

The matter appears to me to come within the principle upon which the judgment of James, L.J.. in The Anna, I. Probate, page 295, was based, and I think that it is too late to raise this question of jurisdiction after such lapse of time.

I desire expressly to reserve my views as to how far, if at all, the provisions of the Order-in-Council generally, in the absence of such words as we are here considering, can be varied by Ordinance, having regard to the provisions of Article 17 of the Order-in-Council, as amended by the Palestine (Amendment) Order-in-Council, 1923.

I have had the advantage of reading the judgment which my brother Copland is about to deliver. I agree with him that Courts of Appeal should generally follow their own precedents and those of other divisions of the same Court. Where, however, despite this principle, there are, or may be tought to be, conflicting judgments, they must enquire into the whole question, and in my view are not necessarily bound by the latest judgment.

Delivered this 27th day of October, 1938.

Chief Justice.

I concur in the conclusion arrived at by His Honour the Chief Justice.

Puisne Judge.

(*Abdul Hadi, J.*)

JUDGMENT.

Frumkin, J.

The Magistrates' Courts (Jurisdiction) Ordinance, 1935, regulating the jurisdiction of Magistrates' Courts and appeals from judgments of such Courts, lays down in Section 6 that —

> "The decision of the District or Land Court in any appeal from a Magistrate's Court shall be final, but the presiding Judge of the Court may, if he considers it proper so to do, grant leave to appeal to the Supreme Court on a point of law."

The original Magistrate's Courts Jurisdiction Ordinance, 1924 (Cap. 87) contained a similar provisions in Section 5 which reads as follows:—

> "The decision of the District or Land Court in any appeal from a Magistrate's Court shall be final, but the President of the Court may, if he considers it proper so to do, grant leave to appeal on a point of law to the Supreme Court sitting as a Court of Appeal.

2. Since the first promulgation of this Ordinance in 1924, it has been the invariable practice of this Court to hear appeals on leave granted from the judgments of the District Court in its appellate capacity issued on appeal from Magistrates' Courts. Leave to appeal may have been too frequently and generously granted, but the fact remains that hardly a week passed without this Court having to deal

with one or more appeals of this nature.

3. The present appeal is such a case, and Mr. Cattan, for the Respondent, took the preliminary point that under Article 43 of the Palestine Order-in-Council, 1922, this Court has no jurisdiction to hear such appeals. The relevant part of the Article reads as follows:—

> "The Supreme Court, sitting as a Court of Appeal shall have jurisdiction, subject to the provisions of any ordinance, to hear appeals from all judgments given by a District Court in first instance, or by the Court of Criminal Assize, or by a Land Court."

It would follow as a result of this argument that as this appeal is an appeal from a judgment of the District Court, given not in first instance but in its appellate capacity, that part of the Magistrates' Court Jurisdiction Ordinance allowing such an appeal, is ultra vires the Order-in-Council.

Mr. Cattan further relies on a recent judgment of this Court in the Liquidators of the Phoenix Life Insurance Co. v. Kurt Drucker (Civil Appeal 177/38) wherein it was held that a judgment issued by the District Court on appeal from an order of a liquidator, cannot be heard by this Court.

5. Against the aforementioned decision another case — Kramer v. Kipnis and others (Civil Appeal 33/36), has been cited. In that case this Court overruled the preliminary objection taken, also under Article 43 of the Order-in-Council, that this Court has no jurisdiction to entertain an appeal from an order of the President of the District Court under the Workmen's Compensation Ordinance, although that Ordinance conferred a right of appeal.

6. I was myself a party to the judgment in the Phoenix case, but already upon the delivery of my judgment in that case I expressed my reluctance in arriving at that conclusion, bearing in mind the effect that decision might have on the long established practice to hear appeals from judgments of the District Court in its appellate capacity, especially in matters within the Magistrates' Courts jurisdiction, which form quite a considerable proportion of the number of appeals heard by this Court. Since then my attention was called to the Kramer v. Kipnis case, and I am glad the matter came up for further discussion. After giving it further consideration I am now inclined to take the broader view in interpreting Article 43 of the Order-in-Council.

7. This case in its essence is indistinguishable from the Kramer case. There was an appeal not contemplated by Article 43 of the Order-in-Council, so that if that Article were to be considered in a restrictive sense, limiting the right of the Supreme Court to hear appeals to such cases only as are specifically mentioned in the Article

that appeal could not have been entertained. Yet the Court relying on Article 17 of the Palestine Order-in-Council, which gives the High Commissioner power to promulgate ordinances, took the view that such power includes the promulgation of ordinances extending the jurisdiction of this Court. If that is the case with regard to a Tribunal not mentioned at all in the Order-in-Council, a fortiori, this principle must apply to a Court mentioned in the Article as one of the Courts from which this Court has power to hear appeals.

8. The words "in first instance", after the "District Court", should not, to my mind, be taken as restrictive. It would be so if not for an ordinance extending the right to hear appeals from judgments other than those given in first instance. It is not necessary to discuss any further the question as to whether or not the power granted to the High Commissioner under Article 17 of the Order-in-Council goes so far as to empower the High Commissioner to issue ordinances repugnant to or inconsistent with the Order-in-Council. As justly stated in the Kramer case it cannot be suggested that an ordinance extending the jurisdiction of this Court is in any way repugnant to or inconsistent with the Order-in-Council. To my mind it makes little difference whether the extension is with regard to the tribunal from which appeals may be heard or as to the types of appeals which can be heard.

9. Mr. Levin who very ably represented a Respondent in another case in which a similar preliminary objection was taken, referred to Article 38 of the Order-in-Council as amended. In view of the conclusions I arrived at it is not, however, necessary for me to say anything on this point.

10. Unforunate as it may be for me to have to vary my opinion, I am doing so without hesitation on the grounds stated above and with the view of upholding a long established practice well supported by law and justified on its merits. It follows that section 6 of the Magistrates' Court Jurisdiction Ordinance is not ultra vires Article 43 of the Order-in-Council, and the preliminary objection should be overruled.

On the question as to how far this Court is bound by its previous decision I associate myself with the view expressed by the learned Chief Justice.

Delivered this 27th day of October, 1938.

Puisne Judge.

JUDGMENT.

Copland, J.

This is an appeal by leave of the President, from a judgment of the District Court of Jerusalem, in its appellate capacity, confirming a judgment of the Chief Magistrate. Another appeal case of a similar nature, namely — The Administrators of the Estate of the late J. L. Goldberg v. Itin (C.A. 206/38) has been argued at the same time, and I propose to deal with the arguments in both cases in this judgment, since in each case the same preliminary point has been taken. This point, which is of great constitutional and legal importance, is whether there can be any appeal to the Supreme Court, by leave, from a judgment of a District Court given in its appellate capacity, and to determine this it has to be decided whether an Order-in-Council can be amended by Ordinance, and if so, whether an ordinance which is repugnant to or inconsistent with the Order-in-Council is valid, and if not, whether Section 6 of the Magistrates' Courts Jurisdiction Ordinance 1935 is so repugnant or inconsistent.

But before dealing with these points, I think that it is necessary to consider another point, of equally great importance, and I do so with great reluctance, for up to now I have always considered that the matter needed no argument. The question is whether and if so how far the Court of Appeal is bound by its own previous decisions.

The English law is perfectly clear, and is to be found in Halsbury's Laws of England, Hailsham Edition Vol. XIX. p. 254. Decisions of the Court of Appeal in England upon questions of law are, as a general rule, binding on the Court of Appeal itself, until a contrary determination has been arrived at by the House of Lords. A decision of the Court of Appeal occasioned by the members of the Court being equally divided is not binding on the Court of Appeal; and although a Court consisting of three Lords Justices is not entitled to overrule a decision of a Court of Appeal expressed by two Lords Justices, where a Court of Appeal has before it a series of judgments of the Court of Appeal, which do not appear to be consistent with each other, and one judgment was given when the Lords Justices were not aware of some of the previous decisions, in such circumstances, as a matter of judicial comity, it is open to the Court of Appeal to consider all the previous decisions and to form its own view as to which is the more accurate and shall be followed.

A large number of cases are cited in the note — all of them support the above proposition that the Court of Appeal is bound by its own decisions, whatever the opinions of individual members might have been, if there had been no authority. For example, in Velasquez

Limited v. Commissioner of Inland Revenue, (1914) 3 K.B. at p. 461 — III L.T. Rep. at p. 420, Cozens — Hardy M. R. said that if the matter had come before them for the first time he would certainly have thought that the arguments deserved mature consideration. He goes on to say: "But there is one rule which of course we are bound to abide by, and that is that when there has been a decision of this Court upon a question of principle it is not right for this Court, whatever its own views may be, to depart from that decision. There would otherwise be no finality in the law. If the decision is contended to be wrong, then the proper course is to go to the ultimate tribunal — namely the House of Lords, who have power to settle the law and to hold that the decision which is binding upon us is not good law". Swinfen Eady L. J. and Pickford L. J. concurred. Again in Consett Industrial and Provident Society v. Consett Iron Co. ((1922) 2 ch. at p. 127-172 L.T. Rep. at p. 384) Lord Stendale said: "In my opinion we are not at liberty to form our own opinion on the matter as the case is governed by authority," and later he says: "It was a decision of the identical question arising upon the construction of the identical Act. It is therefore binding upon us unless it has been overruled or unless it was given in circumstances different from those of the case before us," and he goes on to explain this last sentence as circumstances which could alter the construction of the Act.

There is one other case which I think perhaps I ought to mention, Kelly and Co. v. Kellond (1888) 20 Q.B.D. 569 — 58 L.T. Rep. N.S. at p. 264, where Lord Esher M.R. expressed the view that the decision of a question in a particular way by one of the divisions of the Court of Appeal was not binding upon the full Court, but Fry L.J. and Lopes L.J. both expressly said that they did not desire to say anything as to the power of the full Court to disregard the previous decisions of one of its divisons, and this proposition apparently did not commend itself to the majority of the members of the Court. They decided the question before them on other grounds.

It is on the ground of judicial comity that an Appellate Court bows to its own decision. If it does not, then the impossible situation arises, where the decision of the Court depends upon the individual views of the constituent judges, and one gets a series of conflicting decisions which bring the Court into disrepute. Without judicial comity, the law would become completely chaotic.

I have gone into this question in detail, because a decision of this Court in Doukhan and another v. Drucker — C.A. 177/38, given on 28th July, 1938, has been called in question in this present appeal, and the correctness of that decision has been challenged. In that case,

the identical question was raised which is now before us in this present case, and the three judges of this Court came to an unanimous decision that no appeal lay from a judgment of a District Court given in its appellate capacity.

The case was very fully argued by two of the leading advocates of the Palestine Bar, and the judgment was given in full knowledge of the fact that it would upset a practice that had been considered legal for many years, but the Court saw no alternative. In fact the Court stated that it came to the conclusion with regret.

I am very far from saying that this Court can never over-rule its own decisions. There are certain cases where it undoubtedly can and should do so. One such instance I have already mentioned, namely, where one decision appears to be inconsistent with previous decisions on the same point. Another instance, which would never occur in the English Courts, and is therefore not to be found in any of the textbooks, but of which there are certain unhappy examples to be found in the past in the records of this Court, is where no reasons are given in the previous Judgment. It is then impossible to know upon what principle or pirnciples the case has been decided: one cannot be certain if the facts or the circumstances are rasonably the same, and the matter must then be considered on its own merits. Another example would be where it was obvious that the decision was wrong, as where the law had been completely disregarded and it was generally agreed that this was so.

But such cases are exceptional, and none of the above conditions are present in this case, so far as I can see.

A certain amount of uncertainty has, I am afraid, been caused by a somewhat unfortunately worded remark, if I may so term it with respect of Manning, J. in Raja el Issa and another v. Khammar L.A. 52/35. In the course of this judgment he said: "Hassan Eff. Hawa has urged that this decision (i. e. a previous judgment on an identical point) is binding on this Court. A perusal of decided cases shows that this Court has not always regarded itself as bound by its own decisions. I agree in principle that this Court ought to follow its own decisions, but the Law of Palestine may be said to be still in its infancy, and I think that this Court is not precluded from over-ruling its own decisions, unless they have remained unchallenged for a considerable length of time."

If he meant by this, that this Court can form its own opinion on any case which comes before it, irrespective of previous decisions on the same point, then I must respectfully but expressly dissociate myself from such a principle, which is contrary to the English Law as estab-

lished for many years in a long series of decisions and which would render judicial comity in this country non-existent. It would mean that the Law of Palestine would continue to remain in the stage of infancy for ever.

It has been argued that the decision in Doukhan v. Drucker (Supra) is inconsistent with that in Kramer v. Kipnis and another, C.A. 33/36. I do not think that this is so, because that latter case was an appeal by leave of the President, District Court from his decision on certain points of law stated by an arbitrator under the Workmen's Compensation Ordinance. It was not an appeal from a District Court sitting in its appellate capacity, nor in fact was it an appeal from a judgment of a District Court. The question as to whether an appeal could lie from a judgment of a District Court given in its appellate capacity was never argued, and was not present in the mind of the Court. All that Kramer v. Kipnis decided was that if an ordinance grants special jurisdiction to a President of a District Court, and nominates an already existing Court to which an appeal may be made, this is not repugnant to or inconsistent with the provisions of the Order-in-Council. The Order-in-Council was silent on this point, and I think that in such a case there can be no objection to provisions being made for appeals to this Court. The further question whether the High Commissioner has power to promulgate an ordinance repugnant to or inconsistent with the Order-in-Council was not decided, the Court stating that it was unnecessary to consider it. That as I read it, and I was a member of the Court, is the effect of the decision in Kramer v. Kipnis (Supra).

Another case which came before this Court in 1934 was — the Attorney General on behalf of the Commissioners of Stamps v. Joseph, C.A. 71/33 (P.L.R. II. 34). This was an appeal from the judgment of a District Court on an appeal from an adjudication by the Stamp Duty Commissioners. This Court, in dismissing the appeal said: "It cannot therefore be said that the District Court's determination of the question submitted to it on a case stated is a judgment given by the District Court in first instance, and we know of no ordinance subject to the provisions of which the terms of Art. 43 of the Order-in-Council can in this particular case be modified." I do not think that this case is of very much importance, since it does not determine the point which has arisen in this present appeal, namely, whether an ordinance can modify the terms of the Order-in-Council. It merely says that there is no ordinance, so the present point did not really arise.

For the above reasons, therefore, and with the greatest respect to

those who may differ from me, I think that this Court is bound by the decision in Doukhan and another v. Drucker (Supra), and that it is not open to us to disregard it.

That as I see it, should dispose of this present appeal, but I may perhaps add a few words in elaboration of the judgment given by me in Doukhan and another v. Drucker, bearing in mind the arguments addressed to us on the hearing of these two appeals.

The principal Articles of the Palestine Order-in-Council 1922 to which reference must be made, are this following:—

Art. 38. Subject to the provisions of this part of this order and any ordinance or rules, the civil courts hereinafter described, and any other courts or tribunals constituted by or under any of the provisions of any ordinance shall exercise jurisdiction in all matters and over all persons in Palestine.

Art. 40 District Courts shall be established in such Districts as may be prescribed from time to time by order under the hand of the High Commissioner, and every such Court shall exercise jurisiction:—

(1) As a Court of First Instance.—

(a) In all civil matters not within the jurisdiction of the Magistrates' Courts in and for that District.

(b) In all criminal matters which are not within the jurisdiction of the Court of Criminal Assize.

(2) As an Appellate Court from the said Magistrates' Courts subject to the provisions of any Ordinances or Rules.

Art. 41 There shall be a Court of Criminal Assize which shall have exclusive jurisdiction with regard to offences punishable with death and such jurisdiction with regard to other offences as may be prescribed by Ordinance.

Art. 42 The High Commissioner may by Order establish Land Courts as may be required from time to time for the hearing of such questions concerning the title to immovable property as may be prescribed.

Art. 43 There shall be established a Court to be called the Supreme Court of which the constitution shall be prescribed by Ordinance. The Supreme Court sitting as a Court of Appeal shall have jurisdiction subject to the provisions of any Ordinance to hear appeals from all judgments given by a District Court in first instance or by the Court of Criminal Assize or by a Land Court.

These articles define the jurisdiction of the various Civil Courts established by the Order-in-Council or to be established by or under the

provisions of any Ordinance. The original Art. 38 of the Order-in-Council of 1922 was amended in its present form in order to overcome certain doubts which had been expressed as to the validity of Land Settlement Courts. It should be noted that both Arts. 40 and 43 show a distinction between a District Court of First Instance and as an Appellate Court.

Then there is Art. 64 which defines the powers of a District Court in matters of personal status of foreigners and provides that the Courts shall have no jurisdiction to pronounce a decree of dissolution of marriage until an Ordinance is passed conferring such jurisdiction.

The powers of the High Commissioner in regard to legislation are contained in Art. 17 as amended. He may promulgate such ordinances as may be necessary for the peace, order and good government of Palestine, subject to certain conditions and limitations, which do not concern us in this case.

By art. 87 power was given to the High Commissioner to vary, annul or add to any of the provisions of the Order by Proclamation in the Gazette within one year from the date of the commencement of the Order, and by Art. 88 power was reserved to His Majesty in Council at any time to revoke, alter or amend the Order.

Finally there is Section 6 of the Magistrates' Courts Jurisdiction Ordinance 1935 which says:—

> "The decision of the District or Land Court in any appeal from a Magistrate's Court shall be final, but the Presiding Judge of the Court may, if he considers it proper so to do, grant leave to appeal to the Supreme Court on a point of law".

The question then is one of construction, and in the ultimate resort must be determined upon the actual words used, read not "in Vacuo" but as occuring in a single instrument in which one part may throw light on another. The true test, (see the words of Lord Wright M.R. in delivering the judgment of the Judicial Committee in James v. Common-Wealth of Australia, 155 L.T. Rep. 393), must, as always, be the actual language used.

I will now examine the actual language of the Order-in-Council so far as relevant, in order to ascertain its true construction.

It is clear from the wording of Art. 40 that the framers of the Order intended to draw a distinction between the jurisdiction of a District Court in first instance and as an appellate court. It is equally clear that they originally intended that an appeal should lie to the Supreme Court from those judgments only of a District Court in first instance, and that judgments of a District Court in its appellate capacity should be final. Those were the provisions in the Order.

The crucial words which have to be construed are "subject to the provisions of any Ordinance or Rules" occuring in Arts. 38 and 40(2) and the words "subject to the provisions of any ordinance" which are to be found in Art. 43.

The words in Art. 40(2) are clearly restrictive, for the District Court exercises jurisdiction as an Appellate Court from the Magistrates Courts, that is from all judgments of the Magistrates. There is no actual jurisdiction to extend, and the words "subject to the provisions of any Ordinance or Rules", therefore, can only limit the otherwise complete jurisdiction in respect of appeals from Magistrates' Courts.

Art. 38 must I think be divided into two parts — it provides for existing Courts and for other courts to be constituted by or under the provisions of any ordinances.

It begins — "Subject to the provisions of this part (i.e. Part V.) of this Order . . . " Pausing here for a moment, these words again are words of limitation — they restrict the otherwise complete jurisdiction which is given to Civil Courts by the general words at the end i.e., "in all matters and over all persons in Palestine." For the other Articles in Part V assign certain limited jurisdictions to the various courts constituted by these Articles. For example, Art. 39 limits the jurisdiction of Magistrates Courts to that assigned to them by the Ottoman Magistrates Law as amended, altered or extended by any Courts in first instance to matters not within the jurisdiction of certain other Courts. The Courts of the Religious Communities also have certain jurisdiction assigned to them, which but for this assigning would be within the jurisdiction of the Civil Courts. Can the further words " and any Ordinance or Rules" which follow on after the commencing words of this Article be read in a different sense?

It is useful to note that Art. 41 contemplates a possible extension to the jurisdiction of the Court of Criminal Assize by providing that it shall have "such jurisdiction with regard to other offences (i.e. other than offences punishable with death) as may be prescribed by ordinance". Art 64 again makes provision for giving jurisdiction to District Court in matters of Divorce by Ordinance. The wording of both these Articles, where an extension of jurisdiction is definitely contemplated, is very different from the wording of Art. 38 and also of Art. 43. This latter Article limits the jurisdiction of this Court, subject to the provisions of any Ordinance, to appeals from those judgments of a District Court given in first instance, and excludes by implication those judgments of a District Court given as an Appellate Court. If an extension of this Court's jurisdiction to hear appeals from the ap-

pellate judgments of the District Courts had been contemplated then instead of the words "subject to the provision of any Ordinance" one would have expected to find some words such as, " and such other jurisdiction as to appeals from judgments given by a District Court as an Appellate Court as may be prescribed by Ordinance." It seems to me, therefore, that the words "and any Ordinance or Rules" in Art 38 must be read with the words "Subject to the provisions of this part of this Order", and from the wording of Arts. 40, 41 and 64 and the fact that in Art. 40 the words are undoubtedly used in a restrictive sense, and are limited in their application to matters of practice and procedure, the words "subject to the provisions of any Ordinance or Rules" occurring in Art. 38 and the words "subject to the provisions of any Ordinance" in Art. 43 must equally be restricted to matters of practice and procedure and are words of limitation, and cannot extend the jurisdiction of this Court in regard to matters for which special provision has already been made in the Order-in-Council.

It is beyond argument that Rules cannot extend the provisions of an Order-in-Council — they refer solely to practice and procedure — and can only regulate the manner in which appeals shall be brought and such like matters. The words "subject to the provisions of this part of this Order" are also words of limitation, and these words and the words "and any Ordinance or Rules" appearing immediately after them are in the same condition and must all be read together, and cannot in my opinion extend the jurisdiction in the sense contended for by the appellants.

The powers of amendment of the Order are to be found in Arts. 87 and 88. Wide as are the powers of the High Commissioner under Art 17 in regard to the promulgating of Ordinances for peace, order and good government, yet they cannot be extended to cover an extension of the jurisdiction of this Court which is in my opinion, to say the least, inconsistent with the clear provisions of the Order-in-Council itself.

The legislature of Palestine is not a sovereign legislature — it is bound by its written Constitution, namely, the Order-in-Council. The Law Reports of the Privy Council are full of cases under the British North America Act and the Commonwealth of Australia Act where Acts of the Dominion and Commonwealth legislatures have been declared invalid, because Acts of those legislatures have exceeded the powers conferred upon them by their respective Constitutions, even though those Acts had received the Royal Assent.

The same rules of construction must I think apply in Palestine.

For these reasons I am of opinion that the High Commissioner has

no power to promulgate an Ordinance which is inconsistent with the provisions of the Order-in-Council, and a fortiori which is repugnant to those provisions. On that footing it seems to follow necessarily that Section 6 of the Magistrates' Courts Jurisdiction Ordinance 1935, in so far as it purports to give power to appeal by leave to the Supreme Court, must be held to be invalid. I think that the judgment of this Court in Doukhan and another v. Drucker (Supra) correctly stated the law.

Such a result cannot fail to cause regrets. But these inconveniences are liable to flow from a written constitution. With the deepest respect to those who have formed a contrary opinion, I cannot arrive at any conclusion save that I cannot give effect to the appellants' contentions consistently with any construction of the Order-in-Council which is in accord, as I see them, with sound principles of interpretation.

To give that effect would amount to rewriting, not to construing, the Order-in-Council, and that is not the function of this Court.

In the result, I for my part would dismiss these appeals.

British Puisne Judge.

I concur

Puisne Judge.

(*Khayat, J.*)

CIVIL APPEAL NO. 198/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Szymon Furstenberg — Appellant.

v.

Mendel Birenzweig — Respondent.

Claim for sum of money alleged to have been a loan — Defendant denying on oath that money had been given to him as a loan — Conflicting evidence — Onus of proof — Trial Court weighing the evidence before it.

1. Where Defendant denies Plaintiff's contention that the sum claimed had been given to him (Defendant) as a loan Plaintiff must make out a prima facie case on behalf of his contention.

2. If there is a conflict of evidence and Court, looking at it as a whole, comes to conclusion that Plaintiff failed to prove his case, Court of Appeal will not say that trial Court was bound to decide otherwise.

Margolith for Appellant.
Shapiro and *Amikam* for Respondent.
Appeal from decree of District Court, Haifa, dated 3.7.1938.

JUDGMENT.

We need not trouble you Mr. Shapiro. In this case the appellant sued the respondent for a sum of LE. 291, alleged to have been a loan from the appellant to the respondent. The appellant alleged that the money had been sent to a man named Tamarkan and that Tamarkan had paid the amount by cheque to the respondent. Before the District Court, Haifa, the evidence on behalf of the appellant was an affidavit made by the appellant himself in Poland, a copy of the cheque already referred to, and a copy of some previous proceedings before a District Court sitting at Tel-Aviv. The respondent in his reply had denied that this amount was a loan; and before the Court below had given evidence on oath denying that the sum had been given to him as a loan. There was thus a conflict of evidence before the District Court, and, looking at it as a whole, it came to the conclusion that the evidence was not sufficiently cogent to satisfy it that the claim of the appellant was justified. There was a great deal of argument by the advocates on both sides as to the onus of proof, but we have no doubt that the Court below was correct in demanding from the appellant that he should make out a prima facie case on behalf of his contention that he had lent this money to the respondent.

The Court decided that the appellant had failed to prove his case and on a perusal of the record and the argument, we are unable to say that it was bound to decide otherwise.

The appeal will therefore be dismissed with costs. We certify a sum of LP. 15.— as fee for attendance at the hearing.

Delivered this 3rd day of November, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 191/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

Karl Rubin — Appellant.

v.

Alexander Kaufman — Respondent.

Application for leave to appeal made ex parte and not by motion with notice — Points of law set out in application — Leave to appeal granted by presiding judge generally — Part of judgment of a division of Supreme Court regarded as obiter dictum and hence not binding — Civil Procedure Rules 1938, *Rules* 305, 306, 307, 311 — *C.A.* 109/36 — *C.A.* 87/37 — *C.A.* 29/31.

1. On application for leave to appeal to Supreme Court presiding judge to satisfy himself that there is a point of law of sufficient novelty or complexity to warrant an appeal and if so, to grant leave.

2. Points of law on which leave to appeal is granted should be stated by presiding judge in his order granting leave.

3. If points of law are duly set out in application and leave is stated to be granted generally, it is granted in correct form, as it does mean granted in general terms without having regard to the points of law but granted on all points set out and not only on some of them.

4. Application for leave to appeal to Supreme Court must be made by motion in accordance with Rules 305 and 306 of Civil Procedure Rules.

Edit. Note:—See C.A. 109/36 1 CtLR R. 33; C.A. 87/37 2 CtLR 19; C.A. 29/31 1 PLR 599; C.A. 55/36 1 CtLR R. 19; C.A. 44/36 2 CtLR 50.

Turtledove for Appellant.
Dr. Smoira for Respondent.

Appeal from judgment of District Court, sitting at Tel-Aviv, dated 12.4.1938.

JUDGMENT.

In this case two preliminary points were raised by the Respondent. Put shortly, the first point is that no appeal proper lies before this

Court because the application for leave to appeal to the presiding judge who was the President of the District Court was made *ex-parte* and not by motion with notice as is provided by Rules 306, 307 and 311 of the Civil Procedure Rules, 1938.

The second point is that the presiding Judge of the Court below granted leave to appeal generally and that according to the decision in Alter Gross v. Marcus Feitelson and another (C.A. 109/36) that is not sufficient.

I will deal first with the second point. The application for leave to appeal contains four points which are stated to be points of law. On the original application for leave the Presiding Judge made the following endorsement: "Leave to appeal generally to the Supreme Court granted". The Presiding Judge makes reference to the Judgment in Israel Blumenfeld and another v. Imperial Chemical Works (Levant) Ltd., (C.A. 87/37).

In Alter Gross v. Marcus Feitelson and another where the Court was constituted similarly to its constitution in the present appeal it was said:—

> "Appeals by leave from District Courts to the Supreme Court must be on a point of law. It has been held on several occasions by this Court that the point or points of law must be clearly stated by the President of the District Court".

It is the Presiding Judge of the Court who gives leave, and he is either the President or the Relieving President.

In the second case, i.e. Israel Blumenfeld v. Imperial Chemical Industries (C.A. 87/37), the learned Chief Justice made the following remarks:

> "Despite the efforts made by this Court to make clear the provisions of Section 6 of the Magistrates' Courts Jurisdiction Ordinance, leave to appeal was granted on certain points of law which were set out.
>
> "As I have said before, in my opinion, when application is made for leave to appeal the presiding judge (not President of the Court) must satisfy himself that the case involves a point of law of sufficient novelty or complexity to warrant an appeal and if it does leave should be granted and this Court will then deal with the rights of the parties.
>
> "This Court cannot be bound by a number of questions, some possibly theoretical, often the fruits of the ingenuity of counsel, the answer to which or to some of which may not decide the rights of the parties. The law does not provide in this instance for an appeal by way of case stated."

At first sight there appears to be a contradiction, but it should be

noted that the observations of the learned Chief Justice were in the nature of comment on the manner in which leave to appeal had been granted and were not necessary for the decision of the Court in that case and are therefore obiter, and though naturally they are entitled to be treated with respect, they are not binding upon us. With that part of his observations which are to the effect that, when an application is made for leave to appeal, the presiding Judge should satisfy himself that there is a point of law of sufficient novelty or complexity to warrant an appeal, and that, if that is so, leave should be granted and the Court of appeal will then deal with the rights of the parties, we are in agreement. But if it was meant to lay down the principle that the points of law on which leave was granted should not be stated by the presiding judge in his order granting leave, we are respectfully unable to agree since such a principle is contrary to the long established practice laid down by this Court, and is contrary to the judgment of this Court in Alter Gross v. Marcus Feitelson (C.A. 109/36 (supra)). See also Ka'war v. El Taha and others C.A. 29/31 (I P.L.R. 599.)

The order granting leave consists in this case of the application setting out the points of law and also the endorsment of the presiding judge — the points of law are embodied in the order.

In this particular case we think that leave to appeal was granted in correct form, the points of law being duly set out. "Generally" does not mean here that leave is granted in general terms without having regard to the points of law, but that leave is granted generally on all the four points set out, and not merely on some of them.

This objection is, therefore, overruled.

As to the other point, Rule 305 of the Civil Procedure Rules, 1938, reads as follows:—

> "Save where otherwise expressly provided for under these or any other rules relating to civil procedure, all applications shall be by motion with or without notice as the circumstances may require. Applications to the Court shall be heard in open Court and applications to the Judge or Registrar shall be heard in Chambers."

Rule 306 says:—

> "No motion shall be made without notice to any parties affected thereby: Provided that the Court, Judge or Registrar, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious harm, may make any order ex-parte upon such terms as to costs or otherwise, and subject to such undertaking, if any, as to the Court, Judge or

> Registrar may seem just and any party affected by such order may move to set it aside."

These rules appear to be, in a sense, in conflict, since Rule 305 states that "all applications shall be by motion with or without notice" while Rule 306 says that "no motion shall be made without notice to any parties affected thereby".

The Rules must however be read together and we think that the words "with or without notice as the circumstances may require" in Rule 305 must be read with Rule 306, the proviso of which states that delay is a circumstance which would entitle the applicant to make an application without notice.

There is no doubt that an application for leave to appeal is an application as contemplated by Rule 305, and we think that such an application must comply with Rules 305 and 306, that is to say, that it must be made by motion with notice, unless the delay caused by notice being given would cause serious damage, which is not the case here.

It is unfortunate that this case could not be dealt with on its merits, but we have no alternative. Under the old civil procedure rules such application could be made without notice to the other party if made to a Judge. Since the new Civil Procedure Rules have come into force there are no decided cases on this point, this being the first case where such a question has arisen. The law however has been altered by the new Civil Procedur Rules 1938 which must be observed.

That being so the appeal must be dismissed with costs assessed at LP.10 to include advocate's fees.

Delivered this 28th day of October, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 220/38.

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:—

Katr Bint Jiryis Nahas — Appellant.

v.

Jeber Elias Kotia and
Sami Elias Kotia — Respondents.

Distribution of mulk property left in Palestine by deceased foreigner — Law applicable in matter of succession to an immovable of a deceased Lebanese — Meaning of word "foreigner" in Succession Ordinance — Intention of Legislature as cardinal rule of interpretation.

1. As regards immovable property situated outside Lebanon Lebanese Courts will apply law of country where property situated.

2. If national law of deceased foreigner imports law of situation of an immovable, this latter law must be applied.

3. "Foreigner" in Succession Ordinance must always have same meaning as given from time to time in Palestine Order-in-Council.

Goitein for Appellant.
Cattan for Respondents.

Appeal from judgment of District Court, Jaffa, dated 31.7.1938.

JUDGMENT.

This appeal is concerned with the distribution of part of the estate of one Ibrahim Kotia who died intestate at Tripoli in the Lebanon on the 7th December, 1937. At the time of his death he was possessed of mulk property situated in Palestine within the jurisdiction of the District Court of Jaffa, and the appellant, his widow, applied to that Court for an order determining her share in that property. The only other parties concerned in the distribution were two brothers of the deceased and on the 9th of December, 1937, theh Civil Magistrate at Tripoli had made an order that the widow was entitled to a quarter share in the succession and that each of the brothers was entitled to three-eights. I am satisfied, however, that this order did not purport to deal with any immovable property of the deceased situated outside the Lebanon.

2. It fell therefore to the District Court of Jaffa to decide as to the succession to the mulk property of the deceased which was situated within its jurisdiction. A question arose as to what law should be applied and on the evidence the Court decided that the law applicable

was the Lebanese Law. The evidence showed that in the case of immovable property situated outside the Lebanon, the Lebanese Courts would apply the law of the country where the immovable property was situated, that is, in this case the Law of Palestine. This evidence was ignored by the District Court, with the consequence that the appellant was decreed a quarter share only of the said immovable property.

3. The question at issue is governed by Article 64 of the Palestine Order-in-Council, 1922. The deceased was a foreigner and the article enacts that the law to be applied in his case is to be the law of his nationality unless that law imported the law of the domicile. There was no evidence that the law of the domicile is imported in the Lebanon, nor was there any evidence as to the domicile of the deceased being elsewhere than in the Lebanon. As has been seen, the evidence showed that the law of the deceased's nationality imports the law of the situation of an immovable. Section 4(iii)(c) of the Succession Ordinance enacts that in such a case the imported law is to be applied. The result is that the law applicable to the succession to this immovable property is the Law of Palestine, and in accordance with that law it is not disputed that the appellant is entitled to a half share.

4. There was a lengthy argument from Mr. Goitein on behalf of the appellant, that the word "foreigner" in the Succession Ordinance bears a different meaning to that which it has in the Order-in-Council. When the Order-in-Council was made in 1922, Article 59 contained a lengthy definition of the word, into the details of which it is not necessary now to enter. In the following year the Succession Ordinance was enacted and by Section 2 "foreigner" was given the same meaning as in Article 59 of the Order-in-Council. In 1935 there was an amending Order-in-Council and a new Article 59 was substituted for the old one. "Foreigner" was defined in a simple manner to include all persons who were not Palestinian citizens. Mr. Goitein argued that this new definition could not affect the old definition embodied by reference in the Succession Ordinance and adduced authorities in support of his contention.

5. These authorities are not in point — the cardinal rule of interpretation must be the intention of the Legislature which in this case is very clear. The word "foreigner" was defined in the Order-in-Council for several purposes. These included matters of personal status which in their turn include successions, wills and legacies. The Succession Ordinance was enacted to deal with these matters in greater detail, but it could not enact anything inconsistent with the Order-in-Council, or be at any subsequent time inconsistent with the Order-

in-Council. Consequently its definition of the wrod "foreigner" must always coincide with the definition in the Order-in-Council. There cannot be two codes for succession where foreigners are concerned. Consequently when the Succession Ordinance defined "foreigner" as having the same meaning as in the Ordr-in-Council, it clearly inferred that that meaning was to be such meaning as it bore from time to time.

6. This argument of Mr. Goitein's fails, but it does not affect the position of his client, who is entitled to succeed in her appeal. The order of the District Court must be set aside and an order substituted ordering a certificate of succession to issue giving to the appellant twelve shares out of twenty-four in the mulk property in Jaffa and six shares to each of the two brothers. The costs here and below, to include LP. 15.— advocate's fees for each advocate on this appeal will be paid out of the property concerned. Appellants' deposit to be returned.

Delivered this 31st day of October, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 204/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

Asher Kaplan — Appellant.

v.

1. Rivka Maisnik
2. Shifra Chertok
3. Moses Kaplan — Respondents.

Appeal from judgment of Land Court remitting case to Settlement Officer to hear it on merits — Powers of Settlement Officer — Completion of settlement — When sec. 65 of Land (Settlement of Title) Ordinance available.

Settlement of title to land completed when necessary sche-

dule of rights incorporated in new register.

Once settlement completed Settlement Officer has no power to amend register, except to order correction of clerical errors in it and to introduce clerical amendmends or additions thereto.

Edit. Note:—The Respondents were absent from Palestine when the settlement proceedings were going.

Eliash for Appellant.
Gratch and *Elkayam* for Respondents.

Appeal from judgment of Land Court, sitting at Tel-Aviv, dated 7.7.1938.

JUDGMENT.

We are unanimously of opinion that this appeal must be allowed for the simple reason that once settlement is completed the Settlement Officer has no power to amend the register, except to order correction of clerical errors in the register and to introduce clerical amendments or additions thereto.

Section 65 of the Land (Settlement of Title) Ordinance Cap. 80 is only available to a claimant before the new register is completed.

The whole object of land settlement is to settle land as quickly as possible, and settlement is completed when the necessary schedule of rights is incorporated in the new register. Then the function of the Settlement Officer ceases and he has no more power to amend the registration.

The appeal is therefore allowed with LP. 15.— costs and disbursements, the judgment of the Land Court is set aside and the application for leave to appeal to the Settlement Officer made by the Respondents is dismissed.

Delivered this 6th day of October, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 224/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—Copland, J., Khayat, J. and Abdul Hadi, J.
In the appeal of:—

1. Sheikh Abdul Rahman Yacoub Kassem
2. Abdul Kader Ez-Zein Ahmad
3. Khalil Hamad Muhammad Kassem
4. Musleh Khalil Ahmad Akfeh — Appellants. (Respondents).

v.

Sheikh Muhammad Salah — Respondent. (Appellant).

Land planted and cultivated under an unregistered Mugharasah agreement — Land Settlement Officer considering legal as well as equitable rights — Land (Settlement of Title) Ordinance Sec. 10 — Land Transfer Ordinance.

Person cultivating land under an unregistered Mugharasa agreement under circumstances which would prima facie support a claim for a possessory title to whole land has an equitable right to share in land and trees as provided in agreement.

Appellants 1-4 in person.
Walid Salah for Respondent.

Appeal from judgment of Land Court, Nablus, (Settl. Appeal 17/38) dated 30.6.1938.

JUDGMENT.

This appeal depends on the value, if any, to be given to an alleged Mugharasah agreement entered into between the parties. We are agreed that there was evidence to support the findings of fact made by the Settlement Officer that there was a Mugharasah agreement which was in force for a period of about fifteen years. It is true that a Mugharasah agreement is a disposition within the meaning of the Land Transfer Ordinance, but that does not altogether dispose of the question because by Section 10 of the Land (Settlement of Title)

Ordinance, a Land Settlement Officer is to apply the Land Law in force at the date of the hearing of the action and, at the same time, he is directed to have regard to equitable as well as to legal rights.

Now it is true, as I have said, that a mugharasah agreement is void in law, but in our opinion, it will none the less support an equitable title to the land as between the present parties and we therefore think that the Land Court went wrong in their appeal judgment. As the Settlement Officer remarked, this land was cultivated by the Plaintiffs (Appellants here) under conditions that would prima facie support a claim for a possessory title to the whole land in their favour, had they so claimed.

That being so, the appeal must be allowed, the judgment of the Land Court is set aside, and the judgment of the Settlement Officer restored. The Appellants will have their costs together with LP. 4.— travelling expenses.

It follows, of course, that the cross-appeal is dismissed with costs.

Delivered this 10th day of October, 1938.

British Puisne Judge.

I agree with the result of this judgment by virtue of the provisions of Section 54(b) of the Land (Settlement of Title) Ordinance, Drayton, Vol. II, Cap. 80.

Puisne Judge.

SETTL. APPEAL NO. 17/38.

IN THE LAND COURT OF NABLUS (APPELLATE CAPACITY).

Before:—W. Clive Curry, J. (A/President), Muhammad Bey Baradey, J.

In the appeal of:—

Sheikh Muhammad Salah, of Nablus — Appellant.

v.

1. Sheikh Abdul Rahman Yacoub Kassem
2. Abdul Kader Ez-Zein Ahmad
3. Khalil Hamad Muhammad Kassem
4. Musleh Khalil Ahmad Akfeh — Respondents.

Appeal from decision of Land Settlement Officer, Tulkarm Settlement Area, dated 15.11.1937, in cases Nos. 316 and 317 and 319/Tira.

JUDGMENT.

In this case the Land Settlement Officer, after hearing the evidence of the parties and their witnesses, found that appellants handed over the land which was not registered, to the respondents in a "Mugharasa" agreement whereby, in return for the respondent's planting and cultivating appellant's land the respondents become owners of one half of the land and trees. The Land Settlement Officer having heard the witnesses we see no reason for disagreeing with his finding of facts. The Land Settlement Officer as a result of these findings, ordered that one half share of the land and the trees upon it should be registered in the name of the respondents. The appellant has appealed on the ground that "Mugharasa" was a void disposition as the written consent of the Government had not been obtained in accordance with section 4 of the Land (Trasfer) Ordinance.

Following the judgments in C.A. 90/32, 20/33 and 90/33 we hold that the agreement between the parties in this case was disposition under section 11 of the Land (Transfer) Ordinance to which the written consent of the Government was necessary and as that consent was not obtained the agreement was void but that the respondents are entitled under the aforementioned section to recover the money spent by them in improving the land. Such money should include also remuneration for the respondents' labour as, in our opinion, such money and labour formed the consideration for the void disposition as laid down in Civil Appeal 90/33 (See Goadby on the Land Law of Palestine pp. 141 and 146).

On these grounds and in view of the circumstances of this case we find it would be inequitable and unjust were the respondents to be deprived of the fruits of their exertions and of the money they expended on the land, it being borne in mind that it was solely due to their ceaseless and untiring efforts during a period of nearly fifteen years that the land was converted into a thriving orange-grove, while appellant contributed neither money nor labour to the cultivation of this property. We therefore feel that on principles of equity and justice a remedy should be provided for them without their going to the enormous trouble and expense of seeking a remedy by action in the appropriate Court and before the land and trees are registered

wholly in the name of the Appellant, as in the event of the respondents' having to institute a separate action, especially after they have vacated possession and after the land and trees have been registered in appellant's name, litigation between the parties is liable to be protracted apart from the expense and trouble that would be caused to them, before they are in a position to recover compensation, should they ever be able to do so.

We therefore, think that on the analogy of section 60(2) and (3) of the Land (Settlement of Title) Ordinance, the Settlement Officer may apply such remedy and may fix the appropriate compensation (including money and compensation for labour) and charge such compensation on the land, after such land and trees have been registered wholly in appellants' names.

The decision of the Land Settlement is therefore set aside and the case is remitted to him to proceed as directed and give a fresh decision. Costs to follow the event.

Given this 30th day of June, 1938.

In presence of both parties

President.

MISC. APPL. NO. 56/38.

IN THE SUPREME COURT SITTING AS A HIGH COURT JUSTICE.

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

In the application of:—

Manneh Hanna Karr'aa — Applicant.

v.

1. Chief Execution Officer, Jerusalem
2. Mikhail Odeh Sansour — Respondents.

Application to Chief Registrar to petition High Court in forma pauperis — Chief Registrar's Order that he has no jurisdiction in the matter — Application to High Court for exemption from fees — Palestine Order-in-Council, Art. 43.

Where no provision for any other judicial authority to grant exemption from payment of Court fees, High Court may be resorted to under art. 43 of Palestine Order-in-Council.

Edit. Note:—See Misc. Appl. 53/38 4 CtLR 153; Misc. Appl. 41/38 4 CtLR 154; Misc. Appl. 48/38 4 CtLR 157.

Hazou for Applicant.
No appearance for Respondents.

Application for leave to petition the Supreme Court sitting as a High Court of Justice in forma pauperis.

ORDER.

In other proceedings before the Supreme Court*) it appeared that there was a lacuna in the Civil Procedure Rules, with the result that thereunder exemption from the payment of fees could not be granted to an Appellant to the Supreme Court sitting as a Court of Appeal, or to an Applicant to that Court sitting as a High Court. Steps have been taken to remedy this defect. Meanwhile this application is made to this Court sitting as a High Court, by virtue of Article 43 of the Order-in-Council.

We are satisfied from the affidavit, and the information given to us by her learned advocate, that the Applicant should be exempted from the payment of fees, and we make an Order accordingly.

Chief Justice.

CIVIL APPEAL NO. 206/38.

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:—

The Administrators of the Estate of the late J. L. Goldberg — Appellants.

v.

Yehuda Itin — Respondent.

Claim on promissory notes — Decision by Magistrate that onus of proving consideration on Plaintiff — District Court disagreeing with Magistrate but considering error of procedure not serious enough to justify reversal of judgment.

Wrong decision as to question on whom burden of proof

*) Misc. Appl. 53/38 4 CtLR 153.

lies may gravely prejudice one of parties and is therefore an error of procedure serious enough to justify reversal of judgment.

Levin for Appellants.
Margolin for Respondent.

Appeal from decree of District Court, Haifa, sitting as a Court of Appeal, dated 8. 7.1938.

JUDGMENT.

This appeal arises out of a claim made before the Magistrate's Court at Haifa by the administrators of one Goldberg deceased, against the defendant, for the value of ten promissory notes of LP. 10. each. The learned Magistrate, in dealing with the case, decided that the onus of proving consideration was on the administrators and held that they had failed to prove that issue and the case was subsequently dismissed. On appeal to the District Court, the District Court disagreed with the finding of the Magistrate that the onus of proving consideration was on the administrators, but at same time held that the error in procedure was not of sufficient importance to justify them in reversing the judgment of the learned Magistrate. Without going into the merits of the case in any way, we are of opinion that in a case arising out of a bill of exchange or a promissory note, the question on whom the burden of proof lies may be very important, and that if a wrong decision is made it may gravely prejudice one of the parties. We are therefore not in agreement with the District Court, that the error of procedure made by the learned Magistrate was not serious enough to justify a reversal of the judgment. For these reasons we are of opinion that the judgment both of the Magistrate and District Court must be set aside, and that the action must be remitted to the Magisrate's Court for a retrial. The Appellants will have the costs of this appeal and the fee for attendance at the hearing is certified at LP. 10.

Delivered this 14th day of November, 1938.

Senioir Puisne Judge.

HIGH COURT CASE. 59/38.

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

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

In the application of:—

Harhavat Hayishuv Land Co. of Palestine — Applicant.

v.

1. Chief Execution Officer, Haifa
2. Abdul Qader Shibl
3. Mohammad Shibl
4. Ahmed Shibl
5. Mohammad Rajeh Shibl
6. Fatma Shibl
7. Marya Shibl — Respondents.

Mortgagor admitting part of mortgage debt and contesting the balance — Order of Chief Execution Officer to pay admitted sum immediately and to go to competent Court as to other part — High Court granting time to comply with order of Chief Execution Officer — High Court Case No. 35/38.

Mortgagor who contests amount of mortgage debt must go to competent Court to prove his allegations.

Edit. Note:—See High Court 35/38 3 CtLR 225 and Edit. Note thereto.

Machles for Applicant.

Ex parte.

Application for an order to issue to the First Respondent directing him to show cause why his order dated the 20th June, 1938, in Execution File No. 1680/37, should not be set aside and an order refusing the applicaton of Respondents 2 to 7 for an order of sale should not be entered instead, or alternatively that Applicant be given six months in which to go to a competent Court to establish his right to refuse payment instead of fourteen days and that all execution proceedings be stayed during this period of six months. And it is further prayed that execution proceedings in the above Execution File be stayed pending the determination of this application.

ORDER.

We feel that we must refuse this application on the same grounds which we stated in High Court Case No. 35/38, Kamel Diab Hassan and another v. Chief Execution Officer, Tel-Aviv and others, but in the circumstances, we will give the Petitioner another 14 days from to-day to do what the Chief Execution Officer told him to do,

namely, to go to a competent Court to prove his allegations. Subject to this extension of time, the application for an order nisi is refused.

Given this 17th day of August, 1938.

Acting Chief Justice.

EX. FILE 1680/37.

IN THE EXECUTION OFFICE, HAIFA.

Before:—The President (Sherwell, J.).

ORDER.

Immediate payment of such part of the amount claimed viz: LP. 320.450 as is admitted by the mortgagor, but as to the balance in dispute I feel that I must follow the principle and procedure indicated in the decision of the High Court case No. 35/38, the mortgagor is therefore ordered to go to the competent Court to obtain the necessary order and/or decree to the effect inter alia that the amount due and payable under the mortgage in question is LP. 320.450 only.

In the circumstances I give the Mortgagor 14 days to enable him to take steps necessary in this regard and stay proceedings accordingly for such period in the absence of further order.

After such period shall have elapsed and in the absence of any order or decree from the Court, execution to proceed.

Delivered the 20th day of July, 1938.

President.

CIVIL APPEAL NO. 200/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Meshek Gesher, Kvutzat Poalim Lehityashvut Shetufit, Beeravon Mugbal — Appellant.

v.

The General Manager of the Palestine Railways, Haifa — Respondent.

Fire destroying goods carried by rail — Dismissal of claim against Palestine Railways for damages owing to difference of opinion between judges — Court of Appeal remitting case to make definite findings as to allegation of negligence on part of Railway — Validity and scope of By-law 25 of Railways By-laws — Railways Ordinance — Ottoman Commercial Code.

1. By-law 25 of Railway By-laws not unreasonable or ultra vires.

2. In so far as Railway Ordinance and By-laws made thereunder inconsistent with Ottoman Commercial Code they should prevail.

3. Negligence of Railway or its servants does not preclude Railway from relying upon By-law 25 of Railway By-laws (exempting Palestine Railways from liability in cases of certain accidents).

Bar-Shira for Appellant.

Salant (*J.G.A.*) for Respondent.

Appeal from judgment of District Court, Haifa, (12/37) dated 17.7.19938.

JUDGMENT.

Trusted, C. J.

This is an appeal from the decision of the District Court of Haifa whereby, owing to a difference of opinion between the Judges, the Plainntiff's claim was dismissed. The Plaintiff in consequence appealed to this Court, and I am of opinion that his appeal fails.

The case has taken an unfortunate course, and, I fear, partly owing to the view which the Courts have taken, this litigation has been unnecessarily prolonged.

The Plaintiff's claim was against the Palestine Railways for damages for breach of contract for carrying a threshing-machine by rail, and the Plaintiff was given leave by the High Commissioner to sue under

the provisions of the Crown Actions Ordinance. It should be noted that his claim was not, and could not have been, based upon negligence.

At the first hearing before the District Court the Defendants relied upon by-law 25 of the Railway By-laws which they claimed exempted them from liability, as the goods in question had been destroyed by fire. The Court disagreed and the matter came before this Court which held— "we do not express any final opinion on this point (i.e. whether the Railways were relieved of liability by By-law 25) but we both think there is a good deal to be said for the contention that the Railways may be liable if the fire arises owing to the negligence of the Railway or its servants."*)

As I have already said, the action was not framed, and could not have been framed, in negligence. I can only assume therefore that this judgment contemplated the possibility of some principle whereby the Railway would not be entitled to rely on By-law 25, if it or its servants had been guilty of negligence. The case was sent back to the District Court with directions to hear evidence and to "set out in its judgment the findings of fact deduced therefrom and the conclusions of law".

The case was reheard, and one Judge held that the Plaintiff had failed to prove the wilful misconduct of the Defendant, and the other Judge held, as I understand his judgment, that, in the absence of evidence as to how the fire occured, negligence on the part of the Railway should be assumed. In the result the Judges in the District Court again disagreed and the case came before us. No authority has been cited to us by the Appellant for the proposition that negligence on the part of the Respondent might preclude the Railway from relying upon By-law 25, and with all respect to the earlier decision of the Court, I know of no such principle. In my opinion, therefore, it is immaterial whether there was negligence.

It has been argued before us that By-law 25 is so unreasonable that we should declare it ultra vires. I do not agree with that contention. It has further been argued before us that the matter falls to be dealt with under the Ottoman Commercial Code. In my opinion it is not necessary to consider in detail the application of that code, as I am of opinion that in so far as the Railways Ordinance and the By-laws made thereunder are inconsistent with it they should prevail.

The appeal is therefore dismissed with costs fixed at LP. 2.—.

Delivered this 31th day of October, 1938.

Chief Justice.

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*) C.A. 163/37 2 CtLR 115.

JUDGMENT.

Abdul Hadi, J. (*Translation*).

I agree with His Honour the Chief Justice in the conclusion he arrived at in his judgment dismissing this appeal. In my view, if By-law 25 of the Railway By-laws does not absolutely exempt the Railways Administration from liability as a result of fire, the negligence referred to by this Court in its previous judgment, that there was a good deal to be said for the contention that the Railway may be liable if the fire arose owing to the negligence of the Railway or its servants, was not established before the District Court.

I do not agree with the argument urged by Counsel for the Appellant in his other grounds of appeal, that the General Manager of the Palestine Railways has no power to make such a By-law, that such By-law is unreasonable, and that the District Court should have applied the Ottoman Commercial Law.

For these reasons, I am of the opinion that the appeal should be dismissed.

Delivered this 31st of October, 1938.

Puisne Judge.

CRIMINAL APPEAL NO. 46/38.

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:—

1. Ibrahim Mohammad Siksek
2. Jamil Abdul Hafiz Kayyali — Appellants.

v.

The Attorney General — Respondent.

Witness considered by trial Court accessory after fact and not accomplice — Definition of accomplice and of accessory after fact — Element of guilty knowledge — Criminal Code Ordinance, sec. 23, 26 — *Trial Upon Information Ord. sec.* 72(1)(c).

1. An accused person cannot be convicted on the uncorroborated evidence of an accomplice.

2. Court to decide whether evidence tainted before weighing it, and most desirable that it should record its reasons for such decision.

Edit. Note:—See Cr.A. 160/37 3 CtLR 97; Cr.Ass. A 2/30 1 PLR 441.

Cattan for Appellants.

Crown Counsel (*Hogan*) for Respondent.

Appeal from judgment of District Court, Jaffa, (43/38) dated 5.4.1938.

JUDGMENT.

It is not clear from the judgment of the District Court if that Court regarded all the witnesses who gave evidence as to the actual commission of the crime, except Mohammad Saleh, as accomplices. As to him the Court found that they did not consider him to be an accomplice but an accessory after the fact.

An accomplice may be defined as one who is concerned with another or others in the commission of a crime. The Criminal Code Ordinance does not define an accomplice, but a number of persons therein defined by Sec. 23 as principal offenders may be accomplices, and the English word, owing no doubt to the discussion of English principles and cases, has been used in Palestine, and this Court has laid down the principle that an accused person cannot be convicted on the uncorroborated evidence of an accomplice.*)

An accessory after the fact in English law is one who knowing a felony has been committed, receives, relieves, comforts or assists the felon (with some qualifications to this broad definition). An accessory after the fact in Palestine is defined in the Criminal Code Ordinance in Sec. 26, as one, with certain exceptions, who, knowing an offence has been committed by another person, receives or assists such other person in order to enable him to escape punishment.

It is clear that a witness may or may not be an accomplice, the question depending upon whether he has a guilty knowledge. A good example is that of a motor driver who may be driving his vehicle innocently while assisting the offenders, but who may, on the other hand, be driving his vehicle assisting the offenders, knowing that an offence is being committed.

If the evidence of a witness may be tainted, it is for the Court to decide whether his evidence is tainted before considering what weight may properly be given to it, and it is most desirable that the Court of Trial should record its reasons for such decision.

In the present case the Court has decided that the witness, Mohammad Saleh, was not an accomplice but an accessory after the fact. In order to come to that conclusion the Court must have taken the view that he had a guilty knowledge, and in my view, if he had a guilty knowledge the Court were mistaken in describing him as an accessory, and they should have regarded him as accomplice.

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*) Cr. A. 160/37 3 CtLR. p. 37.

That being so I do not think that the Court could convict on his evidence alone, and, as I have stated, it is not clear if they regarded the other witnesses as accomplices, in particular the evidence of Zein Khattar may or may not, according to the view that is taken of that witness, be tainted. We therefore, by virtue of Sec. 72(1)(c) of the Criminal Procedure (Trial Upon Information) Ordinance, quash the conviction of the second appellant Jamil and remit the case to the Court below for a new trial with a direction to them to determine whether Zein Khattar was or was not an accomplice, and in the light of that finding and of the observations in this judgment, to give a fresh judgment in Jamil's case.

The first appellant Ibrahim appealed against his sentence only. We see no reason to interfere and his appeal is dismissed — his sentence will run from the date of hearing, i.e. 28th April, 1938.

Delivered this 28th day of May, 1938.

Chief Justice.

CIVIL APPEAL NO. 205/38.

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:—

1. Yehoshua Kamoni
2. Yehuda Kimel — Appellants.

v.

Hugo Bach — Respondent.

Claim for return of purchase money based on alleged breach of contract — Magistrate confining himself to perusal of relevant documents and to argument of counsel — Claim considered by District Court on appeal as if based on entirely different cause of action — Court of Appeal remitting case to Magistrate to hear evidence.

1. Appellate Court not to consider claim as if based on a cause of action entirely different from that in trial Court.
2. Court must deal only with claim before it and not with right reserved by party to bring a separate action in respect of another claim.

3. Court of Appeal in allowing an appeal may award costs and advocate's fees even if it does not determine case finally but remits it to Court below for completion or retrial.

Levin for Appellants.
Hoter Ishay for Respondent.

Appeal from decree of District Court, Haifa, sitting as a Court of Appeal (214/38), dated 13.7.1938.

JUDGMENT.

In this case the Respondent sued the Appellants in the Magistrate's Court, Haifa, for LP. 100, being part of the purchase money which he had paid as the result of an agreement to buy land. His claim before the Magistrate was based on an alleged breach of contract and the learned Magistrate, having perused the statement of claim and the contract, and heard argument on each side, decided that there had been no breach of contract and dismissed the claim of the Respondent. The Respondent appealed to the District Court. The District Court did not consider the question as to whether the learned Magistrate was right in the decision to which he had come. It considered the claim as if it had been based on an entirely different cause of action and decided that the Respondent was entitled to the refund of his LP. 100. We think that the District Court erred in dealing with the appeal in this manner. The sole question before it was whether the learned Magistrate was right in his decision that there had been no breach of contract, and for this reason we think that the decision of the District Court cannot be supported.

We have listened to argument as to whether the decision of the learned Magistrate was correct, and we have come to the conclusion that he dealt with the issues in too summary a manner. He confined himself entirely to a perusal of relevant documents and to the argument of counsel, and we think that he ought to have heard evidence on the point as to whether a breach of contract has been committed .

In this statement of claim before the Magistrate the Respondent in suing for his LP. 100 stated that he reserved the right to bring a separate action for damages. Whether he has the right to bring a separate action for damages was not a question to be dealt with either by the learned Magistrate or by the District Court. That question would arise only if and when he brings a second action for damages under this contract. All that the learned Magistrate had to consider was that he had a claim before him for LP. 100 only and that this was a matter within his jurisdiction.

For these reasons stated in the first part of this judgment, we order that the judgments of the District Court and of the learned Magistrate be set aside, and that the case be remitted to the Magistrate to give an opportunity to the Respondent to call such evidence as he desires in support of his claim, an that the Appellants be allowed to call such evidence as they desire in rebuttal. The Appellant will have the costs of this appeal, and the fee fixed for attendance at the hearing is LP. 15.

Delivered this 16th day of November, 1938.

Senior Puisne Judge

CIVIL APPEAL NO. 214/38.

IN THE DISTRICT COURT AT HAIFA (APPELLATE CAPACITY).

Before:—The President (Sherwell, J.) and Aaron Shems, J.
In the appeal of:—
Hugo Bach — Appellant.
v.
1. Yehoshua Kamoni
2. Yehuda Kimel — Respondents.

Appeal from judgment of Magistrate's Court, Haifa, dated 25.5.1938.

JUDGMENT.

The main question for determination in this Appeal is whether the purchaser of immovable property is entitled to claim any monies he had paid in respect of a purchase which has not been duly registered in the Land Registry.

2. In Civil Appeal No. 31/1937 (Rebekoff v. Goldenberg) The Supreme Court ruled:

"It is perfectly clear that, subject to the terms of an agreement, the purchaser of immovable property may always bring an action for the return of the money paid by him before the registration is effected in the Land Registry. Section 11 of the Land Transfer Ordinance (Chapter 81 of the Laws of Palestine, page 883 of Volume 11) is quite clear on this point, though of course, the vendor may be at liberty to bring an action for damages."

3. This principle was applied by this Court in Civil No. 111/1937 which was affirmed by the Supreme Court in Civil Appeal No. 108/1938 (Jahshan v. Zalaf and another).

4. The Appellant under the circumstances, is entitled to the return of the money he has paid in respect of the purchase of the land, and consequently the judgment of the Magistrate whereby he rejected his claim must be set aside and substituted by entering judgment in favour of the Appellant (original Plaintiff) in the amount claimed, namely, LP. 100 together with costs here and in the Court below to include LP. 2.— advocate's fees, and the confirmation of the provisional attachment.

5. The claim of the Appellant for interest must, however, be dismissed, for in the contract for sale produced in the file of the case, the parties have agreed for the payment of damages, and they are, therefore, considered to have contemplated the question of interest when arriving at the amount of damages to be paid. See in this regard the judgment of the Supreme Court in Civil Appeal No. 46/1935 (Gorodisky and another v. Husni and Fauzi Abu-Khadra) and followed by this Court in Civil Appeal No. 252/1937 (Mukless v. Shalaby).

6. Judgment must be entered accordingly.

7. A few words may be said with regard to the amount of the claim in this action and the jurisdiction of the Magistrate. Although the Appellant stated in his statement of claim that he reserved his rights to claim in a separate action damages from the Respondent in accordance with the contract, inasmuch as the amount claimed is only LP. 100, the action was within the jurisdiction of the Magistrate, vide the judgments of the Supreme Court in Civil Appeals 89/1933 (Hesselschwardt v. Iffland) and No. 159/1934 (Bayside Land Corporation Ltd. v. Globerman).

Delivered this 13th day of July, 1938, in presence of Mr. Yishay for Appellant and Mr. Jacob Solomon for Respondent.

President.

CIVIL APPEAL NO. 215/38.

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:—

Yehoshua Hankin — Appellant.

v.

1. Zaki Rashid Ash Shanti
2. Mohammad Amin Rashid Ash Shanti
3. Farid Rashid Ash Shanti
4. 'Abd Ar Rauf Rashid Ash Shanti
5. Ribhi Rashid Ash Shanti
6. Fauzi Rashid Ash Shanti
7. Zariffa Rashid Ash Shanti
8. Fatma Mahmud Al Hassan — Respondents.

Sale of mortgaged property through Execution Office — Notarial Notice to prospective purchaser innforming him of adverse claim to land — Prospective purchaser joined as third party to action against registered owner — Purchaser obtaining registration or giving guarantee for any damages claimant may suffer — Admission and statement in Court by registered owner shifting burden of proof on him or his immediate successor in title — Extent of protection given to title obtained by a sale through Execution Office — Mortgage Law (Amendment) Ordinance sec. 8 — Execution Law.

1. Admission by registered owner that his testator had purchased the land before his death, coupled with a statement by such owner that he obtained this land as his share of inheritance by reason of a settlement with the other heirs, shifts burden of proof regarding validity of title on him.

2. If title of immediate predecessor of purchaser of land is disputed, latter (if he had notice of the adverse claim) must prove that predecessor's title was a valid one.

3. Sale of mortgaged property through Execution Office gives no protection to purchaser who had notice of an adverse claim to the property.

Edit. Note:—See C.A. 48/38 3 CtLR 257 and Edit. Note thereto; C.A. 94/38 3 CtLR 268 and Edit. Note thereto.

Eliash for Appellant.
Cattan for Respondents.

Appeal from judgment of Land Court, Nablus, sitting as a Court of Appeal (Land Settlement Appeal 110/37) dated 2.3.1938.

JUDGMENT.

Copland, J.

In the year 1926 Hussein and Kamil, two of the heirs of Rashid el Shanti, who had died in 1925, had the property in dispute registered in their names in equal shares as Miri land planted with oranges and containing certain buildings. In 1926 and 1928, subsequently to this registration, five mortgages were executed by Hussein and Kamil on this property. The mortgage moneys not being repaid, on the 1st August, 1930, the share of Hussein was sold by public auction at the instance of the mortgagees and was bought by by Mr. Y. Hankin, the present Appellant, and registered in his name. On the 19th May, 1931, the share of Kamil was similarly sold, was also bought by the Appellant and duly registered in his name, but before registration, the present Respondents obtained, on the 5th May, 1931, an order of stay from the Land Court, until the present Appellant should give a guarantee for any damage that the Respondents might sustain by the sale — this guarantee was duly given and the sale was completed.

The Respondents to this appeal are the other heirs of Rashid el Shanti, and in June 1930 they had entered an action in the Land Court Nablus against Hussein and Kamil, claiming that the property now in dispute had devolved upon all the heirs of Rashid al Shanti by inheritance, that in 1926 two of the heirs, Hussein and Kamil, illegally had the parcel registered in their names to the exclusion of the Respondents, and they claimed their shares. In the course of the proceedings before the Land Court Hussein and Kamil both stated that originally their father Rashid al Shanti had purchased the land, built on it and planted it, and that after the death of Rashid they had come to a settlement with the other heirs of their father, whereby they, Hussein and Kamil, had obtained this parcel as their share in the inheritance. The present Appellant was cited as a third party to these proceedings. After long delays this Land Court case was eventually transferred to the Settlement Officer,who proceeded to hear it.

The Settlement Officer, in his judgment, came to the conclusion that the registration of this property was legally carried out in 1926, that

he was not satisfied that an old registration for this land, as claimed by the Respondents, ever existed, that the subsequent mortgages were legally raised, and that as the land was sold by public auction, the Appellant had acquired a good title, since a public auction exonerates a purchaser from every responsibilty, and since the mortgages were valid, any subsequent sale must also be valid. He also held that the question of good faith on the part of the Appellant did not arise. He therefore dismissed the Respondents' claim. On appeal to the Land Court, that Court set aside the Settlement Officer's decision and remitted the case to him to determine the rights of the Respondents in this land, as in May 1931, the date when the order of registration in the Appellant's name was made, the Appellant has now come to this Court.

Before this Court the Appellant has argued, first, that since the Settlement Officer had found that an alleged old registration of this land did not in fact refer to this land at all, the whole of the Respondents' case collapsed, and should have been dismissed on that ground alone, and the admission of Hussein and Kamil could not affect this conclusion. Secondly, he has urged that a title obtained by a sale through the Execution Office is unassailable and a complete protection, and that the mortgages having been validly created, any subsequent sale must also be valid, and no question of good faith can arise.

With regard to the first point, I think that the Land Court was right. The admissions by Hussein and Kamil, during the hearing of the previous Land Case, that their father Rashid had purchased the land before his death, coupled with their statements that they had obtained this parcel as their shares of the inheritance by reason of a settlement with the other heirs, the Respondents, undoubtedly shifted the burden of proof, and since the Appellant was claiming through the title of Hussein and Kamil, his immediate predecessors, the onus of proving that Hussein's and Kamil's title was a valid one was on him. What the appellant was purchasing was all the estate and title of the mortgagors, Hussein and Kamil, in the property mortgaged. See Section 8 of the Mortgage Law (Amendment) Ordinance Cap. 95. It is true that as against the mortgagors he acquired an indefeasable title, but he only acquired their title, and he must prove that that title was a valid one, otherwise his title by purchase would be invalid as against any person other than the mortgagors. Everything depends upon whether the registration in Hussein's and Kamil's names in 1926 was a legal registration or not. The alleged settlement by Hussein and Kamil with the Respondents must be proved by the Ap-

pellant. As the Land Court remarked, if this point is determined in favour of the Appellant, the matter will be ended, and this title will be a good one.

As to the second point, namely, whether the Appellant is protected by reason of the mortgages, and the sale through the Execution Office. Before registration of the land was effected in his name, the Appellant had notice of the adverse claim of the Respondents. He had been joined as a third party in the action brought by the Respondents against Hussein and Kamil. He had been served also by the Respondents with notarial notices, informed him of their claim to the land before the registration of each share was perfected. He himself only obtained registration of Kamil's share in his own name, on giving a guarantee to the Respondents for any damages they might suffer. In the light of these facts, it seems to me impossible to argue that he had no notice of any adverse claim to the land. He therefore was not a bona fide purchaser without notice. And it seems to me that this this is fatal to his claim that he is protected. He knew that there was an adverse claim which could only be settled by the competent Court, he nevertheless proceeded to complete the purchase—and he must now take the consequences. The case of Daoud v. Za kay C.A. 48/38, PLR. Vol. 1 p. 313,*) is of no help to the Appellant. What that case decided was that if a bona fide purchaser with notice could show that his predecessor in title was a bona fide purchaser without notice, he would not be affected, but would take his predecessor's title.

Following the principle there laid down, the Appellant must prove that his predecessors' title was a valid one, and it makes no difference that the mortgagees acted in good faith—he is not purchasing their interest, but the interest of the mortgagors in the land.

The Execution Law gives, it is true, a certain amount of protection to purchasers. If no claim to the property to be sold has been made, they are entitled to assume that there is no claim, and if the sale has been carried out properly in accordance with the provisions of the Execution Law, then a purchaser will acquire a good title. (See Weniger v. Carasso and another—C.A. 94/38,**) PLR. Vol. 5 p. 334). But the Execution Law does not protect a prospective purchaser who has notice of an adverse claim to the property being sold.

I think that the judgment of the Land Court is right, and that this appeal should be dismissed, and the case remitted to the Settlement

*) 3 CtLR 257. **) 3 CtLR 268.

Officer to determine on the lines suggested by the Land Court, and in the light of these observation in this judgment.

The Respondents will have the costs of this appeal in any event, assessed at LP. 15 to include advocate's fees.

Delivered this 24th day of November, 1938.

British Puisne Judge.

I concur

Chief Justice.

I concur

Puisne Judge.

HIGH COURT NO. 64/38.

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

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

In the application of:—

Fahima Fakhri Bey — Petitioner.

v.

1. The President, District Court, Haifa acting as Chief Execution Officer
2. Guiseppe Sinigaglia
3. Guillermo Feldman — Respondents.

Amended application to foreclose assigned mortgage — Words "or order" inserted in mortgage deed in wrong place — Chief Execution Officer overruling objection that mortgage was not assignable — Scope of jurisdiction of Chief Execution Officer — Failure of Chief Execution Officer to exercise discretion (with regard to postponement of sale) under sec. 14 of Land Transfer Ord. — High Court granting long postponement — Land Transfer Ord. sec. 14.

1. President, District Court, acting as Chief Execution Officer — debarred from going into questions contesting validity of mortgage or assignment thereof.

2. If High Court of opinion that Chief Execution Officer did not exercise discretion vested in him under sec. 14 of Land

Transfer Ordinance, it may take into consideration special circumstances of case and grant a long postponement of sale instead of short one granted by Chief Execution Officer.

Edit. Note:—See H.C. 59/38 4 CtLR 199; H.C. 35/38 2 CtLR 225 and Edit. Note thereto.

Cattan (by delegation) for Petitioner.
No appearance for Respondent No. 1.
Levin for Respondents 2 and 3.

Application for an order to issue to the first Respondent directing him to show cause why all proceedings in satisfaction of a mortgage should not be anulled on the grounds that he is not empowered to order foreclosure, or, that the assignment is bad in law; and, alternatively, why the sale proceedings should not be stayed for a period of three years as may seem to the Court just and equitable.

JUDGMENT.

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

The Petitioner is a widow and after the death of her husband she sold certain property left by the deceased. Part of the proceeds belonged to her children, but the petitioner spent the money and then in order to put matters right with her children, she executed a mortgage to them of certain immovable property which she possessed in her own right. The children assigned the mortgage to the second and third respondents.

2. The mortgage debt fell due on December, the 8th, 1937. The debt was not paid and the second and third respondents then applied to the Relieving President of the District Court of Haifa for foreclosure. The application was subsequently amended by the Relieving President to an application for sale.

3. The petitioner applied to the Relieving President for relief. She asked that the proceedings for sale be set aside as the assignment to the respondents was bad in law. A mortgage cannot be assigned without the consent of the mortgagor unless the sum secured has been made payable to the mortgagee or order. The petitioner did not consent to the assignment nor was the sum made payable to the mortgagees or order. The words "or order" did however appear to the mortgage in the sentence "the receipt of which sum the mortgagor or order hereby acknowledges", and the Relieving President, in construing the document, held that it was obvious that words "or order" had been put in the wrong place and that it was therefore the intention of the parties that the morgage should be assignable. He accordingly re-

jected the application of the petitioner but granted a short postponement of the sale.

4. The petitioner has applied to this Court for an order either to restrain the sale or to grant a long postponement. Both parties rely on the construction placed on Section 14 of the Land Transfer Ordinance, which empowers a President of the District Court to order the sale of immovable property in execution of a judgment or in satisfaction of a mortgage, and to order postponement of the sale in certain circumstances. This section was enacted on the 5th of May last and replaced a previous Section 14. The previous section had always been interpreted by judicial decision to mean that in exercising the powers conferred upon him, a President of a District Court was not a judicial officer and had not any jurisdiction to determine any issues of fact or law which might seem to be involved in the matter before him. In the case of a mortgage of immovable property for instance, he has simply to see that the mortgage or any assignment thereof is apparently valid and that there has been a default in payment of principal or interest entitling the mortgagee to an order for sale. The new section, while clearing up certain other points on which doubt existed, does not alter in any way the judicial interpretation of the old section as regards the functions of a President of a District Court.

5. Both sides, as I have said, say that this judicial interpretation is in their favour. Mr. Cattan for the petitioner argues that the Relieving President had no jurisdiction to construe the mortgage deed, and to determine the issue as to whether it was the intention of the parties that it should be assignable. He says hat as the sum secured was not expressly made payable to the mortgagees or order, the Relieving President should have treated the mortgage as not being assignable, and should have refused an order for sale. Mr. Levin for the second and third respondents argues that the Relieving President had before him an assignment of the mortgage, valid according to the Land Transfer Ordinance, and that it was not within the province of the Relieving President to enquire whether the assignment should be made or not. He says that this latter question was one solely for the Land Registry at the time of the assignment, that the Land Registry satisfied itself that the mortgage was assignable and that if the petitioner wishes to contest the validity of the assignment she must take the matter to the proper Court for a judicial decision on the issue.

6. I am in agreement with the argument of Mr. Levin. The Relieving President had before him an assignment valid on its face, and the limited scope of his jurisdiction debarred him from going into

questions contesting its validity. Taking, as I do, this view of the matter I think it would be incorrect for us at this stage, to come to any decision as to the construction of he mortgage deed.

7. There remains the question of postponement. Section 14 of the Land Transfer Ordinance to which I have already referred, allows a Relieving President to grant a postponement if he is satisfied that the debtor has reasonable prospects of payment if given time, or that, 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 Relieving President granted a short postponement but it seems to me that he did this merely as an execution officer and that he did not direct his mind to the discretion vested in him under Section 14. Mr. Cattan argues that we should take into consideration the present circumstances in Palestine. I agree that these circumstances are relevant and without going into detail it may be granted that at present it is more difficult for mortgagors to raise money in order to save their property from sale and that property at a forced sale is likely to be sold at a price very much below its value. There is also the further consideration that the petitioner, though she mistook her remedy, may be given the opportunity of testing before a Court her contention that the assignment of the mortgage was invalid. I think that a reasonable postponement of the sale will not prejudice in any way the mortgagees, seeing that they bought for LP. 4.000 a mortgage on a property which had been originally mortgaged for over LP. 6.000 and that they will receive in the meantime interest at 9% on the original mortgage deed.

8. For these reasons I think that we should make an order as follows:—

a) That the order nisi to annul the sale should be discharged.
b) That the order to stay the proceedings for sale for three years should be discharged.
c) That the President of the District Court of Haifa be directed to postpone the sale for six months from this date.

As each side has succeeded in part, I think that the respondents should have half the costs of resisting this application and that the fee for attendance at the hearing should be fixed at LP. 7.500 mls.

Delivered this 29th day of November, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 225/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case of:—

Nimer Ahmad Minawy — Appellant.

v.

Subhi Ass'ad Shahruri — Respondent.

Claim of right of priority by co-owner of land — Allegation by Defendant that right was abandoned by word spoken — Effect of Art. 11 *of Tabu Regulations requiring renunciation to be in writing — Ottoman Land Code, Art.* 41 *— Tabu Regulations, Art.* 11 *— Civil Procedure Rules, Rules* 342 *and* 346 *— Land Appeal No.* 5/27.

1. Right of priority of co-owner under Art. 41 of Ott. Land Code can be effectively renounced by word of mouth, and renunciation proved by oral evidence.

2. Court of Appeal may remit case for determination of a certain issue and return of a record of evidence, together with findings and reasons.

Asal for Appellant.

Khammash for Respondent.

Appeal from judgment of Land Court, Nablus (20/38), dated 12.9.1938.

JUDGMENT.

This is an appeal from the Land Court of Nablus. In my opinion the case should be remitted to that Court for a further finding.

The Plaintiff, as co-owner of certain shares in land in which other shares had been sold by another owner, claimed from the transferee the restoration of his shares under the provisions of Article 41 of the Ottoman Land Code (as amended).

The Defendant asserted that the Plaintiff had, by word of mouth, renounced his right, and that in consequence no written renunciation

had been taken. Upon this the Court gave a preliminary judgment as follows:—

> "The Tapou Registers have been regarded as having the force of law, and the provisions of Art. 11 are clear and reasonable. They require a renunciation of the right of priority such as Defendant pleads that Plaintiff gave to be in writing. Defendant admits he has no written renunciation, and it therefore follows that he cannot prove a binding renunciation. This being Defendant's only plea, we find that plaintiff is entitled to priority in respect of the sale of 21/120 and 21/480 shares in the land referred to in the Statement of Claim."

The Court then went on to enquire into and decide certain questions as to the extent of the land involved and the amount of the Bedl Misl.

The Defendant appeals to this Court and objects both to the preliminary judgment and the decision upon the facts.

As to the facts, the Court heard evidence, and I am of opinion that it was entitled to come to the conclusions to which it did.

The preliminary judgment raises a point of interest and importance. Article 11 is clear, but it is doubtful to what extent parties have availed themselves of it in Palestine, and in practice I believe it is usual for written renunciations to be taken before a Notary Public.

Before the Occupation, I believe that the Court of Cassation held that renunciations should be evidenced by writing, but the matter was considered by this Court in Land Appeal No. 5/27, which is reported in Rotenberg's "Collection of Judgments", Vol. IV, page 1530. In that case the Court of Trial had held, on the strength of "personal" evidence (presumably oral evidence) that the right had been effectively abandoned, and this Court held —

> "The Court holds that the intention of Section 7 of the Lands Courts' Ordinance and all the rules thereof is to the effect that the Land Court is not at all bound by the rules of evidence. The Law has conferred on it an absolute discretion, and consequently, the first objection of Appellant falls to the ground."

The general proposition may appear to be too widely stated, but, in so far as the point in issue was concerned, I think that the decision should be followed.

It is for the legislature to consider whether any change should be made.

As I have stated, I see no reason to interfere with the findings of the Court upon the other issues, and in my opinion, this is a case in

which the provisions of Rules 342 and 346 of the Civil Procedure Rules can usefully be applied.

The case will therefore be remitted to the Land Court to determine the issue whether the Appellant (Plaintiff) orally refused to take his share of the land in question, and when this has been done, to return to the Court the record of the evidence, together with the findings thereon and the reasons therefor.

The question of costs will be reserved.

Delivered this 22nd day of November, 1938.

Chief Justice.

CIVIL APPEAL NO. 222/38.

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. Isaac Zwi Rackovsky
2. Abraham Epstein — Appellants.

v.

Joseph Danon — Respondent.

Case remitted for examination of witness — Application to adjourn trial on ground that travelling unsafe — Hearing of witness while Plaintiff neither present not represented — Deciding Defendant's counterclaim without any notice served on other party — Civil Procedure Rules, Rule 183 *— Maxwell v. Keum* 1928, 1 *K.B.D.*, 645 — *C.A.* 97/38 4 *CtLR* 101.

1. To adjourn or not to adjourn trial — a matter of discretion of trial Court, and if discretion exercised on proper grounds Court of Appeal, as a rule, will not interfere.

2. Party having been given opportunity to examine or cross-examine witness and defaulting without good cause, may be regarded as not availing himself of opportunity; fact that the witness was heard in his absence — immaterial.

3. Court cannot in Plaintiff's absence hear reinstated counterclaim which had been withdrawn, without notice of reinstatement served upon Plaintiff.

King and *Abramovsky* for Appellants.
Levin for Respondent.

Appeal from judgment of District Court, Haifa, dated 27.7.138.

JUDGMENT.

This is an appeal from a decision of the District Court of Haifa involving a claim and a counter-claim. In my judgment, the appeal on the claim fails, and on the counter-claim succeeds.

This Court, in an earlier appeal (C.A. 97/38)*) in which the same parties were involved, (the present Appellant then being Appellant) held:—

> "For this reason we hold that the case must go back to the District Court to allow the Appellant to call the Respondent as a witness, and if, as the result of the evidence given by the Respondent, it will appear that he consented to the extension of time, the Court will reconsider the case on its merits in the light of what took place on the 18th of December. If, however, no such extension will be proved by the admission of the Respondent the judgment of the District Court will stand."

With all respect to this Court this decision appears to be in an unhappy form.

The matter came before the District Court again on 27.7.1938. It seems that the Plaintiffs' advocate, some days before the date fixed for hearing, tried, without success, to have the case adjourned. A later application for an adjournment was made on the ground that in the then conditions it was unsafe to travel to Haifa. The Court considered the question and refused an adjournment, and that refusal is one of the grounds of the present appeal.

Rule 183 of the Civil Procedure Rules gives a Court a discretion to adjourn a trial. Generally speaking, this Court, if it is satisfied that that discretion has been exercised on proper grounds, except in exceptional circumstances, will not interfere (see Maxwell v. Keum, 1928, 1 K.B.D., 645). In this case it appears that the Court gave its decision after due consideration of the facts, and I see no reason to interfere, and on this point the appeal fails.

Despite the application for an adjournment, an advocate attempted to appear for the Plaintiffs, but the Court held that he was not authorised, so that in the result the Plaintiffs were neither present nor represented.

The Defendant appeared and gave evidence denying the extension of time to which this Court, in the first appeal, had referred, and the Court gave judgment dismissing the Plaintiffs' claim.

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*) 4 CtLR p. 101.

In the circumstances, despite the wording of the judgment of this Court, I think that the District Court was justified in so doing, and it was bound to make an Order in this form, although, if the earlier judgment of this Court was taken literally, it was for the Appellants to call the Respondent as a witness, and there was a direction that if the extension was not proved the original judgment of the District Court would stand.

The Appellants, in their grounds of appeal, now complain that they had no opportunity to cross-examine the Respondent in order to obtain an admission from him, but that would appear to be their own fault for not attending the hearing, and on this point the appeal fails.

In addition to giving judgment for the Defendant the District Court went on to hear a counter-claim and made an order allowing it to be reinstated, without the payment of fees, after the determination of the first appeal. The result is unfortunate. When the action was for the second time before the District Court the Defendant (Plaintiff on the counter-claim) applied, on the 6th of July, 1938, for the restoration of the counter-claim without the payment of fees, and the Court, at the hearing, treated it as having been reinstated, and gave judgment for the Defendant (Plaintiff on the counter-claim) for the balance of a sum of LP. 2,500 as damages.

No notice that the counter-claim had been reinstated was served upon the Plaintiffs (Defendants to the counter-claim) and as I have stated, they were not present at the hearing. It is a matter of regret that the District Court did not satisfy itself that the Plaintiffs had been informed that the counter-claim had been reinstated before proceeding to adjudicate upon it.

Mr. Levin, on behalf of the Respondent, with that fairness which we have learned to expect from him, agrees that the appeal on the counter-claim must be allowed, and the case again remitted to the District Court to adjudicate thereon after the Appellants have been properly notified.

In the result the appeal in the action will be dismissed, but that in the counter-claim allowed, and the judgment of the District Court on the counter-claim set aside, and the case remitted to the District Court to hear and determine the counter-claim.

No order as to costs.

Delivered this 17th day of November, 1938.

Chief Justice.

JUDGMENT.

Frumkin, J.

The action of the present Appellants against the Respondent for damages and refund of moneys and promissory notes was based upon an alleged breach by the Respondent of a contract whereby the latter undertook to transfer a house to the Appellants. During the first trial before the District Court the case of the Appellants has boiled down to one main point namely whether or not the Respondent in fact consented to extend the time fixed for transfer to a later date. The Appellants maintained that at that later date they were willing to accept the transfer but the Respondent did not turn up to effect it. The Appellants failed to prove this point and their action was dismissed. On appeal the case was remitted to the District Court to give Appellants a further opportunity to prove their allegation by the evidence of the Respondent.

On the date fixed for hearing before the District Court the Appellants did not turn up, nor did counsel who represented them previously. On behalf of the Appellants another advocate appeared asking to adjourn the case on the ground of the unsafety of the roads preventing the Appellants and their Jerusalem advocate to travel from Jerusalem to Haifa. The District Court refused to grant the adjournment, proceeded with the case, heard the evidence of the Respondent who categorically denied that he ever consented to extend the time for transfer. The Court for the second time then dismissed the action, and for the second time the Appellants now appeal.

The first ground of appeal is that the Court was not justified in refusing the adjournment, owing to the particular unrest in the country for the day or two preceding the hearing. In my view this is a matter which must be left for the consideration of the Court of Trial. It may be that the Court was to some extent influenced by numerous previous attempts on behalf of the Appellants to have the case adjourned. But they also received official information from which they could judge that travelling was not impossible. In any event the Appellants having known beforehand that their advocate is not willing to proceed to Haifa they could have taken timely steps to brief another advocate to represent them. In these circumstances I am not inclined to interfere with the exercise of the discretion of the Court below, and the appeal on this ground must fail.

The second ground of appeal is that in the absence of the Appellants, the Court should not have proceeded to hear the evidence of the Respondent, who was in fact their witness. But even apart from the evidence of the Respondent the Court was justified in arriv-

ing at the conclusion they did. An opportunity was offered to them to prove their case, they did not avail themselves of that opportunity. The Court had therefore no alternative than again dismissing the action. The appeal on this point must also fail.

Where the District Court erred was in proceeding to deal with the counterclaim of the Respondent and giving judgment thereon.

In the first trial the Respondent, upon the advise of the Court, withdrew his counter-claim with leave to reinstate it without fees. This Court in its first judgment commented on this procedure and directed that in the event the case will have to be re-opened upon the Appellants proving the extension of time a very relevant fact bearing on their allegation of breach, the Court should then simultaneously deal with the counter-claim.

The Court could not rely on this direction because the fact was not proved, and the case was not re-opened. The Court could further not rely on the application of the Respondent to have the counter-claim reinstated, because no notice of it was given to the Appellants who rightly say that they were not supposed to know that the counter-claim will be considered on the date fixed for the re-hearing of their claim.

The Appellants therefore succeed on this point and that part of the judgment dealing with the counter-claim is set aside.

The District Court will now in due course have to deal with the counter-claim of the Respondent as an independent claim. The Appellants will then or on another occasion be entitled to raise their claims for the refund of moneys paid and promissory notes given insofar as such claims are not based on the breach of the contract.

The result is that as regards the Appellants' claim for damages the appeal is dismissed and the judgment of the District Court confirmed; but the other part of the judgment dealing with the claim of the Respondent is set aside.

In the circumstances there should be no order as to costs.

Delivered this 17th day of November, 1938.

Puisne Judge.

I concur

Puisne Judge.
(Khayat, J.)

CIVIL APPEAL NO. 188/38.

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:—

Assicurazioni Generali — Appellants.

v.

Samuel M. Levy — Respondent.

Fire insurance policy providing for exceptional conditions not covered by policy — Damages caused by fire during period of disturbances in Palestine — Insuranrce company denying liability in reliance upon clause of exceptional conditions — Evidence called by Insurance Company to prove exceptional conditions — Express agreement as to onus of proof — Court of Appeal drawing inferences from undisputed evidence in trial Court.

1. Where agreement between A and B provides that certain conditions will free A from liability and parties expressly agreed that onus of proving absence of such conditions shall lie on B, B must discharge that onus.

2. Fact that Insurance Company issued the policy at a time when abnormal conditions were prevailing does not deprive Company of its right to rely exceptions created by such conditions.

3. If no real dispute between parties as to facts, Court of Appeal entitled to draw inferences therefrom without remitting case for further hearing and may come to conclusion that Plaintiff failed to discharge onus placed upon him.

Horowitz for Appellants.
Levitsky for Respondent.

Appeal from decree of District Court, Tel-Aviv, dated 30.6.1938.

JUDGMENT.

This is an appeal from a judgment of the District Court sitting at Tel-Aviv, which in my judgment, should be allowed.

By a policy dated 13th November, 1936, the Appellant Company insured the Respondent against fire in his warehouse in Jaffa. The policy contained a number of conditions, but we are concerned only with condition 6, as follows:—

> "6. This insurance does not cover any loss or damage which either in origin or extent is directly or indirectly, proximately or remotely, occasioned by or contributed to by any of the following occurences, or which, either in origin or extent directly or indirectly, proximately or remotely, arises out of or in connection with any of such occurences, namely:—
>
> (1) Earthquake, volcanic eruption, typhoon, hurricane, tornado, cyclone, or other convulsion of nature or atmospheric disturbance.

(2) War, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not), mutiny, riot, civil commotion, insurrection, rebellion, revolution, conspiracy, military or usurped power, martial law or state of siege, or any of the events or causes which determine the proclamation or maintenance of martial law or state of siege.

"Any loss or damage happening during the existence of abnormal conditions (whether physical or otherwise), directly or indirectly, proximately or remotely, occasioned by or contributed to by or arising out of or in connection with any of the said occurence shall be deemed to be loss or damage which is not covered by this insurance, except to the extent that the Insured shall prove that such loss or damage happened independently of the existence of such abnormal conditions.

"In any action, suit or other proceeding, where the Company alleges that by reason of the provisions of this condition any loss or damage is not covered by this insurance, the burden of proving that such loss or damage is covered shall be upon the Insured."

On 14th December, 1936, a fire occured at the insured premises. In March, 1937, the Insured brought an action claiming LP.1900. In its defence the Company admitted that the fire occured, and admitted the amount of the damage, but pleaded that, by reason of condition 6, it was not liable. Alternatively it pleaded (a) that the loss happened during the existence of abnormal conditions, within the meaning of that condition; (b) the —

"loss or damage (if any) either in origin or extent was directly or indirectly, proximately or remotely, occasioned by or contributed to by, or arose directly or indirectly, proximately or remotely, out of or in connection with riot, civil commotion, insurrection, rebellion, revolution, conspiracy, military or usurped power, or one or more events or causes which determine the proclamation or maintenance of martial law or state of siege."

The District Court, not without doubt, following earlier decisions of the same Court (which unfortunately were not cited to us) held that under the condition the onus of proof was upon the Defendant Company, and having heard evidence held, for reasons to which I will later refer, that the Company had failed to discharge that onus and gave judgment for the Plaintiff. The Company now appeals to this Court on the ground that the Court of Trial was wrong in placing the onus upon it, and that that Court misdirected itself in coming to the conclusion that it (the Company) had failed to discharge the onus placed upon it of showing the existence of abnormal conditions.

Mr. Horowitz, on behalf of the Company, informs us tha the policy is in a form common to a group of companies doing business in this part of the world, and that consequently this case is of interest to persons other than the parties.

The first paragraph of the condition in question provides, in an elaborate form, that the insurances does not cover loss due directly or indirectly to (1) natural phenomena, (2) violence due to human agency. If this stood alone it would be for the Company to show that an exception applied.

It is manifestly difficult in times of emergency to prove whether a fire is due directly or indirectly to the cause of the emergency, and I assume that for this reason the second paragraph of the clause was inserted. It provides in wide terms that loss or damage happening during the existence of abnormal conditions arising out of or in connection with the matters set out in the earlier part of the clause, shall be deemed to be loss which is not covered except to the extent that the Insured shall prove that the loss was independent of the abnormal conditions. In refrerence to the argument which was addressed to us I may say that, in my opinion, the words from "whether" to "said occurences" qualify abnormal conditions. Again, if this paragraph stood alone it would be for the Company to prove the existence of abnormal conditions, and for the Insured then to prove that the loss happened independently of them.

In the third paragraph of the clause the parties have expressly agreed as to the onus of proof, and I know of no reason why they should not do so. It is true that the primary object of a fire policy is to insure against fire, that it is often difficult to prove how a fire emanates and that the Company draws up the policy, and in consequence, where there is an ambiguity, Courts are inclined to construe it in favour of the insured; but there seems to me to be no ambiguity in the paragraph. "Allege" does not mean "prove", and I would point out with all respect to the Court below that if its interpretation is applied this paragraph would appear to be surplusage and I can hardly think that it should be so regarded.

In the result, when the Company relies upon the third paragraph it is for the Insured to prove either the absence of the exception, or that, if the exception existed, it did not occasion or contribute to the loss or that the loss did not arise out of it or that the loss or the damage in cases where abnormal conditions existed happened independently of the existence of such abnormal conditions.

Although the Defendant Company in its pleading relied on con-

dition 6 generally, it is clear that throughout this case has been argued on the basis of the existence of abnormal conditions.

Before dealing with this case in detail I would consider what the Insured must prove assuming the Court is satisfied that abnormal conditions existed. Must he prove positively the cause of the fire or can he show by argument or otherwise that the abnormal conditions could not in any reasonable probability have caused or contributed to the fire.

Bearing in mind, as I have said, that the object of a fire insurance is to insure against fire, and that it is common knowledge that in many cases it is difficult if not impossible to prove the cause of a fire, and that the condition does not provide that the Insured shall prove the cause of the fire, I am of opinion that the Insured can discharge the onus by showing that the abnormal conditions could not reasonably have caused or contributed to the fire. In the result, subject to the shifting to and fro of the onus of proof in order that the Plaintiff may recover, it is necessary for the Court to be satisfied either that there was no abnormal condition joined by a chain of causation to one of the events set out in the earlier part of the condition, or, that if there was that condition of affairs it did not affect the fire.

In this case the Court had before it the evidence of the police officer in charge of the district at material times, he was actually called by the Company and cross-examined by the Plaintiff. I will refer in detail to his evidence later. Throughout it seems to have been assumed that the state of affairs which he described was due to one of the matters set out in group (2) in the clause. Upon this evidence the Court below does not appear to have decided if conditions were abnormal in the general sense, but to have decided that they were normal within the contemplation of the parties in that the state of affairs when the policy was issued is the standard of normality (if I may use such an expression) to be applied, and it goes on to state in its judgment —

> "It seems that they themselves (the Insurers) on 13th November, 1936, did not consider conditions to be abnormal, otherwise presumably they would have refused to accept the risk."

With all respect I cannot agree with this view. The object of the policy was to cover fire unconnected with certain exceptions, and by issuing it on a certain date I do not think the Company waived its right to rely upon the exceptions if and when they existed.

Normal conditions no doubt change from time to time, but under the policy abnormal conditions must be connected with certain occurences, and when this is remembered, I see no reason why a Court

should not be able to determine the question of their existence.

Mr. Horowitz suggested that if we were of opinion that the onus was wrongly cast upon the Defendants the case might go back for further hearing, but I do not think that it is necessary. In the result the Court heard the evidence of a responsible police officer, and the Plaintiff did not give evidence himself or call any other evidence. There is no real dispute as to the facts, and we are entitled to draw inferences therefrom.

At the date of the fire the Emergency Regulations were in force — in itself that could seem to be an abnormal condition, other than physical, but it would hardly be suggested that the loss did not happen independently of that. The police were carrying arms, rifles, which in 1935 they did not do. In itself, in the absence of some quite extraordinary accident, this would not affect a fire.

Mr. Hackett also said —

> "Curfew on Jaffa area was removed on 26.10.36. After curfew was taken off fires took place frequently in Jaffa area. These were not fires which would occur in times of normal position of security. I could not say that conditions were normal, there was great enmity between Jews and Arabs at that time. There was a virtual boycott. Arabs were being prevented by intimidation from buying Jewish goods and vice versa. In this quarter then, at 6.45 p.m. on the 14th December, 1936, it would not be safe for Jews to walk about in this quarter. Police patrols were carrying arms, rifles, then. As a general rule in 1935 police did not carry rifles.
>
> "There were a number of outrages in December, 1936, in Jaffa a number of bombs thrown."

and in answer to the Court he said —

> "If a Jew who had business in Mustaquim area just prior to 14.12.36 asked me for advice as to re-opening his shop, I would have told him that it was dangerous. The services of the army were not required then."

Can it be fairly said that the loss or damage must, upon any reasonable view, have happened independently of these abnormal conditions which Mr. Hackett described? I do not think that it can. The Plaintiff has failed, therefore, to discharge the onus placed upon him.

The judgment of the District Court will be set aside and judgment entered for the Defendants, with costs here and below. Costs in this Court to include disbursements and Advocate's fees, to be fixed at LP. 15.

Delivered this 8th day of December, 1938.

Chief Justice.

CIVIL APPEAL NO. 195/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the case of:—

Mohammad Hassan El Budeiri — Appellant.

v.

Ibrahim Ali El Budeiri — Respondent.

Order granting leave to appeal not stating on what points leave granted — Claim of money from Mutawalli by beneficiary of Wakf — Judgment for Plaintiff, Defendant refusing to take oath as prescribed by Court — Judgment of Sharia Court declaring that Plaintiff was not a beneficiary of the Wakf — Review of judgment of Civil Court applied for by Mutawalli refused — Action by Mutawalli for recovery of money paid by him by virtue of judgment — Res judicata — Money alleged to have been obtained by fraud — Special Tribunal and conflicting judgments of Civil and Religious Court.

1. Where order granting application for leave to appeal does not state on what points of law it is granted nor that it is granted generally, Court of appeal may presume that points on which leave granted are those stated in application.

2. If A brings an action against B for recovery of money paid by him to B under a judgment of a competent Court, not an action for setting aside previous judgment on ground of fraud or of fresh material evidence, Court right in considering the matter res judicata.

3. Art. 1840 of Mejelle relating to review of a case after a judgment is governed by special rules laid down in Ott. Civil Procedure Code.

4. Not for Special Tribunal to say what action should be taken when there are two contradictory judgments, one of a Religious, and one of a Civil Court.

Edit. Note:—As to 1 see: C.A. 191/38 4 CtLR 185 and Edit. Note thereto.

Cattan for Appellant.
Ibrahim Kamal for Respondent.

Appeal from judgment of District Court, Jaffa, (CADC 51/38) dated 28.4.1938.

JUDGMENT.

Ibrahim Eff. Kamal, counsel for the Respondent, raised a preliminary objection that the order granting leave to appeal does not state on what points of law leave to appeal is granted. He also argued that the order does not state that leave to appeal is granted generally. The Court overrules this objection. The Appellant stated the grounds on which he desired leave to appeal, and as the District Court said nothing further except that leave was granted, we presume that these are the points on which leave is granted.

There is an unusual history in connection with the circumstances leading up to this appeal. In the year 1931 the Respondent brought an action for money against the Appellant in the Magistrate's Court of Jerusalem basing his claim on the ground that he was a beneficiary in a certain waqf. At the outset of the proceedings before him, the learned Magistrate made an order that the Respondent should go to the Sharia Court and that there was no necessity for the Appellant to take the oath. Afterwards, at the beginning of the year 1932, the learned Magistrate revised this order and ordered the Appellant to take the oath. The Appellant refused, and as a consequence judgment was given against him on the 31st February, 1932.

The Appellant appealed to the District Court and succeeded in getting an order from that Court that the Respondent's action should be dismissed. The Respondent then in turn appealed to this Court and on the 20th April, 1933, this Court referred the case back to the District Court. On the 9th of January, 1934, the District Court referred the case back to the Magistrate with specific directions that the Appellant was to take a certain oath. The case came before the Magistrate on the 24th April, 1934. The Appellant again refused to take any oath except an oath of his own choosing, and as a consequence judgment was given against him for the amount claimed. This judgment was confirmed on appeal on the 10th January, 1935.

It is very important to consider the nature of these proceedings and the grounds on which the present Respondent succeeds in obtaining judgment. Up to this point there is not the slightest indication that the Respondent was guilty of any fraud in obtaining this judgment. The Respondent succeeded because the Appellant refused to obey the

order of the Court to take the oath as prescribed by it.

The second part of the history of the case begins with a judgment of the Sharia Court, dated the 5th May, 1936. This judgment declared that the Respondent was not a beneficiary of the wakf.

So far then there are the judgments of two Courts, one of the Magistrate's Court of Jerusalem confirmed on appeal by the District Court given on the ground that the Appellant refused to take the oath, but of course impliedly declaring that the Respondent was one of the beneficiaries of this waqf. On the other hand, there was the judgment of the Sharia Court giving a contrary decision.

Armed with this judgment of the Sharia Court, the Appellant took the course that was open to him under the Ottoman Code of Civil Procedure i.e. he applied for a review of the judgment of the Magistrate's Court of Jerusalem. The review was refused and this decision was upheld on appeal to the District Court. The Appellant then took the course of starting the same action all over again before the Magistrate's Court of Ramleh and the learned Magistrate at Ramleh came to the conclusion, which we consider is correct that the matter was *res judicata*. The Appellant appealed to the District Court. His appeal was dismissed and he has now appealed to this Court by leave.

Mr. Cattan who appeared on his behalf, submitted three grounds on which he challenged the decisions of the learned Magistrate and the District Court. His first ground was that in accordance with Art. 46 of the Order-in-Council the Courts in Palestine have the same power as the English Courts to set aside a judgment obtained by fraud, and that this power may also be exercised if a party obtains fresh material evidence. We do not think that this jurisdiction of the English Courts is in point in this case. What the learned Magistrate at Ramleh had before him, was an action on a subject matter which had been already decided by a competent Court between the same parties. He had not before him any action to set aside a previous judgment either on the ground of fraud or on the ground of fresh material evidence.

The second ground put forward by Mr. Cattan is that money received without right and by fraud may be recovered. The money in this case which was received by the Respondent was received by virtue of a judgment of a competent Court and it cannot be said to have been received either without right or by fraud. Neither can it be said to be money paid under pressure of legal process, which means that a party reluctantly yields up money when threatened with legal proceedings.

Mr. Cattan's third ground is that the Appellant was entitled to bring this action in accordance with Article 1840 of the Mejelle. Article 1840 of the Mejelle is the last article in Section 3 of Cap. 2 on page 305 of Tyser's translation. Section 3 is headed as relating to the review of a claim after judgment. Special rules are laid down in the Ottoman Code of Civil Procedure for dealing with the review of a case after a judgment, and we think that Article 1840 must be governed by these rules. The Appellant has already applied for a review of the judgment given in 1932 and has failed to obtain that review.

Another matter referred to by Mr. Cattan was that there being contradictory judgments of a Civil Court and a Sharia Court the matter is one which should be referred to the Special Tribunal. The Special Tribunal may be constituted to declare whether a case is within the exclusive jurisdiction of a Religious Court or not. It is not set up in order to say what action should be taken when there are two contradictory judgments, one of a Religious, and one of a Civil Court.

For these reasons we think that this appeal must be dismissed. The Respondent will have the costs and the fee for attendance at the hearing is fixed at LP. 15.

Delivered this 21st day of November, 1938.

Senior Puisne Judge

CRIMINAL APPEAL NO. 69/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

The Attorney General — Appellant.

v.

Rousseau, Ticket Cashier of the Aviv Taxi Service, Jerusalem — Respondent.

Rule made under Road Transport Ordinance fixing certain fares — Criminal proceedings for fare below tariff — Question if fixing of tariff ultra vires or unreasonable.

1. Rule 6 of Road Transport (Routes and Tariffs) (Ammendment) Rules 1937, (which is Rule 11A of principal Rule, 1934)) was made under a definite power given to High Commissioner by sec. 23(s) of Road Transport Ordinance and not ultra vires.

2. If a rule is unreasonable it must be set aside, but fact that it may be difficult to see the reason for it does not make rule unreasonable.

Crown Counsel (*Hogan*) for Appellant.
Levitsky for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 8.6. 1938, whereby Respondent was acquitted of the charge brought against him under Rule 11A of the Road Transport (Routes and Tariffs) (Amendment) Rules, 1937, (Rule 6 thereof), in charging less than the fares laid down thereunder.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jerusalem by the Attorney General — the Respondent having been acquitted of a charge of having charged less than the fares laid down in the Schedule to Rule 6 of the Road Transport (Routes and Tariffs) (Amendment) Rules, 1937, which is Rule 11A of the principal Rules, 1934.

Section 23(s) of the Road Transport Ordinance, amongst other things, gives power to the High Commissioner to make Rules for "re-

gulating, restricting and controlling the tariffs to be charged for journeys made by such public vehicles."

Rule 11A was made under that power conferred by the Ordinance. Rule 11A itself lays down:—

> "No passenger travelling on any public vehicle other than an omnibus between the places set out in the second column of schedule V to these rules shall be charged a fare other than that set out opposite the respective places in the third, fourth and fifth columns of such schedule."

The District Court held that Rule 11A is ultra vires. It cannot be ultra vires because it was made under a definite power given to the High Commissioner by Section 23(s) of the Road Transport Ordinance. The reason given by the District Court for so holding is that there can be no objection to an agreement to accept less than the authorised fare and they refer to English Law on this point. In this view, the District Court were under a misapprehension because the English Law is contained in the Town Police Clauses Act, section 55 of which definitely authorises less than the authorised fare to be taken.

The only point in this appeal is whether this Rule is unreasonable, and if it is unreasonable, then is must be set aside. It is certainly not uncertain, it is not discriminating, and it is waste of time to argue that it is. It may be difficult to see the reason for it, but that is a matter with which we are not concerned. The Rule is not unreasonable so far as we can see either in its operation or in its effect. A rule will only be held to be unreasonable if at all in a very extreme case.

We think that the District Court were wrong anyhow in their reasons and in the result at which they arrived.

The appeal is allowed, the judgment of the District Court is quashed and the casse remitted to them to try it on its merits.

Delivered this 13th day of July, 1938.

Acting Chief Jutice.

CRIMINAL APPEAL NO. 83/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Fareed Hassan Shawash — Appellant.

v.

The Attorney General — Respondent.

Charge of arson — Trial Court inferring from evidence and circumstances that accused responsible for fire — Question raised on appeal that identification was improper.

Where question of proper or improper identification is one of credibility Court of Appeal will not interfere.

Appellant in person.

Crown Counsel (*Hogan*) for Respondent.

Appeal from judgment of District Court, Haifa, dated 3.10.1938, whereby Appellant was convicted under Section 321 of the Criminal Code Ordinance, 1938, and sentenced to seven years.' imprisonment.

JUDGMENT.

There is no need to call upon you, Mr. Hogan.

On the 3rd of October, 1938, the Appellant was convicted of arson by the District Court of Haifa and sentenced to seven years imprisonment. The evidence against the Appellant was to the effect that fire had broken out in a carpentry workshop, and that shortly afterwards he was seen getting out of the window of the workshop. Taking the circumstances into consideration the Court below was justified in interferring that the Appellant was responsible for the fire. The question raised by the Appellant to the effect that he was improperly identified is one of credibility, and we do not propose to deal with that.

The appeal is therefore dismissed and the conviction and sentence are confirmed.

Delivered this 26th day of October, 1938.

Senior Puisne Judge.

PCLA 13/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the application of:—

1. Jaber Elias Kotia
2. Sami Elias Kotia — Applicants.

v.

Katr Bint Jiryes Nahas — Respondent.

Petition for leave to appeal to Privy Council — Respondent contesting that amount involved in dispute exceeds LP. 500 — Adjournment of petition so that affidavit (and counter affidavit) may be filed.

1. Where no indication in proceedings either in trial Court or Court of Appeal that amount involved exceeds LP. 500, petitioner for leave to appeal to Privy Council to file an affidavit as to amount.

2. Petition without necessary affidavit — defective, but this does not mean no proper petition before Court.

3. An application for adjournment to cure defect of petition is not an application for extension of time within which to file the petition.

Eliash for Applicants.
Goitein for Respondent.

Application for leave to appeal to His Majesty in Council from Judgment of the Court of Appeal (CA 220/38),*) dated 31.10.1938.

ORDER.

This is a petition for leave to appeal to His Majesty in Council from a judgment of this Court. The petition simply consists of statements made by the advocate for the petitioners. In that statement it is said that the amount involved in the dispute exceeds LP. 500. This is contested by the other side. There is nothing in the proceedings either of the District Court or this Court to indicate what amount, if any, is involved in this appeal. We are in agreement with Mr. Goitein for Respondent that in a case of this kind an affidavit should have been filed on behalf of the Petitioners. Dr. Eliash, for the Petitioners, having been notified of this view of the Court, has asked the Court to grant him an adjournment so that the necessary affidavit may be filed. Mr. Goitein objected to this course being taken on the grounds that it is really an application for an extension of time within which to file the petition, and that, there being no affidavit, there is no proper petition before this Court. We do not agree that there is no proper petition before the Court. There is a petition but it is defec-

*) 4 CtLR p. 188.

tive for want of an affidavit. Neither do we think that Dr. Eliash's application is an application for an extension of time. We are not disposed to refuse a petition on the ground merely that the petition is defective in some particular, and we have the power to adjourn it in order that the defects may be cured or amended.

In deciding to grant an adjournment we are not deciding the important points which have been raised by Mr. Goitein as to whether an appeal lies as of right in this matter to His Majesty in Council. These points will be decided later if necessary.

This petition is therefore adjourned. The Petitioner will file an affidavit as to the description and value of the land mentioned in the case within ten days from today.

A counter affidavit may be filed by Respondent within the ten following days, and a date can be then fixed for the resumed hearing of this petition.

In the circumstances the Respondent will have today's costs to include a fee of LP. 10 for attendance at this hearing.

Given this third day of December, 1938.

Senior Puisne Judge

CIVIL APPEAL NO. 227/38.

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:—

Leon Levy — Appellant.

v.

1. Hanna Khoury
2. Amin Khoury — Respondents.

Failure to make payment into Court as security for costs of appeal — Listing appeal for dismissal — Refusal of application not made by motion to grant extension of period for payment of deposit as security.

Failure by Appellant to comply with order of Chief Re-

gistrar to make payment into Court as security for costs under rule 3277 does not of itself dismiss appeal, and until Court dismisses it, parties may be heard therein.

2. Application by Appellant under rule 333 to extend period for payment of deposit as security for costs must be made by motion, and not merely on appearing in Court on notice for dismissal of appeal.

Levin for Appellant.
The Respondents did not appear.

Appeal from judgment of Land Court, Haifa (LA. 248/38) dated 29.6.1938.

JUDGMENT.

This application raises an important point of practice.

It appears that the Chief Registrar ordered payment into Court by the Appellant as security for the costs of the appeal under rule 327 (as amended). The Appellant failed to comply with the order and the appeal was listed for dismissal. The Appellant now appears before us and invites us under rule 333 to extend the period for payment.

It is clear that failure to comply with the order does not of itself dismiss the appeal and that until this Court dismisses it, it is before the Court and the parties may be heard therein. Any application should however be made by motion.

In my judgment this is a matter within the scope of rule 333 in that a condition precedent to the hearing of an appeal — other than filing a notice of appeal or payment of the prescribed fees — has not been complied with.

In the application the Appellant does not move the Court by notice but merely appears on the notice for dismissal. It is admitted that the Appellant did not apply to the Chief Registrar to extend the time under the rule and we do not think that he had any adequate excuse for so failing.

In the circumstances I do not think he could hope to suceed and it would appear to be useless therefore to grant an adjournment. The appeal is dismissed.

Delivered this 17th day of November, 1938.

Chief Justice.

CIVIL APPEAL NO. 230/38.

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:—

Aniseh Hassan Hamideh — Appellant.

v.

1. Chief Execution Officer, Haifa
2. Muhammad Baradey Abbasi
3. Muhammad El Kalla
4. Shehadeh Assad El Khoury — Respondents.

Failure of Plaintiff to appear — Telegram sent to Court notifying it that Plaintiff ill — Decree dismissing Plaintiff's action — Plaintiff appealing to Court of Appeal without applying to trial Court to set aside default judgment and reinstate action — Two remedies of party against whom decree made in default of his appearance.

1. A party against whom a decree was made in default of his appearance has the choice of two remedies, either to apply to Court below to set aside its decree or to proceed by way of appeal before Court of Appeal.

2. If no allegation that facts as stated in certificate are untrue, defect in form of certificate may be regarded as immaterial.

3. Where Court of Appeal thinks proper to accept medical certificate that Appellant was ill at time of hearing of action in Court below, it may set aside decree made by that Court in default of Appellant and remit case for re-hearing.

Hassan Bodeiri for Appellant.
Cattan for Respondents.

Appeal from judgment of Land Court, Jerusalem, (54/38) dated 27.9.1938.

JUDGMENT.

When this case came on for hearing before the Land Court of Jerusalem on the 27th September last, the plaintiff, the present appellant, failed to appear, and the Court in the exercise of its powers under Rule 187 of the Civil Procedure Rules, 1938, dismissed the action.

The plaintiff appealed to this Court. A preliminary objection was

taken by Mr. Cattan on behalf of the respondents that the plaintiff had mistaken her remedy which should have been under Rule 213. Rule 213 states that when a decree or order has been given in default of appearance or pleading, the party against whom the decree or order was made may apply to the Court, that is the Court which made the order, and that Court has jurisdiction to set aside the decree or order. This remedy was apparently open to the appellant in the present case. At the same time under Rule 317 it is laid down that an appeal lies to this Court from any decree of a District Court or a Land Court. It seems then that under the rules the plaintiff had the choice of two remedies, either to apply to the Court below to set aside its decree or to proceed by way of appeal before this Court.

The only point with which we are concerned in this appeal is whether the appellant had a reasonable excuse for failing to appear before the Land Court of Jerusalem on the 27th September last. The explanation given is that she was ill and that a telegram notifying that fact had been sent to the Land Court. A medical certificate has been produced before us to the effect that she was ill on the 25th September and that the illness was likely to last for ten days. It is objected by Mr. Cattan on behalf of the respondents that this certificate is not in the form as laid down by the rules made under the Medical Practitioners Ordinance. That of course is so, but as it is not alleged that the facts as stated in the certificate are untrue, the defect in form may be regarded as immaterial. We think that in the interest of justice the proper course for us is to accept the medical certificate as being a state of the genuine circumstances existing at the time and to conclude that the appellant had a reasonable excuse for failing to appear before the Land Court.

Taking this view of the matter we order that the appeal be allowed, that the decree of the Court below be set aside and that the action be remitted to the Land Court for re-hearing. In the circumstances the appellant will pay to the respondents their costs of this appeal not to include any advocates fees.

Delivered this 29th day of November, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 96/38.

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:—

1. Joseph Ouziel
2. Isaac Yizhvi — Appellants.

v.

Benjamin Eliahu Sassoun — Respondent.

Money paid by prospective borrower in connection with loan — Promissory Notes given to prospective borrower as a pledge that loan will be negotiated to him — Failure to effect loan and allegation of maker of notes that it was due to payee's fault — Court finding that payee justified in refusing to go any further with the matter and entitled to recover.

Money paid in connection with a transaction whose completion conditional on certain things being done by payer may be recovered, if Court finds that in the circumstances payer might have many reasonable objections to going any further with the matter.

Levitzky for Appellants.
Elkayam for Respondent.

Appeal from judgment of District Court, Tel-Aviv, sitting in its Appellate Capacity, dated 22.3.1938.

JUDGMENT.

The facts in this case were that the appellants signed a promissory note payable to two payees for the sum of LP. 180. At the same time as the promissory note was made a document (Exhibit B) was drawn up signed also by the appellants. In that document the appellants acknowledged the receipt of the sum of LP. 180 and its effect was that the promissory note was to be a pledge in the hands of the payees, that a loan to them should be negotiated by a company in England within four months. The payees endorsed the note to the respondent and at the end of the four months which was the period of the promissory note, the respondent sued the appellants on it. It was admitted that the respondent was not a holder in due course and the consequence of that was, that the appellans had available to them all

defences which they would have had against the original payees. It is quite clear that they had signed the note on their own responsibility. There are no words to indicate that they signed as agents for any other party. In consequence no defence on that ground is open to them. Another defence which they put forward depends on the interpretation of the document Exhibit B to which I have already referred as being made at the same time as the promissory note. The appellants admit that the loan was not effected, but that this failure to effect the loan was entirely the fault of the payees in refusing to sign certain documents and that that being so the payees could not successfully sue on the note and that therefore the respondent could not sue on the note. This defence of the appellants prevailed before the learned Chief Magistrate. On appeal however, holding in effect that the payees had not acted unreasonably, that they might find that they were unable to conclude the matter for a variety of reasons and that they were not to blame for the fact that the loan was not effected. We are in agreement with the decision arrived at by the District Court. When a person undertakes to accept a loan and the said loan is to be effected within the following four months with some person or company who was unknown to the payees at the time of the making of the promissory note, there may be many reasonable objections on the part of a prudent man to sign the documents which are put before him in connection with the loan. Further, as actually happened, documents may be placed before him at so late a date that the loan could not possibly be effected within the four months.

We think therefore that there was no evidence that it was unreasonable on the part of the payees to refuse to go any further with the matter and that there was no evidence that had the documents referred to be signed, the loan would actually have been effected. The judgment of the District Court was correct and the appeal will be dismissed with costs to include a fee of LP. 15.— for attendance at the hearing.

Delivered this 19th day of December, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 217/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Yacoub Nakashian — Appellant.

v.

Salim Abdo Nassar — Respondent.

Repudiation of contract for sale of land by claiming back money paid on account thereof — Vendor claiming damages to be determined by difference between contract price and market value of the land at date of repudiation — Meaning of "profits" in art. 110 of Ott. Civ. Proc. Code — "Disposition" under sec. 11(1) of Land Transfer Ordinance — Ottoman Code of Civil Procedure, Art. 109, 110 — Land Transfer Ordinance, sec. 11 — C.A. 147/26 — C.A. 126/38.

1. "Profits" in art. 110 of Ott. Civil Procedure Code refer to a gain which a party expects to realise by some dealing with subject matter of contract after contract has been fulfilled, not to one expected exclusively out of bargain between himself and other party to contract.

2. Measure of direct loss caused by repudiation of contract for sale of land — difference between contract price and market value of the land at date of repudiation.

3. A mere agreement to sell land — not a disposition within meaning of sec. 11(1) of Land Transfer Ordinance.

4. Prospective purchaser may on various grounds recover his money before actual disposition effected, but not under sec. 11(1) of Land Transfer Ord. unless Court satisfied that there has been a disposition of the land and without consent of Director of Lands.

Edit. Note:—See C.A. 157/22 5 CoJ 1626; C.A. 147/26 1 PLR 116; C.A. 99/29 5 CoJ 1632; C.A. 105/30 5 CoJ 1636; C.A. 126/38 4 CtLR 34.

Cattan and *Germanus* for Appellant.

Shehadeh for Respondent.

Appeal from judgment of District Court Jaffa, (84/38), dated 30.7.1938.

JUDGMENT.

Manning, J.

This appeal is concerned with the measure of damages under the Ottoman Law in the case of a breach of contract to purchase land.

The relevant provisions of the law are Articles 109 and 110 of the Ottoman Code of Civil Procedure. These are as follows:—

> "Art 109. If the non-performance of an obligation be not due to bad faith on the part of the person bound to perform it, the damages awarded against him shall be equivalent only to the direct and determinate loss suffered by the other party owing to such non-performance."
>
> "Art. 110. If the non-performance of the obligation be due to fraud or bad faith on the part of the person bound to perform it, he shall be liable to pay damages which shall include both direct loss caused to the other party by such non-performance and also profits of which he may have been deprived owing to such non-performance."

A distinction is drawn between direct and determinate loss caused by the breach and profits of which a person may be deprived owing to the breach. In the case at present before us the facts were that the appellant agreed to sell land to the respondent for LP. 300. A fine of LP. 300 was provided in case of breach and the respondent had paid LP. 65 as part of the purchase money. The respondent repudiated the contract and sued sucessfully in a Magistrate's Court for the return of his LP. 65. The appellant then sued in the District Court for LP. 300 as damages. The District Court held that there had been a breach of contract by the respondent. Though the judgment does not say so expressly it is clear that it held that the LP. 300 was a penalty. The appellant called evidence to show that at the time of the repudiation by the respondent, the land was not worth LP. 300 and claimed that he was entitled to damages, such damages to be calculated by the difference between the contract price of LP. 300 and the value of the land at the date of the repudiation. The Court below held that if such damages were proved they fell under the heading of profits of which the appellant had been deprived owing to the breach, that there had been no fraud or bad faith on the part of the respondent and that consequently the appellant was not entitled to recover any damages for the breach. His action was consequently dismissed.

2. In coming to this decision the Court below followed a recent decision of this Court namely Paz v. Salim Mustafa and others, No. 126 of 1938.*) In that case Salim Mustafa and other persons had agreed to sell land to Paz. They refused to fulfil their contract and Paz sued them for damages in the District Court. He claimed LP. 300 as liquidated damages, LP. 44 which he had paid in advance for the land and LP. 20 which he had paid to a surveyor. The District Court decided that the LP. 300 was a penalty. Paz then contended that the

*) 4 CtLR 34.

measure of damages was the difference between the price stated in the contract and the selling price on the date of the breach. The District Court took the view that such damages came under the heading of profits of which Paz had been deprived owing to the breach and that as there was no allegation that the breach was due to fraud or bad faith, no damages could be awarded under this head. They awarded Paz as damages the LP. 44 which he had advanced and the LP. 20 which he had paid to the surveyor. This decision was upheld by this Court on appeal, but in dismissing the appeal this Court overruled one of its previous decisions, decided as long ago as 1926, namely Zeide v. Alcalay, Volume 1, Palestine Law Reports p. 116. That case was similar to the present one. Zeide had agreed to sell land to Alcalay. The latter repudiated the agreement and sued for the refund of the purchase money. Zeide counterclaimed for damages. Alcalay succeeded in his claim. Zeide's counterclaim failed. He appealed and this Court held that he was entitled to be compensated in damages, and that the measure of the damages was the difference between the agreed price and the estimated market price of the land at the time when the contract was repudiated.

3. In the present appeal Mr. Cattan had asked us to say that this latter decision was correct and that this Court erred in overruling it in the Paz case (supra). The solution of the question depends on the interpretation to be placed on the Articles set out above. We are of opinion that "profits" in Art 110 refer to a gain which a party expects to realise by some dealing with the subject matter of the contract after the contract has been fulfilled. They do not include an advantage which he expects to gain exclusively out of the bargain between himself and the other party to the contract.

4. Neither fraud nor bad faith was alleged in the present action. No question therefore arises as to any profits of which the appellant has been deprived by the breach nor are there any allegations of fact which make the question of any such profits relevant. The issues to be determinated are:—

(a) Did the appellant suffer any direct or determinate loss owing to the breach?

(b) If so, how is he to be compensated for that loss?

The appellant desired to sell his land, that is to exchange it for money. He succeeded in inducing the respondent to offer LP. 300 for it. The respondent repudiated the agreement, and if at the time of this repudiation the land was worth less than LP. 300 the apppellant lost the benefit of his bargain. This would be a direct loss and the appellant would be entitled to be compensated for it. The amount

of this compensation can be determined and an appropriate method of determining it would be to award the appellant the difference between the contract price and the value of the land at the date of the repudiation. It seems therefore that the Zeide case (supra) was correctly decided and that it ought not to have been overruled.

5. We think it necessary to refer one point in connection with the case. The respondent repudiated the agreement by suing for the return of the LP. 65 which he had advanced. The learned Magistrate considered that he was bound to give judgment in his favour owing to the provisions of Section 11(1) of the Land Transfer Ordinance. This subsection reads as follows:—

> "Every disposition to which the consent required by Section 4 has not been obtained shall be null and void: provided that any person who has paid money in respect of a disposition which is null and void may recover such money by action in the courts."

The consent required by Section 4 is the consent of the Director of Lands. Disposition is defined in Section 2 as follows:—

> " "Disposition" means a sale, mortgage, gift, dedication of waqf of every description, and any other disposition of immovable property, except a devise by will or a lease for a term not exceeding three years, and includes a transfer of mortgage and a lease containing an option by virtue of which the term may exceed three years."

If a party agrees to buy land and pays the purchase money or part of it, he cannot recover this money undeer Section 11(1) of the Land Transfer Ordinance, unless he satisfies the Court that there has been a disposition of the land within the meaning of this definition and that the disposition was made without the consent of the Director of Lands. A mere agreement to sell land is not a disposition within the meaning of the definition. Such agreements do not require the consent of the Director of Lands. The Courts always treat them as valid in actions for their breach and do not insist on the consent of the Director of Lands being proved. There may be grounds on which a prospective purchaser of land may recover his money before there has been an actual disposition but Sec. 11(1) of the Land Transfer Ordinance is not one of them.

6. Although the Court below took evidence as to the value of the land at the time of the repudiation, it made no finding on this issue. We are therefore unable to decide this appeal at present and under the provisions of Rule 342 of the Civil Procedure Rules, 1938, we

frame an issue as to what was the fair value of this land at the time of the repudiation by the respondent, viz., the date when he commenced his action in the Magistrate's Court for the refund of his LP. 65. We refer this issue for trial to the Court below and direct that either party is at liberty to adduce any additional evidence on the issue. After the issue has been tried the Court below will return to this Court the said evidence with its finding thereon and its reasons therefore.

Costs reserved.

Delivered this 22nd day of Dovember, 1938.

Senior Puisne Judge.

HIGH COURT NO. 68/38.

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

Before:—Copland, J. and Khayat, J.

In the appplication of:—

1. Senta Cordi
2. Julia Cordi
3. Christian Cordi
4. Daoud Cordi
5. Emile Cordi — Petitioners.

v.

1. The President District Court, Jerusalem
2. Catherina Lolas — Respondents.

Postponement of order of sale of mortgaged property — Chief Execution Officer refusing application for further postponement of sale of mortgage — Non-interference of High Court with Chief Execution Officer's discretion if exercised properly.

1. High Court always reluctant to interfere with Chief Execution Officer's discretion if exerised properly.
2. High Court may in refusing application make no order.

as to costs, if application made in forma pauperis.

Edit. Note:—See H.C. 64/38 4 CtLR 213; H.C. 59/38 4 CtLR 199; H.C. 35/38 2 CtLR 225 and Edit. Note thereto.

Applicants in person.

D. Benzion-Mizrachi for 2nd Respondent.

Application for an order to issue to the First Respondent directing him to show cause why his order dated 19.11.38, should not be set aside, and why he should not grant a postponement of the sale for six months, and for an interim order to stay the proceedings in Execution file No. 2330/37 pending the determination of this application.

ORDER.

In this application the petitioners are asking us to grant a further stay of six months in respect of an order of sale given by the Chief Execution Officer, Jerusalem. The mortgage, in respect of which this application for sale has been made, fell due on the 14th of February, 1936. Extensions were granted on the 30th of July, 1937, and again in November 1937. It was not until the 25th of November, 1937, that an order for sale was given. On the 11th of July, 1938, petitioners put in a fresh application asking for a further delay which was refused and they repeated their application on the 11th of November, 1938, and that application was also refused.

Now, as we have said on several occasions, the High Court is always reluctant to interfere with the discretion of the Chief Execution Officer if he has exercised that discretion properly. In this case it seems to us that he has by no means hurried the sale of this property, that he has given a series of extensions to the petitioners on their applications, and that it is now nearly three years since this mortgage debt matured.

In these circumstances we cannot say that the Chief Execution Officer has exercised his discretion wrongly. That is really the only point before us in this application and we think that the application fails. The order nisi must therefore be discharged. No order as to costs as the application is made in forma pauperis.

Given this 20th day of December, 1938.

British Puisne Judge.

HIGH COURT NO. 65/38.

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:—

Manneh Hanna Karra'a — Petitioner.

v.

1. Chief Execution Officer, District Court, Jerusalem.
2. Mikhail Odeh Sansour — Respondents.

Guarantee given before Execution Officer in respect of judgment ordering payment of alimony — Successful petition by principal judgment debtor to reduce amount of alimony — Guarantee in respect of first judgment considered by Chief Execution Officer as having come to end since issue of second judgment.

Judgment reducing amount of alimony adjudged previously — not a new judgment which could relieve from obligations a person who guaranteed payment in respect of previous judgment.

Edit. Note:—See Mejelle Art. 640; H.C. 31/33 1 C o J 139.

Hazou for Petitioner.
Amon and *Bruchstein* for 2nd Respondent.

Application for an order to issue to the 1st Respondent calling upon him to show cause why his order dated 16.5.1938 and 13.7.1938 in Execution File No. 268/30 Beth Lehem, should not be set aside.

JUDGMENT.

This application arises out of proceedings before an Ecclesiastical Court wherein the Applicant obtained an order for the payment of alimony. This order was lodged for execution in the Execution Office of the Bethlehem Court, and in the execution proceedings, for considerations therein stated, before the Execution Officer the second Respondent guaranteed the payment of a monhtly sum in respect thereof.

It seems that the second Respondent applied to the Execution Officer to relieve him of his obligations on the grounds of (inter alia) lack of means, but that application was refused, and we are not concerned with it.

On 20.11.1937 the principal debtor petitioned the Ecclesiastical Court to reduce the amount of the monthly payments, and that Court "decided to amend the said judgment and reduce the adjudged alimony".

Thereupon the second Respondent applied to the Execution Officer to be relieved of his guarantee on the ground that his undertaking became void because of the new judgment, and the first Respondent ordered —

> "I consider the guarantee made by the guarantor to have come to an end since the issue of the Second Judgment of the Ecclesiastical Court, i.e. as from the 20th of November, 1937,"

In our opinion this was not a new judgment, and the first Respondent was wrong in the view which he took.

The Rule will therefore be made absolute, with costs against the second Respondent, being disbursements and advocate's fee LP. 2.—.

Delivered on this 28th day of November, 1938.

Chief Registrar.

HIGH COURT NO. 67/38.

IN THE SUPREME COURT SITTING AS A COURT OF JUSTICE.

Before:—Copland, J. and Khayat, J.
In the petition of:—

J. L. Herschlowitz — Petitioner.

v.

1. The President of the District Court, Tel-Aviv

2. Jacob Leibowitz
3. Moshe Chazan — Respondents.

Order by Chief Execution Officer to postpone proceedings of of sale of mortgaged property — Petition to High Court to set aside order of Chief Execution Officer — Affidavit in respect of petition sworn to by advocate and not by petitioner — Cases in which High Court will interfere with discretion of Chief Execution Officer.

1. If facts deposed to in a petition are within personal knowledge of advocate, affidavit may be made by him and not necessarily by petitioner, especially where advocate in a better position to depose as to the truth of the facts set out, than would be petitioner himself.

2. In matters of discretion High Court will not interfere unless proved before it that Officer has acted illegally or has taken into consideration facts which should not have been so taken, or has been influenced by arguments irrelevant to the issue before him, or the like.

Edit. Note:—As to 2 see H.C. 68/38 4 CtLR 247 and Edit. Note thereto.

Dr. Spindel for Petitioner.
Respondent No. 1: No appearance — served.
Levitzky for Respondent No. 2.
Respondent No. 3: No appearance — served.

Application for an order to issue to the 1st Respondent to show cause why his second order dated 7.10.1938, should not be set aside, and his first order dated 4.2. restored.

ORDER.

In this application the petitioner has asked us to say that the Chief Execution Officer of Tel-Aviv, in ordering a postponement of sale of proceedings in respect of a mortgage, has not exercised his duties or his discretion properly, and has granted too long a period of delay before proceedings of sale should commence.

Two points of importance have been taken by the 2nd Respondent, who is the mortgagor, in the arguments before us to-day. The first one is that the affidavit in respect of the petition was not sworn to or affirmed by the petitioner himself, but by his advocate. We see

no objection to this course if the facts deposed to in a petition are within the personal knowledge of the advocate making an affidavit. In proceedings such as these, which concern execution matters, the advocate probably is in an infinitely better position to depose as to the truth of the various facts set out, than would be the petitioner himself.

The second point is with regard to the discretion exercised by the Chief Execution Officer in making the Order which he did. Now it is necessary I suppose once again to say that in matters of discretion this Court is always loath to interfere, and unless it can be shown to us that the Chief Execution Officer has acted illegally or has taken into consideration facts which should not have been so taken, or has been influenced by arguments which are irrelevant to the issue before him, unless as I say something of that nature is proved before us, we will not interfere with an Order given by the Chief Execution Officer under Section 14 of the Land Transfer Ordinance. Nothing in the arguments which have been addressed to us by the petitioner has convinced us that any of these factors are present in this case. For that reason we think that the petition fails. The rule nisi is discharged with costs assessed at LP. 10—, to include advocate's fees, to be paid by the petitioner to the 2nd respondent.

Given this 22nd day of December, 1938.

British Puisne Judge.

CIVIL APPEAL NO. 221/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Yacov Periman — Appellant.

v.

Mordechai Turkiyeh Respondent.

Purchaser under agreement of sale let into possession of premisess — Action for return of money paid on account of premises and for damages for breach of contract — Action for eviction of premises agreed by Plaintiff to be sold to Defendant — Equitable lien on land for purchase money — Mejelle, Art. 373.

1. Land Courts bound to give effect to equitable rights in land.

2. Person who had been let into possession and had paid part of price of land has an equitable lien on it for his purchase money; such lien coupled with possession obtained with owner's consent — a good defence to a claim for ejection.

3. Agreement for sale of land — valid and legally binding on parties to it and not in itself voidable.

4. A voidable contract is one which may be either affirmed or repudiated at option of one of parties but not of other.

Edit. Note:—As to 1 see C.A. 224/38 4 CtLR 193, C.A. 15/38 3 CtLR 149 and cases cited therein;

As to 3 see: C.A. 241/37 3 CtLR 118; C.A. 217/38 4 CtLR 243.

As to 4 see: Mejelle, Art. 372.

Olshan (*by delegation*) for Appellant.
Ben Ami for Respondent.

Appeal from decree of Land Court, sitting at Tel-Aviv (Appellate capacity) dated 20.6.1938.

JUDGMENT.

The facts out of which this appeal arises are that there had been an agreement between the parties under which the appellant agreed to sell certain premises to the respondent for LP. 300. The respondent paid part of the price and was let into possession, but the sale was not registered, and after some time the respondent started an action in the District Court for the return of the money he had paid and for damages for breach of contract. He continued in occupation of the premises and the appellant took action before the Magistrate for his eviction. The learned Magistrate ordered his eviction but on appeal was reversed by a Land Court, leave being granted to appeal to this Court.

2. The learned Magistrate based his decision on the ground that the respondent could not claim to remain in possession of the property in order to ensure the return of the money which he had paid, and that as this was the only ground on which he based his claim an order for eviction must be made. The Land Court, relying on Article 373 of the Mejelle, decided that the learned Magistrate had erred in so deciding. Article 373 of the Mejelle is as follows:—

> "In the case of cancellation of a voidable sale, if the price has been received, the purchaser has the right of retaining the thing sold until the vendor has returned the price."

3. I do not see how this article can apply as there is no question of a voidable agreement here. The agreement between the parties was valid and legally binding on both. The respondent could not obtain a good legal title until the provisions of the Land Transfer Ordinance had been complied with, but this does not mean that the contract was voidable. A voidable contract is one which may be either affirmed or repudiated at the option of one of the parties but not of the other, and the agreement in this case was not of this description.

4. Land Courts are bound to give effect to equitable rights in land and I think that the true principle on which this case must be decided will be found by examining the equitable rights of the respondent. He had been let into possession and had paid part of the purchase money. I shall leave out of consideration his right to sue for specific performance because he has started an action in the District Court for damages for breach of contract and the return of the purchase money he has paid; but he has an equitable lien on the land for this purchase money and this lien is coupled with possession which was originally obtained with the consent of the appellant. The Appellant has the legal estate but the respondent's equitable lien coupled with possession enables him to resist any attempt by the appellant to eject him.

5. What I have said applies to the position as it is in the present action and will not prejudice in any way the decision of the issues at present pending before the District Court.

6. Before us it was said by Mr. Olshan, on behalf of the appellant, that the respondent's possession of the premises was not the result of the agreement for sale but was simply due to an act of kindness by the appellant. The Land Court was satisfied that it was agreed between the parties that the possession was the result of the agree-

ment. However this may be, it cannot alter the facts that the respondent is actually in possession with an equitable lien and that this possession was obtained with the consent of the appellant.

7. For this reason the appeal must be dismissed and the respondent will have the costs. Fee for attendance at the hearing is certified at LP. 15.—.

Delivered this 21st day of November, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 192/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the application of:—

Dr. Paul Berg — Applicant.

v.

1. Itzhak Karokes
2. Israel Avivi — Respondents.

Application to Supreme Court to rehear appeal which was decided in Appellant's absence — Affidavits and counter affidavit as to possibility on particular date to proceed to Jerusalem — Civil Procedure Rules, Rules 337, 338.

If not contested by other party that Appellant's advocate was actually prevented from appearing at hearing of appeal, appellate judgment given in his absence will be set aside and appeal reheard.

Levitzky for Applicant.
Nedder for Respondent No. 1.
Goddard for Respondent No. 2.

Application under rule 338 of the Civil Procedure Rules, 1938, for the rehearing of the above appeal which was heard ex-parte in the absence of the Appellant.

ORDER.

This is an application made under Rule 338 of the Civil Procedure Rules, 1938. An appeal had been decided in the absence of the Appellant under Rule 337. The Appellant asks the Court now to rehear the appeal on the ground that there was sufficient cause to prevent him from appearing on the date fixed for the hearing of the appeal.

Affidavits have been filed showing that, on this latter date, the Appellant's advocate, who lives in Tel-Aviv, started at 7.30 a.m. to come to Jerusalem in a motor car, and that he was stopped by the military authorities who refused to allow him to proceed, although he explained to them that he was going to attend a case in the Supreme Court.

This affidavit is supported by another affidavit by Dr. Dycian.

A counter affidavit was filed by the Respondents to the effect that numerous cars were allowed to proceed to Jerusalem from the early morning of that day, and the Court is aware that the advocates for the Respondents did travel on that day to Jerusalem from Tel-Aviv, and did actually appear in Court in the case.

The important point is, however, that even if this be so, it is not contested that the Appellant's advocate was stopped and turned back that morning by the military authorities.

In these circumstances we think that sufficient cause has been shown by the Appellant for the failure to appear on the 31st October last, and accordingly we set aside the appellate judgment of the 31st October and we order that the appeal be reheard on condition that the Appellant do pay to the Respondents costs assessed at LP. 25, this to include fees for attendance at the hearing.

Delivered this 13th day of December, 1938.

Senior Puisne Judge.

Current Law Reports

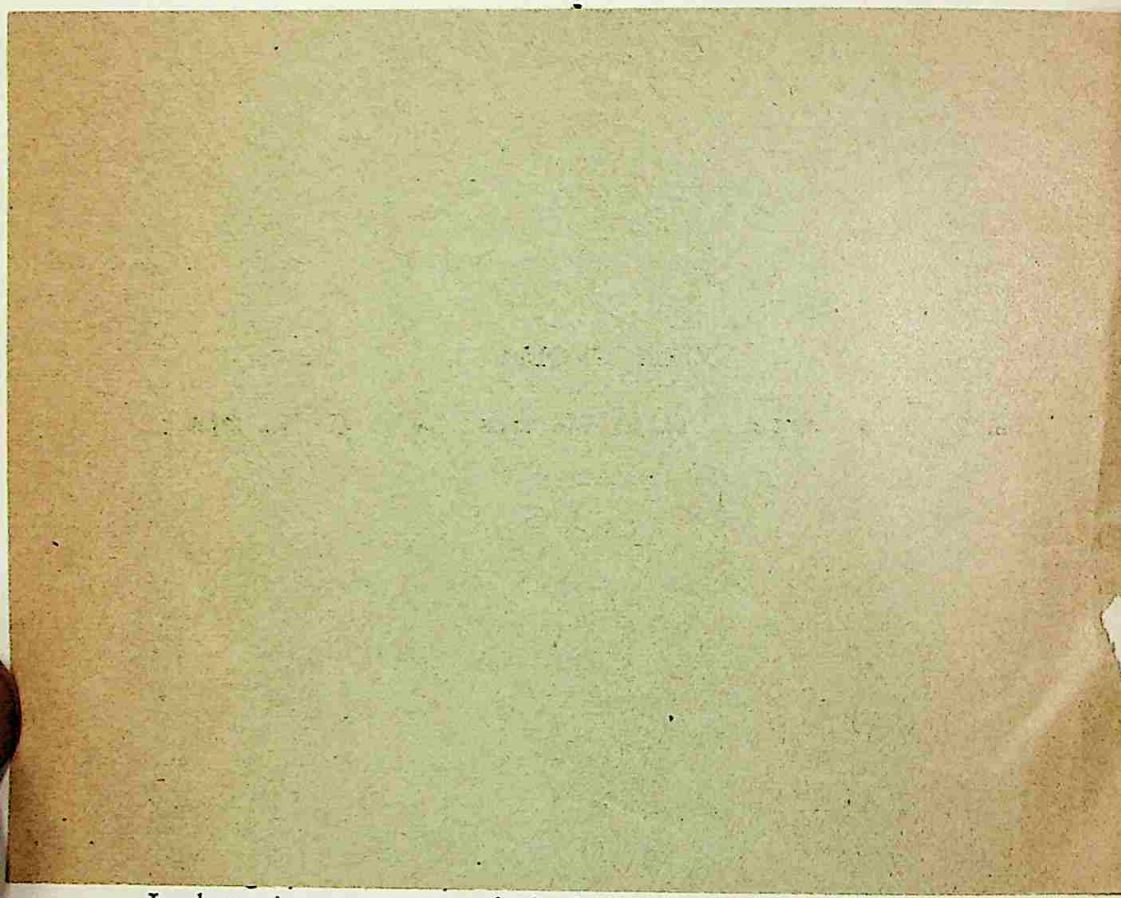
Editor: M. LEVANON, Advocate, Jaffa Rd. Jerusalem

CORRIGENDUM.

Vol. IV, P. 9 *read:* H. C. No. 37/38 for H. C. No. 57/38

Weiss Press, Jerusalem

Application under rule 338 of the Civil Procedure Rules, 1938, for the rehearing of the above appeal which was heard ex-parte in the absence of the Appellant.



In these circumstances we think that sufficient cause has been shown by the Appellant for the failure to appear on the 31st October last, and accordingly we set aside the appellate judgment of the 31st October and we order that the appeal be reheard on condition that the Appellant do pay to the Respondents costs assessed at LP. 25, this to include fees for attendance at the hearing.

Delivered this 13th day of December, 1938.

Senior Puisne Judge.

Current Law Reports

Editor: M. LEVANON, Advocate, Jaffa Rd. Jerusalem

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VOLUME IV.

(1st. July, 1938 — 31st. December, 1938)

Weiss Press. Jerusalem

LIST OF ABBREVIATIONS

AG, Attorney General
Applt, Appellant
CA, Court of Appeal
Co, Company
Coop, Cooperative
CXO, Chief Execution Officer
DC, District Court
Dfdt, Defendant
Eccles, Ecclesiastical
HC, High Court
Jdgt, Judgment
Jurisd., Jurisdiction
LC, Land Court
L Reg., Land Registry — Registrar
LSO, Land Settlement Officer
Mag., Magistrate
MC, Magistrate's Court
OCCP, Ottoman Civil Procedure Code
O. in C., Order-in-Council
Ord., Ordinance
P/A, Power of Attorney
Pal., Palestine
Pltf, Plaintiff
P/n, Promissory Note
PC, Privy Council
Rspdt, Respondent
SC, Supreme Court
XO, Execution Office, — Officer

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o. = others; a. = another.

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