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COLLECTION OF JUDGMENTS

OF

THE COURTS OF PALESTINE

1919 — 1933

INCLUDING
CIVIL AND CRIMINAL JUDGMENTS OF THE PRIVY COUNCIL, COURT OF APPEAL, HIGH COURT, SPECIAL TRIBUNAL, DISTRICT COURT, LAND COURT, CRIMINAL COURTS, ETC.

VOL. V

ARRANGED
ACCORDING TO SUBJECTS
IN ALPHABETICAL AND CHRONOLOGICAL ORDER

WITH
COMPREHENSIVE AND DETAILED INDEX

22033

L. M. Rotenberg—Law Publisher
Tel-Aviv (Palestine)
1935.

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In the High Court of Justice.

(Ex parte)

H.C. No. 48/26.

IN THE APPLICATION OF:

Israel Berchovitch — PETITIONER.

VS

The Chief Execution Officer, Haifa
Abraham Berchovitch
Moshe Berchovich — RESPONDENTS.

Jurisdiction of Religious Court — Rabbinical Court — Claim by heir of estate property not within jurisdiction of Rabbinical Court — Administration of estates.

JUDGMENT.

In the administration of an estate before the Rabbinical Court, a claim was made by one of the heirs of the deceased to ownership of property said to be part of the estate. The Court gave judgment in favour of the Administrators and against the Claimant.

Held that the jurisdiction of the Rabbinical Court in matters of succession did not extend to the decision of a claim of ownership made against the estate.

Ordered that execution of the judgment be stayed.

In the Special Tribunal.

S.T. No. 2/28.

BEFORE:

The Chief Justice, Baker, J. and Sheikh Ismail El-Hafez.

IN THE APPLICATION OF:

Mamur Awqaf of Nablus — PETITIONER.

VS

Saleh El-Hamdan,
Abdel Rahman El-Hamdan — RESPONDENTS.

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Jurisdiction of Religious Courts — Moslem Courts — Proclamation re Courts of 1st November, 1918, replaced by Palestine Order-in-Council, 1922 — Exclusive jurisdiction in matters of personal status of Moslems — Personal status held not to include waqf — Art. 7, Sharia Code of Procedure — Arts. 51, 52, Palestine Order-in-Council, 1922 — Sec. 5, Jurisdiction of Civil and Religious Courts Ordinance, 1925 — Claim that land is waqf — Jurisdiction of Courts to hear action concerning ownership of immovable property.

JUDGMENT OF THE CHIEF JUSTICE.

The Proclamation of 1st November, 1918, to which the counsel for Appellant refers has been replaced by the Palestine Order-in-Council of 1922.

Article 52 of this Order gives the Moslem Religious Courts exclusive jurisdiction in matters of personal status of Moslems in accordance with the provisions of the Law of Procedure of the Moslem Religious Courts of 25th October, 1933.

Personal status is defined in Article 51 and does not include waqf.

Article 52 goes on to say that Moslem Religious Courts shall also have, subject to the provisions of any Ordinance, exclusive jurisdiction in cases of the constitution and internal administration of a waqf constituted for the benefit of Moslems before a Moslem Religious Court.

Now by Section 5 of the Jurisdiction of Civil and Religious Courts Ordinance, 1925, it is provided that every action or other proceeding concerning the ownership or possession of immoveable property shall be decided by a Civil Court notwithstanding any claim by any party or person that the land is waqf.

In this case there is a claim concerning the ownership of immoveable property and the Court by a majority therefore holds the matter is not within the jurisdiction of the Moslem Religious Courts.

JUDGMENT OF MR. JUSTICE BAKER.

I concur.

JUDGMENT OF SHEIKH ISMAIL EL-HAFEZ.

The Majority of the Court rely in their judgment (1) on Article 52 of the Palestine Order-in-Council, 1922, and (2) Article 4 of the Jurisdiction of Civil and Religious Courts Ordinance,

1924. It seems that the Majority are of opinion that both these Articles repeal the provisions of Article 7 of the Sharia Code of Procedure, which law was notified on July 30th, 1919, which Article expressly and conclusively provides that actions relating to raqabe and terms of waqfs are for Sharia Courts. As I am of opinion that the said two Articles do not have the force of repealing the said Article, and do not even conflict with it in any way, it is therefore my duty to expose my views which I support by the following reasons:—

1. Art. 52 is in the Palestine Order-in-Council (constitution). Now it is well known that constitutions and organic laws are not intended to be comprehensive or to contain all the provisions relating to the matters dealt with, but that only general matters and matters of frequent occurrence are mentioned, and it is left to special laws to include the details and other comprehensive provisions. The fact that the Article only contains mention of matters of personal status and the constitution and internal administration of waqfs as being within the jurisdiction of the Sharia Courts does not negative their jurisdiction in actions to raqabe waqfs. If the Article were intended to contain all the matters which are within the jurisdiction of the Sharia Courts it would have been necessary to mention in it several other matters which, it is agreed, are within their jurisdiction, such as a case where both parties are Moslems, and each claims that he constituted certain properties as waqf, but to a different cause. Such a case is, without doubt, within the jurisdiction of the Sharia Courts, although it is not expressly or impliedly provided for in the Article. If the Article were intended to restrict the jurisdiction of the Sharia Courts only to those matters which are therein mentioned, the legislator would have, for example, laid down at the end of the chapter that all provisions contrary to those Articles shall no longer be in force, or would have laid down as follows:—

> "The provisions of Article 7 of the Sharia Code of Procedure shall cease to have effect as from the date of the promulgation of this law."

Such is the rule adopted in laws which are intended to repeal other laws; but the legislator has laid down nothing of this here, and thereby indicated that he does not intend to repeal Article 7 of the Sharia Code of Procedure.

2. The said Article appears in the chapter stating the matters which belong to Religious Courts whether Moslem or non-Moslem,

and by right of arrangement it was restricted to those matters which are common between these Courts equally without regard to those matters which belong to the Moslem Courts. This does not negative the exercise by the Sharia Courts of other jurisdictions and does not negative the fact that there may be other matters, jurisdiction in which, in some forms or phases, would belong to the Sharia Courts and in others to the Civil Courts. Such a case is where title to property has passed to the waqf. Jurisdiction in cases relating to their raqabe belongs to the Sharia Courts, while jurisdiction in cases to their title belongs to the Civil Courts.

3. The wording of the Article:—Moslem Religious Courts alone shall have jurisdiction in matters of personal status, etc., does not grammatically or according to custom mean that their jurisdiction is limited to the matters therein mentioned, but means that these matters are exclusively for the Sharia Courts and no others. Therefore this Article is meant to limit matters of personal status and constitution and internal administration of a waqf, but is not meant to limit the jurisdiction of the Sharia Courts to those matters. It is like when we say: "His Honour the Chief Justice alone shall preside over the Special Tribunal." This does not mean that he may not preside over the Supreme or other Courts; it only means that the presidency of the Special Tribunal is reserved and confined to him and not that his jurisdiction is limited to it.

The above shows that the inclusion of the said Article in the constitution is not intended to circumscribe the jurisdiction of the Sharia Courts or to state the details of such jurisdiction. Moreover, there is nothing in the language or phraseology of the said Article indicating that the jurisdiction of the Sharia Courts is limited to what is mentioned in it. All that can be said is that the matters set out in it are reserved exclusively for the Sharia Courts. I am therefore of opinion that the conclusion arrived at by the Majority of the Court from this Article does not lead to what they decided in their judgment.

As regards Article 4 of the Jurisdiction of Civil and Religious Courts Ordinance, I am of opinion that the interpretation placed on it by the Majority of the Court does not agree with its clear and express provision. The Arabic text of it as given in the Official Gazette is:—

> "The Civil Courts shall decide actions of ownership or possession of immovable property or any pleadings relating

thereto notwithstanding a claim by any party or person that the land is waqf."

The inevitable meaning of this text is that the Civil Courts will decide actions of ownership or possession of immoveable property on any pleadings partaining thereto, and that these Courts shall not be prevented from deciding such actions by a claim that the land is waqf. Whereas the words "the land" are not mentioned earlier in the Article, they should be interpreted to refer to the land of that immoveable property. Therefore the indefinite article "the," prefixed to "land," is instead of the possessive case, and the reading of the Article would be "notwithstanding a claim that land of that property is waqf." By this interpretation alone there can be sense to the Article. Without it no correct meaning can be understood from the Article. If that is so, it is therefore clear that this Article is of the same effect as Article 7 of the Sharia Code of Procedure, which provides: "Sharia Courts shall hear actions to the raqabe and terms of a Waqf with the exception of actions of possession by Ijaratein or Mukata'a" because there would be no meaning to this unless the subject-matter is property originally waqf to which has been attached Ijaratein or Mukata'a. Therefore the provisions of Article 4 of the Jurisdiction of Civil and Religious Courts Ordinance, 1924, is equal to the provisions of Article 7 of the Sharia Code of Procedure and does not repeal it, and thus the meaning of both these Articles is that actions relating to the raqabe and ain of waqf are within the jurisdiction of the Sharia Courts, but that actions relating to the ownership or possession of immovable property are within the jurisdiction of the Civil Courts although such properties or their land were originally waqf.

Whereas this case involves an action relating to the ain and raqabe of a waqf, I am therefore of opinion, in view of the foregoing, that it is not within the jurisdiction of the Civil Courts, but is within the jurisdiction of the Sharia Courts, and I dissent from the judgment of the learned Majority.

Delivered the 16th day of April, 1929.

In the High Court of Justice.

H.C. No. 70/28.

BEFORE:
The Chief Justice, Jarallah, J. and Khayat, J.

IN THE APPLICATION OF:
Sara Yousef Hanna Khasho — PETITIONER.

vs

The Chief Execution Officer, Jerusalem
Manuel Khasho — RESPONDENTS.

Necessity of consent of both parties to jurisdiction of Ecclesiastical Court — Order issued against son to provide maintenance for mother — Art. 54 (ii), Palestine Order-in-Council. 1922.

JUDGMENT.

The Court is satisfied that the consent required by Article 54 (ii) of the Palestine Order-in-Council was given by Respondent, and the Order is therefore made absolute.

Delivered the 18th day of January, 1929.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 15/29.

BEFORE:
The Acting Senior British Judge, Khaldi, J. and Frumkin, J.

IN THE CASE OF:
Wardeh Khayat — APPELLANT.

vs

Sheikh Mahmoud Abdul Razzak Daoudi
Darweesh Daoudi
Astir Assad Khayat
Victoria Yousef Khayat — RESPONDENTS.

Jurisdiction of Religious Court — Moslem Sharia Court — Proof that party is heir — Validity of Certificate of Succession issued by Moslem Sharia Court to non-Moslems — Consent to jurisdiction of Religious Court not obtained in matter of personal status of non-Moslems — Article 52, Palestine Order-in-Council, 1922.

Appeal from the judgment of the Land Court of Jerusalem, dated the 2nd day of January, 1929.

JUDGMENT OF THE LAND COURT OF JERUSALEM.

After consideration it appears that this case is brought for the cancellation of certain Tabu Entries based on a Certificate of Succession given by the Moslem Sharia Court on the 14th March, 1923. This selfsame case was instituted before by the Plaintiff in this Court which decided on the 18th April, 1924, that the Plaintiff should first apply to the Sharia Court for rectification of the distribution set out in the said Certificate of Succession so that she may be accepted as a party to this case when it will be ascertained that she is one of the heirs of Assad El Khayat by whom she claims succession.

The Plaintiff submitted to the said decision and applied to the Moslem Sharia Court in due course for rectification of the distribution. But later on she abandoned pursuing her case before the Moslem Sharia Court and resorted to the Religious Court of the Maronite Community from whom she obtained a Certificate of Succession which she has produced. It is found to be dated the 1st October, 1927, purporting that she is one of the heirs of Assad El Khayat despite the distribution contained in the Certificate of Succession given by the Moslem Sharia Court according to which the estate of Assad Khayat was allotted amongst the persons named therein, in the Tabu office and subsequent to which a certain sale was effected to others.

We will first deal with the question as to whether or not it is possible for us to accept the distribution made by the Religious Court of the Maronite Community, which conflicts with the distribution made by the Moslem Sharia Court which was accepted by the Tabu office in due time and according to which the said office has registered the inherited estate.

It is observed that when the Moslem Sharia Court made this distribution the Maronite Court had no power or jurisdiction to do so and that its jurisdiction to do so was only conferred upon it later by an Order published and promulgated in issue No. 122 of the Official Gazette of 13th August, 1924, more than one year after the Moslem Sharia Court made the said distribution. Furthermore, its jurisdiction in such matters is restricted and is subject to the consent of all the heirs by virtue of Article 54 of

the Palestine Order-in-Council. We see no such consent had taken place. Leaving out of consideration the extent of jurisdiction of the Moslem Sharia Court in matters of distribution of estates of non-Moslem persons under the special provisions of the Palestine Order-in-Council and the Succession Ordinance, 1923, this does not prevent us from showing that the restriction of the jurisdiction of the Moslem Sharia Courts which they had exercised before had only absolutely terminated in accordance with the Succession Ordinance which was promulgated more than 15 days after the emanation of the said distribution from the Moslem Sharia Court, for the distribution by the Sharia Court is dated the 14th March, 1923, and the Succession Ordinance is dated the 1st April, 1923. However this Court after all is not of the opinion that the Ecclesiastical Court is entitled to issue the said distribution which entirely conflicts with the distribution made by the Moslem Sharia Court upon which a certain transaction of sale and conveyance has been based in the Tabu office.

If the Moslem Sharia Court has not competent jurisdiction in such matters then such jurisdiction inevitably belongs to the District Court and not the Maronite Ecclesiastical Court.

Before the Plaintiff produces to us a legal distribution made by a competent Court proving that the Plaintiff is ipso facto an heir of Assad Kayyat, and annulling that made by the Moslem Religious Court, we cannot accept her as a party. It is therefore unanimously decided to dismiss her case and she is at liberty to commence a fresh case when she can produce such distribution.

She is to bear the costs and £P.1 advocate's remuneration to the counsel for Defendants.

Judgment in presence of both parties and appealable.

Delivered the 2nd day of January, 1929.

JUDGMENT.

Service having been proved upon the Respondents upon their failure to appear Appellant requested the Court to try the appeal on its merits which the Court decided to do.

The case was originally brought before the Land Court for the cancellation of certain Tabu entries based on a certificate of succession given by the Moslem Sharia Court on 14th March, 1923. The parties are not Moslems.

Appellant relied upon a Certificate of Succession of the Religious Court of the Maronite Community dated the 1st October, 1927, which was in conflict with the order of succession granted by the Sharia Court.

The question for the lower Court was to decide whether the Sharia Court had power to grant a Certificate of Succession to non-Moslems on the 14th March, 1923, (the date of the said certificates) and if they had not power to invalidate their before mentioned Certificate of Succession and then to consider the Certificate of Succession granted by the Maronite Religious Court of the 1st October, 1927.

The Land Court would appear to have decided that failing the production of a Certificate of Succession overruling the Sharia Court order of succession by some Court other than the Maronite Ecclesiastical Court, the action could not be sustained and dismissed it.

Now it is provided by Article 52 of the Palestine Order-in-Council, 1922, as amended by the Palestine Order-in-Council, 1923, (Bentwich Vol. I page 14) that the Moslem Religious Courts should have exclusive jurisdiction in matters of personal status of Moslems. No provision was enacted enabling them to deal with matters of personal status of non-Moslems, jurisdiction being given by the two subsequent articles to the other Religious Courts.

Accordingly, we are of opinion that the certificate of succession given by the Moslem Sharia Court of the 14th March, 1923, must be held to be invalid.

The judgment of the Land Court is therefore quashed and the case returned for the Land Court to consider the Certificate of Succession of the Maronite Religious Court of the 1st October, 1927, and any other evidence of succession presented to the Court by Appellant.

Costs to be costs in the cause.

Delivered the 9th day of July, 1929.

In the High Court of Justice.

H.C. No. 29/30.

BEFORE:
The Chief Justice, Jarallah, J. and Frumkin, J.

IN THE APPLICATION OF:
Shimon Deutch — PETITIONER.

VS

Chief Execution Officer, Jerusalem,
Khaya Esther Deutch — RESPONDENTS.

Necessity of consent of both parties to jurisdiction of Rabbinical Courts — Matters of personal status under Arts. 53, 65, Palestine Order-in-Council, 1922 — Document containing agreement not to appeal cannot be a consent to jurisdiction — Right to appeal inherent in all cases tried before Rabbinical Court of First Instance.

ORDER.

The Court holds that the document purporting to be a consent by both parties to the jurisdiction of the Rabbinical Court under Articles 53 and 65 of the Palestine Order-in-Council, in a matter of personal status other than those specified in Article 53 (ii) cannot be held to be a consent to such jurisdiction inasmuch as it contains an agreement not to appeal, and a right to appeal is inherent in all cases tried before a Rabbinical Court of First Instance. The Rule Nisi is therefore made absolute with costs.

Delivered the 1st day of May, 1930.

In the High Court of Justice.

H.C. No. 49/32.

BEFORE:
The Senior Puisne Judge and Khayat, J.

IN THE APPLICATION OF:
Issa Turjman
Jiryis Turjman — PETITIONERS.

VS

The Chief Execution Officer, Jerusalem,
Fadwah widow of Elias Turjman — RESPONDENTS.

Jurisdiction of Religious Courts in matters of maintenance of infants — Ecclesiastical Courts — Necessity of consent to jurisdiction — Execution of judgment of Ecclesiastical Court — Jurisdiction of Courts re alimony — "Alimony" interpreted in English sense — Liability of relatives to maintain infants — Application of personal law — Arts. 51-55, Palestine Order-in-Council, 1922 — "Maintenance" defined.

Application for an Order to issue to the Chief Execution Officer, Jerusalem, directing him to show cause why his order dated the 20th May, 1932, should not be set aside.

JUDGMENT.

The Petitioners, Issa and Jiryis Turjman, are seeking to have set aside an order made on the 20th of May, 1932, by the Chief Execution Officer, Jerusalem, for the execution against them of a judgment given in favour of Fadwa, the widow of Elias Turjman, on behalf of her infant children, by the Ecclesiastical Court of the Orthodox Community. Under that judgment, which was delivered on 15th April, 1931, in an action in which Fadwa was Plaintiff and the Petitioners were Defendants, the Petitioners were ordered "to pay 50 mils daily to the minor children of Plaintiff who are the nephews of Defendants". And power was thereby given to the Plaintiff to receive the maintenance and spend it on her minor children.

The Petitioners' objection is based upon two grounds. First that under Articles 51 and 54 (b) of the Palestine Order-in-Council, 1922, the Ecclesiastical Courts have no jurisdiction in matters of maintenance except with the consent of all parties: and secondly that even if the Petitioners are held to have consented to the proceedings before the Ecclesiastical Court, the decision of that Court was merely an award in arbitration proceedings, enforceable, if at all, in accordance with the Arbitration Ordinance, 1926, and was not a judgment which the Chief Execution Officer could order to be executed.

In regard to the first point, the Respondent Fadwa has submitted a copy, certified by the President of the Ecclesiastical Court, of a letter signed by both Petitioners and addressed to him, dated the 15th October, 1931, containing the following paragraph:—

> "I have accepted your judgment at the time only out of pity on my nephews the minors".

It is not contested that the Petitioners appeared before the Ecclesiastical Court and it is not alleged that they raised any objection to the Court's jurisdiction. The Petitioners' first objection therefore fails.

As regards the second point, the Petitioners' argument is based upon the judgment of the Special Tribunal constituted under Article 55 of the Palestine Order-in-Council, 1922, in the case of Alpert vs. the Chief Execution Officer, Jerusalem and Others (Special Tribunal No. 1/28).*)

In his judgment in that case, in which the other members of the Tribunal concurred, the Chief Justice said:—

"The word alimony as we have seen, is used in Section 53 (a) of the Palestine Order-in-Council and it is there enumerated as one of the matters within the exclusive cognizance of a Rabbinical Court, and must, in my opinion, there be interpreted in the sense which it bears in English Law, for there is nothing to show that the legislating authority—in this case His Majesty-in-Council—intended it to be used in any other sense."

The Petitioners' argument is that the same principle must be applied in ascertaining the meaning of the term maintenance in Article 54 of the same Order-in-Council: that in the English Law the maintenance of an infant means an obligation incumbent upon the parents or grand-parents of such infant and upon no other persons and consequently that it is this restricted meaning which must be given to the term maintenance of minors in the Order-in-Council.

This argument might be of substance if it were the fact that in English Law the term maintenance were applicable solely to a liability imposed upon the parents and grand-parents of a minor for his support. Such, however, is not the position.

Apart from its special meaning of the maintenance of an action, the term maintenance in English Law is one of wide application relating not only to persons but also to "corporeal things and documents". See Strouds Judicial Dictionary, 2nd Edition, p. 1139.

Thus the term maintenance of minors means simply provision for their support.

It is true that English Law imposes no liability upon an

*) See ante, p. 126.

uncle for the maintenance of his nephews, but that is not a question with which we are concerned.

It is only for the purpose of ascertaining the meaning in which the term maintenance is used in the Order-in-Council that we have to refer to English Law.

Once the meaning of the term is ascertained, the Law to be applied to the matter so defined is not that in force in England, but the Law of the Community of which the minors are members.

The Petition must be dismissed.

Delivered the 22nd day of November, 1932.

In the High Court of Justice.

H.C. No. 55/33.

BEFORE:

The Senior Puisne Judge and Khaldi, J.

IN THE APPLICATION OF:

Elias Jahshan — PETITIONER.

VS

Chief Execution Officer
in the District Court of Jerusalem
Farideh Daoud Atallah — RESPONDENTS.

Constitution of Greek Orthodox Ecclesiastical Court — Execution of judgment of Religious Court — Judgment attacked on ground of improper constitution of Court — Art. 333, Byzantine Law.

ORDER.

The Petitioner, Elias Jahshan, is seeking to have set aside an Order made by the Chief Execution Officer on the 1st August, 1933, granting execution of a judgment of the Orthodox Ecclesiastical Court of Appeal of Jerusalem, given on the 12th March, 1933 (Eastern), in an appeal to which the parties were the Petitioner and his wife, the present Respondent, Farideh Bint Daoud Atallah.

The ground of the petition is that the Ecclesiastical Court by which the judgment was given was not duly constituted in accordance with the Law of the Orthodox Church: and the Petitioner relies upon Article 333 of the Byzantine Law, as compiled and published by order of the Holy Synod in Constantinople in

1901, whereby the Holy Synod of the Patriarchate is constituted a Court of Appeal.

Article 333, however, forms part of Chapter 2 of Title XVII, the chapter being headed "In particular as to the Patriarchal Throne of Constantinople": and the Article is applicable only in that Patriarchate.

Chapter 4, headed "Of the composition and quorum of the Ecclesiastical and Mixed Ecclesiastical Courts of the remaining three Orthodox Patriarchates," would appear to be applicable to the Patriarchate of Jerusalem; and in that Chapter, Article 344 provides "The Courts of these are constituted conformably to their special regulations and customs."

There is no evidence before us that the Court which gave the judgment, dated the 12th March, 1933, was not constituted conformably to the special regulations and customs of the Patriarchate of Jerusalem.

The petition is therefore dismissed.

Delivered the 15th day of December, 1933.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 163/33.

BEFORE:

The Senior Puisne Judge, Baker, J. and Khayat, J.

IN THE CASE OF:

Joseph Dienfeld — APPELLANT, CROSS-RESPONDENT.

vs

Sara Dienfeld — RESPONDENT, CROSS-APPELLANT.

Jurisdiction of Rabbinical Court — Petitions by foreigner for custody of child, maintenance, alimony and separation — Onus of proof of submission to jurisdiction — Improper assumption of jurisdiction by Ecclesiastical Court — Record of proceedings not kept by Rabbinical Court of First Instance — Arts. 59, 65, Palestine Order-in-Council, 1922 — Exercise by District Court of jurisdiction in accordance with personal law of parties at date when action commenced — Two actions heard together where conducive to speedy administration of justice — Foreigners to consent in writing to exercise of jurisdiction by Rabbinical Court.

INTERLOCUTORY JUDGMENT OF DISTRICT COURT.

Petitioner Mrs. Sara Dienfeld, an American Citizen, is petitioning this Court for an Order against her husband Joseph Dienfeld (1) granting her custody of her minor children Abraham Yehezkel Dienfeld and Rachel Dienfeld and (2) adjudging her husband to pay Petitioner £P.8 per month on account of the maintenance of the said minors and a further sum of £P.11 (on account of tuition fees and necessaries) expended by Petitioner on the minor Rachel.

At the first hearing of the petition on the 9th November, Respondent challenged the jurisdiction of this Court on the ground that before lodging her petition the Petitioner had brought an action in the Rabbinical Court against her husband, the Rabbinical Court had decided the matters in dispute between husband and wife and had pronounced a judgment the terms of which did not apparently please Petitioner. Petitioner denied having instituted proceedings in the Rabbinical Court and declared that it was Respondent who instituted proceedings in the Rabbinical Court against her, obtained a judgment by default and tried to execute the judgment. In their judgment by default the Rabbinical Court had thought fit to state that she was not a religious woman; she resented the accusation and went to see Rabbi Frank, qua Rabbi but not qua judge of a Rabbinical Court. She further declared that she made it quite clear to Rabbi Frank she did not recognise the Rabbinical Court as having jurisdiction over her and that the Rabbinical Court had no authority to give the second judgment which was produced by the Respondent in this Court.

After hearing the advocates of both parties at length I gave an interlocutory judgment in which I held that the onus of proving that Petitioner did submit to the jurisdiction of the Rabbinical Court was in the first place on the Respondent. I further held that the certified true copies of the judgment of the Rabbinical Court produced by Respondent did when read together raise a rebuttable presumption that Petitioner did submit to the jurisdiction of the Rabbinical Court. I gave the Petitioner an opportunity to produce evidence to rebut the presumption and I gave Respondent an opportunity to produce further evidence if he so desired, in support of his contention that Petitioner did submit to the jurisdiction of the Rabbinical Court.

Petitioner gave evidence and denied that she consented to the jurisdiction of the Rabbinical Court.

Rabbi Frank was called by the Respondent; he insisted that Petitioner did consent to the jurisdiction of the Court over which he presided. At the conclusion of Rabbi Frank's evidence Petitioner's advocate for the first time argued that the Beth Din, presided over by Rabbi Frank, was not a competent Court. The question raised at the eleventh hour being of considerable importance both advocates were allowed to submit their arguments on the point in writing.

Two questions have therefore been put before me:—

1. Did Petitioner submit to the jurisdiction of the Rabbinical Court?

2. Was the Beth Din presided over by Rabbi Frank a competent Court?

I will deal with the first question. I am faced with the evidence of Rabbi Frank and Mrs. Dienfeld.

The position is a delicate one: I do not think that Rabbi Frank would tell a deliberate lie in Court. I believe he considers that Mrs. Dienfeld did submit to the jurisdiction of the Beth Din of her own free will or at any rate that he persuaded her to do so, and that in either case the Court over which he presided had jurisdiction. On the other hand I am not convicted that Mrs. Dienfeld did ever intend to submit to the jurisdiction of the Rabbinical Court, and I hold that the Respondent has not discharged the onus on him to satisfy me that the Petitioner did submit to the jurisdiction of the Rabbinical Court. It follows that I need not decide the second question: as to whether the Beth Din presided over by Rabbi Frank was a competent Court. If it was not a Competent Court the Rabbinical authorities would be well advised to put their house in order.

I feel that the time has now arrived when I should openly criticise some of the Ecclesiastical Courts. More than one case from different Religious Courts has come to my notice in which it is abundantly clear that not only has the particular Ecclesiastical Court assumed jurisdiction illegally and improperly, but having wrongly assumed jurisdiction has proceeded to give a very questionable judgment—in one case a patently dishonest judgment.

I am glad to say that in the case before me I could be justified at most in thinking that the Rabbinical Court has snatched up a dispute between foreigners.

The Rabbinical Court has only itself to blame for my finding in this case.

The Respondent was a well known American Citizen; (apparently he wishes to discontinue to be an American Citizen).

Rabbi Frank stated Mr. Dienfeld said he was no longer an American subject so we considered there was no need for the parties to sign a "submission". Further he stated: "I do not remember whether Mrs. Dienfeld was requested to sign a submission—perhaps yes—she did not sign a submission".

Mrs. Dienfeld was not asked to lodge a written complaint.

No record of the proceedings was taken down in writing.

It is not within my province to lay down rules of procedure in an Ecclesiastical Court; but if the jurisdiction of a Court is dependent upon the consent of all the parties, the Court should in some form or other obtain a consent in writing to its jurisdiction before it enters into the merits of a case. I should imagine that the Ecclesiastical Court of Appeal would be in a stronger position to do justice if a record of the proceedings in the Court of First Instance were available if required.

Having held that I am not satisfied that Mrs. Dienfeld did submit to the jurisdiction of the Rabbinical Court it follows that I have jurisdiction to hear her petition which will be heard on 21st April, 1933, when both parties should have in attendance any witnesses they wish to call.

Delivered the 3rd day of April, 1933.

JUDGMENT.

The judgment which gives rise to this appeal was delivered by the District Court of Jerusalem constituted by the British President sitting alone under Article 64 of the Palestine Order-in-Council, 1922, in respect of two actions brought by the present Respondent, Sara Dienfeld (hereinafter described as the "Respondent") against the present Appellant, Joseph Dienfeld, (hereinafter described as the "Appellant").

In the first of these actions, filed on 4th November, 1932, the Respondent claimed:—

(1) the custody of Abraham Yehezkiel Dienfeld and Rachel Dienfeld the minor children of the Appellant and Respondent;

(2) a sum of £P.8 a month as maintenance of the said minor children; and

(3) a sum of £P.11 expended by the Respondent for tuition and necessaries for the said Rachel Dienfeld.

In the second action, filed on the 23rd June, 1933, the Respondent claimed:—

(1) an order of separation from the Appellant; and

(2) £P.4 a month alimony. Both permanently and pendente lite.

The District Court ordered that these actions be heard together and on the 22nd August, 1933, made the following order in respect of them:—

(a) The Petitioner Sara Dienfeld shall no longer be bound to cohabit with the Respondent Joseph Dienfeld and shall be entitled to live separate and apart from him.

(b) She shall be given the custody of the daughter Rachel Dienfeld for whose maintenance the Respondent is hereby ordered to pay the sum of £P.2 per mensem from the date of the institution of this action, i.e. 1st November, 1932.

(c) The Respondent is further ordered to pay the sum of £P.4 per mensem from the date of the institution of the action for judicial separation, i.e 22nd June, 1933, for the support of the Petitioner during such time as she continues to live apart from him, with costs and advocates' fees of £P.2.—

(d) The Respondent is given the custody of the son Abraham Yehezkel.

(e) It is further ordered that Petitioner and Respondent are to allow one another reasonable access to the children at all times during the continuance of this order, and that at least four times during the year they are to provide such facilities as are necessary to enable the two children to meet together.

Wilful failure on either of their part to obey terms of this order will entitle the other party to apply to the Court for the rescission of the whole order.

Against this judgment, the Appellant has appealed and the Respondent has filed a cross-appeal.

The first ground of appeal put forward by the Appellant is that the Court had no jurisdiction to hear these actions as there was no evidence before the Court that the Appellant was a foreigner within the meaning of Article 59 of the Palestine Order-in-Council, 1922.

It is, however, admitted that the Appellant was at one time naturalised in the United States of America, and hence it was for the Appellant to prove that he has, as he alleged, lost his American citizenship.

There is no evidence before the Court to that effect, and the objection therefore fails.

The Appellant also challenged the jurisdiction of the District Court on the ground that both parties had consented to the matters at issue between them being tried by the Religious Courts by virtue of Article 65 of the Palestine Order-in-Council 1922: and that the Rabbinical Court had in fact heard the case and had given judgment thereon. The Appellant does not suggest that the Respondent ever signed any written submission, but maintains that the Respondent's conduct clearly showed that she submitted to the jurisdiction of the Rabbinical Court.

This question was argued at length before the District Court which, after hearing the evidence of the Respondent and of Rabbi Frank, one of the Rabbis by whom the judgment of the Rabbinical Court was given, was not satisfied that the Respondent had submitted to the jurisdiction of that Court.

From the evidence before the District Court, it appears that the Appellant applied to the Rabbinical Court for a decree of separation from the Respondent. His application was heard in the absence of the Respondent and decree of separation was pronounced in default. No copy of this decree is before the Court, though it would appear from the judgment dated 3rd April, 1933, that a copy was produced in the District Court.

Subsequently, the Respondent applied to the Rabbis to have this decree set aside. The Respondent's statement, which the District Court appears to have accepted, was that she applied to the Rabbis as Rabbis and not as a Court. In consequence of her application she was summoned to and attended several audiences by the Rabbis at which the Appellant was also present and eventually a Rabbinical Decree was issued, dated the 26th Elul, 5692. A copy of this decree is in evidence and the translation begins as follows;—

> "In the action before us between the representative of Mr. Joseph Dienfeld and his wife Sara Dienfeld regarding her claim against him for the payment of alimony and maintenance of the child Yehezkel and the daughter Rachel, the said Mr. Joseph Dienfeld replied that he would be willing to have the chidren in his house in order to bring them up according to Jewish rites. Plaintiff said that her husband, owing to his age, is not capable of bringing up small children, and she accordingly asks that he do pay a substantial sum for their maintenance."

The decree directs that the son shall be sent to an Orthodox Institution; and that the father (the Appellant) shall pay to the mother (the Respondent) £P.3 per mensem for the maintenance of the daughter, so long as the father does not take her to an appropriate institution to be brought up.

The District Court held that:—

> "the certified true copies of the judgments of the Rabbinical Court (Beth Din) produced did, when read together, raise a rebuttable presumption that the Petitioner (the present Respondent) did submit to the jurisdiction of the Rabbinical Court (Beth Din)"

and gave the Petitioner an opportunity to produce evidence to rebut the presumption.

So long, however, as the decree of the 26th Elul, 5692, has not been set aside by an Appellate Court, it appears to us to afford conclusive proof that the Respondent did apply for an order for payment of alimony and maintenance; and she must be held to have known that such an order could only be made by a Court, and could not be made by Rabbis as Rabbis.

Without reference, therefore, to the evidence given by Rabbi Frank, we must hold that the Respondent did submit to the jurisdiction of the Rabbinical Court by which the decree was issued.

Provided, therefore, that the Rabbinical Court before which the parties appeared was competent to determine the matters brought before it, the District Court has no jurisdiction with regard to these matters.

The question of the competence of the Rabbinical Court was raised before the District Court, but no decision was given thereon in view of the District Court's finding that there had never

been a valid submission by the Respondent; and consequently this question has not been raised before us, and remains for determination by the District Court.

As regards any claims which the District Court may hold that the Rabbinical Court was incompetent to decide, or which were not submitted to that Court, the District Court must exercise jurisdiction in accordance with the personal law of the parties at the date when action was brought, that is to say, the law of the State in which the Appellant was then naturalised: and before such jurisdiction can be exercised, evidence as to the law of such State applicable to the matters in dispute must be furnished.

The Appellant has also raised the objection that the District Court had no power to hear the two actions together and to give a single judgment in respect of them. Where, however, as in the present case, the actions are between the same parties in respect of claims which might have been included in a single action, and raise issues some of which are common to both actions, we know of no rule preventing the Court from hearing the two actions together, if that course, in the opinion of the Court, is conducive to the speedy administration of justice.

The Respondent has also appealed against the judgment of the District Court in so far as it rejects her claim to custody of her son. To this claim the ruling already given will also apply.

The judgment of the District Court is set aside and the case remitted for completion in accordance with this judgment.

Costs will follow the event.

It is to be observed that among the matters mentioned in the Decree of 26th Elul, 5692, as having been brought before the Rabbinical Court by the Respondent was a claim for alimony, but no decision upon such claim is included in the Decree, nor is any reason stated for excluding this claim from the operation of the Decree.

We think it also desirable to observe that the difficulties of this case have arisen largely from the procedure of the Rabbinical Court, where, as appears from the evidence of the presiding Judge, Rabbi Frank, no record is taken of the proceedings.

In a Court, the decress of which are subject to appeal, this is clearly an unsatisfactory state of affairs; and the question of procedure in Rabbinical Courts of First Instance calls in our view, for the careful consideration of the Rabbinical authorities.

In particular, it seems to us highly desirable that before any matter of personal status affecting a foreigner other than a Moslem is tried by the Court of any Religious Community under Article 65 of the Palestine Order-in-Council, 1922, the fact that such Court can only exercise jurisdiction with the consent of the foreigner shall be explained to him and that he shall sign a written consent to the exercise of such jurisdiciction.

Delivered the 27th day of February, 1935.

ROAD TRANSPORT.

In the High Court of Justice.

H.C. No. 15/31.

BEFORE:

The Chief Justice and Khaldi, J.

IN THE APPLICATION OF:

Kiriath Anavim, Agricultural Co-operative Society Ltd. — PETITIONERS.

vs

The Commandant of Police — RESPONDENT.

Exemption from payment of licence fee for vehicle — Application for order against Commandant of Police — Section 11 (3), Road Transport Ordinance, 1929.

ORDER.

Subsection 11 (3) of the Road Transport Ordinance, No. 23 of 1929, exempts from payment of a licence fee a vehicle which is constructed and used solely.—

(a) for the purpose of agriculture, or

(b) for the carriage:—

(1) of the produce of, or

(2) of articles required for the use of, agricultural land.

It is admitted in paragraph 3 of the Petitioners' application that the REO car had seats inside which it is stated have now been removed.

This being so, whether the seats are still in the car or not it clearly is capable of holding, and has held, seats for persons to sit on. It clearly therefore cannot be said to be either constructed, or used solely, for the purpose of agriculture, or for the carriage of the produce of, or of articles required for, the use of agricultural land.

So too among the purposes for which the Graham car is used the Petitioners expressly state in paragraph 5 (3):

> "The transport of members of the farm to their places of work in the fields and the other places where they have to be, in connection with the carrying out of the agricultural work of their farm."

Members of the farm are clearly not "the produce of agricultural land" nor are they "articles required for the use" of it as contemplated in the section in prescribing the uses other than the purpose of agriculture to which a vehicle can be put while still escaping liability to a licence fee.

The Petition is dismissed with costs.

Delivered the 22nd day of April, 1931.

SALE OF GOODS.

SEE ALSO CONTRACT.

In the Supreme Court sitting as a Court of Appeal.

C.A. of 1922.

BEFORE:

Corrie, J., Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Rushdi El Shawa
and Others — APPELLANTS.

vs

Eliezer Drubin
Barouch Weiner — RESPONDENTS.

Contract to deliver 1000 tons of tibben — Proof that goods sold are not in accordance with contract — Action to cancel contract and for return of notes given thereunder — Damages for breach of contract limited to loss of profits — Objection to experts — Irregularity of procedure not occasioning miscarriage of justice — Article 344, Mejelle.

Appeal from the judgment of the District Court of Jaffa in Civil Action No. 233/21, and judgment number 64/22.

JUDGMENT OF THE DISTRICT COURT.

A contract was made on 17th August, 1921, between the Defendant Rushdi Eff. Shawa of the one part and the Plaintff Eliezer Drubin of the other part, whereby the former agreed to supply the latter 1000 tons of tibben as therein described at the price of 140 P.T. per ton and on account of the purchase money Defendant Shawa received 2 promissory notes for £.350 and £.500 respectively. It appears that Plaintiff Drubin had a contract with the Army for the supply of tibben and it was in order to fulfil this contract that he made the contract with the Defendant Shawa. On 15th and 17th October, 1921, Defendant Shawa, delivered at Gaza to Weiner, agent of Plaintiff Drubin, 30 wagons of tibben which Weiner accepted and despatched to Ludd where it was refused by the Army Authorities as not being in accordance with the contract between them and the Plaintiff Drubin. A further delivery of 890 sacks of tibben was made to Weiner which he accepted on Plaintiff Drubin's behalf and for which he gave a receipt.

As a consequence of the action of the Army Authorities Plaintiff Drubin refused to take delivery of any further tibben, and on 17th November, 1921, he warned Defendant Shawa through the Notary Public that the tibben was not in accordance with the contract and subsequently he brought this action claiming cancellation of the contract, the return of the 2 promissory notes, 2594 sacks alleged to have been handed to Defendant Shawa, or their value and £.1150 damages.

The Defendant Shawa claims that the tibben was in accordance with the contract between him and Drubin and that Plaintiff Drubin should be compelled to take delivery of the balance of the 1000 tons now found at Gaza or pay its value. The point at issue between the parties is whether or not the tibben is in accordance with the contract.

A commission of experts presided over by Major Nathan, Agricultural Inspector, was sent to Gaza to examine the tibben. The experts subsequently gave verbal evidence as a result of which the Court has no difficulty in coming to the conclusion that the tibben was not in accordance with the contract.

The Plaintiff Drubin is therefore entitled to claim the cancellation of the contract and the return of the purchase price paid on account less the price of 30 wagons and 890 sacks accepted by him though his agent Weiner.

With regard to the claim for 2594 sacks Plaintiff Drubin has been unable to prove their delivery to Defendant Shawa and his claim in that respect fails.

There remains the claim for damages. The Court holds that the non-performance of the contract on the part of the Defendant Shawa has not been due to bad faith consequently by the combined effect of Articles 109 and 110 of the Code of Civil Procedure. Plaintiff Drubin is only entitled to claim the profits of which he may have been deprived. If the Plaintiff Drubin has such a claim he can enforce it by a separate action.

There will be judgment for the Plaintiff Drubin against the Defendant Shawa.

(1) For the cancellation of the contract.

(2) For the sum of P.T.63440 being the value of the two promissory notes less the value of the tibben accepted with interest thereon at 9% from the date of the warning, viz: 7th November, 1921.

Judgment appealable. Dated the 13th day of March, 1922. The other Defendants are dismissed from the case.

JUDGMENT OF THE COURT OF APPEAL.

The Court holds:—

(1) That in view of the fact that experts to examine the tibben were appointed in the presence of the Appellants, they cannot now reject the appointment.

(2) That the procedure of the District Court in giving a final judgment after hearing the expert witnesses and without hearing the Appellants after the evidence given by them was irregular. But that such irregularity has not occasioned any miscarriage of justice.

(3) That the decision of the Court that the quality of the tibben did not comply with the contract between the parties, was in accordance with the evidence before the Court.

(4) That Article 344 of the Mejelle does not apply, as the Respondent never disposed of the tibben of which he refused to take delivery.

The Court, therefore, by a majority dismisses the appeal

with costs, by a majority judgment from which Ali Effendi dissents.

Delivered in presence the 19th day of October, 1922.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 157/22.

BEFORE:

Corrie, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

Messrs. Elyashar — APPELLANTS.

vs

Goldstein Brothers — RESPONDENTS.

Contract for sale of goods — Breach of contract by purchaser — Rule to establish measure of damages for breach of contract for sale of goods — Right of vendor to resell the goods where purchaser refuses to take delivery.

JUDGMENT.

This action arises out of a contract for the sale to the Appellants, Messrs. Elyashar, by the Respondents Goldstein Bros., on commission of 25 tons of sugar at the price of LE.23.10.0 Sterling per ton of 2240 lbs., but of which LE.125 was paid on delivery of the bill of lading at Alexandria.

The purchase was never completed, and the District Court has found as a fact that failure to complete was due to the default of the Appellants in payment of the balance of the purchase money.

On 21st October, 1921, the Respondents wrote to the Appellants calling upon them to take delivery of the sugar within 24 hours, otherwise they would hold the Appellants responsible for any difference (in price). The Appellants did not comply with this letter. They have alleged in this Court that in fact the contract was renewed by verbal agreement in November. In the absence of evidence to prove this renewal they have administered an oath to Respondent Maurice Goldstein that such was not the case and he has duly taken the oath. We therefore hold that there was no renewal of the contract.

In November Respondents resold the sugar. The Appellants claim that as the sugar had been sold to them, the Respondents

had no right to resell and they claim repayment in full of the LE.125 deposit.

The Respondents having sold at a loss, claim that the amount of such loss should be set off against the LE.125. We hold that on the expiry of the period of 24 hours given by the Respondents letter of 21st October, they were entitled to resell the sugar; and that any loss occasioned by their so doing must be borne by the Appellants.

If the price of sugar on the 22nd October was higher than that for which the Respondent actually sold, the Appellants are not responsible for the further loss sustained by the Respondents.

If on the other hand the Respondents sold for a price higher than that of the 22nd October, the Appellants are only liable for the loss actually sustained by the Repondents that is, the difference between the contract price and that for which the Respondents re-sold. In any case Respondents are entitled to their commission of 2% on the contract price.

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

1. The Court will ascertain the price for which the sugar could have been sold CIF Port Said on the 22nd October.

2. The difference between the contract price and such last mentioned price, or the price for which the sugar was actually resold, whichever of the two may be the greater, together with 2% commission on the contract price, is to be deducted from the LE.125 deposit by the Appellants, and judgment will be given for them for balance.

Delivered the 1st day of October, 1925.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 149/26.

BEFORE:
The Senior British Judge, Baker, J. and Frumkin, J.

IN THE CASE OF:

George Afenduli — APPELLANT.

vs

Jud Sweidan — RESPONDENT.

Contract for sale of goods — Documents of title transmitted to bank — Refusal of purchaser to clear goods from Customs — Goods sold by Customs Authorities — Measure of damages for breach of contract — Repudiation of contract by Notarial Notice.

Appeal from the judgment of the District Court of Haifa dated 10th July, 1925.

JUDGMENT.

The Appellant in this case claimed £P.990 sterling the price of sugar agreed to be sold to the Respondent. The sugar was despatched by the Appellant to Haifa, and the documents of title were transmitted to Anglo-Palestine Co. to be delivered to the Respondent upon payment of the agreed price. The Respondent, however refused to take delivery on the ground that the sugar supplied was not of the kind contracted for. The sugar remained in the Bonded Warehouse of Haifa and eventually was sold by the Customs Authorities. The amount realised £P.669.949 was paid to the Anglo-Palestine Co. to the account of the Appellant who accordingly has reduced his claim by that amount.

We are unable to accept the Respondent's argument that the Appellant by reducing his claim has acted in a manner inconsistent with his original claim and we have therefore to deal with the merits of the case.

The Respondent alleges that the contract was for the supply of Czechoslovak sugar although this was not stated in the contract which contains the provision "brand at the discretion of the seller".

We are disposed to think that the wording of the contract is conclusive but even if this were not so, the Respondent has altogether failed to satisfy us that prior to signing the contract there were any negotiations which could bind the Appellant to supply Czechoslovak sugar. We therefore think that the Appellant is entitled to damages for breach of contract.

The only question that remains therefore is that of the measure of damages.

Under the agreement between the parties the sugar was to be delivered at Haifa in 3 consignments in January, February, and March, 1925, respectively. On 5th February, 1925, after the first consignment had reached Haifa but before the arrival of the second consignment, the Respondent served a Notarial Notice upon the

Appellant's agent repudiating the contract. Upon receipt of that notice the Appellant was free from the contractual obligation to deliver the sugar, to the Respondent.

We hold that he should have disposed of the sugar for the best price reasonably obtainable and that the measure of damages to which he is entitled is the amount if any by which the price thus obtainable fell short of the contract price.

The Court must therefore ascertain:

(a) The price C.I.F. Haifa obtainable in Haifa for 15 tons of Hungarian sugar on the 5th on February, 1925.

(b) The price C.I.F. Haifa obtainable in Haifa for 15 tons of Czechoslovak sugar on the date of arrival at Haifa of the second consignment in February, 1925.

(c) The price C.I.F. Haifa obtainable in Haifa for 15 tons of Czechoslovak sugar on the date of arrival of the third consignment in March, 1925.

The amount, if any, by which the total of these sums falls short of the contract price of L.990 sterling is the measure of damages to which the Appellant is entitled. In giving judgment, regard must be had to the fact that £P.667.949 is held by the Anglo-Palestine Co. to the order of the Appellant.

The judgment of the District Court is set aside and the case remitted to be completed in accordance with this judgment and fresh judgment given. The costs of the appeal are to be paid by the Respondent.

Delivered the 21st day of March, 1929.

In the District Court of Jaffa.

C.D.C. Ja. No. 416/26.

BEFORE:

Copland, J. and Mani, J.

IN THE CASE OF:

The Phoenix Co. PLAINTIFF.

vs

J. Novovolsky DEFENDANT.

BIRZEIT UNIVERSITY
LAW CENTER / LIBRARY

Contract for sale of goods—Refusal by purchaser to take delivery—Plea by purchaser of incapacity to contract — Defence of insanity held invalid — Articles 980, 990, Mejelle.

JUDGMENT.

I do not think that the Defendant's plea is of any avail, even if he can prove that Defendant was incapable because by Article 900 of the Mejelle he would even then be liable to make compensation for the damage caused to Plaintiff.

Defendant has given an order by which goods were sent from Europe to Jaffa. These goods are lying in the Bonded Stores unpaid and undoubtedly Plaintiffs have suffered damage.

Defendant was served with a Notarial Notice, and no reply was made to it.

No guardian has been appointed which should have been done if Defendant is incapable of transacting business. But even in the hospital, the business has been carried on still under his name.

No notice has been published in papers warning people not to deal with him, and this defence of insanity is raised for the first time in Court today.

Article 980 of the Mejelle says that acts done during convalescence are valid. Defendant had been discharged from hospital, he was allowed to go about, to visit his shop and he cannot now be allowed to raise this plea.

It would impose an impossible restraint on commercial dealings if vendors had in every case, before supplying goods to order, to inquire into the mental capacity to contract of the purchasers.

Judgment must therefore be entered for Plaintiffs, for the amount claimed with interest from date of notice with costs and £.3 advocate's fees.

Delivered the 22nd day of November, 1926.

In the District Court of Haifa sitting as a Court of Appeal.

C.A.D.C. Ha. No. 75/27.

IN THE CASE OF:

Spinney's Ltd. — APPELLANT.

VS

Haj Ahmad Mustafa Irani
Ralimi bint Abdel Ghani Bardini — RESPONDENTS.

Essentials of contract for sale of goods — Form of sale gone through for purpose of defeating creditors — No intention that legal property in goods should pass to purchaser — Action appealed from Magistrate retried by District Court on appeal.

JUDGMENT.

In this case the facts are as follows:

A sum of money was owing to Messrs. Spinney's Ltd. and an attachment was levied upon the property found in the house of the debtor. No objection as to the attachment on this property was raised at the time the property was attached. It was only later that the female Respondent came forward with an alleged deed of sale which stated that the property seized has become her property by purchase at some date prior to the attachment. The Civil Magistrate gave a judgment in favour of the female Respondent dated 29th April, 1927, and the District Court on appeal ordered a re-trial before itself.

In every sale there must be two factors, one, the intention of the parties, and two, the form in which the sale is transacted. In this case the formalities of the sale appear to have been observed and the question that really remains for us to decide is what was the real intention at the back of the minds of the female Respondent and her husband, the debtor. Did she intend to take the ownership in the goods mentioned in the deed of sale? Did he intend to deprive himself from the ownership in the goods?

In our opinion there were no such intentions in the minds of the female Respondent and her husband. We are of opinion that what happened was that a form of sale was gone through for the mere purpose of defeating creditors and that in reality the property never passed and never was intended to pass. If such was the state of mind existing in the parties at the time that the

bill of sale was executed, there was no genuine sale at all and the mere trimmings of a written document, stamps, witnesses' signatures, and what not do not make a genuine sale of what was never a sale at all. We do not believe the evidence of the judgment debtor as to the existence of a genuine intention to purchase and sell.

Under these circumstances, the female-Respondent's claim to be the owner of the property in dispute, is dismissed with costs and advocate's fees of three pounds. The Magistrate's judgment is quashed and the attachment confirmed.

Final judgment in presence.

Delivered the 12th day of January, 1929.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 99/29.

BEFORE:

Baker, J., Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Ibrahim Abu Ghali — APPELLANT.

vs

Michel Agelasto — RESPONDENT.

Contract for sale of goods — Refusal by purchaser to take delivery of goods ordered — Measure of damages for breach of contract.

Appeal from the judgment of the District Court of Jaffa dated 15th July, 1929.

JUDGMENT.

The judgment of the Jaffa District Court must be affirmed with the exception of the measure of damages which must be amended and estimated in accordance with the rule laid down in the case of George Afenduli' vs Jud Sweidan (Civil Appeal No. 149/26)*.

In accordance with this ruling, the Respondent should have disposed of the flour for the best price reasonably obtainable when the contractual relations between the parties ceased, namely, 24

*) see ante, p. 1627.

hours after service of the Notarial Notice of the 9th June, 1929. (viz: 10th June, 1929). Therefore the measure of damages to which Respondent is entitled is the amount, if any, by which the price which could have been obtained by sale in Jaffa on the 10th June, 1929, fell short of the contract price.

The case must therefore be returned for the District Court to ascertain the price obtainable in Jaffa for French flour quality S.B.D. mark IV, on the 10th June, 1929.

The price, if any by which this sum falls short of the contract price. i.e. Francs 35456, equal to £P.270.993 mils, is the measure of damages to which the Respondent is entitled.

The judgment in respect of the measure of damages is set aside and the case remitted to be completed in accordance with the above judgment and a fresh judgment given.

Costs of this appeal to be paid by both parties in equal shares.

Delivered the 3rd day of February, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 28/30.

BEFORE:

The Acting Chief Justice, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Yusif Saigh and Brothers — APPELLANTS.

vs

Iskander Braz
Wolf Braz — RESPONDENTS.

Agreement to buy goods through commission agent — Claim for compensation — Refusal to take delivery of goods differing from those contracted for — Parties heard as witnesses—Letters produced in evidence — Silence as consent — Claim for storage is claim for compensation and must be preceded by Notarial Notice.

JUDGMENT OF THE DISTRICT COURT.

Plaintiffs Yusif Saigh and Brothers, represented by Advocate Rushdi Shawa, sued Defendants Iskander Braz and Wolf Braz claiming that:

Defendant (1) in his capacity as Defendant (2) 's agent, had purchased 10 wagons of barley from Plaintiffs, of which 5 wagons were bought at the rate of 167½ piastres per kantar while the other 5 wagons were purchased at 165 piastres per kantar. That Plaintiffs acted as commission agents for the Defendants in the transaction and paid the total price in cash. That out of these 10 wagons 4 were consigned to Defendant (2), who paid them of the price thereof £P.250. That the Defendants having refused to take delivery of the remaining 6 wagons, Plaintiffs were thus compelled to take themselves delivery of the same, which weighed 210 kantars, and they have them stored in a depot. Plaintiffs applied for orders to Defendants for payment of £P.369.242.

The sum in claim is as follows:

£P.58.625 is the price of 35 kantars barley which quantity is the remaining wagon purchased at the rate of 167½ piastres per kantar. Commission due for this wagon is at the rate of 2% per kantar, and it amounts to £P.1.172.

£P.288.750 is due for the price of the remaining 5 wagons, (which are purchased at the rate of 165 piastres per kantar) which weighed 175 kantars, for commission at the rate of 2% per kantar, and for storage as from 23/9/29 to 31/12/29 and 9% interest as from the 23/9/29 to 31/12/29.

Both parties were represented in Court. Defendants' Counsel contended that Defendant (1) acted as Defendant (2)'s agent for purchase of the first five wagons, but not for the latter 5 wagons; that the barley of the first 5 wagons was of Bedouin quality, while that of the latter 5 wagons was of the local quality; and that the agreement between the parties was entered into in respect of the latter quality. Further, he pleaded that if the barley of the remaining 5 wagons is of the local quality his clients were prepared to take delivery of and pay the balance of the price outstanding against them.

Plaintiffs' counsel pleaded that the consignment was similar to that dealt with in agreements, that the agreement was for 10 wagons and not for 5 wagons. He applied for hearing the personal evidence.

The Court heard the parties as witnesses. Plaintiffs' counsel produced in Court 3 letters sent by his clients to Defendant Wolf Braz. These letters are dated 23/8/29, 17/9/29 and 23/9/29 respectively.

The Court finds that it was proved by the evidence of witness Yusif Saigh that Defendant Wolf Braz had ordered 10 wagons barley which fact is supported by the letters produced by Plaintiff, the contents of which letters were never refuted by Defendant's Counsel. The evidence contained in the letter dated 23/8/29 is strong wherein Plaintiff lays down that Defendant had ordered 10 wagons barley and that he (Plaintiff) has purchased this quantity for him. Had Defendant (2) not ordered the 10 wagons barley he would no doubt have replied to the letter saying that his order was only for 5 wagons. The fact of his silence proves the Plaintiff's claim and indicates his agreement and consent.

The Court passes judgment in Plaintiffs' favour against Defendant Wolf Braz for £P.368.747. Out of this sum £P.288 is the price of the 5 wagons which were not consigned, £P.58.625 for the price of the 5 wagons which was not consigned and £P.14.425 is the balance due for the price of the 4 wagons consigned to Defendant (2). Plaintiffs modifying their claim stated that the total price of these 4 wagons was £P.250. Also the sum of £P.6.947 is due to Plaintiff as commission for the barley they purchased. Defendant Wolf Braz will have to pay the sum in this judgment to Plaintiffs as soon as they consign the remaining 6 wagons to him.

The Court dismisses the Plaintiffs' claim for storage and interest, because the claim is nothing but compensation and they are entitled to no compensation unless they had duly served Defendant with a Notarial Notice to the effect which step the Plaintiffs having failed to take. The Court dismisses their claim for storage and interest with costs and fees against Defendant Wolf.

Judgment given in open Court and capable of appeal. Delivered the 6th day of February, 1930.

JUDGMENT.

The evidence before the District Court was sufficient to support the judgment of the Court. Appeal dismissed.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 105/30.

BEFORE:
The Acting Chief Justice, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Jad Sweidan — APPELLANT.

vs

Société pour l'Exportation du Sucre S. A., Anvers — RESPONDENTS.

Contract for sale of goods — Right to refuse delivery of goods because of breach of essential clause in contract — Breach of condition not of the essence of the contract — Grounds giving right to claim for damages distinguished from grounds giving right to repudiate the contract — Rule to ascertain measure of damages.

Appeal from the judgment of the District Court of Haifa, dated the 26th September, 1930.

JUDGMENT.

The Appellant, Jad Sweidan, entered into a contract with the Respondent Company, Société pour l'Expropriation de Sucre for the purchase of 750 double sacks of Polish sugar at the price of lls. 6d. per cwt. C.I.F. Haifa.

The contract, which was signed on the 8th February, 1930, provided that the sugar should be shipped in monthly consignments of 150 sacks in the months of February to June, 1930, inclusive, and contained the following provision:—

> "Le sucre doit être exporté de la Belgique. Sauf mesures restrictions ou dispositions du gouvernement Belge".

On the arrival of the first consignment, the Appellant refused to accept delivery on the ground that it had been shipped from Hamburg and not from a Belgian port. The Appellant also refused to accept the later consignments. In consequence the Respondent Company sued the Appellant in the District Court, Haifa, for the price of the sugar and obtained judgment for LP.860.334.

Against this judgment the Appellant is now appealing on the ground that the Respondent Company has committed a breach of an essential term of the contract, and that in consequence he was entitled to refuse to accept delivery of the sugar.

In our opinion, this objection cannot be accepted. The Appellant has been unable to satisfy us that the condition that the sugar should be exported from Belgium was of the essence of the contract. In our view, it was an additional term of the contract, breach of which gives rise only to a claim for damages.

We hold, therefore, that the Appellant committed a breach of contract in refusing to accept delivery of the sugar, and that the Respondent Company is entitled to damages. There remains the question of the measure of damages. We see no reason to depart from the rule laid down by this Court in Civil Appeal No. 149/26 [1])— George Afenduli vs. Jad Sweidan which was followed by this Court in Civil Appeal No. 99/29—Ibrahim Abu Ghali vs. Michel Agelaste.[2])

Accordingly, the measure of the damages to which the Respondent Company is entitled is the contract price of the sugar, less the price C.I.F. Haifa for which each consignment could have been sold in Haifa upon the day of arrival of such consignment at Haifa.

The judgment of the District Court is therefore set aside and the case remitted for completion in accordance with the terms of this judgment. No order is made as to costs.

Delivered the 15th day of July, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 116/30.

BEFORE:

Corrie, J. Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Ismail Abu Taha — APPELLANT.

vs

Adib Ma'touk Haj Ali Choli — RESPONDENT.

Contract for the sale of growing crops — Orange crop attached by Chief Execution Officer before trees in blossom — Sale of crop from grove previously attached by Chief Execution Officer held invalid — Art. 68, Law of Execution.

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[1]) See ante, p. 1627.

[2]) See ante, p. 1632.

JUDGMENT.

The Appellant's claim is based on a contract for the sale of oranges of the 1930—31 crop, made on the 15th of March, 1930.

On the 29th January, 1930, the vendor's grove had been attached by the Execution Officer. At that time, in accordance with the evidence given before the District Court, not only was there no fruit of the 1930—31 crop visible, but the trees would actually not be in blossom.

Hence it is clear that fruit of the 1930—31 crop comes within Article 68 of the Law of Execution and is included in the attachment.

Hence at the date of the contract the vendor had no power to sell the crop.

Judgment will therefore be entered dismissing the appeal with costs. The order of this Court dated 19th November, 1930, whereby attachment was laid on 1000 cases of oranges in favour of the Appellant is discharged.

Delivered the 8th day of January, 1951.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 15/31.

BEFORE:

The Chief Justice, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Borsig Hall Limited — APPELLANT.

vs

Meir Salzman & Brothers — RESPONDENTS.

Contract for the sale of goods en bloc — Contract impossible of performance — One price payable for pump, motor and accessories — Severability of goods purchased — Right of purchaser to reject whole of goods bought en bloc where some of them defective — Art. 351, Mejelle.

JUDGMENT.

There is a finding of the experts on page 3 of their report as follows:—

"We found from the nature of the centrifugal pump that the pump will be unable to comply with the three conditions together regarding the height and quantity of water. There is therefore in the contract a stipulation which for technical reasons cannot be complied with."

We hold that this is conclusive against the Appellant. The terms of the contract of 24th January, 1929, by which a global price was payable for the pump, motor and accessories satisfy us that under Article 351 of the Mejelle the constituent articles are not severable so that the pump only has to be returned.

We therefore dismiss the appeal with costs and LP.2 advocate's fees and on the cross-appeal we award the Respondents interest at 9% from 13th May, 1930, up to 15th October, 1930, as applied for by Respondents.

Delivered the 16th day of October, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 124/32.

BEFORE:

The Chief Justice, Baker, J. and Khayat, J.

IN THE CASE OF:

A. Dayan — APPELLANT.

VS

Manufacturers Toscane Reunite — RESPONDENTS.

Contract for the sale of goods — Condition of contract that samples to be remitted to purchaser before goods shipped — Breach of such condition — Evidential value of certificate of foreign notary public.

JUDGMENT.

We are not satisfied that the notary public's certificate is proof of the despatch of the sample. Under the order, the samples had to accompany the service, and there is no proof that the samples were so sent, since there is no evidence of the despatch of the samples by any means.

For these reasons the Court by a majority holds that the Appellant was entitled to refuse to accept the goods, and the judgment of the Court below is set aside, and we give judgment for the Appellant with LP.2 advocate's fees and costs.

SECURITY FOR COSTS.

SEE ALSO: CIVIL PROCEDURE, PROCEDURE.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 8/26.

BEFORE:

The Senior British Judge, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Moussah Taish — APPELLANT.

vs

Ibrahim Estoli
and his wife Hanna — RESPONDENTS.

Failure of Appellant to lodge duly authenticated deed of security—Article 186, Civil Procedure Code—Discretion of Court to allow fulfilment of condition precedent to hearing of appeal — Rules of Court, Civil Appeals, 1st June, 1921.

JUDGMENT.

The Appellant has not complied with the requirements of Article 186 of the Civil Procedure Code that a duly authenticated deed of security must be lodged within the time allowed for the appeal.

No valid reasons have been given upon which the Court could exercise in favour of the Appellant the discretion conferred upon it by Rule 2 of Rules of Court, Civil Appeals, 1st June, 1921, to allow an extension of time to the defendant to be made good.

The appeal is, therefore, dismissed with costs including advocate's fees £.9.

Delivered the 14th day of July, 1926.

In the High Court of Justice.

H.C. No. 14/31.

BEFORE:

The Acting Chief Justice and Frumkin, J.

IN THE APPLICATION OF:

Zeev Ostrovsky — PETITIONER.

vs

The Chief Execution Officer, Jaffa

Friedman Brothers, Jaffa — RESPONDENTS.

Pledge made by notarial deed as security for loan — Pledge sold by Execution Officer — Article 72, Notary Public Law—Articles 1, 8, Execution Law — Right of creditor to be treated as privileged—Execution of notarial deed — Seizure of movable and immovable property of debtor.

Application for an order to issue to the Chief Execution Officer in the District Court of Jaffa to show cause why his order dated the 1st March, 1931, in Execution File No. 4599/30, should not be set aside.

JUDGMENT.

By a notarial deed executed on the 20th November, 1929, the Respondents, Friedman Brothers, pledged four cows to the Petitioner, Zeev Ostrovsky, as security for a loan of £P.130.

On the 19th October, 1930, the Petitioner obtained judgment in the Magistrate's Court of Tel-Aviv against the Respondents for a sum of £P.85 costs and interest.

The cows have been sold by the Execution Office for £P.115 and the Petitioner applied to the Chief Execution Officer to be treated as a privileged creditor with regard to the proceeds of sale. In support of his application he relied on Article 72 of the Notary Public Law and Articles 1 and 8 of the Execution Law.

The Chief Execution Officer refused the Petitioner's application on the ground that the judgment of the Magistrate's Court did not state that the debt was a privileged one or that it had any connection with the pledge.

The Petitioner now asks this Court to set aside the Order of the Chief Execution Officer.

It is clear that taken by itself the judgment of the Magistrate's

Court contains no reference to the pledge, and therefore, cannot confer upon the judgment creditor the status of privileged creditor.

Further, it is for the Magistrate to order execution of the judgments of his own Court.

The Petitioner, however, argues that the Chief Execution Officer should have executed the notarial deed in accordance with Article 72 of the Notary Public Law and should have treated the judgment of the Magistrate's Court as evidence of the amount due under the notarial deed.

The contention is in our opinion correct. Article 72 provides that the Execution Office shall on the written demand of the creditor seize the movable and immovable property of the debtor.

If the debtor has any objection to make to the execution it is for him to establish it by action in the competent Court.

The order nisi will be made absolute. Costs of this petition including £P.4 advocate's fees and expenses, will be paid by the Respondents, Friedman Brothers.

Delivered the 24th day of August, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 78/31.

BEFORE:

Corrie, J., Jarallah, J. and Khayat, J.

IN THE CASE OF:

Muhammad Amin El-Bushnak — APPELLANT.

vs

Muhammad Amin El-Jawhary
Yusef Habib — RESPONDENTS.

Security for costs on appeal not correctly filed — Attention of Appellant drawn to fact that security deficient — Discretion of Court to extend time for filing of security — Article 186, Civil Procedure Code.

JUDGMENT.

The attention of the Appellant to the deficiency in the security given was called by the Respondents in their reply to the appeal served on the Appellant on 16th July, 1931.

The Appellant has taken no steps to make good the defect.

The Court therefore cannot exercise any discretion in his favour, and the appeal must be dismissed with costs, including £P.1 expenses for each Respondent.

Delivered the 26th day of January, 1932.

SERVANT.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 81/29.

BEFORE:

The Senior Puisne Judge, Frumkin, J. Khayat, J.

IN THE CASE OF:

Urwat Al Wuthka Co. Ltd. APPELLANT.

VS

Moussa Douad Khalil RESPONDENT.

Question of wrongful dismissal of servant — Damages for wrongful dismissal — Measure of damages.

Appeal from the judgment of the District Court of Jerusalem dated the 18th June, 1929.

JUDGMENT.

We hold that the District Court should first have determined whether the dismissal of the Respondent was wrongful or not.

In the event of the Court deciding that Respondent was wrongfully dismissed, he is entitled to damages, but we are not satisfied that remuneration for the work actually done by him is the true measure of such damages.

In view of the terms of Clause 9 of the agreement between the parties, the Respondent might have been compelled to work for the whole twenty-eight months of the agreed term without any benefit if the Branch of which he was manager had failed to make a trading profit.

We think therefore that the true measure of damages to which Respondent would be entitled is 10/24ths of such profit (if any) as the Court may find the Branch would have made during

the period for which Respondent was actually employed, if the minimum stipulated capital of £.2000 had been put into the Branch at the date of the agreement, and the business had been properly conducted by all parties.

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

Delivered the 23rd day of October, 1930.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 95/30.

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

IN THE CASE OF:

The Orthodox Palestine Assosiation	APPELLANT.
VS	
Vassa Mikhalitsna	RESPONDENT AND CROSS-APPELLANT.

Action by servant for wages due — Monetary allowance to former servant.

Appeal from the judgment of the District Court of Jerusalem dated the 9th day of July, 1930.

JUDGMENT.

The appeal of the original Defendant must be dismissed with costs.

The appeal of the original Plaintiff must succeed and the judgment of the Lower Court must be quashed and judgment given to the original Plaintiff for:

1. Wages up to the end of June, 1924, from the 1st December, 1917, at the rate of 50 gold francs per month plus francs 110,81, admitted to be the balance due by Defendant for wages up to 30th November, 1917.

2. Monetary allowance at the rate of 75 centimes a day from the 1st June, 1924, up to the end of June, 1924.

3. Interest on the whole sum at 9% from date of the action.

There does not appear to have been any application or evidence

of straitened circumstances before the Lower Court upon which they could grant a stay of execution upon the payment of LP.5 per month and this part of the judgment must also be quashed.

The Defendant-Appellant to pay the costs and advocate's fees assessed at LP.3.

Delivered the 24th day of July, 1931.

SHTAR ISKA.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 51/30.

BEFORE:

The Chief Justice, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Moshe Frankenthal — APPELLANT.

vs

Haim Leibel — RESPONDENT.

Written agreement in form known as "Shtar Iska" — Partnership in which one party provides capital and the other the work — Evasion by fiction of prohibition of Mosaic Law against interest — Muradabeh partnership — Effect of refusal to take oath — Waiver by agreement of right to administer oath — Right to administer oath is right which lies within discretion of party — Release from obligation to take oath — Arts. 1413, 1589, Mejelle.

JUDGMENT.

The parties in this case entered into a written agreement in the form known to Jews as "Iska," a word which, literally translated, means merely "business" but which is technically applied to that type of partnership in which one party provides the capital while the other does the business, the profits and losses being divided between the two parties in an agreed proportion. This form of partnership is generally used to cover what is in reality a loan; the investing partner being merely a lender and the working partner a borrower, who buys up the prospective profits of the investor for a fixed sum corresponding to the agreed rate of interest. For this purpose special printed forms, known as "Shtar Iska" (Iska deed) or "Heter Iska" (Permission of Iska) are used, and the partners

need only fill in, in these forms, their names and the amounts involved. Transactions of this nature are made use of by religious Jews, so that by the fiction involved they may evade the prohibitions of the Mosaic Law against the taking and giving of interest. In the present case, neither of these printed forms was used, but a special deed was drawn up differing in many details from either of the common forms, and both parties agree that this transaction was not intended to be a fictitious cover for a loan, but must be taken to be what it purports to be, namely, a partnership.

On behalf of the Respondent it was argued that the "Iska" partnership is identical with the partnership known by Moslems under the name of Mudarabeh, and that hence, all the provisions of the Mejelle relating to Mudarabeh must be strictly applied in this case. The chief ground for this argument appears to lie in the fact that the translator of the Mejelle into Hebrew used the term "Iska" in the translation of "Mudarabeh." There is, in fact, a great similarity between the two types of partnership created under the two systems of law which are so nearly connected in origin and method, but the two forms of partnership in fact differ in many respects, and in our opinion the Court must be guided by the express terms of the contract entered into by the parties in this case, so long as the terms of it are not contrary to public policy.

Now, there are numerous disputes between the parties. First, as regards the length of the duration of the partnership. The contract was entered into for a period which terminated on the first of Adar, 5682, but there is on the deed an endorsement which is not signed, purporting to extend the term for four months, namely until the first of Tamuz, 5682. In the Court of Appeal the Appellant agreed to the fact of this extension which he had not admitted in the Court below; but the Respondent alleged that the period had orally been yet further extended. The Appellant denied this, and, at the request of the Respondent, the Court tendered the oath to the Appellant that the period had not been extended; the Appellant refused to take the oath.

Again, there was a dispute as to the amount invested. Although the Respondent admitted in the deed that he had received £E.400, he alleged that he had in fact received only £E.340. At the request of the Respondent the oath was tendered to the Appellant on this point also; again be refused to take it.

Thirdly, the Respondent alleged that he had paid to the Appellant out of the capital £E.145. This was denied by the Appellant. The Court considering the Respondent a Mudarib by virtue of Article 1413 of the Mejelle, informed the Appellant of his right to administer the oath to the Respondent. The Appellant refused to exercise such right.

The District Court held that as a result of his refusing to take and administer these oaths, the Appellant failed to prove his claim and his action was, in consequence, dismissed.

Against this judgment he has now appealed. His principal ground of appeal is that under the terms of the deed, which is the subject-matter of this action, he is discharged from taking any oath which might be imposed upon him by law, inasmuch as the Respondent has waived his right to administer such oath.

This Court has already held, in Civil Appeal No. 16 of 1928,* that when a party fails to administer the oath to the other party in the Court below he cannot administer it on appeal, unless he reserved his right to do so, which shows that the right to administer an oath, being one which may be exercised or waived, isua right which lies at the discretion of the party.

What we have now, therefore, to consider is whether the contract in fact contains a waiver by the Respondent of his right to administer an oath to the Appellant. As we have already said, the deed in question was drafted in a form well recognised in Jewish Law, which contains expressions and sentenses bearing a special meaning which are known to persons versed in Talmudic Law, and both parties claim to be so versed. The relevant clause of the deed runs as follows in English:—

> "And the holder of the deed shall enjoy all the rights of trust"

Two witnesses gave evidence in the Court below as to the meaning of this clause. Our learned brother Frumkin has consulted authoritative text-books on this question and we have no hesitation in holding that to persons versed in Rabbinical Law, to impose upon a party the status of a man of trust means that he is released from the obligation to take an oath in monetary questions.

We may add, further, that this clause does not form part of the printed forms of "Shtar Iska" and "Heter Iska" to which

*) see ante, p. 1374.

we have referred above. Inasmuch as the Respondent agreed to the express insertion of this clause in the deed which he signed, we must hold that he undoubtedly intended to waive any right of administering the oath to the other side.

The Respondent having failed to prove the extension of the period of the partnership beyond the beginning of the month of Tamuz, and having failed also to prove that he received only £P.340 instead of the £P.400 mentioned in the deed, we are bound, in view of the waiver by him, in anticipation, of the right of administering the oath, to hold that the period of partnership expired on the 1st of Tamuz, 5682, and that the amount received by him was £E.400.

As to the allegation by the Respondent that he paid to the Appellant £E.145 and that the partnership suffered losses exceeding the amount of the capital, these are things which would ordinarily be proved by documentary evidence. The deed however, contains a clause empowering the Respondent to prove any claim regarding the capital by oral evidence. If the Respondent had offered to call witnesses to prove this allegation, we should have had to consider whether such witnesses could be called, the admission of such evidence being contrary to the accepted procedure. In fact, the Respondent did not offer to call any witnesses; as to the first allegation, he wished to take the oath himself and, as to the second allegation, he wished to administer to the Appellant an oath that he did not know of the losses. On both these points the Respondent must fail.

Inasmuch as the partnership is not one of Mudarabeh, there is no authority under which we could allow the oath to be imposed on the Respondent as to the repayment of the £E.145. But for his waiver of the right of administering an oath on the Appellant, the Respondent could have employed the remedy of requesting the Appellant to take the oath that he had not received this sum. In view of his having waived this right, we must hold that the Respondent has failed to prove both repayment of part of the capital and loss of another part thereof.

As an alternative the Respondent pleaded that he was not aware of the insertion of the clause of waiver in the contract, and asked to impose the oath under Article 1589 of the Mejelle on the Appellant to the effect that his (Respondent's) admission in this regard was not false. This Article, however, deals with the

denial of the truth in an admission, and we fail to see how it could be applied to the insertion of a clause forming part of the contract.

In our opinion the appeal must be allowed, the judgment of the District Court set aside and judgment entered for Appellant for the equivalent in Palestine currency of £E.400 with costs here and below and £P.4 advocate's fees. In view of the nature of the contract we do not think the Appellant is entitled to interest.

Delivered the 31st day of December, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 69/33.

BEFORE:

The Senior Puisne Judge, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Joseph Yehia Shaoul — APPELLANT.

vs

Said Yehia Shaoul — RESPONDENT.

Written agreement in form known as "Shtar Iska" — Undertaking to pay interest on money lent — Interest payable under agreement of "Shtar Iska — Rate of interest stipulated in excess of legal rate — Reduction to legal rate — Interest payable not to exceed principal.

Appeal from a judgment of the District Court of Jerusalem holding that interest was payable on the construction of the following document:

"In our presence there appeared Mr. Joseph Yehia Shaoul, may God preserve him, and said unto us "Bear witness and write a bill in any language to be handed to Rabbi Said Yehia Shaoul, may God preserve him, to be kept by him, as proof that I have received from him the sum of £E.365 to deal with them by way of business (Iska) for a period of twelve months . . . Any profits will be divided equally. And it was agreed between us that I should not borrow nor lend the money of the said business to anybody except against a pledge of silver and gold, and keep the moneys in an iron box hidden in the ground . . . as provided by our Rabbis of blessed memory . . .

"It was further stipulated between us that in the event of part of the profits partaining to the lender within the said period amounting to 10 per cent and so long as this document remains in force, he shall receive his due in full. But should the profits exceed that amount, then this would belong to me, the dealer and the owner of the money shall have no share in it. If, which God forbid, the profit will not reach this amount. I from now on bind myself by strict oath, by the will of God, blessed be He, by the will of those sworn to tell the truth and by the will of the lender, not to swear that it has not reached this amount. And I admit that I have taken and received my remuneration in advance from the lender, and in security for the said moneys of the business and the profits, I have from now on subjected to the said lender and to his representatives all the properties that I have in this world . . . and the profits from now on belong to the lender Rabbi Said Yehiah Shaoul, may God preserve him . . ."

JUDGMENT.

The agreement contains an undertaking to pay interest from the date of the agreement at a rate exceeding the legal rate.

The appeal is allowed. Interest is to be paid upon the sums due under the respective agreements from the respective dates thereof at 9 per cent per annum until payment; the interest so pyable not to exceed the principal.

Costs will be paid by the Respondent.

STAMP DUTY.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 70/29.

BEFORE:

Corrie, J., Frumkin, J. and Khayat, J.

IN THE CASE OF:

Yousef Ben Hayem — APPELLANT.

vs

Ouri Cohen — RESPONDENT.

Power of attorney to advocate to appear in action in first instance and on appeal — Stamp duty on same—Stamp duty on document relating to several distinct matters — Section 7 (a), Stamp Duty Ordinance, 1927.

JUDGMENT.

The power of attorney presented by the Appellant in the District Court conferred on the attorney power to appear in an action in first instance and on appeal.

These were, before the Stamp Duty Amendment Ordinance, 1929, separate matters which, under Section 7 (a) of the Stamp Duty Ordinance, 1927, attracted separate stamp duties.

On the face of it, therefore, the power of attorney presented to the District Court was not duly stamped.

The Appellant, however, argues that as he held a separate duly stamped power of attorney authorising him to appear in the Magistrate's Court and under which his appearance in the Magistrate's Court was actually made, the power of attorney which he presented to the District Court was duly stamped. The fact, however, of the existence of an earlier duly stamped power of attorney cannot affect the amount of duty to which the later power of attorney is liable.

The amount of stamp duty payable is to be determined by the matters to which the power extends, and not by those for which it is actually used.

The appeal must be dismissed.

Delivered the 24th day of October, 1930.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 110/29.

BEFORE:

The Senior Puisne Judge, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

I. M. Daniel — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Payment of stamp duty on theatre ticket — Fine for failure to affix correct stamp duty — Exemptions from stamp duty in favour of entertainments for religious and charitable purposes—Section 73 (3) Stamp Duty Ordinance, 1927.

Appeal from the judgment of the District Court of Haifa dated the 6th May, 1929.

JUDGMENT.

The Court had before it tickets stamped as follows:— "49 mils". "To the benefit of the Jewish National Fund 1 mil".

The Court has held this to mean that the amount payable for admission by the ticket produced was 50 mils. As corroboration, the Court had evidence of a witness who testified that he had attempted to obtain admission for 49 mils and had been refused.

There can thus be no ground for setting aside the Court's finding that the price of the ticket was 50 mils.

As regards the Appellant's claim that a portion of this is exempt from duty the exemption in favour of entertainments for religious and charitable purposes, it is clear that Section 73 (3) of the Stamp Duty Ordinance applies, and that exemption must be obtained in advance from the District Commissioner.

The penalty recoverable under Section 73 (3) as amended by Section 9 of the Stamp Duty Amendment Ordinance, 1929, is £P.10 and such penalty only is to be paid by the Appellant.

Subject to this variation the appeal must be dismissed.

Delivered the 12th day of February, 1931.

In the District Court of Jerusalem.

C.D.C. Jm. No. 216/29.

BEFORE:

De Freitas, J. and Valero, J.

IN THE CASE OF:

The General Mortgage Bank of Palestine Ltd. — APPLICANT.

vs

The Commissioners of Stamp Duties — RESPONDENTS

Case stated by Commissioners of Stamp Duties under Section 15 (i) of Stamp Duty Ordinance, 1927 — Stamp duty on debenture — "Issue" interpreted to be mercantile not technical term—Debenture a marketable security transferable by delivery — Item 25 (3), Schedule to Stamp Duty Ordinance, 1927.

JUDGMENT.

This is a case stated by the Stamp Commissioners under Section 15 (1) of the Stamp Duty Ordinance, 1927, at the request of the General Mortgage Bank of Palestine Ltd. The facts are fully set out in the case.

The questions to be decided are whether:—

a) The debenture is subject to stamp duty under the Stamp Duty Ordinance, 1927, and

b) If yes, what duty does it attract.

The Commissioners contend that the debenture attracts a duty of 100 mils in accordance with Item 25 (3) of the Schedule to the Ordinance.

The contentions of the Bank are:—

a) The Stamp Duty Ordinance does not apply; or alternatively,

b) the debenture not being a marketable security, is subject to duty under Item 26 of the Schedule.

With regard to the question whether the Stamp Duty Ordinance is applicable, the answer to the question depends upon whether the debenture was issued prior to the first November, 1927, the day the Stamp Duty Ordinance came into force.

Now, there is abundant authority that the word "issue" is not a technical but a mercantile term. The question is therefore, whether the debenture was issued in the mercantile sense of the term before the 1st November, 1927. Clearly, there has been no delivery by the company constructive or otherwise; nor has there been an agreement to issue, which would have been enforced in equity as a binding contract against the Company.

We, therefore, hold that the debenture was not issued prior to the enactment of the Stamp Duty Ordinance. Further, we are clearly of opinion that the debenture is a marketable security transferable by delivery.

We uphold the opinion of the Commissioners, and assess the duty chargeable on the debenture at 100 mils in accordance with Item 25 (3) of the Schedule.

We make no order as to costs.

Given the 31st day of December, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 66/30.

BEFORE :

The Chief Justice, Jarallah, J. and Khayat, J.

IN THE CASE of :

Mahmud Hussein Salwany — APPELLANT.

vs

Zuhdi Sarandah — RESPONDENTS.

Addition to partnership agreement — Addition insufficiently stamped — Document relating to several distinct matters to be separately and distinctly charged — Meaning of promissory note — Arts. 7 (a), 25 (1) and Items 1, 6, 33, Schedule, Stamp Duty Ordinance, 1927.

Appeal from the judgment of the District Court of Jerusalem dated the 29th May, 1930.

JUDGMENT.

The Respondent, Zuhdi Sarandah, brought an action in the District Court of Jerusalem, against the Appellant, Mahmud Hussein Salwany, claiming a sum of LP.265. In support of this claim he submitted certain documents including a partnership agreement dated the 11th August, 1928, with a supplemental agreement endorsed thereon dated the 7th September, 1928.

Among other defences the Appellant objected that the last mentioned agreement was not duly stamped and therefore was not admissible in evidence. This objection was not overruled by the District Court and judgment was given for the Plaintiff.

In his appeal the Appellant is raising the question of the stamp upon the document of the 7th September, 1928.

The document reads as follows:—

"The first party Zuhdi has paid LP.50 to the second party Mahmud Haj Hussein for completion of the work. Any profits or losses resulting shall be kept by the second party pending the dissolution of their partnership. The second party undertakes to pay, every 15 days, to the first party the sum of LP.50 as instalments due for the sum of LP.200."

The Appellant's argument is that the acknowledgment of receipt of LP.50 attracts a stamp of 7 mils in accordance with Item 33 of the Schedule to the Stamp Duty Ordinance, 1927: that the agreement as to profits or losses requires a stamp of 50 mils in accordance with Item 1 of the Schedule, and that the provision as to the payment of LP.200 by instalments of LP.50 each requires a stamp of 100 mils in accordance with Item 6 of the Schedule, and hence, that the document to which a stamp of 100 mils has been affixed, requires a stamp of 157 mils.

The Appellant's argument is based upon the view that the undertaking as to the payment of LP.200 is a promissory note within the meaning of Section 25(1) of the Stamp Duty Ordinance, 1927, which reads as follows:—

"For the purposes of this Ordinance the expression "promissory note" includes any document or writing (except a bank note) containing a promise to pay any sum of money."

Appellant argues that the provision as to the payment of LP.200 constitutes a promise to pay that sum.

Under the partnership agreement, the Respondent put a sum of LP.150 into the partnership, the receipt of which sum the Appellant thereby acknowledged and the agreement provided that the work should be done by the Appellant and that the profits should be equally divided. The agreement contained no term as to repayment of the LP.150.

The supplemental agreement of the 7th September, 1928, however, materially alters the position of the parties. Under that agreement a sum of LP.200, which presumably consists of the LP.150 originally contributed by the Respondent, and the further LP.50 of which receipt is acknowledged in the first paragraph of the supplemental agreement, are to be repaid by the Appellant by LP.50 of instalments at fixed intervals; and the liability to pay those instalments is incumbent upon the Appellant even though the half share of the profits to which the Respondent is entitled under the original agreement may not amount to LP.200.

In our opinion therefore, the undertaking to pay LP.200 by instalments does require stamping as a promissory note under Item 6 of the Schedule.

The provision as to retention by the Appellant of the profits until the partnership is dissolved is subject to stamp duty in accordance with Item 1 of the Schedule.

It follows that in our view, the agreement of the 7th September, 1928, in insufficiently stamped; and hence is inadmissible in evidence and the Respondent is only entitled to judgment for such sum as may be found to be due to him on the other documents in evidence.

The judgment of the District Court is set aside and the case remitted for completion with this judgment. The costs of this appeal including LP.4 advocate's fees and expenses will be paid by the Respondent.

Delivered the 24th day of August, 1931.

In the District Court of Jerusalem.

C.D.C. Jm. 30/32.*

BEFORE:

Abdel Hadi, J. and Valero, J.

IN THE CASE OF:

Hanna Bishara — PLAINTIFF.

vs

Tannous Brothers — DEFENDANTS.

Action on unstamped promissory note — Penalty of LP.10 paid for failure to stamp — Effect of payment of penalty — Affixing and cancellation of stamp by person to whom bill presented for payment — Stamping of promissory note after execution.

JUDGMENT.

In this case the Plaintiff is suing on a promissory note for £P.4000 signed by the Defendant but which is unstamped.

A sum of £P.10 has been paid to the Commissioners of Stamps as a penalty apparently in accordance with the first paragraph of Section 30 (1) of the Stamp Duty Ordinance, 1927.

* see to the same effect C.A. No. 83/34.

Now the latter part of Section 30 (1) of the aforesaid Ordinance provides as follows:—

> ".....and the person who takes or receives from any other person any such bill or note either in payment or as a security, or by purchase or otherwise, shall not be entitled to recover thereon, or to make the same available for any purpose whatever."

Section 30 (2) of the same Ordinance deals only with a case where a bill of exchange is presented to another and allows the person to whom it is presented to affix adhesive stamps. There is no mention in this subsection of promissory notes.

In our opinion, therefore, the promissory note for £P.4000 the subject matter of this case, ought to have been stamped on the date of execution. No section of the law has been quoted to us whereby we could allow stamps to be affixed after the execution of a promissory note.

It follows in our view that the promissory note in this case not being stamped on the date of its execution is inadmissible in evidence.

Plaintiff is only entitled to administer the oath on the Defendants that they are not liable for the amount claimed.

Judgment in presence, subject to appeal.

Delivered the 11th day of February, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 84/32.

BEFORE:

Baker, J., Frumkin, J. and Khayat, J.

IN THE CASE OF:

Zipora Lifshitz — APPELLANT.

vs

Deeb Bamieh — RESPONDENT.

Action on bill of exchange insufficiently stamped under Ottoman law — Time for payment of penalty for insufficient stamping — Penalty payable at any time before judgment — Article 41, Ottoman Stamp Law.

JUDGMENT.

This is an appeal from a judgment of the Jaffa District Court whereby the said Court dismissed a claim on a bill for £P.100 upon the grounds that the bill being insufficiently stamped, the prescribed fine should have been paid prior to the indorsement to the present holder (the present Appellant), and that such failure vitiated the claim of the indorser.

We do not agree with the lower Court with regard to their interpretation of Article 41 of the Ottoman Stamp Law and hold that the penalty for insufficiently stamping a document of this nature may be paid at any time before judgment.

The judgment of the lower Court is accordingly quashed and the case returned for the lower Court to enter into the merits of the claim and give a fresh judgment. Costs in the cause.

Delivered the 23rd day of February, 1932.

In the District Court of Jerusalem.

C.D.C. Jm. No. 146/32.

BEFORE:

Sherwell, J. and Baradey, J.

IN THE CASE OF:

Bank Le Credit Gomlin Co-Operative Society — APPELLANT.

VS

The Commissioners of Stamp Duties — RESPONDENTS.

Case stated by Commissioners of Stamp Duties under Sec. 15 (1) of Stamp Duty Ordinance, 1927 — Stamp duty on debenture — Meaning of "transferable by delivery" — Interpretation of legal operation of debenture — Debenture a marketable security transferable by delivery — Items 25 (1), 25 (3), Schedule to Stamp Duty Ordinance, 1927.

This is an appeal against an assessment by the Commissioners upon a case stated by them and filed by the Appellant Society in the District Court under Section 15 of the Stamp Duty Ordinance, 1927.

The question before us is whether a debenture for LP.1, purporting to be No. 1230 of Serial No. 1 and issued by the

Society to one Ephraim Cohen of Tel Aviv on 21st January, 1932, should be assessed for the purposes of stamp duty under subsection 1 of Item 25 of the Schedule to the said Ordinance as a marketable Security not transferable by delivery (as Appellants contend) or under Subsection 3 of the said Item as a marketable security transferable by delivery (as the Respondents have held).

In the course of the arguments heard by us, counsel of both parties have submitted that the Stamp Duty Ordinance, 1927, should be interpreted according to English law. In this we also agree. Counsel for the Appellant in his attractive and learned argument has referred almost entirely to English legal treatises and authorities including Vol. 24 of Halsbury's Laws of England and Highmore's Stamp Laws at pp. 229—30. We cannot accept, however, the conclusion at which he somewhat ingeniously arrives, nor do we consider that he has reconciled satisfactorily within his own arguments the opinion and principles referred to in the 4th para. appearing on p. 188 of the 18th Ed. of Alpe's Laws of Stamp Duties which was referred to by the Court.

We find nothing, however, in Section 1543 or Section 1566 at pp. 712, 713 and 730—731 in Vol. 24 of Halsbury's Laws of England which is inconsistent with the interpretation of the meaning of the words "transferable by delivery" as laid down in the passage in Alpe's work as above-mentioned, in which it is stated that these words mean "transferable otherwise than an instrument of transfer".

Now it is clear from Halsbury that we have to look at the debenture in question to see what appears upon the face of it to be its legal operation when first executed so as to be capable of that operation and we must, as it is further stated, "decide according to the real nature of the transaction".

However, to ascertain the proper stamp which the instrument should bear, we have to take as the material date that at which the instrument first became liable to duty.

On the face of this debenture appear its terms which in Clause 3 expressly embody the conditions endorsed on the back of the debenture,—"the conditions indorsed hereon, which shall be read as part of this debenture". On the back of the debenture appear "the conditions within referred to"—fourteen in all.

Further, there appears besides these conditions a form of "transfer to bearer" in pursuance of Condition 3 of the above conditions; also a form of "Note of Transfers" with spaces for six or seven transfers.

On 21st January, 1932, it appears that this Society issued this debenture to Mr. Cohen subject to the said conditions. It is quite clear from the words of the 3rd condition that at the time of executing the debenture the Society regarded and intended to treat and to be bound by the debenture as if it were a marketable security to bearer. They expressly made provision both in its wording and form so that the debenture became transferable otherwise than by an instrumeent of transfer and at the option of the registered holder and not at its own.

The Society clearly contemplated and intended that the debenture should be convertible into a security registerable to bearer and transferable by delivery. In this context what may or may not have been the immediate intention of Mr. Cohen when the debenture was issued to him is immaterial. He could change his intention whatever it was, but the Society, if it was to abide by its undertakings, could not do so. The Society was bound to expect at any time conversion of the debenture if so requested. We think, so far as the references to pp. 229—230 of Highmore's Stamp Law is concerned, that what is stated there is not contrary to the principle underlying there. In any event, the decision in Knight's Deep Ltd. vs. The Commissioners of Inland Revenue (1899) which is referred to there, is distinguishable inasmuch as the option in that case lay with the Company and not with the registered holder or bearer of the debenture as in this debenture. That case is merely authority for saying that a premium which is payable under or secured by a debenture only in an event dependent on the option of the obligors cannot be included in the amount chargeable with stamp duty.

We think the real test in this case is whether the debenture is transferable otherwise than by an instrument of transfer. We find that this debenture is and was at the material time a security to registered holder convertible into a security to bearer and as such is transferable by delivery, no other instrument being required whether the registered holder is changed or whether it is registered simply to bearer.

For the above-mentioned reasons we think the appeal fails. We therefore confirm the adjudication by the Stamp Commissioners on the debenture in question in accordance with Item 25 (3) of the Schedule to the Stamp Duty Ordinance, 1927, and dismiss the appeal with costs.

Delivered the 27th day of April, 1932.

In the District Court of Jaffa.

C.D.C. Ja. No. 459/32.

BEFORE:

Copland, J. and Toukan, J.

IN THE CASE OF:

Zadok Chelouche	PLAINTIFF.
vs	
Yousef Ibn Murad Abu Shahin on behalf of the estate of the late Murad Abu Shahin	
Daoud Ibn Suliman Abu Msallam	DEFENDANTS.
Naim Ibn Abdel Hadi	THIRD PARTY.

Nonfulfilment of contract entered into by deceased—Liability of estate for refund and for damages—Liability of guarantor of agreement on breach of agreement — Adjudication made by Stamp Commissioners and adjudication stamp affixed—Adjudication of Commissioners invalid if not in accordance with law—Document relating to several distinct matters to be separately and distinctly charged—Document chargeable both as agreement and as guarantee — Sections 7, 14, 16, 17, Stamp Duty Ordinance, 1927 — Application by third party for removal of provisional attachment—Attachment of orange crop previously sold to another held invalid.

JUDGMENT.

This is an action which raises a very interesting and difficult point of law.

The Plaintiff is suing the two Defendants on an agreement made on the 19th October, 1930, for the sale of 3000 cases of oranges. The sum of LP.200 was advanced by the Plaintiff to the late Murad Abu Shahin as part payment of the purchase price, and the agreement was guaranteed by the second Defendant, Daoud Ibn Suleiman Abu Msallam.

No cases of oranges were delivered as a matter of fact, and the Plaintiff now claims the LP.200 which he paid on account of the purchase price, together with 200 mils per box undelivered, under Clause 4 of the agreement.

As regards the first Defendant the late Murad Abu Shahin was the vendor under the contract, and there is of course no doubt that his estate is liable for the sum advanced to him and for the damages for the nonfulfilment of the contract.

With regard to the second Defendant, he is sued as a guarantor, and in his case a difficult point of law arises. The document, on execution, was stamped with a 50 mils revenue stamp as an agreement. On stamping of the document, it was, in November last year, sent to the Commissioners of Stamp Duties with a request to assess the proper rate of duty payable. They made their assessments as follows: "Item 1: 050 mils duly stamped, and Item 26 (2) Ad Valorem on total amount advanced". Item 26 is headed "Mortgage or Bond" and Item 26 (2) includes a collateral, or auxiliary, or additional or substituted security..." The additional duty due therefore being 40 mils an impressed stamp denoting this duty was applied and also the Commissioners affixed an adjudication stamp with the amount as assessed by them.

Section 7 (a) of the Stamp Duty Ordinance, 1927, is in the following terms:

> "Except where express provision to the contrary is made by this or any other Ordinance:—
>
> (a) A document containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate document, with duty in respect of each of the matters".

We are of opinion that the decision of the Commissioners as to the amount of duty payable was correct and that the document was properly chargeable both as an agreement and as a guarantee.

Now, Section 14 (2) of the Stamp Duty Ordinance reads as follows:—

> "If the Commissioners are of opinion that the document is chargeable with duty, they shall assess the duty with which it is in their opinion chargeable, and when the document is stamped in accordance with the assessment, it may be stamped with a particular stamp denoting that it is duly stamped."

Subsection (3) of Section 14 states:

> "Every document stamped with the particular stamp denoting either that it is not chargeable with any duty, or is duly stamped, shall be admissible in evidence and available for all purposes notwithstanding any objection relating to duty".

There are certain provisos to this Section which do not affect the case before us.

Section 16 (4) disallows a document to be given in evidence unless it is duly stamped in accordance with the law in force at the time when it was first executed.

Section 17 (1) says:

"Save where other express provision is made in this Ordinance, any unstamped or insufficiently stamped document may be stamped with an impressed stamp after the execution thereof on payment of the unpaid duty and a penalty..."

Section 17 (2) (a):

"In the case of such documents hereinafter mentioned as are chargeable with ad valorem duty, the following provisions shall have effect:

(a) The document unless it is written upon duly stamped material, shall be duly stamped with the proper ad valorem duty before the expiration of thirty days after it is first executed or after it has been first received in Palestine in case it is first executed at any place out of Palestine, unless the opinion of the Commissioners with respect to the amount of duty with which the document is chargeable has, before such expiration, been required under the provisions of this Ordinance."

Section 17 (2) (d) applies the provisions of this subsection to the cases of mortgages or bonds. There is therefore no doubt that a mortgage or bond or a collateral security thereto cannot legally be stamped after the expiration of thirty days from the date of their execution. The Commissioners did stamp the document in fact over two years after execution and the document was not presented to them for their opinion until over two years had elapsed from the date of its execution, and the point we have to decide is this: Whether Section 14 (3) enables us to receive this document in evidence as a collateral security? In a Scottish case which was decided in 1879, Vallance v. Forbes, where a document had been stamped after execution the Court held that the Stamp Commissioners were not authorised to stamp with an adjudication stamp a document prohibited by law from being stamped after execution, and that the adjudication stamp on such document was, therefore, ineffectual. This decision was based on the English Stamp Act, and the sections of the Palestine Stamp Duty Ordinance which I have read, are word for word corresponding to the sections in the English Stamp Act. This case has

never been overruled, and I think, therefore, that we are bound by this decision.

We are of opinion that the Commissioners of Stamp Duties had no power to stamp this document, because they were prohibited by law from doing so, and that the adjudication stamp which they affixed is ineffective for the purposes of Section 14 (3). It follows, therefore, that this document is inadmissible as against the guarantor, the second Defendant, being unstamped and incapable of being legally stamped even under penalty.

To turn now to the last point in this case, the action entered by the Third Party. It is an application for the removal of a provisional attachment which had been placed by the Plaintiff on certain oranges of the second Defendant, the guarantor. The third party relies on a contract dated 31st May, 1932, made between himself and the guarantor, by which the guarantor sold to the third party the whole of his crop in a particular named orchard at 4 shillings per case. The provisional attachment which was placed on these oranges was made at a considerably later date than that of the contract date. It has been objected that this contract is for the sale of a particular number of cases of oranges and not for the whole crop. It is however, perfectly clear from the wording of the contract that it is for the sale of oranges from a particular named orchard mentioned in the agreement.

In any case the provisional seizure will fall to the ground since we have held that the guarantor cannot be sued under this document, but apart from that we are of opinion that the provisional seizure must be released by reason of this contract, because the oranges are the property of the Third Party.

As a result, therefore, we give judgment for the Plaintiff for LP.200 and LP.600 damages against the first Defendant, with costs and LP.2 advocate's fees, in default. The provisional attachment is confirmed.

The case against the second Defendant is dismissed with costs and LP.2 advocate's fees.

The provisional attachment placed on the properties of the second Defendant is released. The Plaintiff, will have to pay to the Third Party his costs and LP.2 advocate's fees.

Delivered the 26th day of January, 1933.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 71/33.

BEFORE:

The Chief Justice, Frumkin, J. and Khayat, J.

IN THE CASE OF:

The Attorney-General on behalf of the Commissioners of Stamp Duties — APPELLANT.

vs

Dr. Bernard Joseph — RESPONDENT.

Appeal against assessment made by Commissioners of Stamp Duties — Question of difference in duty between general and particular power of attorney — Decision of District Court on appeal from Commissioners held final and not subject to appeal — Art. 43, Palestine Order-in-Council, 1922 — Jurisdiction of Supreme Court on appeal from District Court restricted to judgments given by District Court in first instance — Secs. 13, 15, Stamp Duty Ordinance, 1927.

JUDGMENT OF THE DISTRICT COURT.

The Court holds that this Power of Attorney is not a general Power of Attorney and is confined to matters arising out of a specific case, namely the bankruptcy proceedings of Solomon Jacir Freres and is therefore only subject to 250 mils stamp.

The decision of the Commissioners of Stamp Duties is reversed.

Given the 16th day of March, 1933.

JUDGMENT.

This application purports to be an appeal from a decision of the District Court of Jerusalem on appeal from a decision of the Commissioners of Stamp Duties whose opinion expressed under Section 13 (1) of the Stamp Duty Ordinance, 1927, (No. 31 of 1927) was appealed to the District Court of Jerusalem under Section 15 (b) of that Ordinance.

The Respondent was taken the preliminary point that no appeal to this Court lies.

He bases his case under Article 43 of the Palestine Order-in-Council.

The relevant provision in that article is that

"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."

Now a decision of the District Court of Jerusalem under Section 15 (1) of the Ordinance is given only when there is an appeal from the Stamp Duty Commissioners and the section uses the key word "appeal" in conferring the jurisdiction on that District Court. 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 Article 43 of the Order-in-Council can in this particular be modified.

For this reason we hold that we have no jurisdiction to entertain an appeal from the District Court of Jerusalem in such a case and since no appeal lies, we dismiss the appeal.

The two other preliminary points raised by the Respondent are in consequence of our decision not within our cognisance.

In the District Court of Jaffa.

C.D.C. Ja. No. 312/33.

BEFORE:

Copland, J. and Mani, J.

IN THE CASE OF:

Becky Silverman — PLAINTIFF.

vs

Louis Silverman — DEFENDANT.

Action on promissory note payable in New York — Promissory note stamped with impressed stamp after execution thereof — Impressed stamp affixed by Commissioners of Stamp Duties without adjudication stamp — Commissioners of Stamp Duties bound by provisions of the law — Sec. 29, Stamp Duty Ordinance, 1927.

JUDGMENT.

This is an action on a promissory note for 10,600 dollars expressed to be drawn and made payable in New York.

The claim is actually for 7000 dollars only because receipt of 3600 dollars is admitted.

A series of objections have been taken, but I propose to deal in detail with one only, because if this should be decided against the Plaintiff, it will dispose of the whole case, and that is the question of stamping. The point that has been taken is that this document is improperly stamped inasmuch as it had been stamped with impressed and not with adhesive stamps as required by Section 29 of the Stamp Duty Ordinance, 1927. The history of the stamping appears to be as follows:

The promissory note, being expressed to be payable in foreign currency, and the holder being uncertain as to the amount of duty, he sent up the document to the Commissioners of Stamp Duties to assess the duty which is payable. The Commissioners duly assessed and stamped the note with impressed stamps denoting the amount. They did not at the same time, as they should have done, affix an adjudication stamp. Now, the law is quite clear that "No bill of exchange or promissory note shall be stamped with an impressed stamp after the execution thereof." The duty on the promissory note should, therefore, have been levied by means of adhesive stamps, and as the defence quite rightly remarked, the Commissioner of Stamp Duties are bound by the provisions of the law as members of the public are. They are not entitled to stamp or cause to be stamped a document otherwise than in the accordance with the provisions of the law.

This being so, both my colleague and myself feel compelled to hold, with great regret, that this document is not properly stamped. The result is that the Plaintiff is unable to sue for the 7000 dollars alleged to be due on this promissory note.

With regard to the other points raised by the defence, with the exception of the question of consideration about which we express no opinion, they all fail.

It is, therefore, only on this highly technical point of stamping, and where in fact the revenue has not suffered any loss, that we feel compelled to dismiss the case with costs and £P.2 advocate's fees.

The provisional attachment granted in this case is of course released.

Delivered the 15th day of October, 1933.

SUCCESSION.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 127/26.

BEFORE:
The Chief Justice, Seton, J. and Frumkin, J.

IN THE CASE OF:
Moshe Trevich — APPELLANT.

vs

Miriam, Leah, Arieh and Yehouda Trevich — RESPONDENTS.

Rabbinical Court prohibited from dealing with succession — Appeal from Order of President of District Court — Order under Sec. 7, Succession Ordinance, 1923, held to be a judgment of the District Court — District Court may be constituted by single Judge — Appeal from interlocutory order — Art. 66, Civil Procedure Code — Jurisdiction of Rabbinical Court in matters of succession — Consent to jurisdiction of Rabbinical Court — Whether such consent to be in writing — Arts. 43, 53, Palestine Order-in-Council, 1922 — Interpretation of statutes — Section of law amended by judicial interpretation to include words not stated therein — Secs. 6, 7, Succession Ordinance, 1923 — Interlocutory distinguished from final order.

JUDGMENT.

This is an appeal from an order made by the President of the District Court of Jaffa prohibiting the Rabbinical Court from dealing further with the succession to the estate of Haim Zwi Trevich, deceased, late of Tel-Aviv, an Ottoman subject. It has been argued by the Respondents that no appeal lies in such a case on the ground that an Order made by the President of the District Court under Section 7 of the Succession Ordinance, 1923, is not a judgment of the District Court because a District Court cannot be constituted with a single judge. There is no authority for this contention, as may be seen by reference to Article 62 of the Palestine Order-in-Council, 1922, where we find that a foreigner committed for trial may claim that the District Court shall consist of a single British Judge. The Respondents alternatively plead that the order in question is an interlocutory order and as such is not appealable under the provisions of Article 66 of the Code of Civil Procedure; but it is clear from the nature of the order that it is not an interlocutory order but a final order,

depriving as it does the Rabbinical Court from exercising jurisdiction once and for all in the matter of their succession.

The appeal therefore lies and must be considered upon its merits.

One of the reasons put forward by the Respondents for upholding the order made by the President of the District Court is that the Rabbinical Court only has jurisdiction to deal with questions relating to the succession to the estates of intestate Jews where all parties concerned consent to such jurisdiction and in the present case there has been no such consent.

Article 53 (i) of the Palestine Order-in-Council, 1922, gives to the Rabbinical Court exclusive jurisdiction in matters of marriage and divorce, alimony and confirmation of wills of members of their community other than foreigners. The next paragraph gives them jurisdiction in any other matter of personal status of such persons "where all the parties to the action consent to their jurisdiction."

Section 6 (1) of the Succession Ordinance provides that the Court of each of the specified religious Communities shall have jurisdiction in matters relating to the intestate succession upon death, to persons who up to the date of their death were members of the community. This jurisdiction is concurrent with the jurisdiction of the Civil Courts, who are also given power to deal with such matters by Section 1 (iii) of the Succession Ordinance.

It will be observed that Section 6 (1) does not repeat the provisions of the Order-in-Council "where all the parties to the action consent to their jurisdiction" and the question is whether these latter words should be read with Section 6 (1) and form part of it.

We are of opinion that they should, because we assume that in the absence of words expressing a contrary intention, it was intended by the Ordinance to allow to the Rabbinical Court the same jurisdiction as that given by the Order-in-Council and not to extend it.

We hold therefore that Section 6 (1) of the Succession Ordinance must be read together with Article 53 (iii) of the Palestine Order-in-Council and, in consequence, that if the Rabbinical Court are to be held to have jurisdiction in this case it must be proved that all parties to the action have consented thereto.

The next question is whether all the parties to the action have consented to the jurisdiction of the Rabbinical Court. The Order-in-Council does not say whether the consent must be in writing or whether it may be inferred from the circumstances of the case and we do not think we need to go into the question further than to say that in our opinion the consent must be clear and beyond doubt.

In this case there was neither consent in writing nor such conduct on the part of the parties from which the consent can be inferred. On the contrary, it is quite plain that from the very beginning the Respondents did not wish to go before the Rabbinical Court.

The President of the District Court has based his decision prohibiting the Rabbinical Court from dealing further with the succession in this case upon grounds which it is not necessary for us to discuss because we hold that there being no consent to the jurisdiction of the Rabbinical Court by all the parties and no likelihood of any such consent it was just and convenient that the President of the District Court should make the order which he did.

The appeal is dismissed. Costs to be paid out of the estate.

Delivered the 28th day of July, 1926.

In the District Court of Jaffa.

C.D.C. Ja. No. 35/28.

BETWEEN:

Miriam, Leah, Yehuda and Arieh Trevich — APPLICANTS.

vs

Moshe Trevich — RESPONDENT.

Collection of debt due to estate — Refusal of President District Court to instruct administrator to take action — Application to Court for directions — Order not subject to appeal — Sec. 16, Succession Ordinance, 1923.

JUDGMENT.

This is an application under Section 16 of the Succession Ordinance, 1923, in which the Plaintiffs ask for the leave of the Court to bring an action in their own name against the Defendant

in respect of a debt which they alleged is owing by him to the estate of the deceased who was the father of all parties.

The application has already been before this Court in various forms and when an application was made to the President for instructions to be issued to the administrator to sue leave was refused. In effect this is an attempt to get round the refusal of the President.

The Supreme Court has already held that an order is not subject to appeal.*) We see no reason for granting leave to sue for this matter has already been carefully considered on previous occasions and the application is therefore refused with costs.

Dated the 17th day of April, 1928.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 65/29.

BEFORE:

The Chief Justice, Jarallah, J. and Khaldi, J.

IN THE CASE OF:

Abdallah el Burghi
Em Sotta el Burghi — APPELLANTS.

vs

Sarah Aaronson
Rifka Aaronson
Toba Rutman — RESPONDENTS.

Certificate of succession issued by Sharia Court — Land sold on strength of such certificate — Certificate later revoked — Bona fide purchasers for value without notice.

Appeal from the judgment of the Land Court of Haifa dated the 13th April, 1929.

JUDGMENT OF THE LAND COURT.

In this case the Defendants bought the land in question in the Land Registry Department on the strength of a certificate of succession issued to their vendors by the Sheri Court of Jaffa dated 27th November, 1920.

This succession certificate was finally reversed on the 22nd April, 1926.

*) see ante, p. 1061.

In our opinion the Defendants were bona fide purchasers for value without notice and accordingly the Plaintiffs' case must be dismissed with costs and £P.5 advocate's fees.

The Plaintiff is of course at liberty to claim from the vendor compensation for the loss he has sustained.

JUDGMENT.

The Court, after hearing Dr. Joseph for the Appellants and Abcarius for the Respondents, orders that the appeal be dismissed with £P.2 advocate's fee and costs.

Delivered the 17th day of March, 1931.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 39/30.

BEFORE:

The Acting Chief Justice, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Ismail Hussein Abu Sam'an and Others — APPELLANTS.

vs

Muhammad Ibrahim Mahmud Abu Sam'an and Others — RESPONDENTS.

Succession to miri land — Certificate of Succession as evidence of ownership — Possession for period exceeding period prescribed for prescription.

Appeal from the judgment of the Land Court of Jaffa, dated 5th May, 1930.

JUDGMENT.

The facts of the case are:

Plaintiffs claim an inherited share, in accordance with the Law of Succession to miri land, left to them by their ancestor Mahmud Abu Sam'an.

In support of their claim they produced a Tabu registration in the name of the ancestor and a Certificate of Succession.

Defendant's defence was that soon after the death of the

ancestor, about 40 years ago, the heirs made a division by agreement and later on sold and that they were since using the inherited lands in accordance with the said division and sale for a period that exceeds the prescribed period for prescription and therefore Plaintiff's action is barred.

After hearing the evidence and considering the facts of the case, the Land Court was satisfied that the enjoyment of the land since that date until now was based on the said division and sale and accordingly dismissed the Plaintiff's claim.

The Appellants now raise objection to the said judgment in that the division was illegal and the sale was not proved.

This Court is of opinion that an old disposition which is based on division and sale on which a long time has passed cannot be discussed now after all the heirs have used the land for a long period without dispute or interruption, by virtue thereof.

We, therefore dismiss the appeal and confirm the judgment of the Lower Court with costs.

Delivered in the absence of both parties on the 24th day of August, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 8/32.

BEFORE:

The Senior Puisne Judge, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Sarah Khouri
Hilweh Katato — APPELLANTS.

vs

Miriam bint Hanna Ziadeh — RESPONDENT.

Certificate of Succession issued by District Court — Certificates of Succession issued by two different Ecclesiastical Courts—Ecclesiastical Courts prohibited from dealing with estate—Jurisdiction of Religious Courts re question of validity of decree of divorce — Judgment of Religious Court invalid where proceedings irregular — Application of Article 55, Palestine Order-in-Council, 1922— Khayat vs Khayat, discussed—Sufficiency of evidence before District Court that proceedings in Religious Court notified to party — Conflict of evidence

as to service of process—Burden of proof of validity of conflicting judgment — Application to treat two conflicting marriages of deceased as valid for purposes of distribution of his estate. — Affidavit accepted as evidence.

Appeal from the judgment of the District Court of Jerusalem, dated the 23rd December, 1931.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jerusalem, dated the 23rd of December, 1931, whereby the Court ordered that a Certificate of Succession, to the estate of Jiries Yaqub Katato, deceased, be issued to the Respondent, Miriam bint Hanna Ziadeh, widow of the deceased Issa, brother of the deceased, and Hannah, Hilaneh, Salma and Katrina, sisters of the deceased.

The following facts are found by the Court:

1. In 1901 the deceased, who was then a member of the Latin Community, was married in the Latin Church at Bir Zait to the Respondent Miriam, who has been at all times a member of the Latin Community.

2. About the year 1907, the deceased and the Respondent Miriam ceased to live together and since their separation the Respondent Miriam has never instituted proceedings in any Court against the deceased.

3. In 1907 and 1908, the deceased alleged in the Orthodox Ecclesiastical Court that the Respondent Miriam had committed adultery and he obtained a divorce from her.

4. In 1908 the deceased went through a form of marriage with the Appellant Sarah Khouri.

5. The ceremony was performed by the Father of the Appellant.

6. The Appellant Sarah gave birth to a daughter, the Appellant Hilweh, of whom the deceased was the father.

7. The deceased died on the 6th of February, 1927.

8. On the 28th June, 1929, the Latin Ecclesiastical Court issued a Certificate of Succession in favour of the Respondent Miriam, and the brother and sisters of the deceased.

9. On the 8th of July, 1929, the Orthodox Ecclesiastical Court issued a Certificate of Succession in favour of the Appellants Sarah and Hilweh.

On the 28th of July, 1931, the District Court of Jerusalem issued an Order under Section 7 (1) of the Succession Ordinance, 1923, prohibiting both the Latin and Orthodox Ecclesiastical Courts from further dealing with the estate of the deceased.

The first point raised by the Appellants is that the matter was not within the jurisdiction of the District Court as the question at issue was whether the decree of divorce was valid or not; and that this involved the question of the jurisdiction of the Religious Courts, which should have been referred for decision to the Chief Justice under Article 55 of the Palestine Order-in-Council, 1922.

This objection appears to me to be misconceived for two reasons. In the first place, the ground of the District Court's judgment was not that the decree of dissolution of marriage issued by the Orthodox Court was not within its jurisdiction; but was, that in view of the fact that the Respondent Miriam had never been cited to appear before the Orthodox Court, the decree issued by that Court, even if within its jurisdiction, was issued in proceedings that were irregular and therefore could not be regarded as valid by the Civil Court.

Further, even if the question of the jurisdiction of the Orthodox Court had been in issue, Article 55 of the Palestine Order-in-Council, 1922, would not have been applicable. The relevant provision of that article reads:

> "Where any action of personal status involves persons of different religious communities, application may be made by any party to the Chief Justice, who shall, with the assistance, if he thinks fit, of assessors from the communities concerned, decide which Court shall have jurisdiction."

The provisions of this Article therefore could not be applied where the question at issue was whether a particular Religious Court had jurisdiction in the past to determine a matter then brought before it.

The second ground of appeal is that the judgment of the District Court implied the finding that the decree of dissolution of marriage issued by the Orthodox Court was invalid for lack of jurisdiction, and this was contrary to the principle laid down by the Chief Justice sitting under Article 55 of the Palestine Order-in-Council, 1922, in the case of Khayat vs Khayat.*)

*) Reported ante, p. 1244.

That was a case in which the Petitioner Sama'an Khayat and the Respondent Marie Khayat, who were both members of the Melkite Community, were married according to the rites of that Community. It was alleged that, subsequently, the Petitioner and Respondent appeared before the Orthodox Court in proceedings that resulted in the issue by that Court of a decree dissolving the marriage. Later the Petitioner went through a form of marriage with another woman in accordance with the Orthodox rites. Proceedings were taken by the Respondent, prior by the British Occupation, in the Court of the Melkite Community, which issued an order for alimony against the Petitioner.

The matter came up again in 1923, when on a fresh application by the Respondent to the Melkite Court, the amount of alimony was increased, and it was on account of that order that application was made to the Chief Justice under Article 55.

In the course of his judgment, the Chief Justice said "The case set up by the Petitioner that the marriage was dissolved in 1898 by a decree of an Orthodox Religious Court and by consent of the woman, will be for him to set up, if he be so minded, before the Court which judges his first wife's claim for alimony. I hold that a Religious Court of the Melkite Church should have that jurisdiction."

It appears to me that the passage cited covers the present case. By virtue of the order made under Section 7 of the Succession Ordinance, 1923, the District Court occupies in the present case the position which in Khayat vs Khayat was occupied by the Melkite Court; and it is for the Appellants to establish before the District Court their claim that the marriage of the late Jiries Yaqub Katato to the Respondent Miriam was dissolved by a decree of the Orthodox Court, exercising jurisdiction with the consent of the Respondent Miriam. In dealing with this question the District Court did not decide whether the Respondent Miriam, by consenting to the jurisdiction of the Orthodox Court, could confer upon it jurisdiction to dissolve the marriage.

The question to which the District Court directed its attention was a question of fact, namely, whether or not the Respondent Miriam had ever received notice of the proceedings in the Orthodox Court. And this question the District Court answered in the negative on the evidence before it.

This brings me to the third point raised in the appeal which was, that the District Court had not before it evidence upon

which it could hold that the Respondent Miriam was not notified of the proceedings of the Orthodox Court.

The evidence before the District Court consisted of two documents. On behalf of the Respondent there was filed an affidavit on the Respondent Miriam that she did not know of any case raised against her by Jiries Jaqub Katato, in any Court, whether Eccelesiastical or Civil in any respect since the date of her marriage and that she had never been summoned to appear in any Court and had never been served with any judgment.

On behalf of the Appellants a Certificate by the Chief Clerk of the Orthodox Patriarchal Court was filed to the effect that that Court had "within its jurisdiction dealt with the case and dissolved the marriage".

No evidence was produced of any appearance by the Respondent Miriam before the Orthodox Court, or of any service upon her of any summons or of any notification to her of any judgment.

Bearing in mind the fact that the burden was upon the Appellants of establishing the validity of the decree of the Orthodox Court, which involved proof that the Respondent Miriam had notice of its proceedings, I hold that the District Court, in the absence of such evidence, was bound to treat the decree as invalid.

It is unnecessary for me, therefore, to deal with the question of the admissibility in evidence of the Respondent's affidavit. But it should be pointed out that when evidence was called for by the Court, the Respondent's advocate said that he would file an affidavit, and no objection was taken at that time by the Petitioners. Further, when the affidavit was subsequently filed, the Appellants' advocate did not exercise his right to have the Respondent called and cross examined thereon. Under these circumstances the Appellants must be held to have accepted the affidavit as evidence.

The Appellant's claim that they should be given time in which to submit further evidence to the Court, cannot be admitted, in view of the fact that the District Court's proceedings were adjourned for a month to enable them to do this.

Finally, the Appellants argue that in determining the persons entitled to succeed to the Estate of the late Jiries Yaqub Katato, the Court could and should treat both marriages as valid.

The Appellants state that judgments to a similar effect have been given in the Egyptian Courts and they rely, by way of analogy, upon the judgment in Ogden vs Ogden, L.R. (1908) Probate, page 46.

This argument is open, however, to the objection that the marriage celebrated between the deceased and the Appellant could only be regarded as valid by a Civil Court, if it had been preceded by a decree dissolving the deceased's marriage with the Respondent Miriam issued in proceedings which the Civil Court could regard as being free from all irregularity; and the District Court has held that such was not the case.

It follows that this claim by the Appellants must fail. The Appellants will pay the costs of this appeal including £P.2 advocate's fees.

Delivered the 4th day of November, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 70/33.

BEFORE:

Baker, J., Khayat, J. and Khaldi, J.

IN THE CASE OF:

Argentine Morcos — APPELLANT.

vs

Michael Morcos
Hanna Morcos — RESPONDENTS.

Order made by President, District Court under Sec. 7, Succession Ordinance, 1923, not reversible by District Court — Religious Court ordered to refrain from dealing with estate — Finality of order made by President, District Court, in judicial capacity — Grant by District Court of Certificate of Inheritance.

JUDGMENT.

On the 29th June, 1932, the Appellant applied to the District Court for the issue of a Certificate of Inheritance. The President of the District Court, Jerusalem, on July 7, 1932, issued an order under Section 7 of the Succession Ordinance, 1932, ordering the Latin Ecclesiastical Court to refrain from dealing any further in the matter of the estate. The District Court on March

13, 1933, dismissed the application for a Certificate and referred the matter back to the Ecclesiastical Court and the Order under Section 7 was cancelled. Against this judgment the present appeal was lodged.

We are of opinion that the main question in the appeal is whether the President of the District Court was justified in cancelling the before mentioned order he gave under Section 7 of the Succession Ordinance, 1932. We hold that the President of the District Court was acting in a judicial capacity and as such when an order is given him, the same is a final one unless reversed by a higher Court. Therefore the original order of the President of the District Court must stand and the case be remitted to the District Court for a Certificate of Inheritance to be granted.

Delivered the 26th day of May, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 120/33.

BEFORE :

Baker, J., Frumkin, J. and Khayat, J.

IN THE CASE OF :

Haim Srogowitz — APPELLANT.

vs

Moshe Chelouche
Zalkind Stalbow — RESPONDENTS.

Action against administrators brought by one beneficiary without authority of others — Personal liability of executors for wrongful acts during course of administration — Wrongful payments by executors — Sec. 17, Succession Ordinance, 1923.

JUDGMENT.

We are satisfied that under Section 17 of the Succession Ordinance that any beneficiary in the estate of a deceased is entitled to bring an action against an executor or administrator for any wrong committed by him in the course of his administration.

The Appellant is a legatee and also a residuary beneficiary and we are satisfied that although he is not the sole legatee nor has he the authority from the other legatees, that under the before

mentioned section of the Succession Ordinance his action is properly conceived.

Therfore the judgment of the Lower Court must be quashed, the appeal allowed and the case must be remitted for the said Court to enter into the merits and give a fresh judgment.

Costs in the cause.

Delivered the 25th day of April, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 156/33.

BEFORE:

The Senior Puisne Judge, Khaldi, J. and Abdel Hadi, J.

IN THE CASE OF:

Aba Davidoff — APPELLANT.

vs

Dvora Davidoff
Zeina Abrahmoff — RESPONDENTS.

Death of intestate before enactment of Succession Ordinance, 1923 — What law applicable to distribution of such estate — Sec. 2 (iii) (a), Succession Ordinance, 1923 — Application of Law of Inheritance of Mulk Property as administered in the Sharia Courts.

JUDGMENT.

Joseph Davidoff, the administration of whose estate is in question died intestate before the enactment of the Succession Ordinance, 1923, and it follows that the provisions of Section 2 (iii) (a) of that Ordinance do not apply to the distribution of his estate.

The law in force at the date of the deceased's death was the Law of Inheritance of Mulk Property as administered in the Sharia Courts and the deceased's estate will be distributed accordingly.

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

Costs of all parties here and below will come out of the estate.

Delivered the 22nd day of November, 1934.

SUPREME MOSLEM COUNCIL.

In the High Court of Justice.

H.C. No. 80/25.

BEFORE:
The Acting Chief Justice and the Acting Senior British Judge.

IN THE APPLICATION OF:

Said Bey Fahoum of Nazareth — PETITIONER.

vs

Election Inspection Commission for the District of Nazareth in the election to the Supreme Moslem Council — RESPONDENT.

Application to re-open election — Election of members to Supreme Moslem Council — Supreme Moslem Council is part of Organization of the Government of Palestine — Bodies supervising election to Supreme Moslem Council are public bodies — Jurisdiction of High Court to issue orders to public bodies — Election in accordance with Ottoman Law of Election of Deputies — Jurisdiction of Mejlis De'awi — Refusal of right to vote to persons named in the voting list — Art. 5, Regulation of the Supreme Moslem Council, 20th December, 1921 — Art. 43, Palestine Order-in-Council, 1922 — Sec. 6, Courts Ordinance, 1924.

Application for an Order that the Order dated 19th December, 1925, whereby the Respondents were required to show cause why an Order should not issue directing them to re-open the election or to hold a fresh election in order that voters wrongly excluded may be allowed to vote, be made absolute.

JUDGMENT.

The Petitioner is asking that the election of secondary electors to elect a member of the Supreme Moslem Council held in Nazareth on the 14th December, be declared null and void on the ground of illegalities of procedure, and that an Order be issued to the Inspection Commission of Nazareth directing them not to take into consideration the votes of the persons declared to be elected as the result of such election.

The first question raised by the petition is that of jurisdiction.

Under Article 5 of the Regulations of the Supreme Moslem Council issued on the 20th of December, 1921, elections are to

be held in accordance with the Ottoman Law of Election of Deputies subject to such amendment as is mentioned in that article.

A further amendment of the electoral machinery was made by a resolution published in Official Gazette No. 148.

The Supreme Moslem Council is part of the Organisation of the Government of Palestine and the bodies to which by law duties are entrusted in connection with the election of Members of the Supreme Moslem Council are public bodies.

An order to such a body to do or to abstain from doing a certain act is therefore an Order which this Court has jurisdiction to make, unless there is some other authority which has jurisdiction.

The body against which we are asked to make an Order in the present case is the Inspection Commission of the Kaza of Nazareth.

Under Article 13 of the Law of Election it is the duty of this body to publish a list of qualified electors; and a period of 15 days is prescribed by Article 14 for objection to be made to the list on the ground that any person has been wrongfully included or excluded. The Article requires that the Inspection Commission shall decide as to the validity or otherwise of any such objection, and shall notify the applicant of the decision taken, and provides for an appeal against such decision to the Mejlis De'awi.

It is stated that the appellate jurisdiction of the Mejlis became later invested in the Court of First Instance; and that such jurisdiction is now exercisable by the District Court. But this is a point which we have not now to decide, as the question raised by this petition is not within the jurisdiction conferred upon the Mejlis by Article 14.

What is alleged in the petition is that after the list of electors had been settled and the period of the objection had expired, the Inspection Commission wrongfully refused to allow certain persons whose names were in the list, to vote. This is not a matter to which Article 14 applies.

That, however, does not dispose of the question. Under Article 45 and the following Articles, it is the duty of the Inspection Commission of the Kaza, when the secondary electors have been elected to conduct the secondary election; and under Article 51, the Inspection Commission of the Kaza is bound to make a return to the Inspection Commission of the Liwa containing the result of the election in the Kaza.

It might be argued that the Inspection Commission of the Liwa was the body having authority to decide whether any primary election was duly conducted and hence whether the votes when given should be taken into account.

From Article 52, however, it would appear that the duties of the Inspection Commission of the Liwa consist solely of counting the votes given by the secondary electors in the various Kazas as shown by the return from the Inspection Commission of each Kaza; and that the Inspection Commission of the Liwa has no jurisdiction to enquire whether the secondary electors so voting were duly elected.

The Ottoman Law provided a further tribunal to which objection could be made against the validity of the election of a Member of the Chamber of Deputies, namely, the new Chamber itself.

The provisions for the hearing of such objections, however, are not contained in the Law of Elections but in the Regulations of the Chamber of Deputies, which have not been made applicable to the Supreme Moslem Council.

Nor indeed does it appear that these Regulations could be applied seeing that as objection has been made to the election proceedings not only in the Liwa of Acre but also in those of Jerusalem and Nablus, the new Council would not contain a single elected member against whose election no objection had been made, and it would thus be impossible to constitute a Commission for the examination of electoral returns as provided by Part III of the Regulations.

It follows therefore that there is no other Tribunal having jurisdiction in the matter, and hence that under Article 43 of the Palestine-Order-in-Council, 1922, and Section 6 of the Courts Ordinance, 1924, this Court has jurisdiction.

There is no dispute as to the facts which give rise to this petition. The primary election in the town of Nazareth was conducted by the Inspection Commission of the Kaza. Certain persons whose names were in the list of electors which had been posted in accordance with Article 13, and to whom no objection had been made within the period of a fortnight allowed by Articles 13 and 14, were not allowed to vote when they presented themselves at the polling-booth.

Such exclusions were made by virtue of decisions of the Inspection Commission which, with the grounds upon which they were given, were recorded in the minute book of the Commission, or on the separate sheets of paper, and were signed by the Members of the Inspection Commission.

It is argued by the Petitioner that the Inspection Commission had no authority to exclude any elector whose name was on the register.

Article 14 provides that "At the end of the fortnight after which the registers are removed no application, objection or appeal shall be accepted."

It is not suggested that any objection was made to any of the persons thus excluded from voting.

Under Article 12 "the Inspection Commission will inspect the Registers received to assure themselves that they are in accordance with the law and do not contain an error or defect" before posting up the lists. But there is no provision which enables the Inspection Commission to make on their own initiative any alteration in the lists after they have been posted and the period for objection has passed.

Moreover, that it was not the intention of the Law that the Inspection Commission should decide on the day of the election whether or not a registered elector should be allowed to vote, is clear from the fact that it is not to the Inspection Commission but to a body known as the Electoral Committee, whose constitution is prescribed by Article 31, that the duty of conducting the election is entrusted. The Inspection Commission is to be represented at the election by a single member, who under Article 20 is to be chosen by lot.

It was therefore irregular that the Inspection Commission should itself conduct the election and decide whether a duly registered elector who presented himself was entitled to vote, or not. The illegality of procedure was clearly of such a nature as to affect the actual votes cast and consequently the election proceedings were invalid.

The Order asked for must issue.

Delivered the 11th day of January, 1926.

In the High Court of Justice.

H.C. No. 3/26.

BEFORE:
The Acting Chief Justice and the Acting Senior British Judge.

Validity of election of members to Supreme Moslem Council — Election not held in accordance with Ottoman Law of Elections — Procedure on amendment of Regulations for the Supreme Moslem Council — Articles 5, 8 (4), Regulation of the Supreme Moslem Council, 20th December, 1921.

JUDGMENT.

The issue raised by this Petition is whether the election for the Supreme Moslem Council held in the District of Beersheba, on or about the 15th November, 1925, is valid or not.

The election was not held in accordance with the Ottoman Law of Elections, as required by Article 5 of the Regulations for the Supreme Moslem Council published in Official Gazette No. 58; but in accordance with a resolution of the electoral college passed on the 25th August, 1925, to the effect that "Elections in Beersheba shall be carried out by the recognised Sheikh in proportion to the official census of the Government".

The effect of this Resolution was to substitute the recognised Sheikhs for the secondary electors contemplated by the Ottoman Law of Elections.

The objection taken by the Petitioner is that the resolution is an amendment of Article 5 of the Regulations; that in consequence, in order to be valid it must conform to the requirements of Article 8 (4) of the Regulation, namely, it must be passed by a majority of two-thirds of the electoral college and be approved by the Government and that neither of these conditions has been fulfilled.

There can be no question that the resolution does constitute an amendment to Article 5 of the Regulation, and that in order to be valid, it must conform to the requirements of Article 8 (4).

We will consider first the question of the Government's approval.

The Respondents have put in a copy of a letter from the President of the Supreme Moslem Council to the Chief Secretary,

enclosing among other documents the text of the resolution, and the Chief Secretary's reply.

In his reply, the Chief Secretary refers to protests received from certain petitioners, with regard to which he says:—

"Their petitions may be grouped under three heads:—

(a) that the electoral procedure, involving an amendment of Article 5 of the Order constituting the Supreme Moslem Council, has been decided in an unconstitutional manner.

(b) that modifications of the Order constituting the Council are necessary and should be made at an early date.

(c) that the relations between the Government and the Council should be defined more precisely than at present.

2. I will express my opinion briefly under these several heads:—

(a) I am satisfied that the procedure for the forthcoming elections as agreed to by the majority of the electoral council was decided in a constitutional manner and may be adopted for the forthcoming elections."

The Respondents argue that paragraph 2 (a) quoted above is an announcement of the approval by the Government of the resolution with regard to Beersheba.

On examining, however, the enclosures contained in the President of the Supreme Moslem Council's letter, it will be found that they include another resolution by the electoral college which is expressed to be an amendment of Article 5 of the Supreme Moslem Council's Regulation, and with regard to this the President of the Supreme Moslem Council writes:—

"We therefore submit to Your Honour the amended Article for the purpose of approval by the Government in accordance with the last paragraph of Sub-Section 4 of Article 8.

"We also submit to Your Honour copies of:—

6. The Mazbuta on elections by Beersheba Tribes."

It is to be noted that the first of these Resolutions (which refers to the constitution of Inspection Commissions) is submitted specifically as an amendment to Article 5 requiring the approval of the Government; and in fact a Notice was published in Offi-

cial Gazette No. 148 declaring that the High Commissioner has approved of a modified form of this amendment.

With regard to the Resolution relating to Beersheba, however, there was no suggestion that an amendment to Article 5 was proposed: no approval by Government was asked for, and no notice that such approval has been given has ever been published.

It is clear that the resolution as to Inspection Commissions stands on a totally different footing from that relating to Beersheba; and it cannot be held that the passage quoted from the Chief Secretary's letter constitutes an approval by the High Commissioner of the Resolution as to Beersheba as an amendment to Article 5 of the Regulation.

One requirement of Article 8 (4) has therefore not been complied with in regard to this Resolution, and in consequence it has no legal effect as an amendment to Article 5, and an election held in accordance with the resolution is invalid.

The Order asked for by the Petitioner must issue.

Delivered in presence the 11th day of February, 1926.

In the High Court of Justice.

H.C. No. 16/26.

BEFORE:
The Acting Chief Justice and the Acting Senior British Judge.

IN THE APPLICATION OF:
Awad El Armuch — PETITIONER.

vs

The Inspection Commission of Jerusalem — RESPONDENTS.

and

IN THE APPLICATION OF:
Abdul Latif Bey Salah — PETITIONER.

vs

The Inspection Commission of Nablus — RESPONDENTS.

Constitution of Supreme Moslem Council—Election of members of Supreme Moslem Council — Articles 5, 8 (4), Regulation of the Supreme Moslem Council, 20th December, 1921 — Constitution of Electoral College — Difference in publication between English and Arabic versions of Official Gazette — Grounds for setting aside elections of secondary electors—Functions of Inspection Commission—Office of Mejlis De'awi obsolete.

JUDGMENT.

The two petitions relating to the election of members of the Supreme Moslem Council raise the same points, and for the sake of convenience, they have been heard together.

The Supreme Moslem Council was constituted by an Order of the High Commissioner issued on 20th December, 1921, and published in Official Gazette No. 58, giving effect to an Instrument called a Regulation, which had been drawn up by a Committee of Moslem representatives.

Article 5 of that Regulation is as follows:—

> "Each member of the Council shall be elected by the secondary electors elected by the inhabitants of the Liwa which the member is to represent in accordance with the Ottoman Law of Election to the Chamber of Deputies, provided that in that Law 'the Municipal Council' shall be substituted for the 'Administrative Council".

Article 8 (4) of the Regulation of the Supreme Moslem Council provides for amendment of the Regulation, as follows:—

> "If however a law or regulation is to be amended or supplemented the Council shall submit same to the electoral college and an absolute majority must be obtained for passing the proposal; provided that no amendment to the provisions hereof shall be made unless it be passed by a majority of two-thirds of the electoral college and approved by the Government".

The Electoral College mentioned in this Article is not defined in the Regulation. There is, however, no dispute as to what was the body so described, or that it was identical with the General Committee referred to in Article 6 of the Regulation.

It consisted of 56 persons, namely four representatives from each of the 14 Kazas, elected by the old secondary electors of the Kaza.

Official Gazette No. 148 issued on the 1st October, 1925, contained a notice of an amendment to Article 5 of the Regulation. The Notice recites the provisions of Article 8 of the Regulation with regard to amendment of its provisions and Article 5 and proceeds as follows:—

> "And whereas the following amendment of Article 5 has been passed by the required majority and has been approved by the High Commissioner.
>
> Notice is hereby given that the provision to Article 5 of the Regulations is cancelled, and the following paragraph shall be added to that Article:—
>
> (2) The Commission of Inspection prescribed by Article 10 of the Ottoman Law of Elections to the Chamber of Deputies shall for the purpose of the next election of the Supreme Moslem Council be composed of the Members of the Electoral College which elected the existing Council, who shall elect in each Kaza six other persons to be added to the said Commission of Inspection; provided that in any place where there is an elected Municipality having a majority of Moslem Members, of which the term has not expired in accordance with the Ottoman Law, such Moslem Members shall form part of the Commission of Inspection in place of the six Members to be elected by the Secondary electors.
>
> (3) The Inspection Commission shall prepare and arrange the electoral areas."

It is on the meaning of Clause (2) that the question raised in the Petitions depends.

There is clearly an inconsistency between the provision of the Clause which directs that the six persons to be added to the Commission of Inspection in each Kaza shall be elected by "the members of the electoral college which elected the existing Council" and the concluding words of the Clause which refer to "the six members to be elected by the secondary electors".

Notwithstanding this reference, I have no doubt that the earlier portion of the Clause, which is the operative part, must govern the whole, and hence that the effect of the Clause is to provide for the election of the 6 additional members of the Inspection Commission in each Kaza by the members of the Electoral College.

In the Arabic edition of the Gazette, however, the wording of the first part of the Clause differs from the English version and is to the following effects:—

> "(2) The Inspection Commission prescribed by Article 10 of the Ottoman Law of Elections to the Chamber of Deputies shall for the purpose of the forthcoming elections of the Supreme Moslem Council be composed of the members of the electoral college which elected the existing Supreme Moslem Council for each Kaza. There shall be added to the said Commission 6 persons elected by the secondary electors for each Kaza".

And in the Kazas of Jerusalem and Nablus, to which these petitions relate, the Arabic version of the Gazette has been followed, and the six additional members of the Inspection Commission have been elected by the old secondary electors of the Kaza.

The argument of the Petitioners is that such election is not in accordance with the amendment approved by the High Commissioner as it appears in the English Gazette, and thus is illegal; and consequently in view of the important part which the Inspection Commission plays in the elections of secondary electors, these elections must be declared void.

To this the Respondents reply that the Arabic is the original and therefore the authoritative text, and hence that the election of members of the Inspection Commission was held according to Law.

They further argue that even if the elections to the Inspection Commission were not duly made, the elections of secondary electors are not to be set aside on that account, unless it is proved that irregularities were committed by the Inspection Commission.

In support of their first contention the Respondents point to the fact, which is admitted by the Petitioners, that the Resolution of the El-Coll which was submitted to the Government in Arabic for approval, provided for the election of the six additional members of the Inspection Commission by the general body of secondary electors of the Kaza, and not by the members of the El-Coll.

The Respondents argue that it was this Resolution which is the original, and that its terms should be held to prevail over those of the English Gazette.

In my view there would be great force in this contention if the Notice merely recorded a resolution by the El-Coll.

Such, however, is not the effect of the Notice. What it contains is an approval by the High Commissioner of an amendment to the Regulation, and such approval must necessarily have been given to the English version of the amendment.

In this connection it must be noted that the version of the Clause in the Arabic edition of the Gazette, while it agrees with the Resolution submitted to the Government for approval, as regards the point at issue is not identical in wording, or in effect, with that Resolution. Indeed, the two Arabic texts differ in one important particular.

In the Arabic Gazette, as in the English, the amendment to Article 5 of the Regulation is expressed to apply to the forthcoming election of the Supreme Moslem Council only.

In the Resolution submitted to the Government for approval there is no such limitation.

Thus it is clear that whichever form of the notice of approval is accepted, the Government did not merely approve of the Resolution in the form in which it was submitted; and the altered form to which the High Commissioner's approval was given must be held to be that of the English Gazette.

It follows that the election of additional members of the Inspection Commissions in the two Kazas now in question was not made in accordance with the amendment approved by the High Commissioner.

Moreover, if the form of the Resolution passed by the El-Coll and submitted for approval by the Government was as it has been presented to the Court, it follows that the form in which the amendment was approved was never passed by a majority of two thirds of the Electoral College and hence that the requirements of Article 8 (4) of the Regulation have not been complied with, and that the amendment published in Official Gazette No. 148—whether the English or Arabic text be adopted—has no legal effect.

We have therefore to decide whether the fact that the additional Members of the Inspection Commissions were not legally elected invalidates the elections of secondary electors.

To answer this question, it is necessary to examine the functions assigned to the Inspection Commission and to consider whether they are of such a nature as to give to the body exercising them power to affect the result of the elections.

In addition to certain purely ministerial functions, such as counting the votes as shown by the returns from the various electoral areas, and declaring who, as a result, are the successful candidates, the Inspection Commission has duties to perform which unquestionably involve the exercise of a discretion.

Under Article 12 of the Law of Elections, the Inspection Commission is to revise the lists of electors prepared by the Mukhtars before they are published.

Under Article 14, the Inspection Commission is to receive objections to the published lists, on the ground that any person has been wrongly included therein or omitted therefrom, and to give decisions upon such objections.

It is true that under the same Article an appeal lay from the decisions of the Inspection Commission to a body called the Mejlis De'awi.

The Mejlis De'awi, however, does not now exist, and although it has been argued that its appellate jurisdiction is now vested in the District Court, it is difficult to see how, having regard to the terms of Section 40 of the Palestine Order-in-Council, 1922, this view can be sustained?

In my opinion, therefore, the Inspection Commission is the final authority so far as the lists of electors for the present election are concerned; and hence is in a position which gives its decisions a direct effect upon the result of the elections. The Inspection Commission in fact settles who shall vote and who shall not.

It must follow that elections held under the control of an illegally constituted Inspection Commission are invalid.

The Order asked for by the Petitioners must issue.

Delivered in presence the 11th day of February, 1926.

In the High Court of Justice.

H.C. No. 48/30.

BEFORE:

The Chief Justice, Corrie, J. and Jarallah, J.

IN THE APPLICATION OF:

Muhammad Hifzi Ahmad Abu El Hamid — PETITIONER.

vs

President, Supreme Moslem Council — RESPONDENT.

Application for order to President of Supreme Moslem Council — Imam of Mosque dismissed — Appointment of religious officer by Baraat of the Sultan — Supreme Moslem Council held to stand in place of Advisory Council of waqfs in Constantinople — Procedure on dismissal of Moslem religious official — Articles 52, 53, Regulations Relating to Appointment of Religious Officers.

ORDER.

This is a Petition from Muhammad Hifzi Ahmad Abuel Hamid, the First Imam of the Mosque of Jazzar at Acre, asking that the President of the Supreme Moslem Council should be directed to retain the Petitioner in that official position.

The Petitioner was appointed by a Baraat of the Sultan of Turkey, dated 1326.

On the 10th May, 1928, a circular was issued under the signature of the President of the Supreme Moslem Council addressed to the Mamur Awqaf at Acre, asking him to warn the officers of the religious institutions in his district against sitting in coffee houses, and to draw their attention to the fact that non-observance of the warning would "subject them to such treatment as is justifiable." This circular was signed, amongst others, by the Petitioner.

On the 5th August, 1929, the Mamur Awqaf of Acre forwarded to the Inspector of Religious Places a mazbata signed by various persons making complaints against the Petitioner and stating that he had several times been warned, but that, nevertheless, he was in the habit of absenting himself without permission. This was forwarded to the President of the Supreme Moslem Council under cover of a letter from the Inspector of Religious Institutions, dated the 6th August, 1929, in which he complained of the Petitioner's habit of sitting in coffee houses and absenting himself without permission from his post of Imam.

On the 18th September, 1929, the Mamur Awqaf of Acre sent a reminder to the President of the Supreme Moslem Council asking for the result of the mazbata of 5th August, 1929, and on the 25th January, 1930, the Petitioner was informed by the Waqfs Department at Acre that he was dismissed from his post for sitting in cafés and absenting himself without permission.

There were placed before us, on behalf of the Petitioner, certain Regulations of the year 1330 relating to Waqf officials and other officers of Religious Institutions, Articles 5 and 7 of which dealt with absence of officials from their duties and the punishment for such absence without permission. These Regulations, we were informed, had been adopted by the Instructions which were also placed before us on behalf of the Petitioner, and which we were told were issued by the Supreme Moslem Council. Article 7 of these instructions reproduces with very slight alterations the same penalties for absence without leave as are contained in the Regulations of 1330. The penalties are, for the first offence; a written warning, for the second: a deduction of a part of the offender's salary, not exceeding one-half of his monthly salary, for the third: a deduction of from one-half to the whole of a month's salary, and for the fourth offence: dismissal.

In addition to these instructions, we had placed before us on behalf of the Petitioner, Article 53 of the Ottoman Regulations relating to appointment of religious officers, dated 23rd July, 1329. This article requires that holders of posts who commit acts, other than crimes or misdemeanours as dealt with in Article 52, which call for dismissal according to the Sharia Law, shall have the matter investigated by the Mamur Awqaf of the locality, who has to take "the statement of the holder of the post together with that of all those whose statements should be taken" and if, after these investigations, the conduct of the person charged is deemed to call for dismissal, the highest Mamur Awqaf of the place is temporarily to suspend the offender from his office and to forward the documents concerning the investigation to Constantinople, where the Advisory Council of Waqfs, if it agrees that the charges have been proved and that the act requires dismissal, is to dismiss the holder of the post and see that another is appointed in his place.

Taking first the instructions with regard to absence without leave, it appears obvious that no written warning with regard to such absence was ever given to the Petitioner. The circular of

May 10th, 1928, cannot be taken as a warning on this matter as it is concerned only with the practice of frequenting cafés.

Again, with regard to absence without leave, Article 7 of the instructions requires three successive offences to be committed involving lesser punishments, while only the fourth entails dismissal.

However, as will be seen from the later part of this judgment, it is unnecessary for us to decide whether these instructions have the force of law or not.

As to Article 53, it appears clear, and Fakhri Bey admitted it in argument, that the Supreme Moslem Council stands in the place of the Advisory Council of Waqfs in Constantinople.

Fakhri Bey, in his arguments before us, urged that Section 8 (1) (f) of the Supreme Moslem Council's Regulations relieves the Supreme Moslem Council from carrying out the provisions of Article 53 of the Ottoman Regulations of 1329, but Section 8 (1) (f) lays down no procedure as to what steps should be taken before the dismissal of Moslem religious officials; the provision at the end that, when an official is dismissed, notice thereof should be sent to the Government setting forth the reason for dismissal, cannot be taken to replace provisions as to the procedure antecedent to dismissal, for it serves only to place responsibility on the Council to notify the Government, after a dismissal has been made, of such dismissal, stating the reasons therefor.

In the absence of anything to satisfy us that Article 53 has been replaced by any other provision of law, we are bound to assume that it is still in force, subject only to the modification that the Supreme Moslem Council stands in the shoes of the Advisory Council of Constantinople.

If this be so, it follows that, as there was no statement taken from the holder of the post, which is obviously a provision inserted to give a person accused of an offence a right to offer any possible explanation, and as there were no statements taken from persons testifying against the holder of the post, and as the Supreme Moslem Council acted without receiving a record of such preliminary investigation of the charge, we must hold that, owing to the breach of the terms of Article 53, the dismissal was improper. This, as we have pointed out above, relieves us from the necessity of coming to any decision as to whether the instructions as to absence without leave are operative in law or not.

We wish to add the following:—

The Petition in this case is against the President of the Supreme Moslem Council. The whole Council and not merely the President should have been cited as Respondents to this Petition. Throughout the argument the matter has been treated as one affecting the Council as a whole, and the order which the Petitioner seeks to have set aside, which was given by the Acting President of the Supreme Moslem Council, has been regarded as an order of the Council as a whole. It is clear that the President of the Supreme Moslem Council has no power apart from the Council to dismiss an official.

The rule must be made absolute with £P.2 advocate's fee and costs, and must issue against the President of the Supreme Moslem Council as representative of the Council as a whole.

Delivered the 27th day of November, 1930.

In the High Court of Justice.

H.C. No. 23/31.

BEFORE:

Corrie, J., Baker, J. and Jarallah, J.

IN THE APPLICATION OF:

'Ata 'Abdul Fattah Naser Eddin
and Nine Others — PETITIONERS.

VS

The President and Members of the
Supreme Moslem Council — RESPONDENTS.

Application for order to issue to Supreme Moslem Council re application of income of Moslem waqfs — Enforcement of conditions stipulated by dedicators of waqf — Monies of Awqaf not spent in accordance with stipulations in trust deeds — Art. 8, Regulation of the Supreme Moslem Council, 20th December, 1921 — Duties of Supreme Moslem Council — Nature of Awqaf mazbuta — Art. 46, Palestine Order-in-Council, 1922.

JUDGMENT.

The Petitioners, who are Moslem inhabitants of Hebron, are applying for an order to issue to the President and Members of the Supreme Moslem Council directing the Council to enforce the

conditions of the dedicators in regard to the manner in which the revenues of the Mosque of Ibrahim at Hebron should be expended.

In support of their petition the Petitioners have filed affidavits by a number of persons who depose that the Waqfias of the Awqaf in question are deposited in a safe in the Mosque, the keys of which are in the custody of persons other than the Petitioners or the Respondents, and that under these Waqfias "dedications are made for opening hospices, observances of religious rites, supplying Hebron with a water supply, reimbursement of the expenses requisite for the repair of the said Mosque (then using the balance of the revenue assigned for repairs, after affecting them, for the poor of Hebron), and the establishment of a Hospital in Hebron. In certain of these deeds of dedication both poor and rich folk are put on the same level as beneficiaries."

The Petitioners allege that the income of these Awqaf is collected by the Government and paid over to the Respondents by whom a portion is expended in Hebron, while the balance is applied elsewhere.

The Petitioners rely upon Section 8 (1) of the Regulations of the Supreme Moslem Sharia Council issued on the 20th December, 1921, and published in the Gazette No. 58, dated 1st January, 1922, which provides that the duties of the Council shall be, inter alia,

> g) to enquire into all Moslem Awaqf and to produce proof and evidence establishing the claim of these Awqaf with a view to having such returned to them.
>
> The Council shall enforce the conditions of the dedicator in regard to the manner in which the revenues of such Awqaf should be expended."

The Petitioners maintain that the Awqaf in question belong to the category of Waqf Sahih, and they rely upon paragraph 165 of the Treatise on the Laws of Awqaf by Omar Hilmi, who is regarded by both sides as a writer of authority—which states that "In true dedications the breach of a condition imposed by the dedicator which is in conformity with the sacred law is not allowed."

The Respondents admit receipt of the revenues of the Awqaf in question and agree that such revenues are not wholly expended in Hebron, but are apportioned annually between Hebron and Jerusalem.

They state that they have not in their possession the Waqfias, or authentic copies of them, and that their authority for apportioning the income in this manner is an old established practice in force under the Ottoman Government and observed by the British Administration up to the time when the Supreme Moslem Council was created and given control of the Waqf funds.

In proof of this practice the Respondents have filed a number of Exhibits, including accounts (Exhibits 3, 4, 16, 17 and 18), which go to show that the income of the Hebron Awqaf was apportioned by the Ottoman and British Government in the manner in which it is now apportioned by the Respondents, and this fact has not been contested by the Petitioners.

The Respondents further argue that the Awqaf in question are mazbuta and that, as a matter of law, the terms of the Waqfias need not be observed with regard to Awqaf of this category.

Awqaf Mazbuta is the name given to Waqf properties administered directly by the Minister of Awqafs (Omar Hilmi, para. 33).

The Respondents have filed Exhibits which go to show that under the Turkish Government the Hebron Awqaf were so administered.

The Petitioners, while they do not deny this, are not prepared to admit that these Awqaf are legally mazbuta, maintaining that they were improperly seized by the Imperial authorities, but they have produced no evidence in support of this claim, and the fact that the Awqaf were of the mazbut category would appear to be proved by the certificate of the Finance Officer which has been filed (Exhibit 22), and the extracts from the Tabu Records (Exhibit 23).

In support of their argument that, as regards Waqf mazbut, observance of the terms of the Waqfia is not required, the Respondents cite Art. 9 of the Law of 6 Ramadan, 1332 (16 July, 1330) which brings into force the provisions of Art. 8 of the Law of Appropriation of 1328 (see Destur, Vol. 6, p. 1063).

That Article deals with Mulhaqa Awqaf, that is, with "dedicated properties which are administered by special mutawallis, under the supervision of the Minister of Awqaf." (Omar Hilmi, para. 34.) It directs that the revenues of such Mulhaqa Awqaf, "whose revenue and expenditure have been included from time immemorial in the Budget, shall be included in the Budget as heretofore."

"Those whose revenues and expenditure are not included in the Budget, their revenue shall be entered as deposits and expenses paid out of this account."

"When the Waqf has finally become mazbut, its revenue should be collected in the same manner as the revenue of the Mazbuta Awqaf, and the same shall be included in the chapters and provisions of the Budget and shall be recorded as revenue."

"The offices and items of expenditure officially allocated shall be paid from their respective budgetary provision."

The Petitioners have objected that the Law of 1332/1330 is not in force in Palestine, but upon examination that objection cannot be sustained. So far as this Court is concerned, the rules or to enforcement of the Ottoman Law are laid down by Article 46 of the Palestine Order-in-Council, 1922, which provides that

> "The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on November 1st, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice."

Now the 1st November, 1914, is equivalent to 1330 in the Ottoman Financial Calendar. It follows that this Court is bound to have regard to a law issued in July, 1330. It is difficult, however, to see how this Article can be construed as having the importance which the Respondents appear to attach to it. It would appear to be merely a regulation as to the manner in which the accounts of the Ministry of Awqaf are to be kept.

The Respondents also rely upon the provisions of Article 7 of the Budgetary Law of June, 1326, and upon Articles 28 and 33 of the Law of 19 Jamad el-Akhir, 1280.

We are not prepared to hold, however, upon the strength of the Articles cited, that the conditions of the dedicator may be disregarded in the case of any Mazbut Waqf. The true test would appear to be whether the Waqf is of the Sahih category or not. (Omar Hilmi, paras. 165, 166.)

It does not follow that the Petitioners must succeed.

The practice whereby a part only of the income of the Hebron Awqaf was allocated to Hebron and the remainder was spent elsewhere, was established under the Ottoman Government, and, so far as the evidence goes, has been in force for a considerable

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period, and has never hitherto been challenged. Indeed the Petitioners do not contest that such is the fact.

We are unable to accept the Petitioners' argument that the second part of Article 8 (1) (g) of the Regulations of the Supreme Moslem Council lays upon the Council a duty to observe the conditions of the dedicators in the case of a Waqf previously administered by the Awqaf Ministry without regard to such conditions. Subsection (g) must be read as a whole, and requires only that the conditions of the dedicator shall be observed with regard to Awqaf recovered by the Council.

The Petitioners are asking that the established practice shall be abandoned, and that the funds shall be administered in accordance with Waqfias, which they cannot produce, and of which they have not even certified copies. Their petition is based solely upon affidavits as to the general tenor of these Waqfias.

It is true that at the last sitting of the Court the Petitioners filed a report (Exhibit G) made to the Ministry of Awqaf by the Hebron authorities in August, 1269, as to the contents of one of the Waqfias, that of Sumail, and as to the manner in which the funds were then applied, and stating that the other Waqfias were similar to that of Sumail. But it is difficult to see how this strengthens the Petitioners' case, as the report states that the funds were being spent in accordance with the Waqfia, and proceeds to mention among the beneficiaries, persons resident in Jerusalem.

Some support, however, to the Petitioners' case is afforded by a document filed by the Respondents (Exhibit 1), which is a report made by the Hebron Waqf Commission on the 14th February, 1311. This contains a summary of the contents of three Waqfias, including that of Sumali, and declares that "the beneficiaries are entitled to the payments on the strength of the conditions of the dedicators."

But taking the Petitioners' case as a whole there is not, in our opinion, evidence before the Court upon which it could make the order sought.

There is not even evidence as to the number of Waqfias in existence, or as to the lands to which any one of such Waqfias relates.

Nor is there before us evidence to show whether the dedications

were of the Sahih category or not; and this would appear to be a question to be determined by another Court.

The petition must be dismissed with costs.

Delivered the 7th day of May, 1932.

In the High Court of Justice.

H.C. No. 61/31.

BEFORE:

The Acting Senior Puisne Judge and Khayat, J.

IN THE APPLICATION OF:

Daoud Ansari — PETITIONER.

vs

The President and Members of the Supreme Moslem Council — RESPONDENTS.

Application by dismissed curator of Mosque for order to Supreme Moslem Council for re-instatement — Appointment of Religious Officer by Baraat of Sultan — Majority resolution of Supreme Moslem Council held valid — Arts. 50, 53, Regulations Relating to Appointment of Religious Officers — Supreme Moslem Council held to stand in place of Advisory Council of Waqfs in Constantinople — Art. 8, Regulation of the Supreme Moslem Council, 20th December, 1921.

JUDGMENT.

This is a return to a rule nisi by this High Court calling upon the President and members of the Supreme Moslem Council, Jerusalem, to show cause why their decision discharging Petitioner from the office held by him should not be set aside and the Petitioner reinstated in his substantive office and his original salary be paid to him.

The rule was obtained on the application of Sheikh Daoud el Ansari who produced a Baraat of the Sultan of Turkey, dated the 22nd Thil-Hija, 1327 (1898), whereby applicant was appointed a curator of the Mosque Omar (Masjid el Aqsa). Applicant stated that he had performed the service of a curator from the date of his appointment until May 23rd, 1928, when he received the instructions of the Supreme Moslem Council to clean round the Sacred Rock.

On July 2nd, 1928, applicant addressed the following letter to the President of the Supreme Moslem Council:—

"His Eminence,

The President of the Supreme Moslem Council through the District Administrator of Awqaf. (Waqf.)

"On May 23rd, 1928, I was notified of an instruction, based upon your orders, to clean round the Sacred Rock. My post, however, is a curator (kayim) of the Sacred Rock and Masjid el Aqsa, as well as a cleaner, candle-lighter and farash in Masjid el Aqsa, by virtue of Firmans.

"Having, however, seen your Eminence's order, I proceeded to do the work and have till the present been doing it most satisfactorily. The assignment to me of the work in question being a hardship to me and contrary to your sense of justice, I hereby submit this petition asking that instruction may be given to reinstate me in my old position in the Sacred Rock."

Petitioner protested several times to the Supreme Moslem Council and on October 13th, 1931, received a letter of which the following is a translation:

"Servant of the Haram, Sheikh Mahmud Jawdat et Danef, Jerusalem.

"I have received a letter from the Director of Public Awqaf, dated October 12th, 1931, No. 6622 saying that you were dismissed from your office. You are hereby informed accordingly.

(sgd) Ared Younis El Husseini.
Sheikh El-Harem El Sharif."

Upon the first hearing of the return to the rule nisi, Sheikh Ragheb Abu Saoud appeared, to represent the President and two members of the Supreme Moslem Council and to oppose the granting of an order absolute: the remaining two members were represented by Hassan Eff. Budeiri, who stated that he was instructed not to oppose the making of the order absolute.

It is however common ground that the resolution dismissing Petitioner was signed by three of the four members and the President of the Council and in the absense of any law or rule to the contrary, I am of the opinion that a majority resolution is good and that Petitioner's objection to the resolution must be dismissed.

Sheikh Ragheb stated that "Respondents relied for the dismissa of the Petitioner on Article 50 of the Ottoman Regulations relating to the appointment of Religious Officers dated the 23rd of July, 1329, but that he did not propose to deal with Article 50 but Article 53 of the said law".

He stated that the reasons which led to the dismissal of Petitioner were:

1. Importuning and accepting alms from visitors to the Mosque subsequent to an undertaking not to do so in consideration of an increase in his salary.

2. Refusing to hand over his duties to a successor in accordance with instructions received by him.

3. Having been fined LP.1 by the Civil Courts.

4. Refusing to carry out the duties of this new post to which he had been appointed.

5. For economic reasons.

Now the aforementioned Articles 50 and 53 read as follows:

Article 50:— "If a servant of a religious institution does not carry out his duties as prescribed by regulations properly and without lawful excuse he shall be dismissed."

Article 53:— "If the holder of posts commits acts other than those mentioned in Article 52 which necessitate dismissal according to Sharia Law, the matter will be investigated fully by the Mamurs of Awqaf of the Locality after taking the statement of the holder of the post together with that of all those whose statements should be taken; if the act which is considered as necessitating dismissal is established, the holder of the post would be suspended from work temporarily by the Highest Mamur Awqaf of that place and the investigation and documents concerning this matter would be sent to Constantinople with the first mail. If, after consideration of the matter in the Advisory Council of Waqfs, the said Council affirms the truth of the charges and that the act necessitates dismissal according to Sharia Law then the holder of the post would be dismissed and another would be appointed in his place."

It has been held by the Court, (in case No. 48/30)* and it cannot be disputed, that the Supreme Moslem Council now stands in the place of the Advisory Council of Waqfs in Constantinople; neither can it be contended that Section 8 (1) (f) of the Supreme Moslem Council's Regulations of December 20, 1921, relieves the

* see ante p. 1693.

Supreme Moslem Council from carrying out the provisions of the before-mentioned Article 53 of the Ottoman Regulations of 1329, for Section 8 (1) (f) does not lay down any procedure as to what steps should be taken antecedent to the dismissal of Moslem Religious Officials, but the steps to be taken subsequent thereto.

Counsel has failed to satisfy us that Article 53 is not good law and still in force and we must hold that such is the case, subject to the modification that the Supreme Moslem Council must be substituted for the Advisory Council of Constantinople.

We have no evidence that Article 53 was ever complied with before Petitioner received notice of his dismissal; certainly Petitioner was never called upon to answer the charge and counsel for the two members of the Council states that his clients were not opposed to the order in view of the fact that a proper and legal enquiry into the charge had never been made.

In the absence of such an enquiry this Court cannot enter into or investigate the alleged charges and it follows that owing to the breach of the terms of Article 53 the dismissal was improper and the rule must be made absolute with LP.5 advocate's fee and costs.

Delivered the 14th day of June, 1933.

TAXES.

In the High Court of Justice.

H.C. No. 56/26.

BEFORE:

The Chief Justice and the Senior British Judge.

IN THE APPLICATION OF:

Messrs. B. Goralsky
and A. Krinizi — PETITIONERS.

vs

The Township of Tel-Aviv
The Chief Execution Officer
of Jaffa — RESPONDENTS.

Demand for taxes made by Township of Tel-Aviv executed by Chief Execution Officer — Collection of taxes by Municipality without judgment — Order nisi granted.

Application for an order to issue to the Township of Tel-Aviv and the Chief Execution Officer in the District Court of Jaffa to show cause why an Order should not issue requiring them to refrain from executing a demand for taxes in favour of the Township without a judgment.

ORDER.

The Court upon hearing Mr. Gorodissky on behalf of the Petitioners orders and it is hereby ordered as follows:

That the Chief Execution Officer in the District Court of Jaffa do appear before this Court, if he so desires, on Friday 5th November, 1926, to show cause why an Order should not be issued requiring him to refrain from executing a demand for taxes by the Township of Tel-Aviv without a judgment.

That the return day for the hearing and determination of the petition be Friday the 5th November, 1926.

That notice of the application and copy of this Order be served upon the Council of the Township of Tel-Aviv.

Delivered in presence of the advocate of the Petitioner the 22nd day of October, 1926.

In the High Court of Justice.

H.C. No. 2/29.*

BEFORE:
The Acting Chief Justice and Baker, J.

IN THE APPLICATION OF:
Moshe Danenberg PETITIONER.
vs
The Local Council of Tel-Aviv RESPONDENT.

Question of whether House Tax payable by landlord or tenant — Liability of landlord to pay House Rate in respect of vacant premises — Right of Local Council to charge Service Rate for removal of refuse — Powers of Local Council of Tel-Aviv — Scope of Local Councils Ordinance, 1921 — Order made under authority of Ordinance not to exceed the authority conferred by the Ordinance— Methods of assessing Municipal House Rate — Section 4, Municipal Councils Validation Ordinance, 1925 — Sections 3, 5, Tel-Aviv Township Order—Service Rate held ultra vires the Local Council.

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*) see also H.C. No. 54/26, ante p. 727.

JUDGMENT.

The Petitioner, who is the owner of house property in Tel-Aviv, raises three questions in his petition:—

(1) Whether the House Tax payable in respect of premises in the occupation of a tenant is to be collected from the tenant or from the landlord.

(2) Whether the owner is liable to pay House Rate in respect of vacant premises or not.

(3) Whether the Local Council is entitled to charge a Service Rate for the removal of refuse from the premises occupied by the Petitioner or not.

The powers of the Local Council of Tel-Aviv are derived from the Local Councils Ordinance, 1921, as amended by the Local Councils Ordinance, No. 2, 1921, and the Order issued on the 11th May, 1921, constituting the Township of Tel-Aviv.

The provisions of the Local Councils Ordinance, 1921, were as follows:—

"(1) for larger Villages.

1. The High Commissioner may, on the recommendation of the District Governor, by an Order published in the Official Gazette, declare that any large village shall be administered by a Local Council. The Order shall specify the functions of the Council, its powers and obligations and its area of jurisdiction.

(2) for Quarters of a Town.

The High Commissioner may in the same manner, and on the like recommendation, declare that a Local Council may be constituted in a quarter of a town which is distinguished by its needs and character from the rest of the Municipal area. The Order shall be made only if the agreement of the Municipality has been obtained and shall specify in addition to the particulars above-mentioned the relations of the Local Council to the Municipality. Subject to the provisions of the Order, the powers of the Municipality over the quarter shall not be impaired.

Taxation Powers of Local Council.

2. The Local Council so constituted shall have power with the sanction of the District Governor to levy rates on

the property of the village or quarter or to impose certain fees which shall be enumerated in the said Order. It shall draw up annually a budget showing its estimated revenue and expenditure which shall be submitted to the Municipality, if the quarter is within a Municipal area, and in other cases to the District Governor for approval. Any disagreement between the Council and the Municipality shall be referred to the District Governor, whose decision shall be final."

The Tel-Aviv Township Order is in many respects a remarkable document. Not only does it contain no express reference to the Ordinance under the authority of which it was made, but it would appear to have been framed without regard to the terms of that Ordinance.

Thus, on the one hand, by Section 3 of the Order, the Local Council of Tel-Aviv is given power to issue bye-laws; and by Section 10 it is given power to hold immovable property and to raise a loan on the security thereof; matters which clearly exceeded the authority conferred by the Ordinance, and necessitated the enactment of the amending Ordinance (No. 2).

On the other hand, except for the provision of Section 4 of the Order that the Local Council shall draw up annually a budget of its revenue and expenditure, no attempt is made in the Order to comply with the requirement of Section 1 (1) of the Ordinance that—

"the Order shall specify the functions of the Council."

We are thus left to determine the functions assigned to the Council by inference from the general tenor of the Order.

We hold that the effect of the Order was to transfer to the Local Council of Tel-Aviv, as regards its area of jurisdiction, all the duties previously incumbent upon the Municipality of Jaffa.

With regard to the powers of the Local Council, and in particular its means of raising revenue, the Order is more explicit.

Section 5 (1) contains the following provisions:—

"The Council shall have power to levy the following taxes, rates and fees on property and persons within the area of the Township.—

(a) A house tax assessed on the rental value of the property at a rate not exceeding 12½ per cent. payable

in accordance with the regulations for the payment of house rate in force from time to time.

.....

(g) Rates for services of lighting and water and other services provided by the Council, payable by persons enjoying such services."

As regards the assessment of House Tax, therefore, we have to ascertain what are "the regulations for the payment of house rate in force" at present.

It appears that instructions with regard to the collection of Municipal House Rate were issued by the Military Administration on 14th January, 1919, No. 3026/F. These instructions, however, were never published in the Gazette or in any official compilation of Ordinances and Orders; nor have either of the parties to this application or to a previous application relating to the collection of Municipal House Rate (H.C. 54/26) been able to obtain a copy of these Instructions for submission to the Court.

It thus remains a matter of doubt whether these Instructions ever had the force of law or whether they were not merely rules for the guidance of officials of the Revenue Department.

Apart from these Instructions, no regulations as to the method of assessing the Municipal House Rate have been issued since the British Occupation, and neither the Petitioner nor the Respondent has been able to cite any Ottoman regulation.

In the circumstances, it is perhaps not surprising that the evidence tendered goes to show that the method of assessment differs in different Municipalities.

Thus, for example, while in Jerusalem Municipal House Rate is not levied in respect of premises that are empty; in Jaffa it is levied on empty premises at half the rate charged upon occupied premises.

Again, in Jerusalem Municipal House Rate is levied from the occupier, even though a lease under which the owner is made liable may have been registered with the Municipality; while in Jaffa the Tax is levied from the owner, unless he has registered a lease under which the tenant undertakes the liability.

This difference is important in view of the fact that in 1925 a Municipal Councils Validation Ordinance was enacted, Section 4 (1) of which provided that:

"Notwithstanding anything in the Ottoman Law of Municipalities of the 27th Ramadan, 1294, any rates or taxes imposed or any fees charged by a nominated Municipal Council since the British Occupation shall be deemed to have been and to be validly imposed and charged."

At that date both Jerusalem and Jaffa had nominated Municipal Councils. Hence the effect of the Ordinance was to legalise one method of assessment of Municipal House Rate in Jerusalem and a different method of assessment in Jaffa.

It is to be noted that the provisions of the Ordinance do not extend to Local Councils. It follows that the method of assessment to be applied in Tel-Aviv is the method which by that Ordinance was legalised for Jaffa, the Municipality out of whose area of jurisdiction the Township of Tel-Aviv was created, namely, the method in force in Jaffa in 1925.

Hence the answer to the first and second questions raised by the Petitioner are:—

(1) Where premises within the Township of Tel-Aviv are in the occupation of a tenant, House Tax is to be levied upon the owner unless he has registered with the local Council a lease making the tenant liable for the tax.

(2) House Tax is to be levied from the owner of vacant premises within the Township at one-half the rate payable in respect of occupied premises.

(3) There remains the question of the legality of charging a Service Tax for the removal of refuse from premises occupied by the Petitioner.

We have already held that all the duties which before the creation of Tel-Aviv Local Council were incumbent upon the Jaffa Municipality have devolved upon the Local Council.

We have no doubt that the provisions already quoted of Section 5 (1) of the Tel-Aviv Township Order, while authorising the Local Council to levy a rate in respect of additional services provided, do not authorise it to charge a service rate in respect of a service which the Local Council, as successor to the Municipality of Jaffa, was already bound to perform in return for payment of House Tax.

It follows that if the Jaffa Municipal Council was liable for the removal of refuse from houses within its area without making

any charge other than Municipal House Rate, then the Local Council is in the same position and is not entitled to charge a separate Service Tax in respect of such removal.

Now Article 3 of the Municipal Law of 27th Ramadan, 1924, declares that (inter alia):—

"The duties of a Municipal Council are to watch over and attend to the following:—

(k) the maintenance of the town in a state of cleanliness at all times by removing refuse and depositing it (in towns not on the sea shore) in places select for refuse pits outside the town."

Article 62 of the same Law requires that:

"The Municipality should prevent:

(a) The public or sweepers from shooting refuse in the streets or open spaces."

It is in fulfilment of the obligation imposed by these provisions that Municipalities maintain a service for the removal of refuse from houses.

The Municipal Law does not authorise the imposition of a special rate in respect of this service, and hence unless a special rate was in fact levied at the date of the enactment of the Municipal Councils Validation Ordinance, 1925, a Municipality has no authority to levy any such rate.

No separate rate for removal of refuse was levied by the Municipality of Jaffa where, as stated in evidence by an employee of the Municipality, it is one of the services covered by the Municipal House Rate.

Hence we must hold that the imposition of a Service Rate for removal of refuse from the premises occupied by the Petitioner in Tel-Aviv is ultra vires the Local Council.

An Order will issue accordingly.

No order is made as to costs.

Delivered the 24th day of June, 1929.

In the High Court of Justice.

H.C. No. 45/29.

BEFORE:

The Acting Chief Justice and Baker, J.

IN THE APPLICATION OF:

The Local Council of Tel-Aviv — PETITIONER.

vs

The Chief Execution Officer, Jaffa,
Mr. H. Farbstein,
Mr. Jacob Ben-Meir,
Dr. Harrari — RESPONDENTS.

Landlord and tenant — Liability to pay House Tax — Payment of outgoings imposed by agreement of lease — Section 5, Township of Tel-Aviv Order, 1921—Payment of House Tax enforced by Chief Execution Officer.

ORDER.

This Petition arises out of the Order made by this Court in the case of Danenberg vs the Local Council of Tel-Aviv (H.C. No. 2/29).*

In that case the Court held that "where premises within the Township of Tel-Aviv are in the occupation of the tenant, house tax is to be levied on the owner, unless he has registered with the Local Council a lease making the tenant liable for the tax."

The Respondents, Mr. Farbstein and Mr. Ben-Meir, are tenants of a house in Tel-Aviv of which the Respondent, Dr. Harrari, is the landlord.

This Petition relates to the liability for house tax in respect of this house for the years 1926-27, 1927-28, 1928-29.

A separate lease was signed for each of the three years. The relevant clauses of the three leases are as follows:—

(i) Contract of the 1st July, 1926—

"The outgoings imposed on the house (a) by the Government, such as Werko and the like, shall be payable by the landlord; (b) by the Management of the Quarter, such

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*) Reported ante p. 1705.

as for water, watching, cleaning and the like, shall be payable by the tenants."

(ii) Contract of the 1st July, 1927—

"The outgoings imposed on the house (a) by the Government, such as Werko and the like, shall be payable by the landlord; (b) by the Management of the Quarter, such as for water, watching, cleaning and the like, shall be payable by the tenant."

(iii) Contract of the 1st July, 1928—

"The outgoings imposed on the house (a) by the Government, such as Werko and the like, shall be payable by the landlord; (b) by the Municipal Administration, such as for water, watching, cleaning and the like, shall be payable by the tenants."

The Chief Execution Officer has held that under these clauses the tenants are not liable to pay house tax and has made an Order refusing to levy execution in respect of the house tax due. It is this Order which the Local Council now seeks to have set aside.

I have no doubt that the terms "the Management of the Quarter" and "the Municipal Administration" must be construed to mean the local authority for the time being, that is the Local Council of Tel-Aviv; and this interpretation is not seriously contested by the tenants.

The tenants, however, maintain that the outgoings imposed on the house "such as for water, watching, cleaning and the like" must be held to refer only to the service rates which the Local Council is entitled to impose under clause (g) of Section 5 (1) of the Township Order; and hence that, as the leases are silent with regard to house tax, liability for its payment rests upon the landlord.

I do not think this view can be accepted.

It was decided in Danenberg's case that the payment of house tax covered the liability of the Local Council in respect of scavenging; and having regard to the evidence given in that case, it would appear that the provision of night-watchmen is also a service which the Council is bound to afford in return for payment of house tax. But even if that were not so, I think that the proper construction of the three leases is that all outgoings imposed

by the Government are to be paid by the landlord, while all outgoings imposed by the Local Authority are to be paid by the tenants.

An Order must issue as prayed by the Petitioner.

Delivered the 2nd day of August, 1929.

In the High Court of Justice.

H.C. No. 69/31.

BEFORE:

Baker, J. and Frumkin, J.

IN THE APPLICATION OF:

The Grands Moulins de Palestine — PETITIONERS.

vs

The Chief Execution Officer Haifa,
The Municipality of Haifa — RESPONDENTS.

Tax on steam engines — Licence tax for motors claimed by Municipality of Haifa — Sec. 10 Ottoman Law of Municipal Taxes, 1333 — Fencing of Machinery Ordinance, 1929 — Payment of taxes to Municipality enforced by Chief Execution Officer.

Application for an Order to issue to the first Respondent directing him to show cause why his Order dated 13th November, 1931, should not be set aside.

JUDGMENT.

This is a return to a Rule Nisi issued by the High Court on the 14th day of December, 1931, calling upon Respondents to show cause why they should not be restrained from executing against Petitioners the claim of the Municipality of Haifa for £P.26—being an alleged licence tax payable in respect of the motors used by Petitioners for the purpose of transmission of electric power to their machinery.

The Municipality of Haifa base their claim for the payment of the tax upon Section 10 of the Ottoman Law of Municipal Taxes of 24th Rabi, 1333 which translated into English from the Turkish text, reads as follows:—

"There shall be levied on all motors which create steam which are not exempted by special law or used for agricultural

purposes a licence tax payable once only as follows . . . £P.2. when the H.P. is up to 5, £P.5 when the H.P. is from 5 up to 10 and £P.10 when the H.P. exceeds 10."

Upon notice emanating from the Execution Office, Haifa, being served upon Petitioners to pay the tax, Petitioners opposed on the grounds that none of their motors in respect of which the tax was claimed were in any way of the nature of steam engines and requested the Chief Execution Officer to refrain from execution.

The Municipality replied to the opposition submitting that they were entitled under the Municipal Tax Law to collect licence tax not only in respect of a steam engine but also in respect of motors (prime movers) which is defined in the Fencing of Machinery Ordinance, 1928, as "every engine, motor or other appliance which provides mechanical energy derived from steam, water, wind, electricity, combustion, or other source." The Municipality at the same time requested that the question should be taken to the High Court.

The learned Chief Execution Officer upon the opposition and reply thereto expressed an opinion that upon the interpretation of Section 10 of the said Municipal Tax Law it appeared that the Section did not apply to the dynamos of the Grands Moulins de Palestine and stayed execution for fifteen days to enable the present Petitioners to apply to the High Court.

The only question for this Court is whether the motors of Petitioners in respect of which the claim of the Haifa Municipality is made are steam engines or motors which create steam within the meaning of Section 10 of the Municipal Tax Law.

There is a wide distinction between a steam engine or motor which creates steam and the motors or dynamos of Petitioners which distinction I am of opinion cannot be bridged by the definition of a prime mover contained in the Fencing of Machines Ordinance, 1928, which definition Respondents request us to accept.

I am accordingly bound to hold that the motors or dynamos of Petitioners are not liable to be taxed under the before-mentioned Section 10 of the Municipal Tax Law, and make the Order Nisi absolute with costs to include £P.4 advocate's fees.

Delivered the 15th day of March, 1932.

In the District Court of Jerusalem sitting as a Court of Appeal.

C.A.D.C. Jm. No. 212/31.

BEFORE:
De Freitas, J., Abdul Hadi, J., Valero, J.

IN THE CASE OF:
K. Friedenberg — APPELLANT.
vs
Municipality of Jerusalem — RESPONDENT.

Collection by Municipality of Municipal Taxes — Ottoman law applicable under Article 46, Palestine Order-in-Council, 1922 — Municipal Tax Law, 1330, not in force in Palestine.

Appeal from the judgment of the Magistrate, Jerusalem, dated the 15th July, 1931, in Magistrate's Court File No. 3137/31.

JUDGMENT.

The Municipal Tax Law of 26th February, 1330, came into force after November 1st 1914, and has never been declared by Public Notice to be in force in Palestine.

Therefore, in accordance with the provisions of Article 46 of the Palestine Order-in-Council, 1922, the tax cannot legally be collected.

The judgment of the Magistrate is set aside and judgment for the Plaintiff (Appellant) must be entered with costs in this Court and in the Court below.

Delivered the 27th day of February, 1933.

In the High Court of Justice.

H.C. No. 58/32.

BEFORE:
The Chief Justice and Khayat, J.

IN THE APPLICATION OF:
Tanas Sliheet — PETITIONER.
vs
The District Commissioner, Jerusalem District — RESPONDENT.

Statutory duty of District Commissioner to demand only those taxes due in accordance with law — Rate and basis of collection of Urban Property taxes — Section 5, Urban Property Tax Ordinance, 1928 — Section 3, Urban Property Tax (Amendment) Ordinance, 1932.

Application for an order to issue to the Respondent directing him to show cause why his Order contained in his notice dated the 11th July, 1932, No. 40141, calling upon the Petitioner to pay an additional tax of 3% under the Urban Property Tax (Amendment) Ordinance No. 10 of 1932, in respect of 12 months (1st April, 1931 — 31st March, 1932) instead of six months (1st October, 1931 — 31st March, 1932) should not be set aside and the execution proceedings taken thereon cancelled.

JUDGMENT.

We hold that it is in conflict with a statutory duty of the District Commissioner for him to demand from a taxpayer a tax larger than he is by law entitled to demand.

Section 5 of the Principal Ordinance, Urban Property Tax Ordinance, 1928, No. 23 of 1928, enables "a tax not exceeding 10% of the net annual value of the property to be prescribed annually by the High Commissioner in Council."

The Order of the High Commissioner in Council of the 18th March, 1931, fixes the rate at 9% for the period 1st April, 1931, to the 31st March, 1932, but Section 3 of the Urban Property Tax (Amendment) Ordinance, 1932, No. 10 of 1932, provides that in addition to the tax assessed as payable under the Principal Ordinance for the period 1st March, 1931, to 31st March, 1932, i.e. 9%, the High Commissioner may by order declare that there shall be payable in respect of the period 1st October, 1931, to 31st March 1932, a further tax which, with that previously assessed in respect of the period 1st April, 1931 to 31st March, 1932, shall not exceed 12% of the net annual value of the property.

An Order by the High Commissioner in Council dated 1st March, 1932, declared that in addition to the tax, namely 9%, assessed as payable under the Principal Ordinance for the period 1st April, 1931 to 31st March, 1932, there shall be payable in certain urban areas, including Jerusalem, in respect of the period 1st October, 1931 to 31st March, 1932, a further tax on certain

types of house property at the rate of 3%. It is quite clear that this order imposes a 3% tax on the net annual value in respect not of the whole year but of the six months from the beginning of October till the end of March, and that this additional tax of 3% for the second half of the year together with the 9% previously imposed in respect of the whole year does not conflict with Section 3 (1) of Ordinance No. 10 of 1932 by prescribing a tax which exceeds, in respect of the whole year, the 12% there laid down as the maximum which can be imposed.

For these reasons the Rule Nisi is discharged.

In the High Court of Justice.

H.C. No. 88/32.

BEFORE:

Baker, J. and Khayat, J.

IN THE APPLICATION OF:

Socrat Tokadlides — PETITIONER.

vs

The District Commissioner
Northern District — RESPONDENT.

Collection by District Commissioner of taxes due on properties sold in execution — Foreclosure of mortgage — Property sold by public auction—Taxes payable before property registered in Land Registry in name of purchaser — Taxes collected from proceeds of sale not only on mortgaged premises but on all other properties of mortgagor—Taxes are charge on any immovable property of defaulter—Discretion of District Commissioner under Section 12, Collection of Taxes Ordinance, 1929 — Retrospective operation of Ordinance to be expressed — Article 5, Ottoman Tax Law, 1325.

ORDER.

This is a return to a rule nisi issued by this High Court on the 7th day of July, 1933, calling upon the District Commissioner, Northern District, Haifa, to show cause why he should not be ordered to refund to Petitioner the sum of £P.82.172 mils, a sum of money deducted in respect of taxes alleged to be due on property sold in execution of a mortgage debt by the Haifa Execution Officer.

1. The rule was obtained on the application of Petitioner, who on 2nd February, 1927, advanced the sum of £E.1,150 (viz., £P.1,179.487 mils) by way of mortgage on certain shares of propeties belonging to one Jamil Abyad.

The mortgagor failing to repay the money advanced when the mortgage money became due, the mortgaged property was sold by public auction and realised the sum of £P.1,417.500 mils.

2. Before the sale transaction was registered in the Land Registry and the proceeds of sale paid to Petitioner, the District Commissioner for the Northern District deducted the sum of £P.186.812 mils, being taxes, due not only on the mortgaged premises but due on other properties belonging to the mortgagor.

The District Commissioner purported to make the said deduction in accordance with provisions contained in Section 12 of the Collection of Taxes Ordinance, 1929, which provides as follows:

> "The Tax due shall be a first charge on any immoveable property of the defaulter and no transaction in respect of such property shall be entered in any register of the Government save with the consent of the District Commissioner unless it has been ascertained that the tax due has been paid."

3. The amount due to the Petitioner on account of the money advanced, interest, and costs expended by him in execution of the mortgage was £P.1,388.086 mils so that the sale of the mortgaged property after the deduction of the before mentioned sum of £P.186.812 mils has resulted in Petitioner suffering a loss of £P.157.398 mils and he now claims that inasmuch as the property mortgaged to him amounted to 4/24 shares only of the mortgagor's property, that upon the sale of such property in satisfaction of the mortgage debt taxes actually due on the said 4/24 shares may be only deducted from the proceeds of the sale of the said property, and that such taxes due amount to £P.104.640 mils and therefore he is entitled to a refund of £P.82.172 mils.

4. Petitioner's advocates, Messrs. Eliash and Olshan, upon the hearing for an order nisi argued that Section 12 of the Ordinance does not empower the authorities to charge a single property with taxes due on other properties where such other properties are capable of satisfying the debt, alternatively that the decision of the District Commissioner was an improper exercise of the discretion vested in him by Section 12 of the Ordinance (by the

words "save with the consent of the District Commissioner"), in that it imposed on him an unnecessary hardship in a case where Government's claim to taxes was amply secured by other property belonging to the mortgagor.

Upon the hearing on the return to the rule nisi Petitioner's advocate, Mr. Eliash, advanced the further argument that the mortgage deed having preceded in date the Collection of Taxes Ordinance, 1929, which has not a retrospective operation; the said Ordinance cannot interfere or take away his vested right which he possessed prior to the said Ordinance being enacted.

5. There is no doubt in our minds that Section 12 of the Collection of Taxes Ordinance clearly enables a District Commissioner to veto the registration of a transaction in respect of any immoveable property solely on the ground that a person owes taxes in respect of property other than that which the transaction is concerned with and to refuse his consent to registration until such taxes have been paid.

We cannot refrain, however, from expressing the opinion that the said Section, whatever may have been the intention of the draftsman, appears to us in its present form unreasonable and unconscionable and must necessarily lead to the creation of many injustices to purchasers of property who have no reason to suspect that they are obtaining anything but a perfectly good title free of incumbrances to property they are buying.

The mortgage, however, the subject-matter of this application, was created on the 2nd February, 1927, prior in date to the Collection of Taxes Ordinance.

The said Ordinance cannot be construed to have a retrospective operation for it neither appears in the Ordinance to be retrospective nor does it arise by necessary implication and at the property time of its enactment the mortgagor had a vested right in the property which the said Ordinance cannot divest him of by imposing a new obligation or duty for Article 5 of the Ottoman Tax Law, 1325, limited the collection of taxes to the property transferred. Accordingly we are of opinion that the rule must be made absolute with costs and advocate's fees assessed at £P.5.

Delivered the 18th day of September, 1933.

In the High Court of Justice.

H.C. No. 25/33.

BEFORE:

The Acting Chief Justice and Baker, J.

IN THE APPLICATION OF:

Palestine Potash Ltd. — PETITIONERS.

vs

District Officer, Jerusalem,
Jericho—Bethlehem Sub-District — RESPONDENT.

Concession lands not subject to taxation — Palestine Potash Company not liable to pay House, Land or Corporation taxes — Application for injunction toissue to District Officer.

ORDER NISI.

Order to issue to Respondent to show cause why an order should not be made restraining him from proceeding with the assessment of the immovable property held by the Petitioner as lessee in respect of House and Land Tax and Corporation Tax. Notice to be also served on the Attorney General.

Note: the order Nisi was made absolute on July 28, 1933, the Respondent raising no objection.

THIRD PARTY.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 44/26.

BEFORE:

The Chief Justice, Seton, J. and Jarallah, J.

IN THE CASE OF:

Rabbi Joseph Deutsch and Others — APPELLANTS.

vs

Rabbi Abraham Shorr — RESPONDENT.

Admission of third parties — Payment of fees on such admission — Action for injunction restraining delivery and receipt of correspondence — Exclusive jurisdiction of Rabbinical Court — Amendment of name set out in notice of appeal.

Appeal from the judgment of the District Court of Jerusalem dated the 22nd February, 1926, whereby the Appellants after they had been admitted as third parties were refused to be heard on the ground that the Court could not hear them as no fees had been paid.

JUDGMENT.

In February, 1926, the District Court of Jerusalem had before it for the third time an action brought by Rabbi Abraham Shorr against the Postmaster-General and Another, Shlomo Perlman, asking for an Order against the Postmaster-General restraining him from delivering the registered mail addressed to the "Aged Home" to Perlman and against Perlman restraining him from interfering with the same.

The Court had up to then refused to exercise jurisdiction in the matter on the ground that it had to do with the administration of a Jewish Religious Institution within the exclusive jurisdiction of the Rabbinical Court, without ascertaining what the institution was to which the letters were addressed as the "Aged Home" and whether it was in fact an institution of such a nature and instituted in such a manner as to come within the exclusive jurisdiction of the Rabbinical Court.

When the Court gave judgment on the 22nd February, 1926, Perlman had withdrawn from the case and so much of the judgment as concerns him is not disputed. But certain persons had been admitted by the District Court by an Order of 23rd December, 1925, as third parties and these have not been heard on the ground that the Court could not hear them as no fees had been paid.

We are not aware of any fees being payable by persons who enter as third parties and no rules have been shown to us requiring such fees to be paid. These people were admitted as third parties and are entitled to be heard before any order is made enabling Rabbi Shorr to receive the proceeds of the mail as the judgment has ordered.

We are of opinion that the persons admitted as third parties ought to be heard. In their notice of appeal they appear under an official title as trustees of the Jewish Aged Home. We allow them to amend and the title of the appeal will appear with their several names as Appellants as set out in the Order admitting them as third parties.

Delivered the 31st day of May, 1926.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 125/26.

BEFORE:

The Senior British Judge, Jarallah, J. and Khayat, J.

IN THE CASE OF:

Joseph Marcos
Francis Marcos
Mubarac Marcos — APPELLANTS.

VS

Issa Marcos — RESPONDENT.

Third party opposition against judgment of the Court of Appeal — Proof that person is member of partnership firm — Estoppel by previous admission — Effect of failure to register partnership — Art. 161, Civil Procedure Code.

Opposition by way of a third party opposition against the judgment of the Supreme Court sitting as the Court of Appeal dated 4th March, 1926, whereby the judgment of the District Court of Jerusalem dated 4th February, 1925, for payment to the Respondent of the sum LE.528.526, by the partnership of Anton and Jacob Marcos was confirmed.

JUDGMENT.

It is common ground that the business of the Grand New Hotel is carried on by a partnership of which opposers are members. The question at issue is whether the Respondent Issa is or is not a member of the partnership. The action was originally brought by Issa against one of the heirs of Anton Marcos as representing the inheritance of those two deceased persons.

The claim was in fact however based not upon inheritance but upon alleged partnership between the persons who were the heirs and judgment was given upon a finding of the Court that such partnership existed and that Issa was a partner. The present opposers were aware of the proceedings, and gave evidence, but they were not formally joined as partners and hence their opposition must be allowed. On the merits of the case the opposers' claim is that the partnership by which the business of the Grand New Hotel was carried on did not include the Respondent Issa as a member, and that the only interest that Issa had in the business was that he owned a share in the furniture and goodwill, for which the partners paid him an annual sum and such payment

not being in form of a share of the profits of the business, but rather in the nature of rent.

It is clear, however, that in their evidence in the District Court each of the three opposers swore that Issa was a partner and entitled to a share in the profits, which share had been paid. In the face of this evidence the opposers' claim cannot now be heard.

There remains only to be considered the claim that the partnership is unregistered and that in consequence the Respondent could not maintain an action for a share of the profits.

It appears that the partnership had in fact been registered under the name of the Grand New Hotel but that the registration was defective to the extent that the names of responsible partners were given incorrectly as "Anton & Jacob Marcos" when in fact the partners were the heirs of these persons. Whether the error would be sufficient to prevent the partnership from successfully maintaining an action in its firm-name is a question which we have not to decide.

But the opposers cannot be allowed to escape their liability to the Respondent, whose membership of the partnership they have admitted on oath, merely on account of a defective registration for which they themselves are equally responsible.

The opposition must be dismissed with costs. Advocate's fees £E.3.

Delivered the 2nd day of August, 1926.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 132/28.

BEFORE:

Corrie, J., Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Johan Eckstein,
Mayer Shapira,
Herman Pensak — APPELLANTS.

vs

Mohamed Said Esh-Shanti — RESPONDENT.

Application for joinder of third party — Payment of summons fees on same — Exercise of right of recourse under Art. 115, Civil Procedure Code.

INTERLOCUTORY JUDGMENT.

Where a Defendant exercises his right under Article 115 of having a person, against whom he claims recourse, joined as a third party, he is applying to the Court to hear and determine a claim which is distinct from that of the Plaintiff, and upon which the Defendant could, if he preferred to do so, found a separate action.

Upon such separate claim fees are clearly payable.

By its Order dated 9th September, 1928, the District Court ordered that the Defendant must pay the "usual fees in this case, and they must also pay summons fees."

It must have been obvious to the Defendants that they were not complying with this order when they paid only summons fees; and we hold that the District Court was right in dismissing this application.

Delivered the 4th day of April, 1929.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 132/28.

BEFORE:

Webb, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

Johan Eckstein
Mayer Shapira
Herman Pensak — APPELLANTS.

vs

Mohamad Said Esh-Shanti — RESPONDENT.

Application for joinder of third party—Exercise of right of recourse under Article 115, Civil Procedure Code — Failure to pay cost of summoning of third party — Application to join third party on the ground of right of recourse held to be an admission of liability—Cancellation of revenue stamp on documents — Section 16 (4) Stamp Duty Ordinance, 1927 — Article 29, Ottoman Stamp Law, 1323 — Interpretation of words "duly stamped" — Omission of District Court to give judgment jointly and severally corrected by Court of Appeal.

Appeal from the judgment of the District Court of Jaffa, dated the 30th day of October, 1928.

JUDGMENT.

The Appellants were sued on a document signed by them and 23 other members of a Masonic Lodge, by which, after acknowledging that the Lodge was indebted to the Plaintiff in the sum of £E.400, it was agreed that he should receive 50% of the income of the Lodge, such sum not to be less than £E.15 per month, and the signatories made themselves jointly and severally liable for repayment in the event of there being no income of the Lodge. It was further provided that upon any instalment being unpaid the whole debt should fall due.

When the case was before the District Court the Defendants first raised the points:—

1. That, as the 26 persons who signed the document were jointly and severally liable, the remaining signatories should be joined as third parties, and

2. That by the rules of the Lodge all disputes between members should be settled by arbitration.

Then the Defendants suggested that the document sued on had been signed by them in blank and in the belief that they were signing a paper upon which was to be written an address of greeting to another Lodge, and that the Plaintiff had fraudulently written the undertaking to pay him over their signatures. This charge of forgery was investigated by the Magistrate and was dismissed.

When the case came again before the District Court, an Order was made joining the other signatories as third parties, but the Defendants failed to pay the necessary costs and accordingly the Court ordered the case to proceed against the Defendants alone. This order of the District Court was affirmed on the 4th April, 1929.

On the other points raised by the Appellants we are of opinion that the District Court was right in holding that the application by the Appellants to have the remaining signatories to the document joined as third parties involved an admission of their own liability and that they were not then entitled to dispute their liability by suggesting that the Plaintiff should prove that

he had first made a demand upon the Lodge and had failed to obtain payments as a condition of suing the Appellants.

The charge of forgery has been raised on appeal, namely that the document sued on was inadmissable in evidence because it was not "duly stamped" in accordance with the law in force at the time when it was made. Stamp Duty Ordinance, 1927, Section 16 (4).

The law in force was Article 29 of the Ottoman Stamp Law, 1323, which requires the stamps on a document to be cancelled at the time of the execution of the document by writing across them the signature of the person who executes the document and the date. It is said that the stamps on this document were only affixed after execution and they are cancelled by having had lines drawn across them.

Now, under the former law, if this document has been wholly unstamped, on its production to a Court the person liable to pay the stamp duty would have been ordered to pay a fine and thereupon the document would have been treated as valid so far as compliance with the Stamp Law was concerned. And we are of opinion that the words "duly stamped" in Section 16 (4) mean duly stamped in respect of the amount of stamp duty, and do not require compliance with the technical requirements of the former Stamp Law as regards time and mode of cancellation. To hold the contrary would mean that any document which was not stamped at the time of execution would be valueless even after the person liable had paid the fine required by law. But the object of the law was merely to impose a penalty, and the effect of the payment of the penalty must be to annul the offence and its consequences.

We therefore dismiss the appeal of the Defendants.

The Plaintiff has entered a cross-appeal because by an oversight, the District Court failed to give judgment against the Defendants jointly and severally. It is admitted that the Plaintiff has received £P. 90 from one of the Defendants, and as the liability is joint and several, the other Defendants are entitled to the benefits of this.

We therefore vary the judgment of the District Court by ordering the Defendants jointly and severally to pay to the Plaintiff the sum of £P. 284.359 (being the equivalent of £E. 270) with interest at 9% as from the 14th December, 1926, and the costs

and advocate's fees awarded by the District Court and costs of appeal, and £P.3 advocate's fee.

Delivered the 12th day of November, 1929.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 41/31.

BEFORE:

The Senior Puisne Judge, Baker, J. and Khaldi, J.

IN THE CASE OF:

Frederick Vester,
Yerahmiel Amdursky,
Frederic Fast — APPELLANTS.

vs

Victoria Jawharieh,
Saliba Ibrahim Sa'ad — RESPONDENTS.

Intervention by third party in action in District Court — Furniture attached in execution — Allegation of ownership of furniture made by third person—Proof of such allegation—Right of lessee of attached goods to receive notice of order of attachment — Grounds entitling intervention by third party.

Appeal from the judgment of the District Court of Jerusalem, dated the 4th March, 1931.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem dated 4th February, 1931, whereby a third party intervention by the Appellants Messrs. Amdursky and Vester, and a similar intervention by the Appellant Frederick Fast in an action in the District Court were dismissed; and the Respondent Saliba Ibrahim Sa'ad was ordered to pay the sum of LE.3000 to the Respondent Victoria Jawharieh and a provisional attachment in her favour upon certain furniture was confirmed.

The ground upon which the intervention by the Appellants Amdursky and Vester was dismissed was that whereas they claimed to be owners of the furniture, they were actually merely creditors of Saliba Sa'ad and as such must obtain judgment against him and thus establish the right to participate in the attachment.

Admittedly, however, Saliba Sa'ad's assets were insufficient to meet his debts other than the amount claimed by Victoria Jawharieh. It follows that the Appellants as creditors had an interest in obtaining a declaration that the judgment in favour of Victoria Jawharieh was collusive, and their claim could not be satisfied by mere participation in the execution, as suggested by the judgment of the District Court.

As regards these Appellants, therefore, the judgment cannot stand.

The Appellant Friedrich Fast intervened on the ground that he was, at the time when the attachment was made, the lessee of the furniture; and that the attachment was void as no notice of the order was given to him.

The Court held that he had suffered no damage by the attachment, as he did not claim to be owner of the furniture, and at the date of his intervention his lease had expired; and upon this ground the Court dismissed his intervention.

We find some difficulty in following the reasoning underlying this decision.

The Appellant alleges that he did not receive due notice of the order of attachment and thus was unable to submit to the Chief Execution Officer an opposition to the order, and in consequence, his premises were broken open for the purpose of effecting the attachment and he had to take up his residence elsewhere for the last two or three days of his lease.

If these facts are established they constitute in our view sufficient ground to entitle him to intervene in the action.

We therefore hold that, as regards all the Appellants, the judgment must be set aside, and the case remitted to the District Court.

Costs will follow the event.

Delivered the — day of April, 1932.

TITLE TO LAND—

SEE ALSO: LAND, TRANSFER OF LAND.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 135/26.

BEFORE:

The Senior British Judge, Khaldi, J. and Khayat J.

IN THE CASE OF:

Abdallah Abd El-Hafez
Hamdan Mustapha El-Hafez — APPELLANTS.

vs

Abdel Kadar Khalil Salman — RESPONDENT.

Title to land by possession — Claim of title to land based solely on occupation and cultivation for more than 10 years — Claim of title against individual differentiated from claim of title against Government — Effect of Articles, 20, 78, Ottoman Land Code — Regulation 8, Tabu Regulations, 1276 — Written evidence required to set aside registered title — Evidence of witnesses, possession or admissions of other parties not sufficient to set aside registered title — Limitation of actions for title to miri land — Establishment of Haqq El-Karar — Escheat of State lands — Adverse possession as plea — Presumption of ownership carried with registered title.

Appeal from the judgment of the Land Court of Nablu dated July 10th, 1926.

JUDGMENT OF MR. JUSTICE CORRIE.

This appeal arises out of an action whereby the Appellants Abdallah El-Abd El-Hafez and Hamdan Mustafa El-Abd El-Hafez claimed title to two plots of miri land which are registered respectively in the names of Khalil Suleiman El-Hussein and Khalil Salman El-Taher, of both of whom the Respondent Abdel Kader Khalil Salman is the heir.

The Appellants' claim is based solely upon occupation and cultivation for a period of more than ten years. The Land Court has dismissed the action regarding the judgment of this Court in the case of Mahmud and El-Abed sons of Diab Abdel Rahman and Others vs Selim El-Amri (Land Appeal No. 56/24) as authority for the view that Article 78 of the Land Code does not apply to a claim by one individual against another. It does not appear from

the Record what was the nature of the evidence which the Appellant proposed to submit.

If he was relying purely on the evidence of witnesses, it is clear that the evidence would be inadmissible under the rule so frequently laid down by this Court, that the evidence of witnesses unsupported by evidence in writing cannot be heard against a kushan. See the judgment in the case of Afifeh bint Elias Abu Rahmi and Others vs. Naim Jirius Abyad and Another (Land Appeal No. 137/23)*.

If, however, the Appellants can produce written evidence or an admission of their possession by the Respondent the position is governed by other considerations.

The case cited by the Land Court was one in which the Defendant pleaded that the Plaintiff's action was barred by lapse of time under Article 20 of the Land Code. The Land Court held that after making all proper allowances a period exceeding 10 years had elapsed between the time when the Plaintiff's right of action arose and the commencement of proceedings, and dismissed the action. At the same time, however, the Land Court made a finding to the effect that the sale of the Defendant's ancestor upon which the Defendant based his claim was invalid. On appeal the Plaintiffs claimed that upon this finding judgment should have been given in their favour, as time could not run against them where the possession adverse to them was not under a good title, and relied (inter alia) upon Article 78 of the Land Code.

The Court of Appeal in giving judgment said:

"Article 78 is part of Chapter IV of the Land Code which applies to Escheat Lands and applies to the rights of an occupier against the Government, and not to the rights of claimants to the land" and dismissed the appeal."

It is agreed, however, that this judgment is authority only for the principle that where a Defendant sets up the defence of adverse possession it is Article 20 of the Land Code by which the rights of the parties are governed, and hence that the judgment is not an authority for a case in which 10 years undisturbed possession is claimed by the Plaintiff. In support of this argument cases have been cited which it is alleged, laid down that ten years' undistubed possession entitled a Plaintiff to registration as against a Defendant already registered as owner of the land.

* See ante, p. 764.

The majority of the cases quoted for and against this proposition have not been reported and as the point is one of considerable general importance it seems desirable to give a summary of the judgments cited.

In the case of Abdul Rahman Saleh El-Hirsh vs Ali Muhamed El-Mustafa (Land Appeal No. 81/25)[1]), the Appellant's defence was that the Respondent's action was barred under Article 20 of the Land Code. The Land Court gave judgment for the Respondent on the ground that the Appellant had not proved one of the grounds of ownership required by Article 78 of the Land Code and Regulation 8 of the Land Registry regulations. On appeal the Court of appeal held as follows:

"Article 78 and Tabu Regulation 8, however, apply to the case of a person claiming from the Government the issue of a Kushan. The article which applies where the defence of prescription is set up against another person claiming title is Article 20.

For the purpose of that Article, provided that the Defendant does not admit that his possession is wrongful, all that is required is that he should prove that he has held undisturbed possession for more than ten years. This is an issue of fact which it is for the Land Court to decide."

The judgment of the Land Court was set aside and the case remitted for the facts as to possession to be determined.

In the case of Afifeh bint Elias Abu Rahmi and Others vs Naim Jirius Abyad and Another (Land Appeal No. 137/23)[2]) the Respondents claimed shares in the mulk house and land registered in the name of Shukri Abu Fahmi, of whom the Appellants were some of the heirs.

The Land Court heard the evidence of the witnesses as to the title to the land in reliance upon Article 82 of the Code of Civil Procedure and upon such evidence supported by the Appellants' own admission as to the possession by the Respondent and evidence as to payment of werko by the Respondents, the Court gave judgment for the Respondent. On appeal the Court of Appeal held:

"This is a question whether there was evidence before the Land Court which could justify it in the finding that the then registration in the name of Shukri was fictitious and should be

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[1]) See ante, p. 1474.
[2]) See ante, p. 764.

set aside in favour of the Respondents. There is no written evidence to contradict the registered title which carries a presumption of ownership. The evidence of witnesses, the possession of the Respondents, the admissions of other parties interested, however convincing, are not sufficient to override the general rule that has been established in this Court that a registered title will not be set aside except by some evidence in writing sufficient to support an adverse title or to corroborate evidence in support of such adverse title. Judgment as against the Appellant will be set aside."

This is in terms a judgment, not upon the meaning of Article 78 of the Land Code, but upon the admissibility of evidence of witnesses against a registered title. It is, however, relevant to the question of title by possession, as proof of possession by the Respondents did not rest upon the evidence which the Court of Appeal excluded but upon admissions by the Appellants, and thus the judgment is authority for the rule that so far as mulk property is concerned, possession unsupported by evidence of title is insufficient to enable a Plaintiff to succeed against a Defendant who is registered as owner.

In the case of Ahmad Yousif Ismail Abu Hijla and Others vs Darwish Ahmad-El Yousif and Others, (Land Appeal No. 113/26), the Appellants claimed (inter alia) 2 and 2/5ths kerats in certain lands by purchase from Assad, ancestor of the Respondent, and subsequent possession for 36 years. The Appellants having failed to prove the purchase, their claim was dismissed by the Land Court. On appeal, the Appellant pleaded that apart from proof of purchase they were entitled to registration by prescription. The Court of Appeal held by a majority:

"The right of the Appellants to obtain a registered title to the 2 2/5ths kerats depended upon proof of purchase from Asad. The Appellants failed to prove the purchase and their claim to registration fails. The appeal is dismissed.

In the case of Henri Frank vs The Government of Palestine (Land Appeal No. 19/1923)[1] the judgment of The Court of Appeal was to the following effect:

"The Land Court in giving judgment to the Plaintiff on the ground of occupation for ten years was wrong. The effect of Article 20 of the Land Code is to defeat a Plaintiff whose claim has not

[1] See ante, p. 1470.

been asserted by action for ten years in favour of a Defendant who has been in occupation during this period.

"The Article does not give an acquisitive title to the occupier so as to entitle him as a Plaintiff to obtain judgment for registration as owner in the place of a registered Defendant".

The case of Abdel Halil Haj Shaaban Tafish and Others vs Ismail Ahmed Ghalayani and Another (Land Appeal No. 93/26) has been cited as one in which judgment against a registered owner was based upon possession. In that case the Respondents claimed by inheritance from Osman Ghalayani shares in certain lands registered in the names of Appellants' ancestors. The Appellants while denying the Respondents' title, admitted that Muhamed Shaker and his brother Hamid, not parties to the action were entitled to shares in the lands. On this admission that the Land Registry did not correctly record the true facts as to title, the Land Court admitted the evidence of witnesses on behalf of the Respondents and gave judgment in their favour. On appeal the Appellants pleaded that possession without title was insufficient ground for a judgment. The appeal was dismissed.

This action, while it is of importance as establishing one of the exceptions to the general rule that the evidence of witnesses unsupported by written evidence is inadmissible against a registered title, is not authority on the question of title by possession, as the witnesses whose evidence was heard by the Court gave evidence not merely as to the Respondents' possession but also as to the ownership of the land.

It thus appears that while in a series of judgments the Court has refused to order the registration of a Plaintiff whose claim was based solely upon ten years' possession, no case has been cited in which such possession unsupported by evidence of title has been held to be sufficient ground for registration against the holder of a kushan; and to hold this, would, in my opinion be inconsistent with those judgments, especially that in Ahmad Yousif Abu Hijla and Others vs Darwish Ahamd El-Yousif and Others, which seems to me to be indistinguishable from the present case.

Further, having regard to the terms of Article 20 of the Land Code it would, in my opinion be inconsistent to hold that a ten years' occupier could obtain a title against a registered owner.

Article 20 prevents the registered owner from enforcing his

right by action after ten years' adverse possession. But while it bars his remedy it does not destroy his right and so long as he has a right to the land even though he cannot enforce it by action it would be inconsistent to hold that the occupier had also acquired a right which was capable of registration.

One other question remains to be dealt with. On the 20th December, 1332, The Council of State gave a decision upon a question submitted to it by the Ministry of Justice as to the effect of Regulation 8 of the Tabu Regulations of 7th Shaaban 1276. That decision, as held in the above cited case of Mahmud and El-Abed Diab vs. Selim El-Amri was not a decision binding upon the Courts but only governed the action to be taken by the Registrar. It has, however, been argued that from that decision is to be inferred that a Plaintiff who proved more than ten years' undisturbed possession would be entitled to the issue of a Kushan in spite of previous registration in the name of the Defendant.

Regulation 8 of the Tabu Regulations of 7th Shaaban, 1276, is to the following effect:

"Persons who in accordance with Article 78 of the Land Code have a right by prescription having acquired possession by devolution, by inheritance, sale by the previous possessor, or grant by competent persons and having had undisputed possession for ten years, but who did not possess a title deed shall be given a new title deed on payment of a fee of 5%."

The circumstances which gave rise to the decision were as follows:

A registered owner of land died leaving three sons and two daughters, and the eldest son applied to the Land Registry for the registration of the whole land left by his father in his own name by Haqq El Karar, on the ground that he had cultivated it for a period of about 20 years.

The question which the Council of State was called upon to decide was this: Where the applicant for registration has proved title by inheritance and more than ten years' occupation of the land to the exclusion of the other heirs, is that a case in which under Regulation 8 he could be granted a Kushan for the whole of the land by the Land Registry or not? The decision of the Council of State was as follows:

"Whereas establishment of Haqq El Karar over miri land or mewkufe lands depends upon the claimant (i.e. the person registered

as owner) abandoning his claim without a legal excuse such as absence in a distant country or minority, and whereas claims of ownership on the ground of prescription (Murur Zaman) and Haqq El Karar are dependent upon the person in possession making no avowal and admission that he was in possession illegally or by way of lease or loan and that the ownership be based on succession or transfer or authorisation by the Mamur Tabu, as is expressly provided by the Tabu Regulations; Therefore every claim by an heir or co-owner on the ground of Haqq El Karar merely by reason of cultivation for a long period is one that needs no judgment."

Thus the decision of the Council of State bore no reference to the case of an application based upon possession unsupported by one of the legal grounds of ownership, but was limited to a particular class of applications based upon possession coupled with title by inheritance.

Hence it is in my opinion impossible to make any inference from this decision as to the rights of a Plaintiff who has possession but no title.

I hold that the appeal must be dismissed with costs.

Delivered the 29th day of December, 1927.

JUDGMENT OF MR. JUSTICE KHALDI.

Whereas the actual possession of the Appellant has not been proved, I concur in the result of the learned Vice-President, i.e. to dismiss the appeal and to confirm the judgment.

JUDGMENT OF MR. JUSTICE KHAYAT.

1. I hold that Article 78 of the Land Code treats as Mahlul all lands which have been left without cultivation for a term of 10 years. This is clear from the Article itself, the second paragraph of which is as follows: "Nevertheless if such person admits and confesses that he took possession of the land without any right when it became Mahlul the prescription cannot be regarded." Also by the following phrase which appears in the first paragraph:— "Such lands shall not be regarded as Mahlul" i.e. with regard to the payment or non-payment of the Tabu value. This is understood from the last paragraph of the Article.

2. Article 8 of the Tabu Regulations cannot be construed as in any way binding upon the Courts. It can be interpreted only in the following two senses: (a) that the person who has

been in possession of land for ten years is required to prove that he acquired it by one of the three sources of ownership,—in this case it is not necessary to prove prescription because that person's right is proved by proof of one of the sources of ownership: (b) that mere allegation of acquisition by one of the three sources of ownership is sufficient and that the party is only required to prove possession for ten years. According to this view prescription creates a right.

3. I, therefore, hold that the real Defendant in cases of this nature is the Government and that the registered person is merely a third party. Previously actions were started in this form; but the present Government seeing that it had no direct interest in these cases, did not enter them, therefore, the persons who started actions of this nature only cited the third party as the Defendant the real Defendant being the Government inasmuch as the law regards the land Mahlul because the registered person has not cultivated it for three years.

4. I am, therefore, of opinion that evidence of possession may be heard in this case and that the judgment should be set aside and the case remitted.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 137/26.

BEFORE:

The Senior British Judge, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Elie, Yacoub and Naif
sons of Assad Habib Hawa — APPELLANTS.

VS

Hussein Ali Saad
and Others — RESPONDENTS.

Proof of ownership of land—Verbal testimony to establish contents of agreement—Tithe certificate as evidence of ownership—Mukhtar's signature as admission binding on village.

Appeal from the judgment of the Land Court of Haifa, dated 16th day of June, 1926.

JUDGMENT.

This appeal relates only to such of the lands included in the Appellants' Statement of Claim as are not registered in their names.

Part of the evidence upon which the Appellants rely consists of an alleged agreement between them and the villagers of Yacoub for the planting of the lands in dispute. In accordance with the previous judgment of this Court the Land Court has heard the witnesses to this agreement and is not satisfied from their evidence that the agreement is genuine.

In addition, however, to this agreement the Appellants have submitted two tithe certificates, one for 1333 and one for 1920 in each of which the Appellants are shown as liable for one half of the tithe on the lands in dispute.

These certificates are signed by the Mukhtar and as the Respondents are appearing not in an individual capacity but as representing the village of Yanoub the signature of the Mukhtar is evidence against them.

No explanation of these certificates is offered by the Respondents except a suggestion that the villagers were fraudulently attempting to saddle the Appellants with payment of tithe of land of which they were not the owners.

Taken in conjunction with the evidence as to possession I think these certificates establish the Appellants' claim.

The appeal must be allowed with costs.

Delivered the 20th day of December, 1926.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 32/27.

BEFORE:

The Chief Justice, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Yousef Elias Abyad — APPELLANT.

vs

Shaul Shlomo Slonim
Jemil Elias Abyad — RESPONDENTS.

Purchaser by registered transfer as purchaser in good faith — Existence of private agreement between original vendor and stranger not known to purchaser.

Appeal from the judgment of the Land Court of Haifa dated January 7th, 1927.

JUDGMENT.

The first Respondent acquired the land in the year 1925 from one Aziz Irani, who in 1922 obtained it from one Zeinal Zadeck Pasha, who again in her turn purchased it from the second Respondent already in 1916.

All the three transfers were effected by proper registrations in the Tabu Office or Land Registry respectively.

It is not alleged that either of the purchasers had any knowledge of the private agreement made between the second Respondent and his brother, the Appellant.

Hence, there could be no claim against the first Respondent who is a purchaser in good faith, nor could there be a claim against the second Respondent who is no more in possession of the property.

The Appeal is therefore dismissed with costs including £P.5 advocate's fees and travelling expenses.

Delivered the 7th day of May, 1928.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 41/27.

BEFORE:

The Senior British Judge, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Avshalom Fein
The Jewish Colonization Association — APPELLANTS.

vs

Joseph Jerusalemsky — RESPONDENT.

Application for registration as owner on basis of transfer in 1906— Sufficiency of evidence to establish title to land—Action for damages or for recovery of money paid is not question for Land Court.

Appeal from the judgment of the Land Court of Jaffa, dated 21st February, 1927.

JUDGMENT.

The Respondent claimed to be registered as owner of certain lands in the colony of Rishon-le-Zion, as a transferee of Benjamin Fein, father of the Appellant Avshalom Fein.

At the time of the alleged transfer in 1906, the lands in question were registered in the name of Baron de Rothschild.

There is no evidence before us as to the terms upon which Benjamin Fein cultivated these lands, but there is evidence that at the time of his death in 1908 he owed the sum of 29048.52 Frs. to the Jewish Colonisation Association in respect of these lands.

The Respondent cannot have a better claim to the registration than Benjamin Fein would have, if he were still living and no transfer had been made, and no document has been produced which would have enabled Benjamin Fein to sustain a claim to be the registered owner of the land.

It may be that the Respondent is entitled to damages or recovery of money paid as transferee of Benjamin Fein, but that is not a question for a Land Court.

The appeal is allowed and the judgment of the Land Court set aside, costs to be paid by Respondent.

Delivered the 7th day of September, 1927.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 55/27.

BEFORE:
The Senior British Judge, Khaldi, J. and Abdel Hadi, J.

IN THE CASE OF:

Badawi Mohd Hussein El Natsheh
Mohd. As'ad Hamseh — APPELLANTS.

vs

Haj Abdel Fattah Kashmar — RESPONDENT.

Title to land by possession — Sufficiency of evidence of witnesses as to possession to set aside registered title.

JUDGMENT.

As against Appellant Badawi, the Respondent has failed to prove a purchase and judgment has been given in his favour solely on the evidence of witnesses as to his possession.

Subject, however, to certain definite exceptions, it is a general rule of evidence in the Land Court that the evidence of witnesses is not sufficient to set aside a registered title; and as the Respondent failed to prove his purchase, the judgment of the Land Court as against Badawi must be set aside and the said claim must be dismissed.

As against Appellant Mohd., the Respondent proved his purchase. The Appellant, however, was not sued in a representative capacity as an heir of his grandmother Fatmeh Mohd. Hussein, but in his personal capacity, and judgment should accordingly have been limited to the share which Mohd. has inherited in the $4^1/_2$ shares belonging to Fatmeh.

Subject to this amendment the judgment against Mohd. is affirmed. As between the Appellant Mohd. and the Respondent, costs are to be borne in equal shares.

Judgment given in presence the 11th day of October, 1927.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 96/27.

BEFORE:

The Senior British Judge, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Shlomo Fridman — APPELLANT.

vs

Badi's bint Abdul Karim — RESPONDENT.

Bona fide purchase without knowledge of defect in title—Purchaser from registered owner — Superiority of rights as between two innocent parties—Sale set aside where purchasers were not purchasers in good faith.

JUDGMENT.

The Appellant has bought by registered transfer from a registered owner, the Palestine Land Development Company which in

its turn had bought by registered transfer from the persons who were registered as owners of the whole land.

The Land Court has held that these purchases were made in good faith without knowledge of the fact that the Respondent was entitled to a share in the land.

The purchaser had done all that he could be expected to do. The Respondent had omitted to obtain registration as owner of the share to which she was entitled.

As between two innocent parties the purchaser, who has done all that is required by law, and who moreover has the legal title vested in him, has clearly the better claim.

The Land Court, however, has given judgment for the Respondent in reliance upon certain judgments of this Court and we have therefore to consider the effect of these judgments.

The first judgment relied upon by the Land Court is in Muhammad and Yusef, Sons of Jibril Taha Jibril vs Taha and Khadra, Children of Abdel Fatah Taha Jibril (Land Appeal No. 80 of 1924), delivered on 7th April, 1925, affirming the judgment of the Land Court of Jaffa delivered on 29th May, 1924. In that case certain of the heirs of Jibril Taha, in whose names the land in dispute was registered, transferred their shares in the land to the Defendants who were also heirs of Jibril Taha. The Plaintiffs proved that the land had in fact been held in partnership between Jibril and his brother Abdel Fatah, their ancestor, and the Court set aside the sale as regards the shares to which the Plaintiffs were entitled as heirs of Abdel Fatah.

In that case, however, the purchasers being themselves heirs of Jibril, could not be regarded as purchasers in good faith without notice of the Plaintiffs' rights and the judgment is thus no authority for the present case.

The other judgment relied upon by the Land Court is that given in Khadijeh bint Said and Another vs Muhamed Said Abdalla Idriss and the Heirs of Said Abu Gazale (Land Appeal No. 31/24) delivered on 22nd September, 1924, setting aside the judgment of Land Court of Jaffa in Action No. 102/22 delivered on 17th February, 1924.

In that case twelve out of twenty-four shares in certain land were registered in the names of Sheikh Abdulla Idriss, and on his death were transferred into the names of his three sons, by whom

they were sold to Said Abu Gazale. The Plaintiffs, other heirs of Sheikh Abdalla, claimed to have the sale declared void as regards the shares to which they were entitled by inheritance. Their action was dismissed.

On appeal, this Court allowed the Plaintiffs' claim and declared the sale void as regards the Plaintiffs' shares. In that case, however, the questions raised in the appeal were (a) whether or not the Plaintiffs' action was barred by lapse of time, (b) whether or not the Plaintiffs had knowledge of and acquiesced in the sale.

The defence that the purchaser had bought in good faith without knowledge of the Plaintiffs' rights, was not raised and it may be inferred that such a plea could not have been sustained, in view of the fact that said Abu Gazale, the purchaser, was owner of the other twelve out of twenty-four shares in the land in co-ownership with Sheikh Abdulla.

The decision in that case therefore does not govern the present case, where the purchaser has bought in good faith without notice of any right vested in the Respondent.

The appeal must be allowed, the judgment of the Land Court set aside and the Respondent's action dismissed with costs here and below.

Delivered in absence of Appellant and in presence of Respondent the 5th day of April, 1928.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 85/28.

BEFORE:

The Senior British Judge, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Elias Saman Mansour and Others — APPELLANTS.

vs

Heirs of Muhammed Said Najame — RESPONDENT.

Period of limitation of actions concerning land planted with trees — Defeasibility of title of bona fide purchaser for value without notice of defect — Exercise of right of recourse against transferor — All intermediate transferors against whom right of recourse may be exercised made parties to the proceedings — Joinder of third parties.

Appeal from the judgment of the Land Court of Haifa dated 10th September, 1928.

JUDGMENT.

The Land Court has given judgment for the Respondent on the ground that as the land in dispute is planted with trees, the period of limitation of actions is fifteen years and hence the action is not barred. The Court has found as a fact that the oldest cultivated trees were planted not earlier than 1918. The action was begun in 1926, and hence it is necessary for this Court to consider whether the period of limitation was fifteen years or ten years. In either case action is not barred and the appeal in that respect fails.

The appeal, however, has raised another point of law with which the Land Court has not dealt, namely, that the Appellants as bona fide purchasers for value from the registered owner, without notice of any adverse claim, have a good title. If the Appellants fail, they will have a right of recourse against their transferors, and ultimately there will be a right of recourse against the Government of Palestine, under whose grant the Appellants claim. The Attorney-General, therefore, and all intermediate transferors are necessary parties to the proceedings.

The judgment must, therefore, be set aside and the case remitted to be completed after notice to all parties interested.

Costs will follow the event.

Delivered the 20th day of March, 1929.

In the High Court of Justice.

H.C. No. 40/30.

BEFORE:

The Chief Justice and Khayat, J.

IN THE APPLICATION OF:

Rivka Aaronson
Toba Rutman — PETITIONERS.

vs

The Director of Lands — RESPONDENT.

Effect of registration of transfer in Land Registry — Guarantee of title or validity of transaction not implied by registration — Sec. 8 (3), Transfer of Land Ordinance, 1920-21.

Application for an order to issue to Respondent directing him to show cause why the note placed on the Register should not be cancelled.

JUDGMENT.

The Director of Lands has no authority derived either from the Transfer of Land Ordinance 1920-21, or any rules made thereunder (for in fact no such rules have been made), to add a note such as that set forth in the petition to the entry in the register relating to these lands in Khor-el-Wassa, Hudeira. The occurrence in the law of what is printed as Section 8 (3) on page 63 of Bentwich Vol. 1 by which "no guarantee of title or of validity of the transaction is implied ..... by the registration of the deed", makes the fact of such note having been made the more surprising.

The rule must be made absolute with LP.2 advocate's fees and costs.

Delivered the 4th day of July, 1930.

In the High Court of Justice.

H. C. Nos. 18 and 19/32.

BEFORE:

The Chief Justice, and Khayat, J.

IN THE APPLICATION OF:

The Attorney-General — PETITIONER.

VS

The Chief Execution Officer, Haifa,
Shufiyeh Bint Mu'aib El-Kanj
Anton Ya'qub El-A'Ama — RESPONDENTS.

Ghor Lands ordered sold by Chief Execution Officer — Agreement between Government of Palestine and cultivators of Beisan — Transfer of State lands upon conditions — Art. 114, Ottoman Land Code — Rights of creditors against transferee of Ghor land — Ghor Agreement not a legislative act.

ORDER.

The Attorney-General has applied for, and obtained from this Court, a rule nisi requiring the Chief Execution Officer of Haifa to show cause why his order dated the 2nd July, 1931, ordering

the sale of the Ghor Lands should not be set aside on the ground that pursuant to the provisions of the Agreement between the Government of Palestine and the Cultivators of Beisan, dated 19th November, 1921, and described as the Ghor Agreement, no such order of sale could be made before all the instalments of the transfer price of the said lands had been paid in full.

This Ghor Agreement, on the strength of which title-deeds were issued, amounted to a definite transfer of the lands, subject to a condition the effect of which is to secure the payment of what is called "Badal Tatweeb." There is nothing in this agreement inconsistent with the provisions of the Land Code; on the contrary, the tenure described therein is similar to that dealt with in Article 114 of the Land Code as amended.

Clauses 2 and 16 of the agreement confer on the transferee such rights as are vested in owners of miri lands with the power to mortgage such lands to the Government. Although no disposition by the holder of the title-deed is allowed by the Agreement, such prohibition does not affect the rights of creditors who can attach the lands and have them sold in satisfaction of their claims. Moreover, the persons to whom the lands were ordered to be sold must have been aware of the restriction on the holding of the registered owners, as shown in the title-deeds themselves and are, therefore, bound to abide by them, and their rights must be subject to the conditions of the agreement.

In spite of the wording of Clause 15 of the agreement, we hold that an instrument such as the Ghor Agreement cannot be considered a legislative act. It was neither passed by a legislative body nor confirmed by any Ordinance. Furthermore, it does not impose on creditors such restriction as would ensure the payment of the Government dues.

On these grounds the rule nisi dated 2nd April, 1932, must be discharged, with costs and £P.2 advocate's fees.

Delivered the 19th day of December, 1932.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 39/32.

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

IN THE CASE OF:
Alexandra Nader — APPELLANT.

VS

Mohamed Taher Qaraman & Another — RESPONDENTS.

Improper sale by guardian of miri land of minor — Act by father as guardian of child invalid unless sanctioned by Court — Purchaser from registered owner — Defeasibility of title of bona fide purchaser without notice of defect — Discovery of defect in vendor's title by reasonable diligence — Purchaser not acting with reasonable diligence not bona fide — Presumption of constructive notice of defect in title — Art. 52, Ottoman Land Code — Land Courts to have regard to equitable as well as to legal rights to land — Which party to suffer for mistake made by Land Registry official — Right to make search of register and documents in Land Registry — Amendment of Register without payment of transfer fees ordered by Court.

JUDGMENT.

This is an appeal against the judgment of the Land Court, Haifa, in an action by the Appellant, Alexandra Nader, daughter of Salim Khayat, claiming a declaration of title to one half of the land of which the Respondents, Mohamed Taher and Abder Rauf Aamman are registered as owners.

An extract from the Land Register shows that the Appellant and her sister Victoria were formerly registered as owners of the land.

On the 17th February, 1922, a transfer of the land to Anis Abder Razzak and Sadiga, widow of Abdel Mejid Ramadan, was registered, each of the transferees being registered as owner of one half of the land.

On the 19th June, 1924, a partition between Anis and Sadiga was registered. On the 19th June 1924, and the 25th January, 1929, Anis and Sadiga transferred the whole of their shares to the Respondents.

The Appellant's claim is that the transfer in favour of Anis and Sadiga was made during her minority by her father Salim

Khayat, in his capacity as her guardian, that the concent of the Religious Court to the transfer was never obtained and hence that the transfer was invalid.

To this the Respondents reply that they are purchasers in good faith from the registered owners without notice of any defect of title, and hence that the registration in their favour must prevail over the Appellant's claim whatever defect there may have been in the earlier title. In support of this view they cite a series of judgments of this Court, including Land Appeal No. 96/27, Shlomo Fridman vs Badia bint Abdul Karim.*)

The Appellant, however, argues that the Respondents must be held to have had notice of the defect in their vendor's title, as if they had examined the documents filed in the Land Registry at the time of the transfer to their vendors, they would have found that the deed of transfer was expressed to be made by Salim Khayat as guardian of his infant daughters, and they would thus have been put upon enquiry as to the consent of the Religious Court and would have discovered that such consent had never been given.

Having regard to the provisions of Article 52 of the Land Code, it is clear that the miri land of a minor can only be sold by his guardian (if at all) with the consent of the Religious Court, and Land Registry authorities were at fault in permitting registration of the transfer by Salim Khayat to Anis and Sadiga without production of a consent by the Religious Court. In this connection, we have to consider the effect of Section 7 (1) of the Land Courts Ordinance, 1921, which provides that:

"The Land Court will apply the Ottoman Law in force at the date of the British Occupation as amended by any Ordinances or Rules of Court issued since the Occupation; provided that the Courts 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 would not in my view be in accordance with the requirement that the Courts shall have regard to equitable rights if the Appellant were to be deprived of her land through a mistake on the part of the Land Registry officials to which she, in no way contributed and which she was powerless to prevent, in favour of purchasers

*) see ante, p. 1740.

who, had they taken the precaution of inspecting the documents filed in the Land Registry at the time when their vendors were registered, would have discovered that their vendors' title was defective.

It is to be noted that Part 3 of the Regulations for Land Registries include the following:—

"1. Register and the documents referred to therein may be searched by any person who has an interest in the property.

2. Application will be made in writing on L.R. form No. 1."

The form L.R. No. 1 is a form of application to search the register and documents relating to the land specified therein. From this it is clear that so far as searches are concerned, no distinction is made in the Registry between the register and the file of documents, and a person applying to search the register receives notice of the fact that there are documents filed in the Registry which are open to his inspection.

The position of the Appellant in this case is totally different from that of the Respondent in Shlomo Fridman vs. Badia bint Abdul Karim (L.A. 96/27). In that case the Respondent was entitled by inheritance from her grandfather to a share in a piece of land, but was not registered, the whole land being registered in the names of his other heirs. The Appellant acquired the land by registered transfer from a vendor who had bought from the registered heirs by registered transfer.

In giving judgment for the Appellant this Court observed that:—

"The purchaser has done all that he could be expected to do; the Respondent has omitted to obtain registration as owner of the share to which she was entitled.

As between two innocent parties, the purchaser who has done all that is required by law, and who moreover has the legal title vested in him, has clearly the better claim."

These considerations do not apply to the present case, where the failure to take all possible steps to secure a good title has been on the part of the Respondent and not of the Appellant.

The appeal must be allowed.

In view of the fact that the present situation could not have arisen but for an error on the part of the Land Registry authorities,

the Appellant is entitled to have the register amended and to be entered thereon as owner of one half of the land without payment of registration fees.

Costs here and below will be paid by the Respondent including £P.7 advocate's fees and expenses.

JUDGMENT OF MR. JUSTICE KHALDI.

The Land Court found as a fact that the Defendants have acquired the property in good faith from the registered owners without notice of any defect of title and this Court cannot go behind this finding. The fault of the Land Registry authorities to permit the registration of the transfer by Salim Khayat to Anis and Sadiga, without production of a consent by the Religious Court is not a matter for which Defendants could be held responsible. The title deed of a person is prima facie evidence of a perfect title and there seems to be no authority whereby, in a case such as this, an obligation is imposed on intending purchasers to examine the documents filed in the Land Registry at the time of the transfer to their vendors.

The Land Registrar when issuing a title deed is presumed to have been satisfied that the requirements of the law have been complied with.

The appeal must be dismissed.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 67/32.

BEFORE:

The Senior Puisne Judge, Baker, J. and Khaldi, J.

IN THE CASE OF:

Ahmed Abou Nyma — APPELLANT.

vs

Anglo-Palestine Bank and Another — RESPONDENTS.

Title to land by possession — Claim of title based on possession for more than ten years — Written evidence required to set aside registered title — Evidence of witnesses, possession or admissions of other parties not sufficient to set aside registered title.

JUDGMENT.

This is an appeal against the judgment of the Land Court in an action whereby Appellants claimed that they had been in possession of the miri land in dispute for 35 years. They attempted to prove their title to the land by personal evidence and werko extracts; and they further alleged bad faith on the part of Respondents, who, when the land was registered into their names, knew of the possession of Appellants. The Respondents, on the other hand, argue that no oral evidence is admissible to refute Tabou records.

The Land Court dismissed the action of the Appellants on the ground that Appellants cannot prove their case by personal evidence.

Now, in Afifeh bint Elias Abu Rahmi and Others vs Naim Jirius Abyad and Another (Land Appeal 137/23) the Court of Appeal said:—

> "The evidence of witnesses, the possession of the Respondents, the admissions of the parties interested however convincing, are not sufficient to override the general rule that has been established in this Court that a registered title will not be set aside except by some evidence in writing sufficient to support an adverse title, or to corroborate evidence in support of such adverse title."

The general rule thus expressed has been followed in this Court subject to a few recognised exceptions, as for example, where the claim is to lands of a village cultivable in common according to the custom of the village.

No such special circumstances are present in this case, and we hold that the general rule is applicable.

The appeal is dismissed with costs.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 73/32.

BEFORE:

The Chief Justice, the Senior Puisne Judge and Khaldi, J.

IN THE CASE OF:

Ismail Muhammad Ofi and Others	APPELLANTS.
vs	
Keren Kayemeth Le-Israel	RESPONDENT.
Michel Tayan for the heirs of Anton Tayan	THIRD PARTY.

Guarantee for appeal found to be insufficient — Refusal of Court to adjourn for production of proper guarantee — Deposit in cash accepted in lieu of guarantee — Article 186, Ottoman Code of Civil Procedure—Claim of title based on old possession—Written evidence of ownership required to set aside registered title.

Appeal from the judgment of the Land Court of Nablus, dated the 27th September, 1932.

INTERLOCUTORY JUDGMENT.

The Court holds that the guarantee produced by the Appellants is insufficient inasmuch as the Mukhtar's is the only certificate of means. Notice having been given to Respondent, the Court will not adjourn for production of proper guarantee.

The Court is prepared to accept a deposit in cash of £P.25 in lieu of a guarantee and undertaking of advocates for Appellants to pay this sum. The two advocates give a personal undertaking to pay the sum.

JUDGMENT.

The Appellants' claim is based on old possession unsupported by any registration or written evidence of title. The Respondent Company is registered as owner of the land in claim by purchase at a sale by auction held by the Execution Office in satisfaction of a mortgage created by the third party's ancestor.

The Appellants' case is that the lands in dispute were not included in the mortgage and were wrongly included in the land register in the name of the Respondent.

In view, however, of the judgment of the Court of Appeal in Land Appeal No. 19/23 — Frank vs The Lands Department — it is clear that in the absence of any evidence of title on the part of the Appellants it would be of no avail for them to produce evidence of long possession and there is no ground for the Court to consider the question of Respondent's title.

The appeal is dismissed with costs to include £P.2 advocate's fees to Respondent and Third Party.

With regard to the interlocutory order by which we accepted the personal guarantees of the advocates for the Appellants to deposit £P.25 as security for costs, we order that this sum be paid within four days.

Delivered the 12th day of December, 1932.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 74/32.

BEFORE:

The Acting Chief Justice, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Salim Suleiman Cotran
Na'im Suleiman Cotran
Bin Suleiman Cotran — APPELLANTS.

vs

Iskander Naser Cotran — RESPONDENT.

Claim of title to land based on alleged transfer made by deceased person—Defeasibility of title of bona fide purchaser without notice of defect — No right of appeal from decision of trial Court on any issue decided except as set out in judgment.

JUDGMENT.

This appeal arises out of an action brought before the Land Court of Haifa by the Respondent Iskander Naser Cotran who claimed a declaration of title to 8 out of 24 shares in a certain piece of land which shares he alleged had been purchased by his father from Suleiman Cotran.

The Respondent further alleged that the present Appellants, who are the heirs of Suleiman, sold the shares to one Nathan Kaiserman by whom they had been resold to Lord Melchett.

The Land Court found in favour of the Respondent that he had acquired title to the shares in claim, but dismissed his action on the ground that there was no evidence proving that Lord Melchett had knowledge of the Respondent's previous ownership.

The present Appellants were joined with Lord Melchett as Defendants to the action though there does not appear to be any ground for this, as the only question before the Court was that of the title to the land and the Appellants clearly have no claim to be the owners.

The Appellants have brought this appeal not on the ground that they object to the judgment dismissing the Respondent's claim, but because they are aggrieved by the finding of the Court that the Respondent was formerly the owner of the shares in dispute.

I hold that this is not a ground upon which an appeal can lie.

Unless a party desires that a judgment shall be set aside or varied, he is not entitled to appeal against that judgment merely because he is of opinion that one of the issues before the Court was wrongly decided.

The Appellants have stated that the reason for which they have filed this appeal is that they fear that the Respondent may bring an action against them for the value of the shares and may rely upon the finding of the Land Court as to his former ownership.

If, however, such an action is brought, it will be for the Court which hears that action to decide all the necessary issues including that of the Respondent's former title to the shares.

The appeal is dismissed with costs and £P.2 advocate's fees.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 8/33.

BEFORE:

The Senior Puisne Judge, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Rushdi Jum'ah Baiyari — APPELLANT.

vs

Taufiq Omar El-Mughrabi — RESPONDENT.

Claim of title to upper storey of house—Transaction in immovable property not registered — Written evidence of ownership required to set aside registered title — Presumption that where fresh storey is added to registered house it is property of registered owner of house.

JUDGMENT.

This appeal arises out of an action brought by the Respondent Taufiq Omar El-Mughrabi, against the Appellant, Rushdi Jum'ah Baiyari claiming a declaration of title to the upper storey of a house in Acre, of which storey the Appellant is registered as owner.

The house upon which the storey in dispute is built and the ground on which it stands were formerly the property of the Respondent's mother, Bahiyeh bint Mohammad el Wannas, and was registered in the Land Registry in her name: a transfer of Bahiyeh's property to the Appellant was registered on the 31st of August, 1927.

Ten days later, namely on the 10th September, 1927, the Appellant applied for registration of the upper storey now in dispute which he alleged he had erected since the purchase of the ground floor from Bahiyeh.

The registration was effected on the 28th November, 1928.

On the 2nd of March, 1931, the Respondent commenced his action. In support of his claim he submitted evidence that a building licence had been issued to him by the Municipality on the 21st April, 1926, and that the materials for the building of the upper storey had been bought by him and the work carried out under his instructions.

Upon the issue of fact, the Land Court held in favour of the Respondent that the upper storey had been built before the purchase by the Appellant. Having satisfied themselves that there was reason why the Respondent should not have brought his action sooner, the Court held that the Respondent's case was proved and gave judgment accordingly.

Among the grounds of appeal, the Appellant maintains that there is no article of law which supports the judgment and there is no documentary evidence in support of the Respondent's claim.

We think that this appeal is well founded.

In the first place, the transactions to which it relates have all taken place since the Transfer of Land Ordinance, 1920. But even if such were not the case, the Appellant is registered as owner, while the Respondent upon whom the burden of proof lies, has produced no documentary evidence of title whatever. Further, we see no reason to infer that, because the instructions for the erection of the upper storey were given by the Respondent and the building permit was issued in his name, the Respondent acted on his own behalf and built the upper storey out of his own money. Where a fresh storey is added to a registered house, the presumption is that it is built by and is the property of the owner of the registered house; and the fact that the Respondent, whose mother was the registered owner, obtained a building permit in his own name and gave all instructions for the building is not, in our opinion, sufficient to rebut this presumption. The proper inference seems to us to be that he was acting as agent for his mother.

Even, however, if such were not the case, the Respondent has failed to obtain from his mother any acknowledgment of his title to the upper storey.

The appeal must be allowed, the judgment of the Land Court set aside and the Respondent's action dismissed with costs here and below.

TOWN PLANNING.

In the High Court of Justice.

H.C. No. 81/27.

BEFORE:

The Senior British Judge, Jarallah, J. and Frumkin, J.

IN THE APPLICATION OF:

Muhammad Eff. Fitiani — PETITIONER.

VS

Suleiman Bey Toukan, in his capacity as President of the Municipal Council of Nablus — RESPONDENT.

Demolition order made by Municipal Council — Municipality not proper party to grant demolition order — Building permit to be issued by Local Town Planning Commission — Appeal to Central Commission by person aggrieved by refusal of Local Commission to grant permit — Rule 4, Rules of 15th March, 1922, under Town Planning Ordinance, 1921 — Sec. 35, Town Planning Ordinance, 1921 — No jurisdiction in High Court where other remedy provided.

Application for an Order to issue to the Respondent directing the withdrawal of the Municipal Warning (Notice) calling upon Petitioner to demolish the shares of his house and directing the Municipal Council to issue to Petitioner a Building Permit.

JUDGMENT.

The Municipality is not the proper party to grant a building permit (Rules of 15th March, 1922, No. 4 under Section 5 of the Town Planning Ordinance, 1921). The Local Town Planning Commission has not been made a party to these proceedings. Even if they were a party, under Section 35 of the Town Planning Ordinance, an appeal from the refusal of a Local Commission lies to the Central Commission and hence this Court has no jurisdiction.

The Petition is dismissed.

Delivered in presence the 30th day of January, 1928.

In the High Court of Justice.

H.C. No. 82/29.

BEFORE:
The Chief Justice, Jarallah, J. and Frumkin, J.

IN THE APPLICATION OF:
Hikmet Rashid el Namli — PETITIONER.
vs
Chairman of Local Town Planning Commission,
Hassan Eff. Shukri — RESPONDENTS.

Application to High Court against Mayor to enforce grant of building permit — Effect of certificate of expropriation of land issued by Municipality — Building permit to be issued by Local Town Planning Commission — Appeal to Central Commission by person aggrieved by refusal of Local Commission to grant permit.

ORDER.

The Court holds that the Mayor has no standing in the case and that the decision of the Local Town Planning Commission is subject to revision by the Central Town Planning Commission and that the certificate of expropriation deprives the Petitioner of any property in the land and so of any right.

Rule discharged with costs LP.2 advocate's fees to Mayor and to Chairman of Town Planning Commission respectively.

Made the 15th day of September, 1930.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 79/30.

BEFORE:
The Acting Chief Justice, Jarallah, J. and Frumkin, J.

IN THE APPLICATION OF:
Emmanuel Hagenlocher (General Representative of Mr. Gustaf Bauerle, an Heir of the late Christian Bauerle, who acts on behalf of the Heirs of his Father — APPELLANT.
vs
Adib El-Hannawi — RESPONDENT.

Building erected in accordance with Town Planning Regulations but overlooking women's quarters of neighbour — Conformity with Regulations no defence — Removal of nuisance — Art. 1202, Mejelle.

JUDGMENT.

At the hearing of this case in the District Court the Court was divided in opinion, and accordingly judgment was entered for the Defendant, who is present Respondent.

The learned Judge, who was in favour of dismissing the action, based his judgment upon the fact that the Respondent's house had been erected in accordance with the Town Planning Regulations.

This, however, in the opinion of this Court, is not a sufficient defence. It may well be that a building has been erected in accordance with Town Planning Regulations, and yet that windows in that building may overlook the women's quarters of a neighbouring house, and thus come within the provisions of Article 1202 of the Mejelle.

The judgment of the District Court is, therefore, set aside and the case is remitted for the Court to determine whether or not any of the windows in the building recently erected by the Respondent do, in fact, overlook the women's quarters of the Appellant's house, and to give judgment.

Costs will follow the event.

Delivered the 6th day of July, 1931.

In the High Court of Justice.

H.C. No. 84/30.

BEFORE:

Baker, J., Jarallah, J. and Frumkin, J.

IN THE APPLICATION OF:

Abraham Elk — PETITIONER.

VS

Chairman of the Local Town Planning Commission of Jerusalem — RESPONDENT.

Owner of premises ordered to demolish — Judgment given against former owner to demolish premises not valid against new owner— Order to demolish under Section 38, Town Planning Ordinance, 1921, held to lie in personam and not in rem.

JUDGMENT.

Application was originally made to the Magistrate's Court under Section 38 of the Town Planning Ordinance, 1921, against the former owners of the premises, the subject-matter of this application, and a judgment was given against the previous owner, inter alia, to demolish the staircase and the balcony of the said house.

On the strength of this judgment the present applicant was ordered to demolish the said staircase and balcony, and it is against the enforcement of this order that the applicant now applies.

Now Section 38 of the Town Planning Ordinance is very clear. It prescribes the following:—

> "Any person carrying out any work without having obtained a permit, etc. . . ."

Therefore this section clearly acts in personam and not in rem, and the person it can only lie against is the person carrying out the work and perforce not the property itself.

Accordingly the order must be made absolute with costs and £P.3 advocate's fees.

Delivered the 9th day of February, 1931.

In the High Court of Justice.

H.C. No. 33/31.

BEFORE:

Corrie, J. and Frumkin, J.

IN THE APPLICATION OF:

The Administrator of the Estate of Simha Mandelbaum — APPLICANT.

vs

The Jerusalem Town Planning Commission
Jamal Hashem — RESPONDENTS.

Application for order to issue to Town Planning Commission to cancel permit granted to neighbour — Necessity of minimum set back of building from road — Road not adopted by Commission under Town Planning scheme.

JUDGMENT.

The Petitioner is the Administrator of the Estate of the late Simha Mandelbaum, which includes a house built upon land situated within the Jerusalem Town Planning Area in a district classified under the Town Planning Scheme as a Residential District, Class C.

The 2nd Respondent Jamal Hashem, is the owner of adjoining land. At the date when this petition was filed, he was engaged in building a house on his land in accordance with a permit granted by the 1st Respondent, the Jerusalem Town Planning Commission.

The Petitioner seeks an order directing the Commission to cancel this permit, on the ground that it is at variance with the Town Planning Regulations.

The Petitioner's contention is that under Zoning Table III annexed to the Regulations it is required that in a Residential District Class C, buildings shall be constructed with a minimum set back from the road of 3 metres, while under the permit granted to the Respondent Jamal Hashem, he is allowed to build without any set back whatever.

To this the Commission reply that the Regulations upon which the Petitioner is relying apply only to a road which the Commission has adopted as a road under its Town Planning Scheme, and that the road adjoining the Respondent Jamal Hashem's property has not been so adopted.

In proof of the fact that the road in question has not been adopted, the Town Planning map was produced by the Municipal Engineer.

In the face of this objection, the Petitioner's claim cannot be sustained and the Petition is therefore dismissed with costs.

Delivered the 31st day of July, 1931.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 19/33.

BEFORE:

The Acting Chief Justice, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Moshe Grill — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Jurisdiction of Magistrates' Courts to hear charges under Section 38, Town Planning Ordinance, 1921 — Criminal jurisdiction of Magistrate—Section 4, Town Planning (Amendment) Ordinance, 1922—Jurisdiction conferred by Magistrates' Courts Jurisdiction Ordinance, 1924, and amending Ordinances.

JUDGMENT.

This appeal raises the question whether a Magistrate's Court has jurisdiction to try charges under Section 38 of the Town Planning Ordinance, 1921.

As regards the Magistrates' Courts which then existed, jurisdiction in charges under Section 38 was conferred by Section 4 of the Town Planning (Amendment) Ordinance, 1922, enacted on 1st August, 1922, which provides that:

> "where proceedings are taken before a Magistrate's Court or Municipal Court, such Court shall not inflict a fine in excess of the amount to which its jurisdiction is limited by law."

The Magistrate's Court there referred to, however, was the Court which existed before effect was given to the Palestine Order-in-Council, 1922.

Article 39 of that Order provided that:

> "Magistrates' Courts shall be established in each district and sub-district as may be prescribed from time to time by Order under the hand of the High Commissioner. These Courts shall have the jurisdiction assigned to them by the Ottoman Magistrates Law of 1913, as amended by any subsequent Law or Ordinance or Rules for the time being in force."

In exercise of the power conferred by this Article, an Order was issued on 1st August, 1924, by Section 2 of which Magistrates' Courts were established and their areas of jurisdiction defined. These are the Magistrates' Courts with which we are now concerned.

The jurisdiction as to subject-matter of these new Magistrates' Courts was defined by an Ordinance enacted on the 1st August, 1924, of which the short title is the Magistrates' Courts Jurisdiction Ordinance, 1924.

As regards criminal matters, the jurisdiction thereby conferred on these new Magistrates' Courts was restricted to offences for which the maximum penalty does not exceed imprisonment for one year or a fine of £E.100, and offences under Articles of the Penal Code specified in the first part of the Schedule to the Ordinance.

This Section was amended by the Magistrates' Courts Jurisdiction (Amendment) Ordinance, 1926, Section 2, which extended he jurisdiction of the new Magistrates' Courts to offences under certain Ordinances scheduled thereto; these, however, did not include the Town Planning Ordinances.

The jurisdiction of the Magistrates' Courts was further amended by the Magistrates' Courts Jurisdiction (Amendment) Ordinance, 1930, which is the enactment now governing the question of jurisdiction: but that Ordinance did not add the Town Planning Ordinances to the Ordinances in respect of which the Magistrate's Court is to exercise jurisdiction.

It follows that, as the maximum penalty under Section 38 of the Town Planning Ordinance, 1921, is £P.200, the Magistrate's Court has no jurisdiction to deal with offences thereunder.

The appeal is allowed and the judgment of the District Court affirming the judgment of the Magistrate's Court convicting the Appellant is set aside.

Delivered the 26th day of July, 1933.

TRADE MARKS.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 2/24.

BEFORE:

The Chief Justice, Corrie, J. and Frumkin, J.

IN THE CASE OF:

Westminster Tobacco Co. — APPELLANT.

vs

The Registrar-General of Trade Marks — RESPONDENT.

Refusal by Registrar of Trade Marks to register mark — Interpretation of word "used" in Sec. 1, Trade Marks Ordinance, 1921 — No restriction to user in Palestine to be inferred.

JUDGMENT OF MR. JUSTICE HAYCRAFT.

The refusal of the Registrar-General to accept for registration the mark in question on the ground of non-user in Palestine is reversed. The mark may be accepted for registration on proof to the satisfaction of the Registrar-General of user in Palestine or elsewhere, unless it fails in some other respect to satisfy the requirements of the Trade Marks Ordinance.

No order is made as to costs.

JUDGMENT OF MR. JUSTICE CORRIE.

We are not prepared to hold that in Section 1 of the Trade Marks Ordinance, 1921, the words "the term Trade Mark shall mean a mark used upon or in connection with goods", the word "used" can be held to imply "used or proposed to be used."

We hold on the other hand that in interpreting this Section no restriction to user in Palestine is to be inferred, and that on proof to the satisfaction of the Registrar-General of user either in Palestine or elsewhere, the mark may be accepted for registration, unless it fails in some other respect to conform to the requirements of the Trade Marks Ordinance.

Frumkin J.: I concur.

Delivered the 3rd day of May, 1924.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 11/24.

BEFORE:

Corrie, J., Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Régie des Tabacs Ottomanes — APPELLANTS.

vs

The Registrar-General of Trade Marks
Baddour Brothers — RESPONDENTS.

Opposition made to application for registration of Trade Mark — Trade Mark calculated to deceive purchasers owing to similarity — Fact that considerable portion of purchasers are illiterate to be taken into consideration — Rule for establishing whether mark sufficiently distinctive — Commission of offence under Sec. 23 (7) (e) Trade Marks Ordinance, 1921.

JUDGMENT.

The Court is asked by the Régie, the opposers to this application for registration, to say that the Trade Mark in respect of which the Applicants Baddour Brothers desire registration is calculated to deceive purchasers owing to its similarity to their own registered Mark.

It is rightly argued on behalf of the Régie that the fact that a considerable portion of purchasers are illiterate must be taken into account, and that the Court must endeavour to view the Mark from the point of view of an illiterate purchaser.

It is further argued that Baddour Brothers' Mark is not sufficiently distinctive to prevent their goods from being mistaken for those of the Régie's goods.

In illustration of this argument, packets of the Régies and Baddour Brothers' goods were produced, and it was urged that the latter might well be mistaken for the former.

We are not satisfied, however, that this is the true test of the admissibility of Baddour Brothers' application.

It may well be that a purchaser literate or illiterate would mistake the Baddour Brothers' packet for that of the Régie, being misled by the colour of the paper and the banderole and the general similarity of get-up: and if a Court were to hold that

such similarity were due to an attempt of Baddour Brothers to lead intending purchasers to accept their goods in the belief that they were those of the Régie, they might be convicted of an offence under Section 23 (7) (e) of the Trade Marks Ordinance, 1921.

But the fact that the Trade Mark of Baddour Brothers may not be sufficiently unlike that of the Régie to make such fraudulent user impossible, is not enough to render the Mark incapable of registration.

In deciding whether the Mark is sufficiently distinctive, the Court has to consider proper, honest user, and not user in a form intended to deceive.

In the present case we are of opinion that the Mark in respect of which application is made by Baddour Brothers differs sufficiently from that of the Régie to make it distinctive even to an illiterate purchaser provided that he pays any attention to the Mark as apart from the general get-up.

Altough the general arrangement of the design is similar to that of the Régie, the substitution of the cyphers and the Chariot for the seal impressions and monogram which appear in the Régie's Mark, should in my opinion be sufficient to call the attention of a purchaser who is not relying wholly upon the general appearance and get-up of the packet, to the fact that it is not the Régie's goods that are being offered to him.

We hold that the opposition should be dismissed.

Delivered the 26th day of October, 1925.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 141/24.

BEFORE:

The Chief Justice, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Mocolas Seferoglou — PETITIONER.

vs

Hagob Maltchadjian — RESPONDENT.

Application for cancellation of Trade Mark — Right to benefit of Ottoman registered Trade Mark as declared by Treaty of Peace Ordinance, 1925 — Trade Mark calculated to deceive public.

Application for the cancellation of Trade Mark "Bafra" registered in the name of the Respondent Hagob notice of which appeared in the Official Gazette No. 98 of 1st September, 1923, on the ground that the Mark is owned by the Petitioner.

JUDGMENT.

There are two grounds for this registration to be cancelled:—

1. That Petitioner was at the time when the registration was made entitled to the benefit of an Ottoman Registered Trade Mark as declared by the Treaty of Peace Ordinance, 1925.

2. The second ground is that the Respondent's Trade Mark was an imitation of that used by the Petitioner calculated to deceive the public as holding out that it represented the same business as that of the Petitioner.

The order will be that the registration of the Trade Mark published in Gazette No. 89 at p. 312, 1st September, 1923, entered in the name of the Respondent, be cancelled.

As to costs further application should be made.

Delivered in presence of both parties the 22nd day of October, 1925.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 29/27.

BEFORE:

The Chief Justice, Corrie, J. and Frumkin, J.

IN THE CASE of:

The Attorney-General — APPELLANT.

vs

Sa'id Daoud Kan'an — RESPONDENT.

Criminal liability for infringement of Trade Mark — Packing or wrapping goods so got up as to lead intending purchasers to believe they were goods of another manufacturer — Section 23 (7) (e), Trade Marks Ordinance, 1921—Reasonable probability of deception in imitation of Trade Mark—Injunction granted against continued repetition of infringement.

JUDGMENT.

In this case, which is an appeal by the Attorney-General from an acquittal by the District Court of Nablus, the Respondent Said Daoud Kan'an is charged with the infringement of the Trade Mark of Haj Nimr Nabulsi in respect of soap.

The majority of the Court below dismissed the charge but the President, while of opinion that the prosecution had not proved a case of imitation of the Trade Mark on the soap under Section 23 (7) (a) of the Trade Marks Ordinance, 1921, held nevertheless that the accused should be convicted under Section 23 (7) (e) of packing or wrapping his goods so got up as to lead intending purchasers to believe they were the goods of another manufacturer.

So far as the imitation of the Trade Mark goes, the Complainant, who is the son of one Hassan of Nablus, a former well-known soap boiler, has registered as his mark a crescent containing the words "Hassan El Hakiki Ibn Nimr," i.e., "The real Hassan the son of Nimr," beneath which is a star bearing the words one above the other, "Hassan Nabulsi", i.e., "Hassan of Nablus."

The mark used by the Respondent, which is attacked as an imitation, consists of a faint circle containing the words one above the other "Nablus
Hassan
Said."
in letters much larger than those in Haj Nimr's registered Trade Mark.

The argument of the Government Advocate was to the effect that the essential feature of the registered mark was the name "Hassan" in juxtaposition with the word "Nabulsi," meaning "of Nablus," that the occurrence in similar proximity of the words "Hassan" and "Nablus" in the Respondent's mark was the adoption of a single characteristic and distinctive particular from the Plaintiff's mark, the use of which alone or with other matter may well be an infringement of the entire mark, and which at any rate throws upon the Defendant the onus of proving the contrary.

The test appears to us to be that laid down by Lord Selborne in the Singer Manufacturing Co. v. Loog (1882) 8 A.C., p. 18, that there can be no infringement, in cases where the Plaintiff's mark is not actually copied, if there is no reasonable possibility

of deception. So, too, Cozens Hardy M.R. in Claudies Ash Sons and Co. v. Invicta Manufacturing Co. 28 R.P.C., 597 (which was affirmed by the House of Lords in 29 R.P.C., p. 465 (1913), said that although it was not necessary that a Trade Mark should be copied in full, a thing must, in order to infringe, be so like and differ so slightly that, when used on the goods, it would be calculated so deceive.

We are of opinion that the faint circle in place of the crescent and star, the absence of any inscription such as "Hassan El-Hakiki Ibn Nimr," the presence of the word "Said" before "Hassan" and the use of "Nablus" in place of "Nabulsi" all make the difference between Respondent's soap and that of the Complainant so marked as to rule out a reasonable probability of deception.

When, however, we come to the get up of the sacks in which the Respondent's soap is wrapped, we find that the Respondent, who, as we have seen, is named Said Daoud Kan'an, stencils on his sacks "Hassan El-Hakiki Mal el Sab'a" with the device of a lion, that is to say, he does not use his own name at all but employs the words "Hassan El-Hakiki," i.e., "The real Hassan," which forms a part, and that the first and most conspicuous part of the Complainant's registered Trade Mark.

We are not in the least impressed by Mr. Eliash's insistence that the Respondent has a son named Hassan since he has used a description which as applied to himself is inaccurate and by reason of its inaccuracy approached more nearly to the description of the Complainant and which, in consequence, as was said by Lord Langdale in Holloway v. Holloway (1850) 13 Beaven p. 209, is an obvious badge of fraudulent intention.

Being satisfied of the probability of deception we are of opinion that the decision of the Court below must be reversed, the Respondent must be convicted under Section 23 (7) (e) of the Trade Marks Ordinance and fined £P.5 and costs and that under the last sentence of Section 23 (7) an injunction must be granted against a continued repetition of the offence constituted under this section.

Delivered the 19th day of March, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 15/29.

BEFORE:

The Acting Chief Justice, Frumkin, J. and Khayat, J.

IN THE CASE OF:

George Schicht Aktiengesellschaft — APPELLANT.

vs

Israel Brikstein — RESPONDENT.

Application for cancellation of registration of Trade Mark — Mark calculated to deceive the public and encourage unfair trade competition — Who is "person interested" for purpose of applying for cancellation — Sections 5, 16, Trade Marks Ordinance, 1921.

JUDGMENT.

The Applicant Company is applying under Section 16 (1) (i) of the Trade Marks Ordinance, 1921, for cancellation of the registration of the Respondent as owner of the Trade Mark "Ceres," registered upon application No. 1080 in Class 42, advertised in the Supplement to Official Gazette No. 182 of the 1st March, 1927.

The ground of application is that the mark is calculated to deceive the public and encourages unfair trade competition; and hence, by virtue of Section 5 (4) of the same Ordinance, is not capable of registration.

The Applicant Company has filed evidence to show that it is registered in Czechoslovakia, Austria, Hungary, Yugoslavia, Poland, Roumania and other European countries as the proprietor of the Trade Mark "Ceres" and of wrappers of which specimens have been submitted.

On comparison of the Respondent's wrapper with the specimens of those of the Applicant, we have no doubt that the former is calculated to deceive persons accustomed to buying the Applicant's goods into the belief that the Respondent's goods were made by the Applicant.

That there are persons in Palestine who are acquainted with the Applicant's Marks and are thus liable to be deceived, cannot be contested, in view of the fact that there are now in the country many thousands of persons who, until recently, were living in countries in which the Applicant's Trade Mark is registered and its goods are on sale.

The only question, therefore, for the Court is whether the Applicant is a "person interested" within the meaning of Section 16, having regard to the fact admitted by the Applicant, that no sales of his goods have taken place in Palestine since the commencement of the War.

The term "person interested" is one peculiar to Palestine legislation, the term employed in the corresponding provision of Section 35 of the English Trade Marks Act, 1905, upon which the Trade Marks Ordinance is based, being "person aggrieved."

The term "person interested" is, in our view, a term of wider application than "person aggrieved," and if the applicant is a "person aggrieved," within the meaning of the Trade Marks Act, it follows that he is a "person interested," within Section 16 of the Trade Marks Ordinance.

Now, in Apollinaris Company's Trade Mark (1891), 2 Ch. 186, at page 224, Lord Justice Fry, in delivering the judgment of the Court of Appeal, said:

> "We approach this question..... with these two observations: in the first place, that the question is merely one of locus standi; and in the second that the words 'person aggrieved' appear to us to have been introduced into the statute to prevent the action of common informers, or of persons interfering from merely sentimental motives, but that they must not be so read as to make evidence of great and serious damage a condition precedent to a right to apply. Further, we are of opinion that, wherever one trader, by means of his wrongly registered trade mark, narrows the area of business open to his rivals and thereby either immediately excludes or with reasonable probability will in the future exclude, a rival from a portion of that trade into which he desires to enter that rival is an 'aggrieved person'."

We have no doubt that the Applicant is a "person aggrieved" within the terms of this judgment, and hence that he is a "person interested" within Section 16 of the Trade Marks Ordinance.

An order for the cancellation of the Respondent's Trade Mark will issue with costs, including £P.6 advocate's fees and expenses.

Delivered the 3rd day of April, 1930.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 4/32.

BEFORE:

Corrie, J., Baker, J. and Frumkin, J.

IN THE CASE OF:

The Irish Industrial Development Association Inc. — APPELLANTS.

vs

Société Anonyme A. Andre Fils — RESPONDENTS.

and

The Registrar of Trade Marks — THIRD PARTY.

Procedure on lodgment of opposition to registration of Trade Mark — Section 9 (2), Trade Marks Ordinance, 1921 — Section 7, Trade Marks Rules, 1921 — Notification to Registrar of opposition — Opposition to registration not heard after mark registered.

JUDGMENT.

The Court holds that the meaning of Subsection (2) of Section 9 of the Trade Marks Ordinance, 1921, is that while a copy of the notice of opposition is to be served upon the applicant for registration through the Court, or in such other manner as the Law for the time being may prescribe for the service of documents upon parties to an action, the copy of the notice to be communicated to the Registrar is to be sent to him direct, either by actual delivery at his office, or by registered post in accordance with the Trade Marks Rules, 1921, Section 7.

It follows that the opposer has not adopted the prescribed procedure as regards notification to the Registrar of his opposition and there was no reason why the Registrar should have refrained from registering the Trade Mark.

The mark having already been registered, it is too late for this Court to hear an opposition to registration; and as the opposer has failed to take the necessary steps, there is no ground for allowing him to amend his application.

The application is dismissed with costs, including £P. 2 advocate's fees.

Delivered the 3rd day of February, 1933.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 15/33.

IN THE CASE OF:

Cotonificio Cantoni S.A. — APPELLANTS.

vs

The Registrar of Trade Marks

Elie Levie — RESPONDENTS.

Opposition to registration of Trade Mark — Mark calculated to deceive public into believing they are buying opposer's goods — Words capable of registration.

JUDGMENT.

The mark to which this opposition relates consists of a crown within a rectangle while beneath it, in Arabic characters, are the words Malbus El Omara El Asli, that is "the Original Princess Wear".

The advertisement of the application for registration states that no claim is made by the applicant to the exclusive use of the words "Original Princess Wear" (in Arabic).

The opposers object to the registration of these words on the ground that they would deceive the public into the belief that they were buying the opposer's goods.

While we feel some doubt as to this, we have no doubt that the use of these words as part of the registered trade mark of the Respondents would be calculated to deceive the public, in that it would lead them to believe that the goods so marked were made by the original manufacturer of the kinds of goods known as "Princess Wear" and that he was the only person entitled to apply this term to his goods. That this would be misleading is clear from the fact that the Respondents are content that all other manufacturers of goods of this kind should also be at liberty to describe their goods as the original Princess Wear. Registration of the term "the original" can only be permissible, if at all, in a case where the owner of the mark is the only person who has the right to apply that term to his goods. The opposition must therefore be allowed and the Registrar's order accepting the Respondents' application for registration must be set aside.

Whether the crown which the Respondents proposed to register as part of their mark is so clearly distinct from the Imperial Crown,

used in connection with the Government of Dominions and Colonies of His Majesty, as to be registrable is a question which does not arise upon this opposition.

The costs of this opposition will be paid by the Respondents, including expenses and £P.5 advocate's fees.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 110/33.

BEFORE:

The Chief Justice, Baker, J. and Frumkin, J.

IN THE CASE OF:

J. and J. Colman, Limited . APPELLANT.

vs

Yohel Kurakawa and Co. RESPONDENTS.

and

The Registrar of Trade Marks THIRD PARTY.

Opposition to registration of Trade Mark — Mark calculated to deceive — Procedure on application by two persons claiming registration of nearly identical Trade Marks—Priority of several claimants—Priority of user of unregistered Mark—English practice followed—Sections 5(9), 17, Trade Marks Ordinance, 1921.

JUDGMENT.

This is an opposition by the well known firm of mustard manufacturers Messrs. J. and J. Colman against the registration of a mark on behalf of the Respondents in respect of mustard, the application for which has been duly advertised in the Gazette.

The applicants have registered certain trade marks in Palestine, which were published in the Gazette of October, 15, 1923, and if the mark now proposed to be registered by the Respondents were identical with one of these marks or so nearly resembling one of them as to be calculated to deceive, there would be an end of the matter, as the Respondents' mark would not be capable of registration under Section 5 (9) of the Trade Marks Ordinance 1921. This however is not the case, but the applicants, Messrs Colman, have, through their secretary, sworn an affidavit dated June 30, 1933, in which they say that since 1927 they having been selling and are still selling a type of mustard, called Durham Mustard, in

Palestine, under a label which as we have seen closely approximates in colour, printing, size, wording and general get up to the mark which the Respondents are endeavouring to have registered.

This mark, for Durham Mustard, for some reason, the applicants have never registered or applied to have registered in Palestine and in consequence the Registrar cannot be seized of their claim so as to refer the issue to the Court of Appeal, since under Section 12 of the Ordinance when two people claim to be proprietors of nearly identical Trade Marks, they must also both claim to be registered as proprietors thereof before the Registrar can refer the issue to the Court of Appeal, which in determining the rights of the parties has to have regard not only to the priority of user of the mark in Palestine but to the date of registration of the mark in the country of origin.

The first part of Section 12 of the Palestine Ordinance is clearly taken from Section 20 of the Trade Marks Act of 1905 and the somewhat puzzling expression in the fourth line of our Ordinance "otherwise than under Section 6 (9) hereof" clearly can mean nothing more than "in cases not covered by the proviso to Section 6 (9) herein."

The present case is not within that proviso, so that the practice under the section in the present application can be governed by the English practice, and we can follow the cases of the applications of Javal and Parquet and Piesse and Lubin 29 R.P.C. 627 (1912) in which, as set forth on page 260 of the 5th edition of Kerly on Trade Marks; "where an opponent appealed to the Court alleging substantial user by him of the mark, the appeal stood over to enable him to make an application to register, and finally was heard with his appeal to the Court from the refusal of the Registrar to register his mark."

This is what we propose to do in the present case, and in view of the provision in Section 12 of our Ordinance as to the dates of registration in the country of origin of the marks, we order that this application in opposition to the Respondents' mark being registered should stand over for three months when we propose to hear it together with any reference which may be made to us by the Registrar in the event of the applicants in the present case applying to the Registrar to have their Durham Trade Mark registered by him.

Delivered the 9th day of May, 1934.

TRANSFER OF LAND.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 60/22.

BEFORE:

Corrie, J. Khaldi, J. and Abdul Hadi, J.

Irregular purchase of land made through Execution Office—Irregularity known to purchaser—Cancellation of sale—Valuation of land made in absence of owner held invalid — New inspection ordered by Court — Sale through Execution Officer re-opened — Article 5, Moratorium Law, 30th September, 1921.

JUDGMENT.

The Court finds that in accordance with the judgment issued from this Court of Appeal in the Civil Case No. 37/22 that the sale to the Appellant through the Execution Office does not prevent the lodging of a case against him if the sale was made in a manner which is in contradiction with law and the purchaser knew of it.

Whereas the purchaser, i. e. the Appellant is one of the owners who has a share in the land sold, therefore he must be considered to have been aware of its real value and knowing Article 5 of the Moratorium Law issued on the 30th September, 1921.

If the sale was for less than two-thirds of the real value of the land it must be cancelled.

Whereas it was found that the valuation of the land which is under dispute was made by the order of the Land Court and in the absence of the Appellant and there is no proof that he was notified to be present in accordance with law.

Therefore it was decided to set aside the judgment of the Land Court and to renew the inspection and the valuation, if the Appellant will demand that, and to issue a judgment in accordance with the new inspection. If the Appellant will not demand that he has to be sentenced in accordance with the previous judgment.

Delivered the 23rd day of January, 1923.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 109/22.

BEFORE:

The Chief Justice, Jarallah, J. and Frumkin, J.

Transfer of land made to minor — Minor's liability for contract made by him — Seller to minor cannot annul sale on ground of minority of purchaser—Act inconsistent with carrying out of contract.

JUDGMENT.

It was shown that the Appellant in this claim wanted to cancel a transaction of sale which took place between the seller, who is the Appellant, to a purchaser who was then a minor and was not qualified to make the above sale.

The minor who is not qualified to make a transaction is not bound by the contract whether he was purchaser or vendor and he can annul the transaction when he is minor or adult and the seller who sold to the minor cannot withdraw from the sale for the reason of minority of the purchaser. The Respondents who are the heirs of the vendor are in the same material position as the testator so that the heirs cannot withdraw from the contract for the reason of minority just as the original vendor could not.

But whereas the vendor after the said sale sold a few trees to a third person, therefore if this fact will be proved it would be deemed that the vendor when selling those few trees believed that the said sale is unconsidered; it was therefore decided to set aside the appeal.

Delivered the 20th day of February, 1923.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 30/23.

BEFORE:

The Acting Vice President, Jarallah, J, and Frumkin, J.

IN THE CASE OF:

Mohamed Yusef Hassan — APPELLANT.

vs

Mohamed Wahbeh Abu Saadah — RESPONDENT.

Sale purported to be made during period prohibited by law held invalid — Proclamation, No. 76, Prohibiting Land Transactions, 18th November, 1918 — Land dispositions prohibited pending the re-organization of the Land Registries after the Occupation.

JUDGMENT.

The purported sale of the house in question took place during a time when sales were prohibited (Proclamation of 18th November, 1918) therefore, the Court decides to quash the Land Court's judgment and decides that the house is to be returned to the Appellant subject however to his paying Respondent the sum of £E.23 costs against Respondent.

Delivered the 16th day of June, 1923.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 88/25.

BEFORE:

Corrie, J., Jarallah, J. and Khayat, J.

IN THE CASE OF:

Moshe Pinhasovitz — APPELLANT.

vs

Sarah Litwinsky
Morris Litwinsky
Reinhardt Lippman
Philip Groll
Emanuel Hagenlocher — RESPONDENTS.

Application to set aside registration of land in Land Registry — Registration alleged to have been made pursuant to bad arbitration award — Disposition of immovable property forbidden by Proclamation — Articles 2, 8, Proclamation No, 76 of 18th November, 1918 — Purchase of land in 1922 by unregistered deed — Breach committed by vendor in transferring land to stranger — No law of specific performance of contracts in Palestine—Remedy of damages for breach of contract — Section 7 (i), Land Courts Ordinance, 1921 — Equitable rights to land — Land under Ottoman Law habitually dealt with by unregistered deed — Question of damages not a matter for Land Court.

JUDGMENT.

The Appellant is claiming that the registration in the name of the First Respondent Sarah Litwinsky of the southern part of an orange grove be set aside.

Registration was effected under a transfer from Reinhardt Lippman, the Third Respondent, acting as attorney of the heirs of the former owner Fritz Lammle. The Appellant claims that he is entitled to the land under an agreement dated 6th March, 1922, made between his attorney Isaac Rivkind and Fourth and Fifth Respondents, Philip Groll and Emanuel Hagenlocher, therein described as the attorneys of the heirs of Lammle.

The agreement (referred to in the proceedings as Exhibit "L") is described as an addendum to the "contract of sale from Mr. Lammle to the Appellant", and provides for the rate at which the purchase money should be converted from Marks into Egyptian currency and fixes the date of final payment as the 31st December, 1922.

Disputes arose between the parties as to the carrying out of the agreement: there were abortive arbitration proceedings and eventually a fresh submission to arbitration which resulted in the issue of an award. There were delays in carrying out the award and ultimately the southern portion of the orange grove was registered in the name of the Respondent Sarah Litwinsky under a transfer from the Respondent, Reinhardt Lippman, the attorney of the heirs of the registered owner Lammle.

The Appellant's case is that, for various reasons the award was bad, that the registration was made in pursuance of that award and should therefore be set aside.

Before considering the objections to the award raised by the Appellant there are certain questions arising out of the earlier transactions which have to be dealt with.

The contract of sale (Exhibit "A") to which Exhibit "L" is described as an addendum, is dated the first August, 1918.

But by Article 2 of Proclamation No. 76, dated 18th November, 1918, it was declared that:—

> "until it is possible to re-establish and re-organize the Land Registry Offices, owners of immovable property have no power to make dispositions of their immovable property and any disposition of immovable property which has taken

place, or may hereafter take place in contravention of this Proclamation is invalid."

By Article 8 that Proclamation applied to the Ottoman Sanjak of Jerusalem in which the land in dispute is situated.

Exhibit "A" therefore was ab initio invalid as a disposition of immovable property.

On the 6th March, 1922, however, when Exhibit "L" was signed, transfers of land were no longer prohibited and the Appellant argued that the right construction of that document is that it was a sale of the land, as on that date, upon the terms contained in Exhibit "L".

Assuming that this construction was correct and that the parties had authority to enter into the contract; assuming further that the arbitration award was defective so that a transfer made in pursuance of the award was not within the authority conferred by the Appellant's submission to the arbitration; what, then, is the Appellant's position? The Appellant is a person who has bought land by unregistered deed in 1922. The vendor, in breach of his contract with the Appellant has transferred the land to some other person.

There is no law whereby specific performance of an agreement for the sale of land can be enforced in Palestine nor does it affect the position that the agreement should have been expressed to be in the form of a sale to be perfected by registration at a later date. If the vendor fails to register the land in the name of the purchaser at the agreed date, the purchaser cannot compel him to do so. His remedy is in damages.

It is true that Section 7 (1) of the Land Courts Ordinance, 1921, provides that:—

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

This provision has been applied by the Courts to unregistered transactions which took place before the British Occupation in which it appeared from the circumstances, such as delivery of possession and payment of purchase money, that the parties intended the transaction to take effect as a sale without registration.

In spite of the Ottoman law as to registration a considerable

part of the land of Palestine remained unregistered and was habitually dealt with by unregistered deeds.

It was held that under such circumstances it would be inequitable to refuse to recognise the validity of a sale of land by unregistered deed, merely for the lack of registration, and in a number of cases judgment has been given upholding the validity of the unregistered sale and declaring that as against the vendor, the purchaser is entitled to registration.

That principle however, can only be applied to a case in which the sale took place before the British Occupation as the Proclamation of the 18th November, 1918, rendered all dispositions of immovable property made after the Occupation invalid.

The Transfer of Land Ordinance, 1920, enabled sales of land validity to be made by registered transfer under certain conditions but it did not validate unregistered sales to which the terms of the Proclamation of November, 1918, still apply. Such a transaction as "L" may be valid as an agreement for sale giving rise to an action for damages for breach but it has no effect as a transaction of title to land and the purchaser has no equitable right to which Section 7 (1) of the Land Courts Ordinance, 1921, could apply.

Thus even upon the assumptions that have been made in favour of the Appellant, he can have no claim to have the registration in the name of the Respondent Sarah Litwinsky set aside and there is no need for the Court to inquire into the validity of his objection to the arbitration award.

If the Appellant's rights have in fact been infringed his remedy is in damages, and that is not a matter for the Land Court.

There remains one other point to be considered. In the Land Court the Appellant based his case not only upon the agreements of first August, 1918, and 22nd March, 1922 but also upon an agreement dated 1st October, 1917. (Exhibit "C").

In arguing the appeal the Appellant appeared to place no reliance upon this document and the Respondents have pointed out that there is no reference to the document in the correspondence and alleged that no agreement was in fact signed in 1917.

Even however, if the authenticity of Exhibit "C" is established that would not affect the legal position. Exhibit "C" is nearly indentical in terms with Exhibit "A", the only difference between the two being in the dates of payment of the purchase money and delivery of kushans.

From the fact that the parties afterwards signed the agreement of the 1st August 1918, it must be inferred that the agreement of the 1st October 1917, if it was actually made on that date, was rescinded by mutual consent.

But even if that were not the case, in view of the fact that the purchase money was not paid and that there was no delivery of the property, the agreement does not come within the class in respect of which the Court would make an order for registration in the purchaser's name under the terms of Section 7 (1) of the Land Courts Ordinance, 1921.

The appeal must be dismissed with costs.

Delivered the 22nd day of April, 1926.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 80/27.

BEFORE:

The Senior British Judge, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Meyer G. Shapira — APPELLANT.

vs

Moshe Hayim Shwilli — RESPONDENT.

Contract for sale of land without period fixed for formal registration—In absence of express provision duty is on vendor to effect registration into purchaser's name — New obligations cannot be imposed by Notarial Notice — Three days as reasonable delay to effect registration.

JUDGMENT.

This is a case arising out of a contract of sale of land entered into between the Appellant as vendor and the Respondent as purchaser. No period was fixed within which the formal registration was to be effected. Nor does the contract contain a provision dispensing the parties from sending Notarial Protests.

The contract was entered into on the 8th of September, 1925, and the purchaser, after paying the full price of the land, called upon the vendor by Notice dated 24th August, 1926, to effect registration within ten days.

Three days afterwards, the vendor replied by Notice making the transfer subject to a condition not provided for in the contract and inviting the purchaser to call at the office of his advocate for signature of the Petition for sale after having fulfilled the fresh condition.

An action was then entered by the purchaser on September 13th, which was determined on the 4th October by the parties consenting to a delay of two months within which to complete the sale.

No steps were taken by either party during this period. After its expiry, on December 6th, the purchaser again sent a Notarial Notice granting vendor a fresh delay of three days. The vendor replied on the 9th blaming the purchaser for not coming to sign the Petition for Sale as called upon by Notice of August 27th.

Action was re-instituted on December 10th, 1926.

The District Court in its judgment dated January 30th, 1927, held that failing any provision in the contract as to which of the parties is responsible for taking the necessary steps to see registration effected, and following the general rule, it is upon the vendor to do it, and hence gave judgment against him for the return of the purchase price received and damages.

This judgment is now appealed.

In our opinion the Notarial Notices, interchanged by the parties before the action was started, are of no value, firstly, because the vendor was then under no obligations to transfer within a given period, and such obligations could not be imposed upon him by mere Notice. Secondly, whatever rights he might have acquired by the Notice, such rights were waived by consenting to the delay embodied in the first judgment of the District Court.

There was no necessity for the purchaser to send any notice during the period of delay, because he might expect the vendor to take the necessary steps any day during that period.

The Notice of December the 6th is in order. It is argued that the delay of three days given by the purchaser in this Notice is not a reasonable delay. It might be so if we disregard all previous proceedings; but it is not an insufficient delay if we consider all the previous warnings of the purchaser, and approving as we do, of the finding of the District Court that, failing any provision to the contrary, the burden of registration is upon the vendor.

The appeal is to be dismissed with costs.

Advocates' fees and expenses fixed at £P.7.500.

Delivered the 29th day of May, 1928.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 106/27.

BEFORE:

The Chief Justice, Corrie, J. and Frumkin, J.

IN THE CASE OF:

The Palestine Land Development Company Limited — APPELLANT.

vs

Rafiq El-Omari and Others — RESPONDENTS.

Contract to transfer land "unless an administrative objection occurs by Government" — Action for damages for breach of contract — Transaction not completed because of Government's refusal to approve—Such refusal made on ground that vendor was not owner of part of property sold — Such refusal not "an administrative objection" — Article 106, Civil Procedure Code made inapplicable by agreement — Recovery of interest on monies paid to vendor who has not transferred — In absence of express agreement Land Registry file to be completed where land situated.

JUDGMENT.

By agreement dated 17th March, 1925, made between the Respondents on the first part, and Mr. Yoshua Hankin, therein described as the agent of the Appellant Company, on the other part, each of the Respondents agreed to transfer to the second party or to any person named by him "all the shares, to him belonging and owned in joint ownership in the lands situated in Haram village, Jaffa District, and which each holds by virtue of a title deed now in the Land Registry of Jaffa."

The contract recited that certain sums had been paid to the Respondents on the 7th September, 1921.

The provision with regard to completion was as follows:—

"The first party is bound to transfer, officially, the whole shares which he owns in El-Haram at any time this is asked by the second party, and provided that he does not exceed three months as from undermentioned date, unless an

administrative disallowance (impediment, objection) occurs by the Government, in which case the transfer shall be put off until such impediment collapses."

The contract also provided that "if the first party commit a breach or has repudiated a term or more of the contract, they shall:—

(a) refund to the first party (sic) all moneys received by them on account of the price with interest from the date of receipt until full payment without serving any notice to that effect,

(b) pay the second party £E. 2 for each dunam of the Haram lands referred to in this contract, no matter how much the area may be (plan filed in the Land Registry Office, Jaffa).

This shall be considered as liquidated damages. Each individual of the first party shall pay in proportion to his share without any notice to that effect. The breach thereof amounts to a notice. No objection against the damages shall be entertained."

No transfer has ever been made by the Respondents.

By a Notarial Notice dated the 12th July, 1925, and served on the Respondents on various dates from the 19th September to the 25th September, 1925, the Appellant called upon the Respondents to attend in the Land Registry Office, Jerusalem, within five days from the date of service to complete the purchase.

No action was taken by the Respondents.

On the 26th November, 1925, the Appellant commenced an action in the District Court of Jaffa to recover the moneys paid in respect of the purchase and the penalty for non-completion.

On the 28th March, 1927, the District Court gave judgment in favour of the Appellant for the moneys paid in respect of the purchase, but dismissed the claim for the penalty.

In this appeal the Appellant is claiming to recover the penalty for non-completion.

It is common ground between the parties that failure to complete was due to the refusal of the Government to approve of the transaction and that such refusal was based upon a denial by the Government of the Respondents' title to part of the land.

We do not think it can be maintained that such refusal was "an administrative objection."

The judgment of the District Court is based upon Article 106 of the Code of Civil Procedure. This is, in our view, a misapprehension. The effect of the provision in the agreement that "each individual of the first part shall pay in proportion to his share without notice to that effect. The breach thereof amounts to a notice", is to render Article 106 inapplicable. If a breach has been committed no notice is necessary before a claim for damages is made.

The question for this Court is whether service of a notice was essential before any breach could be committed: and if so, whether the requisite notice was served.

The provision with regard to completion is very difficult to construe. We think, however, that its meaning must be that (in the absence of any administrative objection) the Respondents were bound to transfer whenever called upon by the Appellant to do so, provided that if they were notified to complete before three months from the date of the agreement had elapsed, they were entitled to postpone transfer until the end of the three months.

If, as we hold, this is the true meaning of the agreement, the Respondents committed no default unless they were duly notified to transfer.

The notice served upon the Respondents called upon them to attend in the Land Registry Office, Jerusalem, and stated that the documents were in that office. Haram village, however, is in the Jaffa District and the natural place for completion would be the Land Registry Office, Jaffa. In the absence of any provision to the contrary in the agreement, or of any subsequent agreement modifying the terms of the original agreement, the Respondents were entitled to insist that completion should take place in Jaffa, and were entitled to disregard a notice calling upon them to complete elsewhere.

The Appellant Company is suing for a penalty; and to entitle them to recover it must be shown that the Respondents have infringed not only the spirit but the letter of the clause in the agreement which makes a penalty payable.

We are not satisfied that this is the case, and we therefore hold that the appeal on this point must be dismissed.

The Appellant Company has also raised the question of the date from which interest on the sums received by the Respondents should run.

The District Court has ordered payment of interest from 17th March, 1925, the date of the agreement between the parties on which the action is based.

The Appellant claims that interest should run from the date when the sums in question were paid to the Respondents, which as appears from the agreement, was the 7th September, 1921.

In support of this claim, the Appellant relies upon the following provision of the agreement:—

> "If the first party commits a breach or has repudiated a term or more of the contract, they shall:—
>
> (a) refund to the first party (sic) all moneys received by them on account of the price with interest from the date of receipt until full payment without serving any notice to that effect".

It is clear, however, that this clause is only operative in the event of a breach or repudiation which would also entitle the Appellant to recover a penalty under Clause (b): and we have held that, in the events which have happened, a penalty cannot be recovered.

It follows that the Appellant cannot take advantage of the provisions of Clause (a) with regard to the payment of interest.

The appeal must be dismissed with costs and £P.6 advocate's fee.

Delivered the 15th day of October, 1928.

In the High Court of Justice.

H.C. No. 25/30.

BEFORE:

The Chief Justice and Baker, J.

IN THE APPLICATION OF:

Saleh Ibrahim Oufi
and Others — PETITIONERS.

vs

The Chief Execution Officer, Nablus
Bishara Tayan's Heirs
The Department of Lands.
Keren Kayemeth Le-Israel — RESPONDENTS.

Application to set aside order of Chief Execution Officer for eviction from land — Provision of sufficient land for tenants of agricultural land — Courts prevented by Proclamation of 24th June, 1918 from ordering sale of immovable property in execution — Consent of Administration to disposition of immovables—Discretion of President of District Court to order postponement of sale in execution of judgment or in satisfaction of mortgage — Termination by landlord of tenancy of cultivator invalid without certain notice—Termination of tenancy by operation of law — Section 3 (1), Protection of Cultivators Ordinance, 1929 — Law speaks from date of commencement — Sections 6, 7, 8 and 14, Transfer of Land Ordinance, 1920—Transfer of Land Ordinance, No. 2 of 1921—Transfer of Land (Amendment) Ordinance, No. 2 of 1921.

ORDER.

We are asked to make the rule nisi in this case absolute on the grounds that:—

(1) there was no compliance with what in the revised edition of the Legislation of Palestine is printed as Section 8 (1) of the Transfer of Land Ordinance, 1920-1921.

(2) there was no compliance with Section 3 (1) of the Protection of Cultivators Ordinance, 1929.

As to (1), it is necessary to consider three Ordinances.

The first of these is the Transfer of Land Ordinance, 1920. Section 14 of this Ordinance runs as follows:—

> "The provisions of the Proclamation of 24th June, 1918, preventing the Courts from ordering the sale of immovable property in execution of a judgment or in satisfaction of a mortgage shall remain in force till further order."

The provision herein referred to is Section 22 of the said Proclamation. It is in the following terms:—

> "Until further notice the Court shall not order the sale of any land in execution of a judgment or in satisfaction of a mortgage in any form, provided always that interest shall continue to run upon the debt at the rate fixed by the contract or, in the absence of such rate, at a rate to be fixed by the Court."

Section 4 of the Ordinance requires any person wishing to make a disposition of immovable property to obtain first the written consent of the Administration. The consent of the Administration is governed by the terms of Sections 6, 7 and 8.

The Transfer of Land Ordinance No. 2 of 1921, after reciting the effect of Section 14 of the Transfer of Land Ordinance, 1920, and the grave hardship "caused in many cases to creditors and mortgagees owing to the prohibition against enforcing their claims," goes on to give the Court power to order the sale of immovable property in execution of a judgment or in satisfaction of a mortgage, subject to the President of the District Court's power to order postponement of the sale if he is satisfied (a) that the debtor has reasonable prospects of payment if given time, or (b) 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 Transfer of Land (Amendment) Ordinance No. 2 of 1921, repeals Sections 6 and 7 and a part of Section 8 of the Transfer of Land Ordinance, 1920, and replaces them by a new provision in Section 2 thereof.

It appears to us that Section 1 of the Transfer of Land Ordinance No. 2 of 1921 which first allowed the Courts to order the sale of immovable property, inasmuch as it begins with the words "notwithstanding anything in the said articles of the Proclamation of June 24th, 1918, and the Transfer of Land Ordinance, 1920," is not governed by the provisions of Section 4 and Sections 6 to 8 of the 1920 Ordinance, or the provisions of the Transfer of Land (Amendment) Ordinance, 1921, which replaced them.

We now come to the alleged non-compliance with Section 3 (1) of the Protection of Cultivators Ordinance, 1929. In his Order of 19th February, 1930, the President of the District Court states that the four Appellants "were all duly served on 1st October, 1928, with notice to quit the lands after the expiry of one year from the date of the said service" and goes on to say "I refuse their application for the cancellation of the Order for their eviction, made by me on 30th November, 1929."

It is to be noted that he does not say that his refusal is because 12 months' notice has been given in terms of Section 3 (1) of Ordinance No. 27 of 1929. We cannot accept Mr. Eliash's argument that because 12 months' notice from the 1st October, 1928, was given, therefore the provisions of that Section of the law have been complied with. The law speaks from the date of commencement, in this case 31st July, 1929. Obligations are imposed on the landlords and rights are conferred on the tenants only as from that date. These obligations and these rights are comprised

in the provisions as to notice in Section 3 (1). The landlord cannot escape that obligation by saying that he has ex gratia fulfilled it; it may be a few months, or a year, or a few years before the date of commencement of the law. In other words, he cannot in anticipation of the obligation later to be imposed on him take steps to escape the obligation which is applied to him at a future date.

On the other hand, as Mr. Horovitz has pointed out, Section 3 (1) applies only to the termination of a tenancy by a landlord and does not apply to a transfer made by the President of the District Court as Chief Execution Officer lawfully terminating the tenancy by operation of law. If it was the intention of the legislature to bind the Chief Execution Officer in such cases as well as the landlord, it should have said so in Section 3, but as it has not done so, we hold that the rule must be discharged with costs.

Delivered the 4th day of June, 1930.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 87/30.

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

IN THE CASE OF:

Haifa Bay Development Company Limited — APPELLANT.

vs

Alexander Margulies — RESPONDENT.

Claim for refund of monies paid under agreement of sale — Usual agreement to sell not a disposition of immovable property — Sec. 11, Land Transfer Ordinance, 1920.

Appeal from a judgment of the District Court of Haifa requiring the Appellant to repay monies paid on account of purchase price of land on the ground that the agreement of sale was invalidated by Section 11 of the Land Transfer Ordinance, 1920. The agreement in question was the usual agreement to sell and provided that an official transfer was to be made in the Land Registry.

JUDGMENT.

In view of the nature of the contract we are of the opinion that it is not a disposition of immovable property within the meaning of Article 11 of the Land Transfer Ordinance, 1920. The Respondent's claim accordingly fails. The appeal must be allowed and the judgment of the lower Court quashed and Respondent's action dismissed with costs here and below, and advocate's fees assessed at £P.3.

Delivered the 17th day of July, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 93/32.

BEFORE:

The Senior Puisne Judge, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Hashem Musa Shawish — APPELLANT.

vs

Hassan El-Miqdadi — RESPONDENT.

Agreement to purchase shares of miri land — Offer by vendor to transfer only a part of the land sold held not to be a performance of the agreement — Damages for breach of contract to transfer land.

JUDGMENT.

On the 13th September, 1930 the Appellant, Hashem Musa Shawish entered into an agreement to purchase certain shares in miri land from the Respondent, Hassan el Miqdadi. The agreement has never been carried out, and in consequence the Appellant brought an action against the Respondent in the District Court of Nablus claiming damages for non-fulfilment of the agreement. The District Court held that the Respondent did not fail to perform his obligations under the agreement, but that he performed them, and dismissed the action. Against this judgment the Appellant is now appealing.

One of the grounds of appeal is that the Respondent has never offered to transfer the whole area which he agreed to transfer, but has only offered a transfer of a smaller area, namely, 170

dunams and 678.64 sq. metres. The provisions of the agreement with regard to area are as follows:—

> "On the date below the First Party (the Respondent) undertook to sell to the Second Party (the Appellant) and transfer into his name all the shares registered in his name of the common shares, regardless of the exact number of dunams and shares, of the land called Khor el Sahali (Abu Sahali) situated at Taibet Tahta village, which measures 181 dunams and 879.34 sq. metres (new)."

Thus it is clear that the Respondent undertook to transfer the whole of his shares in the land in question whatever their area might be. Now there is before the Court an extract from the Land Register which shows that on 12th December, 1931, the Respondent was registered as owner by "combination of shares" of the whole of an area of 181 dunams 879.34 sq. metres in Khor el Sahali. It follows that this is the area which the Respondent was bound to transfer under the terms of the agreement.

From the notarial notices which have been put in evidence it is clear that the Respondent never offered to transfer this area but only a smaller area of 170 dunams 678.64 sq. metres. He has therefore failed to fulfil his obligations under the agreement and the appeal must be allowed.

The judgment of the District Court is set aside and the case remitted for completion. Costs will follow the event.

In the Land Court of Jaffa.

L.Ja. No. 64/33.

BEFORE:

The President and Mani, J.

IN THE CASE OF:

Izrael Szpanbok	PLAINTIFF.
vs	
Geulah Company, Ltd.	DEFENDANT.
and	
Baith Venahlah Co-operative Society, Ltd. Bnei Brak	THIRD PARTY.

Action by one member of Society against party dealing with Society — Application for injunction to restrain transfer of land — Injunction an extraordinary remedy and not normally used if there are other means to serve the same purpose — Grounds on which injunction granted.

JUDGMENT.

This is an application for an injunction to be issued directed to the Geula Company restraining them from transferring to the Bait Venahla Society of Bnei Brak certain land which it is alleged was purchased for the Society of which the Plaintiff claims to be a member.

An interim injunction against the Geulah Company was issued by this Court on the 20th November, 1933, on an ex parte application.

The Bnei Brak Society now apply to be admitted as Third Party and for the injunction to be discharged. The Defendant Company also ask for the discharge of the injunction.

Now, it seems to us that in this particular case the right of an injunction depends upon the right of ownership. An injunction in any case is an extraordinary remedy and it is not one which a Court will normally employ if there are other means to serve the same purpose.

In this case the Plaintiff has certain other courses open to him. If he claims ownership he could apply for a provisional attachment, which is the normal method adopted in land cases, and then, within the prescribed period file an action in the Land Court, or, if he sees fit to adopt that course, to make a claim for damages in the District Court, if he were really entitled to them.

We have reached this conclusion: that in order in cases of this nature to obtain an injunction, that is, a permanent injunction, the applicant for the injunction must be able to prove ownership and must claim ownership. He cannot obtain an injunction simply because he claims to have a certain interest.

The action must, therefore, fail, and the case is dismissed with costs and £P.4 advocate's fees, being £P.2 for the Defendant and £P.2 for the Third Party.

The interim injunction is accordingly discharged.

We have not dealt with the various other points raised and we do not wish to express any opinion on them.

Dated the 13th day of December, 1933.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 90/33.

BEFORE:

Baker, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

Muhd. Takrouri — APPELLANT.

vs

Abdel Rahim Murri'b — RESPONDENT.

Agreement to transfer part interest in land to another on condition that the other plant trees on it held to be a disposition— Recovery of monies paid under null and void agreement — Disposition of property to which consent of Government not obtained — Lack of consideration for illegal agreement — Section 11, Transfer of Land Ordinance, 1920.

JUDGMENT.

Section 11 of the Transfer of Land Ordinance, 1920, prescribes that every disposition to which the written consent of the Government 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 the same by action in the Court.

Appellant agreed with Respondent to plant his land with trees the consideration therefor being that Appellant at the end of eight years should be the owner of half of the land planted. This is clearly a disposition of property to which consent of the Government was not obtained and therefore in accordance with Section 11 is null and void.

Section 11, however, provides that a person who has paid money in respect of a disposition which is null and void may recover the same by action in the Courts. Appellant has clearly expended money in planting a portion of the land with trees and I am of opinion that the before-mentioned second paragraph of Article 11 clearly envisages not only the payment of the money in kind but also money spent on the land of another (if that is the consideration for the illegal disposition).

Accordingly the judgment of the Lower Court must be quashed and the case returned for the said Court to estimate the

money spent on Respondent's land in accordance with the contract and to give a fresh judgment.

Costs in the cause.

In the District Court of Jerusalem.

C.D.C. Jm. No. 317/33.

BEFORE:

Sherwell, J. and Atalla, J.

IN THE CASE OF:

B. Goldberg
and Others — PLAINTIFFS.

vs

The Palestine Land
Development Co., Ltd. — DEFENDANTS.

Refusal by vendor to transfer land — Right to damages for breach of contract but no right to claim value of land—Inability of vendor to ascertain who is heir of deceased purchaser—One or more heirs entitled to sue in name of estate — Art. 1642, Mejelle — Lapse of rights of heirs to sue in name of estate on appointment of administrator — Jurisdiction of Rabbinical Court to appoint administrator of estate — Administration of estate of foreigner — Application of personal law in matters of personal status—Sections 3, 15, Succession Ordinance, 1923 — Certificate of Succession not properly given by Rabbinical Court even if there is mutual consent to the jurisdiction—Articles 59, 64, 65, Palestine Order-in-Council, 1922.

JUDGMENT.

In this case, the Plaintiffs, Bracha Goldberg and Alexander Goldberg, sons of the late Boris (Dov) Goldberg, claim from the Defendant Company, Hachsharat Hayishuv Co. Ltd. (the Palestine Land Development Co. Ltd.) the sum of £P.5590 plus interest, costs and advocate's fees. This sum, the Plaintiffs state, is the present value of 2795 squre pics of land (forming three plots of land) situated at Haifa which the Defendant Company sold in 1920 to their late father, the deceased Boris (Dov) Goldberg. The Plaintiffs allege that the Company has refused and still refuses to transfer the land in question in the Land Registry to their names, contrary to the terms of an agreement made between the Defendant Company and the Plaintiffs' ancestor.

Advocate for the Defendant Company, whilst denying that his clients are under any legal obligation to transfer the property to the Plaintiffs or any other person, admits that the Company did, in fact, in 1912 sell three plots of land to the deceased Boris Goldberg by "simple contract", but added that later during the lifetime of the deceased (Plaintiffs' ancestor), the Company, on an order received from the deceased, did transfer one of the plots to a third person. With regard to the other two plots, advocate for the Defendant Company stated that the Company is under no legal obligation to the Plaintiffs, either to pay the amount claimed or to transfer the property, but that the Plaintiffs might, if they think fit, claim damages for breach of contract. Defendant's advocate stated further, however, that the Company always was and still is willing to consider the two plots the property of the deceased, and to transfer them (after Werko and Tithes are paid) to the deceased's estate or to the order of the legal representatives of the estate. The Company, however, is not in a position to determine to whom the transfer ought to be made in view of an order (Ex. D/1) which they received from Eliahu Goldberg (oldest son of the deceased) and Yuda Karmi who purport to have signed the order as "Administrators" of the Estate of Boris Goldberg, which is in conflict with the claims of the Plaintiffs. In other words, they were not prepared to take the risk and transfer to one party or the other except on the order of a Competent Court. Advocate for the Defendants accordingly asked for the joining of the said B. Goldberg and Yuda Karmi as third parties which was opposed by the Plaintiffs.

The Plaintiffs are suing in accordance with Article 1642 of the Mejelle which entitles one or more heirs to sue in the name of the estate.

As evidence that the Plaintiffs are heirs of the deceased Boris Goldberg, a Certificate of Succession purporting to be issued by the Rabbinical Court of Tel-Aviv has been produced to us. The same Rabbinical Court, it is admitted also, appointed Eliahu Goldberg and Yuda Karmi, who gave the order referred to above, as "Administrators" of the estate.

It is a well established principle that where the property is vested in an administrator, the right of the heirs to sue in the name of the estate, in accordance with Article 1634 of the Mejelle, lapses. (See for instance, Section 15 (iii) of the Succession Ordi-

nance). It follows, therefore, that if the Administrators are appointed by a competent court, the action should be dismissed.

The Plaintiffs, however, allege that to give a Certificate of Succession, it had no power to appoint "Administrators" of the property of the deceased who was a foreigner, unless the matter had been referred to it by the President of the District Court, in accordance with Section 3 of the Succession Ordinance, (which they state has not been done in this case) and they therefore ask us to find that the Administrators were not legally appointed, and as such, are not entitled to give to Defendants the order which they did give (Ex. D/1), and that accordingly, the Defendants were not justified in refusing the transfer of the lands in question and are liable to pay the value of the land.

Now it is admitted by both parties here that Boris Goldberg was a foreigner (Russian) within the meaning of Section 59 of the Palestine Order-in-Council, 1922. Section 64 (i) of the Order-in-Council provides that matters of personal status affecting foreigners other than Moslems shall be decided by the District Court which shall apply the personal law of the parties. Section 64 (ii) further provides that the personal law shall be the law of the nationality of the foreigners concerned unless that law imports the law of his domicile in which case, the latter shall be applied. Again Section 65 of the Order-in-Council provides that nothing in the preceding Article shall be construed to prevent foreigners from consenting to matters of personal status being tried by the Courts of the Religious Community having jurisdiction in like matters affecting Palestinian citizens.

In this case, however, we have no evidence before us to show that all the interested parties have consented to submit to the jurisdiction of the Religious Court, either in regard to the issue of the Certificate of Succession, or to the appointment of Administrators.

But even if there had been the mutual consent of all interested parties to the jurisdiction of the Religious Court, we are not satisfied that the Court could give a Certificate of Succession, except on reference to it by the President of the District Court under Section 3 of the Succession Ordinance, after being duly satisfied:

(a) that the deceased was, at his death, a member of the Jewish Community; and

(b) that the law of the Jewish Community was the

law applicable to the distribution of the estate in accordance with the Russian (Soviet Law): since it is clear from Section 6 (2) of the Succession Ordinance that the Rabbinical Court can only apply the religious law or the Ottoman Law, but not the national law, which, by Section 64 of the Palestine Order-in-Council, is declared to be the personal law to be applied in case of foreigners, it follows, therefore, that the Rabbinical Court was not entitled to issue the Certificate of Succession, and that Plaintiffs, cannot sue in the capacity alleged.

Further, even if it is held that the Plaintiffs are entitled to sue in the capacity alleged, in accordance with Article 1642 of the Mejelle, we are of the opinion that their claim for the value of the land cannot be maintained, as there is no rule of law which entitles them to make such a claim.

This action is based on a contract of purchase of land which the Plaintiffs allege occurred sometime about 1920 and which the Defendants say occurred in 1912. But whether the contract was entered into in 1918 or 1920, it does not give the Plaintiffs the right to claim the value of the land; the Plaintiffs' remedies — if any — would appear to be under Section 11 of the Land Transfer Ordinance, namely, the recovery of the money paid in respect of the said disposition (sale contract) and possibly under Section 4 to claim damages for failure to transfer (see C.A. No. 147/25, Meir Zeide vs Salomon Alcalay*). It must be noted here, however, that the transaction relied upon by the Plaintiffs was not an agreement for sale, but an outright contract of sale and the Plaintiffs do not know the amount of money paid for the land in question.

Further also, in order to make the Defendants liable, it is the duty of the Plaintiffs to show us that the refusal of the Defendants to transfer the property was absolute and also unjustifiable. In this case, whilst the Defendant Company denies any binding legal liability to transfer the property to the Plaintiffs or anybody else, who may represent the estate or to their order, nevertheless it is willing to consider the lands as the property of the estate and to transfer it to the name of the person or persons who are declared by an order of the competent Court to have power to dispose of the property on behalf of the estate.

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* Reported ante, p. 378.

In view of the appointment of Administrators of the estate of the deceased by a Court of Law (which appointment is admitted as a fact by the Plaintiffs who deny, however, its validity), we are of the opinion that, pending the final decision by a competent court of the person or persons entitled to administer the estate, the Defendant Company was justified in refusing to transfer the lands to the Plaintiffs upon whom, in our view, rests the onus and duty of establishing their legal right to claim the transfer of the lands in question.

For these reasons, the action must be dismissed.

TRESPASS.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 48/27.

BEFORE:

The Chief Justice, Jarallah, J. and Khaldi, J.

IN THE CASE OF:

Mustafa Amer
Hassan Amer — APPELLANTS.

vs

American Zion Commonwealth — RESPONDENT.

Plea of ownership raised as defence to action for trespass—Duty of Plaintiff in original action to apply to Land Court for adjudication as to ownership.

JUDGMENT OF THE LAND COURT.

Leave to Appeal against a judgment of the Haifa Land Court dated 22nd December, 1926, overruling a judgment of the Haifa Magistrate, dated 30th June, 1926, is hereby granted on the following point:

A, a holder of Kushans for certain lands, sues B for trespass in the Magistrate's Court. B's defence is an allegation of ownership.

Questions of ownership being outside the jurisdiction of the Civil Magistrate, must be decided by the Land Court.

Who should raise this question of ownership before the Land Court? The Magistrate held that A should raise the question. The

Haifa Land Court by a majority held that B should raise the question.

Delivered the 17th day of December, 1926.

JUDGMENT.

The Court holds that the Respondent (Original Plaintiff) and not the Appellant should have raised the question of ownership before the Land Court.

The appeal is therefore allowed with £P.4 advocates' fee and costs.

Delivered the 5th day of March, 1928.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 29/29.

BEFORE:

Baker, J., Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Khadija El-Haj Ahmad Salim,
Ni'meh Ahmad Salim
Aysheh El-Haj Ahmad Salim — APPELLANTS.

vs

Ismail Humeidan Nasra — RESPONDENT.

Right of co-owner to sue separately for trespass to common land—Action for ejectment from land based on Article 24, Ottoman Magistrates' Law—Meaning of "title-deed" under said Article—Tabou kushan not necessary for ejectment action — Sufficiency of werko registration to prove legal possession — Joint and several powers of co-owners of land — Articles 1075, 1077, 1086, 1643, Mejelle.

JUDGMENT OF THE LAND COURT.

On examining this case it appears that the Civil Magistrate has dismissed the Plaintiff's case on the ground that he has not produced an official title, meaning thereby a Tabu Kushan. He did not consider that the Werko registration produced by him was sufficient as the Plaintiff is only one of several co-owners. He also relied on the fact that the Plaintiff's witnesses are owners of shares.

Our Court considers that it is not always possible to produce Tabu registration in cases of ejectment. If the production of such

a title is insisted on, a large number of ejection cases will become impossible of prosecution.

The guiding principle in these cases is the ascertainment of the facts of possession in order to determine whether the Defendant's trespass is recent. If it is recent, and if the Defendant has trespassed by force or without leave, the Civil Magistrate should follow the last paragraph of Article 24 of the Magistrates' Law and direct ejectment. In our opinion, if these facts are established, even the possession of a Tabu Kushan by the Defendant should not avail to protect him. The Civil Magistrate's primary duty is to protect legal possession against recent infringement.

In the case in hand, the Plaintiff has presented a Werko registration which is not disputed by the other side, and this, in in our opinion, suffices. The Civil Magistrate should have accepted it, and then proceeded to take evidence of possession. This is in accordance with the principle of Article 20 of the Rules of Procedure of 1920, and does not appear to be inconsistent with the provisions of Article 24 of the Magistrates' Law. The last-named Article refers merely to a title deed, and does not specify that that deed must be a Tabu Kushan.

The fact that the Plaintiff is not a sole owner does not affect this argument. Though some of the witnesses are his co-owners the fact does not necessitate the rejection of their evidence. The Civil Magistrate's judgment does not indicate that he had any other reason to doubt their statements. In this case, moreover, the interested witnesses are supported by witnesses who are not interested.

The Defendant's witnesses, also confirm the Plaintiff's case since they say that his opponent has been in possession for a year or two only — and they limit the latter's possession to a cave on the property.

On the above evidence we consider that the Civil Magistrate should not have dismissed the Plaintiff's case.

As to the law some discussion is needed. Can one of several co-owners sue alone for ejectment? The Mejelle defines the powers of partners jointly and severally. The Articles in question are 1643 and 1075.

They state that one partner cannot represent his co-owner in respect of a property which has come to them otherwise than by inheritance, and further that each partner is for the purpose

of litigation a stranger to his co-owners when he is in the position of a Defendant.

We hold that this means that a suit cannot be brought against one partner as representing all the other owners — all must be made partners. The reason is that the contrary procedure would facilitate collusion — Article 1643 of the Mejelle, last paragraph, supports this view. Article 1075 Mejelle states that partners are to be regarded as strangers inter se and cannot be taken as representing one another for the purpose of disposition.

In our opinion, this refers to disposition or use of things such as clothes or other personal articles which cannot be used by one partner without excluding the others while the user lasts. This kind of use may be prejudicial to the partners. Land is not used thus. When trespass occurs on jointly owned land a part-owner is not prevented by any clear provisions of the law from suing for the recovery of the whole. The share of such a partner is not separated, and relates to each and every part of the land. If it be held that such a suit must be confined to the undivided share owned by the Plaintiff it becomes impossible to execute a decree for ejectment by delivery. If as a result of the suit the whole property is delivered to the Plaintiff, temporary possession of a partner is preferable to the illegal possession of a stranger, since the partner has defined interests, which is not the case with a trespassing stranger.

In this connection Articles 1075, 1077 and 1086 Mejelle should be consulted. If it be granted that the partners who do not join in the suit agree to the trespass or do not oppose it — their complaisance has no legal value. They own no defined interests which they can yield to the trespasser; they can give no leave of user to such a person where the rights of others are involved; in short their action has no legal value whatever.

We consider that in such a case a suit brought by one of the partners for the recovery of the whole area, in the case in which the trespass is recent, is admissible both in law and justice.

We direct that the Civil Magistrate's judgment be set aside and decree the ejection of the Defendant.

If the latter has any claim of the nature of ownership he should bring a suit in the Land Court to establish it.

JUDGMENT OF THE COURT OF APPEAL.

This is an appeal from the decision of the Jerusalem Land Court granted by special leave on the two following points of Law:—

"1. Must the title deed referred to in Article 24 of the Magistrates' Law be taken as referring to a Tabu registration only or may it include other forms of documentary evidence or title?

2. May one of several undivided co-owners sue separately to defend the common property from trespass or other invasion?"

The Land Court in their judgment of the 9th February, 1929, have dealt with these two points at some considerable length and we are entirely in agreement with their decision thereon, and accordingly dismiss the appeal and confirm their judgment.

Appellants are to pay the costs of the appeal and advocates' fees assessed at £P.1.

Delivered the 25th day of July, 1929.

TRUSTS & TRUSTEES.

In the Land Court of Jaffa.

L.Ja. No. 191/21.

BEFORE:

Copland, J. and Budeiri, J.

IN THE CASE OF:

Arthur Henry Finn — PLAINTIFF.

vs

The Government of Palestine — DEFENDANT.

Land registered by trustee in own name and sold in breach of trust — Several sales of such land subsequently and eventually escheating to Government — Limitation of actions under Article 20 Land Code and Articles 1660—1662, Mejelle—Undisputed possession by Government for period of 19 years — Time held not to run under Article 1663, Mejelle, against person abroad even though he has agent in Palestine—Title to land not obtained through fraudulent breach of trust— Hak-el-Karar held to be plea restricted to private persons and not available to the Government.

JUDGMENT.

This case has been before the Courts of Palestine for many years. By a judgment of the Land Court of Jaffa dated 28th June, 1922, in which the Plaintiff was a Third Party, his claim was dismissed. Against this decision he appealed and the Court of Appeal in its judgment dated 11th June, 1924, set aside the judgment of the Land Court and remitted the case for re-trial. Long delays have since ensued, due partly to the inability of the parties to proceed and partly to the constant changes of personnel amongst the Land Court Judges. But finally, the case has come before this Court.

The facts are as follows:—

One James Finn, the father of the present Plaintiff, was British Consul in Jerusalem for many years in the middle of the last century. In 1850 he bought the pieces of land named respectively Talabieh and Sidara. In 1863 James Finn got into financial difficulties, having incurred certain expenses which were not approved by the British Government, and he was ordered to refund them. A judge was sent from Constantinople in order to help him in winding up his affairs and a deed of arrangement was drawn up in consultation and agreement with the creditors, by which James Finn was to assign a certain sum from his salary to trustees who were to pay the creditors from these assigned sums and were authorised to sell the two plots of land mentioned above, if default were made in payment by Mr. Finn.

The two trustees appointed by the deed of arrangement were Mr. Moore who succeeded Mr. Finn as British Consul in Jerusalem and a Mr. Melville Bergheim, a Bank manager. Mr. James Finn was then transferred to Constantinople and never returned to Palestine. He died on the 29th August, 1872 in London. He left as his heirs his wife Elizabeth Ann Finn (the Mother of the Plaintiff) his sons Alexander Finn and Arthur Henry Finn (the Plaintiff) and his daughter Constance Finn. Mrs. Elizabeth Finn died in 1921, Alexander Finn served in the Consular service in various parts of the world from 1873 to 1912 when he returned to and resided in England until his death in 1919. The present heirs of James Finn are, the Plaintiff, his sister Constance Finn and the widow of Alexander Finn, Mary Margaret Finn. None of the heirs of James Finn ever re-visited Palestine from July 1863, when the family left for Constantinople, until March, 1922, when the present Plaintiff came to Jerusalem.

With regard to the Talabiyeh lands, we are not concerned in the present action and I do not propose to refer to them in detail. This present action concerns the Sidara Lands alone and we must now trace their history from 1863 until to-day.

Melville Bergheim obtained a registration of the Sidara land in his own name, the date of which is, so far as I am able to ascertain, somewhat uncertain, but it was somewhere in the neighbourhood of 1888 or 1890. The land was then sold by Melville Bergheim to one of his clerks, G. Petridess and by the latter to Timothy Bergheim. The Defendant says that this also was in 1888. In 1891 Timothy Bergheim sold to Estiriadess who remained in undisputed possession of it until the year 1319 (1902) when he died without heirs. Whereupon the Sidara lands escheated to the Turkish Government of Palestine. This present action was brought in 1921 and the Government have therefore been in possession of these lands for 19 years.

The position with regard to the Talabiyeh lands was somewhat different, because though Melville Bergheim had obtained registration of this property in his own name at the time when the action was brought claiming this property, it was still in the possession of Melville Bergheim who had become bankrupt and a Syndic had taken charge of his assets

It is admitted by the Defendants that the sale by Melville Bergheim to his clerk, G. Petridess, was a breach of trust inasmuch as Melville Bergheim was a trustee for James Finn and that the conditions which would enable the two trustees of James Finn to sell this land had not arisen. It would therefore appear that the sale of Melville Bergheim to Petridess was a breach of trust, that Istiriadess was in undisputed possession of this land by purchase from Timothy Bergheim who had himself purchased it from Petridess for a period of eleven years, that when on the death of Estiriadess the land escheated to the State, the State remained in undisputed possession of the property for a period of over 19 years.

These are the facts which are either admitted by the parties or which we find to be proved.

Several pleas have been advanced by the Defendants against this action being heard. They plead that in the first place the Plaintiff is barred by the form of prescription known as "Mirour el Zuman" as provided in Article 20 of the Ottoman Land Code and Articles 1660 — 1662 of the Mejelle, that is to say, — that the Plaintiff, having taken no steps to enforce his rights for over 15 years,

cannot now attempt to do so. They claim that since the State had been in undisputed possession of this property for at least 19 years, their title cannot now be questioned. Though neither James Finn nor any of his heirs have been in Palestine between the years 1863—1922, yet the Plaintiff has sued the State in respect of the Talabiyeh lands during the time when this Sidara land was in possession of Istariadess and for the purposes of that action he had a duly authorised agent in Palestine. Granted that this be so, yet we hold that this point is governed by the judgment of the Court of Appeal in Estranjin vs. Tayan (Law Reports 16/9/26 O. G. page 485*). In this case the Court held that according to Article 1663 of the Mejelle time does not run against a mortgagee who is abroad even though he has a fully authorised attorney in Palestine. Article 1663 of the Mejelle runs "consideration is not given to time which passes in consequence of one of the excuses allowed by Sharia Law such as a person being in a foreign country, and the Court of Appeal felt themselves unable to read into this Article the qualification that the presence of a duly authorised agent in the country where the action should be brought, should prevent the application of this Article. This Court is bound by this decision and we have no option but to apply it in this case. Even though therefore, the Plaintiff has brought an action in this country during this period in respect of other property, yet this fact does not take away from him the excuse given by Article 1663 of the Mejelle. Prescription therefore can only begin to run against him as from the year 1922.

The Government further claims that Estiriadess being a bona fide purchaser for value and his title being registered in the Tabu, that this title is a good one and that they, having succeeded to the property by escheat, have thus acquired a good title to this land. With this argument we cannot agree. It is admitted that the sale by Melville Bergheim to Petridess was a fraudulent breach of trust and that being so, Melville Bergheim could not give a good title. This was an invalid sale and it is an established principle that no one can give a better title than he possessed. It does not matter that Estiriadess was a purchaser in good faith. Timothy Bergheim, when he sold the property to Estiriadess, had not got a good title to give, having obtained the property from Petridess to whom it had been sold by Melville Bergheim. The original plea runs right through and vitiates every subsequent sale.

It is still further argued by the Government that Estiriadess

* L.A. No. 64/24, reported ante, p. 646.

in any case by having been in uninterrupted possesion for a period of over ten years, acquired the ownership of this property by possession i.e. by "Hak-el-Karar". But we have before us a decision of the Turkish Council of State dated 30th March, 1307, that the Government cannot plead Hak-el-Karar because this is a plea for private persons only. There is a further decision of the Council of State dated 13th January, 1330, that foreigners had no right to acquire land by Hak-el-Karar and a decision also of the General Assembly of the Turkish Court of Cassation at Constantinople dated 23rd October, 1330, that Hak-el-Karar which is based on a sale shown to be invalid is itself void. This defence therefore falls and we hold that the Plaintiff is not barred from bringing this action by either form of prescription.

This deals with all the points raised by the Defendants. The Government admits that the original sale by Melville Bergheim was in breach of a trust imposed on him, and we find that Plaintiff is not estopped from bringing this action. This being so, we are of opinion that the Government have not got any title to this land and therefore give judgment in favour of the Plaintiff. We order that the registration of the lands be amended in accordance with this judgment and that they be registered in the names of the heirs of James Finn.

The Defendants are prohibited from any interference with the Plaintiff in respect of the Sidara lands.

The Defendants must pay the Plaintiff's costs and £P.10 advocate's fees.

Delivered the 21st day of June, 1929.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 27/28.

BEFORE:

Baker, J., Frumkin, J. and Khayat, J.

IN THE CASE OF:

Rabbi Haim Sonnenfeld
Rabbi Samuel Spitzer
Rabbi Baruch Zenig — APPELLANTS.

vs

Rabbi Abraham Schorr
Rabbi Pinhas Feldman — RESPONDENTS.

Appointment by District Court of trustees of Charitable Trust — Appeal against such appointment — Discretion of the District Court to make an order of succession to trusteeship — Section 29 (2), Charitable Trusts Ordinance, 1924.

JUDGMENT.

By virtue of Section 29, Subsection (2) of the Charitable Trusts Ordinance, 1924, it is enacted that upon application of a similar nature to the one made before the District Court in this appeal, the said Court may make such order as it may deem equitable. The facts were argued before the District Court and the Court used its discretion and gave a judgment which they deemed to be equitable.

We see no reason to interfere with the discretion exercised in this case, and, therefore, the appeal must be dismissed with costs, and £P.2 advocates' fees.

Delivered the 5th day of October, 1928.

In the Land Court of Jerusalem.

L.Jm. No. 33/29.

BEFORE:

Tute, J. and Aziz Daoudi, J.

IN THE CASE of:

Administrators of the Kolel Habad Trust — PLAINTIFFS.

vs

Elimelech Tuktinsky — DEFENDANT.

Rights of administrators of Charitable Trust to sue for recovery of trust property — Rights of administrators restricted by terms of waqfieh.

JUDGMENT.

It has been established by the admission of the Defendant himself that the house in question belongs to, or is under the administration of the Charitable Society named Kolel Habad. This admission corroborates the Trust-Deed and the Kushan submitted by the Plaintiff, in which it is stated that the property in question was made a Trust for the Eskenazim Hassidim Community, named "Kolel Habad". The Defendant, after having denied the truth that

the Waqfia (Trust-Deed) and the Kushan include the house which contains the room under dispute, designated to us at last (by request of the Court) the boundaries of the house containing the room in question, and these boundaries turned out to correspondent generally to the boundaries of the house containing the room in question, as mentioned in the Trust-Deed and in the Kushan. As to the allegation of the Defendant's advocate that the Administrators and the Managers of Kolel Habad Society had given the room in question to the Defendant to use it for dwelling during all his life, and that they were entitled to do so, this allegation is rebutted by the obviousness of the facts and is contradictory to the explicit terms of the Waqfia, because the Administrator is not entitled to grant accommodation to anybody in the said Trust property for a period exceeding three years, as it is clearly stated in the said Trust-Deed.

Therefore the Court finds that the Plaintiff is right in his claim, and it decides that the room in question belongs to the Trust of Kolel Habad which is under the administration and the management of the Administrators (the Plaintiffs); and they are entitled to manage the immovable trust property in conformity with the conditions of the dedicator and consequently they are entitled to recover the room in question, without the Defendant having any right to oppose the Administrators in this matter. It is also ordered that the Defendant shall pay the Court fees and costs and £P.2 advocate's fees.

Judgment delivered in presence of both parties in open Court subject to appeal.

Delivered the 28th day of July, 1930.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 42/29.

BEFORE:

Corrie, J., De Freitas, J. and Frumkin, J.

IN THE CASE OF:

Olaf Erickson Lind — APPELLANT.

vs

Vester & Co., the American Colony Stores — RESPONDENTS.

Application for declaration that property of a partnership be declared a trust—Property help in common by Society not necessarily held upon charitable trust—Necessity of charitable purpose in charitable trust — Section 2, Charitable Trusts Ordinance, 1924.

JUDGMENT.

We have considered carefully the affidavits filed in support of this appeal, and have come to the conclusion that even if all the issues of fact were determined in favour of the Appellant, we could not hold that the property held by the Respondents in trust for the group of persons known as the American Colony, Jerusalem, is held upon a charitable trust.

It is not disputed that, as has been argued by Mr. Goadby, the bond of union between the persons by whom the American Colony was formed was religious, and the group was formed for the purpose of living according to Christian principles.

Nevertheless, the only element in the life of the American Colony as diclosed by the Appellant's affidavits, which differentiated it from any other group of persons living in accordance with Christian principles, was that the members lived a communal life, holding all their property in common. With this exception no specific "religious rites or practices" are alleged in the affidavits.

We are unable to hold that this communal life and sharing of property is sufficient to constitute a charitable purpose.

For the Appellant it has been argued that the fact that some members of the group for whom the property is held in trust by the Respondents are old and infirm, is sufficient to constitute the trust a charitable trust.

But for a trust to be charitable there must be a charitable purpose as defined by the Ordinance; and it does not constitute a trust charitable that one or more of the beneficiaries happen to be infirm or aged, and are thus dependent upon the trust property for their support.

We see no reason to dissent from the judgment of the District Court.

The appeal must be dismissed.

Delivered the 30th day of April, 1930.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 131/30.

BEFORE:

The Senior Puisne Judge, Baker, J. and Frumkin, J.

IN THE CASE OF:

Israel Lieber — APPELLANT.

vs

Jacob Mirenberg
Sheftel Mirenberg — RESPONDENTS.

Invalidation of arbitration award by misconduct of arbitrators — Arbitrator nominated by Court where no agreement reached between parties — Trustee to sign in his capacity as trustee—No authority in District Court to appoint supervisor of business — Refusal by Court to remove trustee.

Appeal from the judgment of the District Court of Jaffa dated the 10th September, 1930.

JUDGMENT OF THE DISTRICT COURT.

Since these two cases depend upon one another, the judgment is consolidated.

We are of opinion that the arbitration award cannot stand. From the evidence we have heard we are satisfied that there was misconduct on the part of several of the arbitrators which will invalidate the award. Some of these arbitrators would seem to be entirely ignorant of the meaning of the word "impartial."

The award must therefore be set aside and the submission cancelled. We are further of opinion that in the circumstances the only proper course which may lead to a settlement of the dispute between the parties is to refer all the alleged parties to arbitration under the submission contained in the Deed of Partnership itself.

Plaintiff in case No. 71/30 has nominated his arbitrator. At the request of the parties we allowed a delay of 48 hours for the parties to agree to a name being submitted as Arbitrator for the Defendants. No such agreement having been arrived at the Court nominates Dr. Farbstein, Advocate, as arbitrator for Defendants. Lieber to apply. Mr. Israel Lieber will get his costs on both actions with £P.10 advocate's fees.

Delivered the 10th day of September, 1930.

JUDGMENT OF THE COURT OF APPEAL.

The Court holds:—

1. That so long as the Appellant is acting as trustee of the business of the factory, he must sign as such.

2. That the District Court had no authority to appoint a supervisor of the business; accordingly the order appointing a supervisor is set aside.

3. The Court sees no ground for setting aside the order of the District Court refusing to remove Lieber from the trusteeship.

4. The costs of the appeal by Lieber will be paid by the parties in equal shares. The costs of the appeal by Mirenberg will be paid by the Appellant.

Delivered the 13th day of February, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 35/31.

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

IN THE CASE OF:

Israel Lieber — APPELLANT.

vs

Jacob Mirenberg
Sheftel Mirenberg — RESPONDENTS.

Allegation of existence of parnership — Application to enforce registration of partnership — Application to restrain partner from management of business and to appoint receiver to manage firm's affairs — Partner constituted a trustee for claimant — Power of Court to appoint trustee — No provision of law enabling Court to appoint receiver of partnership not in liquidation — Power of Chief Justice to make rules re injunctions and appointment of receivers — Sec. 21 (a) (c), Courts Ordinance, 1924 — English law as to receivers not applied — Rules of procedure in force in Palestine.

Appeal from the judgment of the District Court of Jaffa, dated 20th January, 1931.

JUDGMENT.

These are cross-appeals against the judgment dated the 20th January, 1930, of the District Court of Jaffa, in an action brought by Jacob and Sheftel Mirenberg against Israel Lieber.

The Plaintiffs alleged that they had entered into partnership with the Defendant and others in a firm named Lieber Co., for the manufacture of chocolate. They further alleged misconduct on the part of the Defendant and asked the Court alternatively: (a) "to order the Defendant to register the partnership, to use the firm's name and labels as stated in the agreement and to manage the factory only by mutual consent of the claimant, Mr. Sheftel Mirenberg, and to prohibit him any action as regards the factory unless there is a consent to it from the claimant, or (b) to restrain the Defendant from the management of the undertaking and to appoint a receiver in order to manage the affairs."

In their judgment the District Court stated that: "the Defendant has given security which in our opinion is sufficient to cover any claim against him". The judgment proceeds "we continue the security and also the arrangement by which Mr. Rojansky is in charge of all books of the Defendant. Complete liberty of access to these books to be given to all parties in addition to the security. The Defendant is constituted as trustee for all parties. In view of the security and of the nature of the business we are of opinion that to appoint a receiver would not be a proper remedy, and we refuse to make such an order. Neither do we think it proper to restrain the Defendant from the management."

The Defendant is appealing against that portion of the judgment whereby he is constituted a trustee.

We know of no power either under English or Ottoman Law whereby such an appointment can be made, nor indeed, do we understand the effect of such an appointment. If the Plaintiffs are successful in the arbitration proceedings now pending, the Defendant will obviously have to account to them for his management of the business, and he has given security for his liability in that event. Accordingly, we hold that the Defendant's appeal on this point must succeed.

The Plaintiffs are appealing against the refusal of the District Court to appoint a receiver to manage the business pending the result of the arbitration between the parties.

We know of no provision in the Ottoman Law enabling the Court to appoint a receiver and manager of a partnership which is not in liquidation. Subsection (a) of Section 21 of the Courts Ordinance, 1924, confers power upon the Chief Justice with the concurrence of the High Commissioner to make rules regulating among other matters: "(IX) Injunctions and the appointment of Receivers."

No rules have been made under this power. Sub-Section (c) of the same Section contains the following provisions:—

> "Provided further that, until the Chief Justice shall have made rules regulating any of the matters herein referred to, the practice and procedure in force in regard to any such matter at the commencment of this Ordinance shall continue to be followed and be deemed to be valid in all respects."

In view of this provision, the Court is of opinion that the English law with regard to appointment of receivers cannot be applied and the Plaintiff's appeal must fail.

The costs of both appeals will be paid by the Plaintiffs.

Delivered the 31st day of September, 1931.

In the High Court of Justice.

H.C. No. 77/31.

BEFORE:

The Chief Justice and Khayat, J.

IN THE APPLICATION OF:

Mordechai Eliash — PETITIONER.

vs

The Director of Land — RESPONDENT.

Disposition of lands of the nature of private trusts not registrable in Land Registry—Ottoman law silent on creation of private trusts—Doctrine of private trusts not introduced into law of Palestine—Interpretation of statutes — Presumption that legislator does not intend to make any alteration in the law except as is expressed—New principle of law not introduced in Palestine except by distinct legislative enactment — Constitution of waqf — Charitable trust not constituted in respect of miri land—Section 19 Succession Ordinance, 1923—Articles 38, 114, Ottoman Land Code.

JUDGMENT OF THE CHIEF JUSTICE.

This is a return ro the Rule Nisi calling upon the Director of Lands to show cause why a disposition of Lands of the nature of a private trust should not be registered in the Land Registry.

The Petitioner admits that the Ottoman Law is silent as to the creation of private trusts but claims that while it does not allow them it does not forbid them and he argues, because certain Sections of the Companies Ordinance, 1929, No. 98 of 1929, namely, Sections 29 (2), 78 (1) and (3), 79 (1) and (3), 98 (1) (b), 119 (3), 124 (1), 180 and subsections (o) and (w) of Schedule II thereof, refer to Trusts and Trustees, while Section 29 (2) of the Partnership Ordinance No. 19 of 1930 refers to trusts that, therefore, the legislator has introduced the doctrine of private trusts into the Law of Palestine. The Companies Ordinance of 1929 and the Partnership Ordinance of 1930 are very lengthy enactments based upon English Statutes which have been, if one may use the expression, swallowed virtually holus-bolus by the legislator of Palestine with comparatively small alterations. Now there is a presumption that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares either in express terms or by clear implication; or, in other words, beyond the immediate scope and object of the statute. (Maxwell on the Interpretation of Statutes, sixth edition, page 149).

The same authority states that it is more reasonable to hold that the Legislature expressed its intention in a slovenly manner, than that a meaning should be given to its enactment which could not have been intended.

I do not think one can seriously hold, knowing the nature of the legislation with which we are dealing, that the Legislature intended by a mere side-wind to introduce a new principle of law, such as the doctrine of private trusts, into Palestine.

As is said in Craies on Statute Law, third edition, page 112, "To alter any clearly established principle of law a distinct and positive legislative enactment is necessary" and the same authority cites the case of Rolfe v. Flower (1866), Privy Council, page 27, where the Judicial Committee said with regard to an argument that the Legislature of Victoria intended by a certain section of an enactment to alter a well-known principle of bankruptcy law: "If this were the establishment of a new code of insolvent law, and it was the object of the colonial legislature to prevent the

operation of a rule which they considered unjust, it is hardly to be imagined that they would have committed their intention to the equivocal meaning of a few words in a single section of the Act."

Further, the question arises that the land we are concerned with here is Miri which cannot be made Waqf. Since a charitable trust cannot be constituted in respect of this particular type of land, even if the Petitioner were correct as to the introduction of the theory of private trusts, it appears to me that he would fail, as such trust could not be created in respect of land of this nature. For these reasons the order must be discharged with costs.

JUDGMENT OF MR. JUSTICE KHAYAT.

The contract, the registration of which is applied for in the Land Registry, though differing from a Waqf transaction, inasmuch as it is not a dedication for a charitable purpose, cannot be deemed to be a transfer without consideration as laid down in Article 38, or a transfer for a consideration of maintenance as laid down in Article 114 of the Land Code, because trustees are merely nominees bound by certain obligations with the right of revocation of the imaginary transfer being reserved for the transferor with no interest to the trustees; and whereas there is no provision that allows the registration of immovable property in the name of a person by way of trust except, as stated by Petitioner, in the Companies Ordinance.

Further, transfers as such are equal to dispositions in Miri land which are prohibited under Section 19 of the Succession Ordinance, 1923.

I am therefore of opinion that the Order should be discharged with costs.

Delivered the 19th day of July, 1932.

In the High Court of Justice.

H.C. No. 45/33.

BEFORE:

The Senior Puisne Judge and Khaldi, J.

IN THE APPLICATION OF:

Elias Mazawi
and Another — PETITIONERS.

vs

The Acting President of the
District Court of Haifa
Archbishop Hajjar
Elias Sayhoun and Another
The Attorney-General — RESPONDENTS.

Land sold by trustees of School and contract guaranted by Archbishop Hajjar — Undertaking by vendors to obtain sanction of District Court — Objection made by strangers to the contract to such sanction being given — Refusal by District Court to admit strangers as parties — Orders under Section 12, Charitable Trusts Ordinance, 1924, are judgments given by a District Court in first instance and subject to appeal — No jurisdiction in High Court where right of appeal is granted — Jurisdiction of Supreme Court to hear appeals from judgments — Article 43, Palestine Order-in-Council, 1922 — Order of Court giving directions to administrator is judgment and subject to appeal — Section 16, Succession Ordinance, 1923.

JUDGMENT.

The Petitioners are praying this Court to set aside an order made on the 18th July, 1933, by the Acting President of the District Court, Haifa, whereby he refused to admit the Petitioners as parties to proceedings before him arising out of an application by the attorneys of Archbishop Hajjar for an Order sanctioning the sale of immovable property registered in the name of the Greek Catholic Church and Schools of Haifa.

On behalf of the Attorney-General who appears as a Respondent to this petition it is argued that this Court has no jurisdiction to entertain this petition on the ground that the proceedings before the President of the District Court were proceedings under Section 12 of the Charitable Trusts Ordinance, 1924, and hence that an appeal against an Order made in such proceedings lies to the Supreme Court sitting as a Court of Appeal.

We think that this objection is well founded. It is clear that as regards appeal an order made by a Judge under Section 12 of the Charitable Trusts Ordinance must be in the same position as an order made by the Court. Now, by virtue of Article 43 of the Palestine Order-in-Council, 1922, — "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."

It is thus clear that an Order made by the District Court under Section 12 of the Charitable Trusts Ordinance, must, in the absence of any provision to the contrary by Ordinance, be subject to appeal to the Supreme Court sitting as a Court of Appeal and the same must be the case with regard to an Order made by the Judge.

In support of this view, the judgment of this Court in Ex-parte David Moyal, H.C. No. 5/25 may be cited. In that case the Petition arose out of an Order made by the President of the District Court under Section 16 of the Succession Ordinance, 1923, which provides that the Court or a Judge thereof may, upon the application of an administrator give such directions as may from time to time be required as to the administration of the estate.

Upon that petition this Court held that a judgment under Section 16 is a judgment of the District Court and dismissed the petition. We see no grounds for taking a different view in the present case. The petition is dismissed.

Delivered the 25th day of January, 1934.

URTAS SPRINGS ORDINANCE.

In the Privy Council sitting as a Court of Appeal from the Supreme Court of Palestine.

P.C. No. 98/25.

BEFORE:
Viscount Cave L. C., Viscount Dunedin and Lord Parmoor.

IN THE CASE OF:

Jerusalem-Jaffa District Governor and Another — APPELLANTS.

vs

Suleiman Murra and Others — RESPONDENTS.

Appeal to Privy Council from order of Supreme Court sitting as a High Court of Justice — Question of competence of such Appeal not pressed — Palestine (Appeal to Privy Council) Order-in-Council, 1924 — Application of Foreign Jurisdiction Act, 1890 — Springs of the village of Urtas appropriated by Ordinance to the use of the municipality of Jerusalem — Urtas Springs Ordinance, 1925 — Power of High Commissioner to promulgate Ordinances — Interference by Government with private rights — Balfour Declaration and Mandate not authority in Court except as confirmed by Order-in-Council — Ordinance repugnant to and inconsistent with Mandate not to be promulgated — Jurisdiction of Courts to question validity of Ordinance or whether it is inconsistent with Mandate — Meaning of "safeguarding civil rights" — Right of Court to examine proceedings before arbitrator before enforcing award — Jurisdiction of Courts not ousted by insertion in agreement of words that award shall be final.

JUDGMENT OF THE CHIEF JUSTICE OF PALESTINE.

(H. C. No. 27/25.)

This is an application made on behalf of landowners of the village of Urtas for an order against the District Governor of the District of Jerusalem and Jaffa and the President of the Water Supply Commission for Jerusalem to restrain them from interfering with the rights of the landowners to the use of the water of the spring of the village.

An order to show cause was made on the 23rd May on evidence being given on oath that machinery had been set up for the purpose of carrying the water of the spring to Solomon's Pools for the use of the municipality of Jerusalem, and that

notables of the village had been warned by a district official of the Government that the villagers were not allowed to interfere with the operations of the Water Supply Commission. It was also sworn that all the water of the spring was used as of right by the landowners for drinking purposes and for the watering of trees and gardens, and that there was no surplus of water unappropriated.

The 29th May was fixed for hearing Respondents and on that day Mr. Kermack, Government Advocate, appeared on behalf of the Attorney-General and Mr. Moghannam on behalf of the Petitioners.

Mr. Kermack produced an ordinance published and promulgated the same day, the 25th May, and called the "Urtas Springs Ordinance". That Ordinance provides in Section 2 that the High Commissioner may by order published in the Official Gazette authorise the municipality of Jerusalem, or such other authority as undertakes the supply of water to Jerusalem, to take for a period not exceeding 12 months from the date of such order the water arising from the spring in the village of Urtas. In the Gazette appeared an order by the High Commissioner authorising the municipality of Jerusalem to take water from the Urtas springs as provided by the Ordinance.

The right of taking water of the spring is limited in the Ordinance by a proviso that enough water shall be left for the daily needs of the inhabitants of the village and such other persons as have habitually used the water for drinking and other domestic purposes and for their animals as well as for the irrigation of the lands belonging to the inhabitants which at the date of the order were irrigated and planted with trees or other permanent plantations. As regards the watering of vegetable gardens, it is provided in Section 4 that the Board, which is a creation of the municipality, shall compensate the owners of gardens having water rights who may suffer damage to vegetables or crops or be prevented from planting their usual vegetables or crops by the withdrawal by the Board of water from the spring.

There is a Section,—No. 5 which is a special object of complaint. That Section requires all disputes between the Board and the inhabitants regarding the amount of water to be left available for the village under Section 2 or damages to vegetables or other crops claimed under Section 4, or compensation provided by Section 3 for interference with land, to be adjudicated by an

arbitrator to be appointed by the High Commissioner whose award is to be final. That Section goes on to say in Sub-Section 2 that when there is a dispute as to the amount of water made available for any purpose provided for in Section 2 the arbitrator shall not award compensation but shall make an award determining the specific quantity of water which the Board is to make available for the use of the inhabitants.

The first objection raised to this Ordinance, was that the Order-in-Council of 1923, which gives to the High Commissioner power to publish and promulgate ordinances, limits this power to certain purposes,—peace, order and good government, and it was said, that this Ordinance has not any of the three purposes in view, but is made for the purpose of taking away private rights for the benefit of a municipality which sells water at a profit. We found no weight in this objection. It is known that a serious scarcity of water is expected during the present year and the municipality desires to obtain water from the surplus of the village of Urtas, after its main wants have been provided, in order to relieve the vital necessity of the people of Jerusalem. To supply necessities of life is not a matter foreign to good government. It would moreover be difficult for a Court of Justice to find any Ordinance beyond the powers of a legislative authority on the above ground. It is hardly possible to imagine any legislative enactment made except for the purpose of good government and it would not be for this Court to discuss the particular merits of Ordinances made for that purpose unless some other ground was shown.

But Mr. Moghannam went further than that. He referred us to an undertaking made in the Declaration of 2nd November, 1917. We were informed that there was a passage in the Mandate to the same effect. Neither the Declaration nor the Mandate are documents of authority in the Courts except so far as they are referred to and confirmed by the Order-in-Council of 1922 which in its preamble refers to the Declaration of 2nd November, 1917, and adopts it, so that we need not for the moment consider the Mandate.

The terms of the Declaration as they appear in the preamble to the Order-in-Council are to be found in the second paragraph which, after referring to the establishment in Palestine of a National Home for the Jews, goes on to say "It being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine,

or the rights and political status enjoyed by Jews in any other country". Mr. Moghannam argues that this is a promise by the King, that nothing shall be done to prejudice the civil rights of existing non-Jewish communities in Palestine, that the landowners of Urtas are members of a non-Jewish community in existence at the time when the declaration was made, and that the present Ordinance does prejudice their civil rights because it invades their right of property in the water of the springs without providing adequately for compensation to those whose rights are prejudiced. There is no compensation to be paid for damage caused by failure to supply sufficient water for the purposes mentioned in Section 2, and disputes arising from damage to land and cultivation as dealt with in Sections 3 and 4 are directed by the Ordinance to be tried not by those Courts prescribed by the Order-in-Council 1922 and the Courts Ordinance, 1924, but by a special court of one judge of no specified qualification appointed for that purpose by the High Commissioner and from whose decision there will be no appeal. He is called an arbitrator but is not appointed by any agreement of parties and has nothing of an arbitrator except the name.

What is meant by the passage in the declaration referred to in the Order-in-Council and which, it must be noted, speaks of non-Jewish communities only, is this,—that whatever measures are taken in regard to the establishment of a National Home for the Jews, such measures are not to be of such a nature as to prejudice the civil rights of other inhabitants of Palestine. A general provision not to prejudice civil rights would not be made to non-Jewish communities only, but all communities. The whole of the second paragraph of the preamble to the Order-in-Council has to do with the promise of a National Home to the Jews and the just limitation to be imposed on that promise, and it is not relevant to a discussion as to the validity or invalidity of the present Ordinance.

Before deciding the question raised by the Petitioners that the Ordinance is repugnant to and inconsistent with the Mandate, we have to be sure that we are obliged to adjudicate at all on such a question. If we are, it will be extremely inconvenient to the Government and to the Courts of Justice because of the manner in which the Mandate is drawn and the wide field of enquiry which it appears to open up to the courts on the invitation of persons who are opposed to this or that Ordinance.

The Attorney-General, who appeared on behalf ot the Board

at the second hearing, seemed to consider that we had no authority to question the validity of the Ordinance and he referred us to the Colonial Laws Validity Act, 1865, to show that, in order to find a Colonial ordinance invalid, it was not sufficient to find a repugnancy to the common law of England, but that it must be shown to be repugnant to some Act of Parliament extending to the colony. But Section 2 of the Act to which he refers goes on to say "or some order or regulation made under it, or having in the colony the force and effect of such act." In the first place it does not appear that this law has any authority in a mandated territory, but if it has the words quoted above would include an Order-in-Council which has as much authority for us as an Act of Parliament would have in a British Colony.

We are satisfied that we are bound by the general rule that the validity of laws made by a legislature which is not sovereign, but the creature of some instrument of Government, may be questioned by the local courts on the ground that they are repugnant to some provision to be found in that instrument. In that connection we have two questions to consider: (1) the reference to the Mandate in Clause 18 of the Order-in-Council, 1922, and in Clause 3 of the Order-in-Council, 1923, and the effect of this reference to the Mandate on the validity of Ordinances in general and the Urtas Springs Ordinance in particular, and (2) the effect of Part V of the Order-in-Council, 1922, which established courts of Justice, or that part of the Ordinance which refers all disputes to a new court composed of one judge from whose decision there is to be no appeal.

The reference to the Mandate with which we are concerned first appeared in clause 18 of the Order-in-Council, 1922, as follows: — "No Ordinance shall be passed which shall be in any way repugnant to or inconsistent with the provisions of the Mandate." It was repealed in Clause 3 of the later Order which repealed and amended Clause 17 of the Principal order, but the word "promulgated" was substituted for the word "passed".

The Attorney-General argues that the intention of these words is not to render invalid an Ordinance which is repugnant to a provision of the Mandate, but that it is a direction to the local legislature, an infringement of which would render the local government liable to the interference of the Secretary of State and the League of Nations.

But this is a peremptory Order. In Clause 18 of the principal Order it appears in a separate paragraph at the end of the clause after the main paragraph which confers on the legislative council the power to establish ordinances. In Clause 17 as amended by Clause 3 of the later order it comes in Sub-Clause 1 (c). Sub-Clause 1 (a) confers legislative power on the High Commissioner with the following limitation "provided that no Ordinance shall be promulgated which shall restrict complete freedom of conscience and the free exercise of all forms of worship". Can it be argued that the courts of law would be bound to administer a law which purported to suppress the celebration of the Mass? Then again Clause 1 (b) says "No Ordinance shall be promulgated by the High Commissioner until he has consulted the Advisory Council." I doubt if it would be contended by the Attorney-General that ordinances can be validly promulgated without consultation with the Advisory Council, that the High Commissioner could promulgate laws by simple proclamation or advertisement in the Official Gazette and that the courts would be obliged to administer them. If the first two sub-clauses have a real effect in limiting the legislative power of the High Commissioner, I see no reason to make an exception in the case of Sub-Clause 1 (c) which forbids any Ordinance to be promnlgated which is in any way repugnant to or inconsistent with the provisions of the Mandate. Moreover, the use of the words "in any way" show that the Mandate must be scanned in order to see whether an Ordinance which is attacked before the courts does in fact sin at all against the Mandate, and if it is "in any way repugnant" it is invalid from the beginning, in whole and in part. This is an extremely inconvenient conclusion because it enables the best intentioned ordinances to be held invalid because of some repugnancy to a document not easy to construe and throws the responsibility of deciding these matters on courts of law. However, there it is in black and white and we have to give judgments in accordance with the ordinary meaning of words.

When this case was argued before us the first time, no one in court had a copy of the Mandate, and it was generally supposed that it carried us no further than the Declaration of 2nd November, 1917. But on examining that document, we found the second paragraph of the preamble similar to the second paragraph in the preamble to the Order-in-Council of 1922, but in Article 2 we found words which carry us in the direction in which we were urged by Mr. Moghannam. On a second hearing this question was fully argued.

After making the mandatory responsible "for placing the country under such political, administrative and economic conditions as will ensure the establishment of the Jewish National Home as laid down in the preamble" the Article passes on to another matter and then goes on to say "and for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion."

The first and third paragraphs of this Article confirm the declaration in the 2nd paragraph of the preamble, but the 3rd passage goes further than the safeguarding passage in that declaration. It is so general in its scope that it must be intended to mean not only that nothing is to be done in the establishment of the Jewish National Home which will prejudice the rights of non-Jewish communities, but that government must be carried on in such manner as to safeguard the religious and civil rights of all inhabitants. It would be disrespectful to the Mandate to treat this as a mere expression of high principle not to be taken too seriously. It must be taken to mean what it says.

The Attorney-General insists that this Article is merely a practical application of the second passage in the preamble and carries us no further, that the words "civil and religious rights" in that Article are an echo of the words "civil and religious rights" which appear in the preamble. He argues that this Article so far as it relates to civil and religious rights, means no more than that the National Home for the Jews is not to be established in such a manner as to prejudice the rights of other people.

It may be that this was the original form and intention of Article 2, but as it appears at present in the Mandate it deals with three matters:— (1) a National Home for the Jews, (2) the development of self governing institutions, (3) the safeguarding of the civil and religious rights of all the inhabitants. Nos. (1) and (3) are separated by No. (2) which deals with a totally different question, while No. (3) has been extended into a general obligation, not on behalf of non-Jewish communities only, but of all the inhabitants, and it has been severed from the special relation to the "National Home", which it had in the preamble by the insertion of a strange subject matter between the two. As it stands now it imposes a general obligation on the Mandatory, declaring him responsible for safeguarding the civil and religious rights of all the inhabitants.

The Mandate is a political and not a legal document and likely to contain expressions of good intention which are more easy to write than to read. We are, however, bound to read them and give them a practical value and the reiterated insistance on the Mandate in the Order-in-Council oblige us to determine what is the meaning of "safeguarding civil rights."

No efficient government can carry on its work without prejudicing the rights of the citizens. Statutes and Orders regarding public order, customs and excise, public health and municipal reform and a number of other matters essential to the life and progress of a civilized community entail serious prejudice to civil rights. Good governments carry on with wisdom and moderation and bad governments carry on otherwise, but both interfere with civil rights.

The Mandate provides for certain cases of unavoidable interference with civil rights, in the matter of taxes and customs by Article 18, of antiquities by Article 21, and Article 11 provides that the Mandatory "shall have full power to provide for public ownership or control of any of the natural resources of the country", and that Article begins by laying down a general rule as follows:— "The Administration of Palestine shall take all necessary measures to "safeguard the interests of the Community in connection with the development of the country . . ."

It appears from reading the Mandate generally that laws may be made which interfere with civil rights in the interests of the community, and at the same time we are told that civil rights must be safeguarded. Perhaps the safest way to deal with the case before us, is to use two rules, and see if they have been applied in this Ordinance rather than to attempt to lay down a general rule to cover cases we may never have to try.

In this case the High Commissioner has passed an Ordinance enabling a Water Board to control the springs of Urtas and take water from the inhabitants of that place for the benefit of the Municipality and inhabitants of another place, namely Jerusalem. There is a provision for compensation for damage to vegetables and crops limited to such amount as may be awarded by a person to be appointed by the High Commissioner from whose award there is no appeal. For damages owing to a decreased supply of water for drinking and domestic use, for watering animals and irrigating trees no compensation is to be given, but the person

mentioned above and called an arbitrator is to be empowered to decide how much water the villagers should have.

For taking control of the water authority may be inferred from the Mandate. It is almost inconceivable that the action of the Board will deprive the people of Urtas of enough water for their own drinking. That their animals, trees and vegetables should suffer in order that Jerusalem may drink, may be an infringement of civil rights not repugnant to the Mandate. But if the Ordinance does not pretend to provide full compensation for water rights infringed, that can hardly be called a "safeguarding the civil rights of all the inhabitants" because it is a recognised principle of sound legislation that when private property is taken for public purposes, the persons damaged by such taking should be adequately compensated.

The interpretation put on Section 5 of the Ordinance by the Attorney-General is this, that it omits from the jurisdiction of the arbitrator claims for damage against the Board for failure to supply enough water for the purposes mentioned in Section 2, but leaves to the inhabitants their remedies at law by action in the ordinary courts. That would be so if the Ordinance went no further; it requires all such disputes to be tried by the arbitrator and then it limits him to making a declaration as to the amount of water which should in future be made available and forbids him to give money compensation. Suppose a villager claims against the Board that it has not made available sufficient water for the irrigation of his trees which have in consequence been damaged. Can he go to the courts having ordinary jurisdiction and have his case tried, or will he be obliged to go before the arbitrator? His will be a case regarding the amount of water made available, but it looks on the face of it as if it intended to deprive the landowners of Urtas of a right to compensation for damage arising from a failure of the Board to fulfil its obligation under Section 2. If it is conceivable that a court might decide that its jurisdiction was not ousted by the Section, when a question came before it as to damage claimed for injury to trees through insufficient water being left available by the Board for that purpose; nevertheless to interfere with a water right for public purposes and give a conundrum in part exchange is not a "safeguarding of the civil and religious rights of all the inhabitants".

Now we come to consider whether the reference of all disputes to a person called an arbitrator whose award shall be

final is not of itself sufficient to invalidate the Ordinance as being repugnant to the Order-in-Council, 1922, and repugnant to the Mandate. The Order-in-Council in Part V prescribes certain civil courts which are "to exercise jurisdiction in all matters and over all persons in Palestine", and appeals are provided for from the decisions of courts of First Instance to Courts of Appeal. The Ordinance in Section 5, takes from the jurisdiction of courts prescribed by the Order-in-Council, all disputes for damages arising out of the Ordinance and refers them to a person who is called an arbitrator who is to be appointed by the High Commissioner and whose award is to be final. Now an arbitrator is a person appointed by agreement of the parties or under some provision in a contract. He is not appointed by the Chief of the Executive government who appoints judges. There is strictly speaking no appeal from his decision, but when the successful party goes before a court to have the award enforced by means of a judgment the court will look at the proceedings, if any objection is raised, to see if the award ought to be enforced, because the jurisdiction of the courts cannot be ousted by the mere insertion in an arbitration agreement of words to the effect that the award shall be final. But when the award is made final by a statutory enactment the words are intended and do in fact prevent the courts from hearing any objection to what is called an award.

The person, who is called an arbitrator in this Ordinance is a judge of some sort, appointed by the High Commissioner as in the case of other judges and magistrates with judicial powers to award damages. What again is the meaning of the words "whose award shall be final"? Every award is in a sense final if it disposes of all matters referred, and final in the sense that there is no appeal, but it is not final in the sense of being executable without further procedure or that it settles the question for good and all and cannot be set aside or corrected. If the last suggested is the meaning of "final" in the Ordinance and it appears to be so, then the person called an arbitrator is just a new sort of judge, and what is called an "award" is just a judgment from which there is to be no appeal. To substitute this judicial arrangement for the ordinary courts established by the Order-in-Council, 1922, is repugnant to that Order, and is not a "safeguarding of the civil rights of all the inhabitants" as required by the Mandate.

No doubt it is the intention of the Government to provide an efficient and simple method of doing justice in disputes arising

out of the water springs scheme and the measure of compensation for crops and vegetables is generous, but when once the Board has taken over the water and the so-called arbitrator has been appointed, the Government will lose control and there will be no appeal.

In my opinion the Ordinance as it now stands is repugnant to and inconsistent with the Order-in-Council, 1922, and with a provision in Article 2 of the Mandate and is not a valid Ordinance. But taking into account the serious difficulties through which parts of this country will probably pass during the later months owing to want of water, I should be reluctant to interfere with operations undertaken by a public body with a view to meeting such difficulties if interference can be avoided. I think the making of this Order absolute should be postponed for fifteen days if desired by the Attorney-General, in order to enable the Government to amend the offending parts of the Ordinance if it thinks fit to do so.

Delivered the 2nd day of July, 1925.

JUDGMENT OF THE PRIVY COUNCIL.

(Delivered by Viscount Cave L.C.)

This is an appeal by the District Governor of the Jerusalem—Jaffa District and the President of the Jerusalem Water Supply Commission from an order of the Supreme Court of Palestine, restraining them from taking water from the springs at Urtas, a village in the neighbourhood of Jerusalem.

In the month of May, 1925, the water supply of Jerusalem was causing anxiety; and on May 25 the High Commissioner for Palestine, acting under the Palestine (Amendment) Order-in-Council dated May 4, 1923, promulgated an Ordinance (called the Urtas Springs Ordinance, 1925) empowering the High Commissioner by order published in the Official Gazette to authorize the municipality of Jerusalem or such other authority as undertook the supply of water to Jerusalem to take water from the springs in the village of Urtas for augmenting the supply contained in the reservoirs at Solomon's Pools upon certain conditions set out in the Ordinance. On the same day the High Commissioner, acting under the Urtas Springs Ordinance, published in the Official Gazette an order whereby he authorized the municipality of Jerusalem to take over

for a period not exceeding twelve months from the date of the order the water arising from the spring in Urtas for the purpose mentioned in the Ordinance. It appears that the spring at Urtas is the private property of the inhabitants of that village, who use the water for drinking and other domestic purposes, for watering their animals and for the irrigation of land planted with trees or with vegetables or other crops; and the respondents, who represent the inhabitants and landowners of Urtas, objected to the taking of the water and applied by petition to the Supreme Court for an injunction. The Supreme Court granted the injunction asked for, but stayed the operation of the order pending an appeal to His Majesty in Council, for which special leave has been granted.

A question was at one time raised whether an appeal would lie from the Supreme Court of Palestine to His Majesty in Council; but on the argument of the Appeal this point was not pressed, and in their Lordships' opinion there is no doubt as to the competence of such an appeal. The Foreign Jurisdiction Act, 1890, applies to every foreign country in which "by treaty, capitulation, grant, usage, sufferance or other lawful means" His Majesty has jurisdiction, and provides that His Majesty may exercise any such jurisdiction in the same and in as ample a manner as if he had acquired that jurisdiction by the cession or conquest of territory. There can be no question that the jurisdiction exercised by this country under the League of Nations Mandate for Palestine comes within the above description, and accordingly that an appeal lies from the Supreme Court of Palestine to His Majesty in Council. Provision for such appeals has been made by the Palestine (Appeal to Privy Council) Order-in-Council dated October 9, 1924.

Before dealing with the substance of the appeal it is necessary to refer in some detail to the Ordinance which is in question, and to the instruments under which it was made.

By the Mandate for Palestine dated July 24, 1922, the Council of the League of Nations, acting under Article 22 of the Covenant of the League, entrusted to Great Britain the administration of the territory of Palestine which formerly belonged to the Turkish Empire. The Mandate contained the following among other provisions:—

"Article 1. The Mandatory shall have full powers of legislation and of administration save as they may be limited by the terms of this Mandate.

"Article 2. The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish National Home, as laid down in the Preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.

"Article 11. The Administration of Palestine shall take all necessary measures to safeguard the interests of the community in connection with the development of the country, and, subject to any international obligations accepted by the Mandatory, shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein."

By the Palestine Order-in-Council dated August 10, 1922, provision was made for the administration of Palestine by a High Commissioner with full executive powers; and authority to make Ordinances for the peace, order and good government of Palestine was entrusted to a Legislative Council, subject to a provision that no Ordinance should be passed which should in any way be repugnant to or inconsistent with the provisions of the Mandate. The institution of a Legislative Council did not prove successful; and on May 4, 1923, an amending Order-in-Council was made by which the legislative authority was transferred to the High Commissioner, who was thereby authorized to promulgate such Ordinances as might be necessary for the peace, order and good government of Palestine, subject to a condition that no Ordinance should be promulgated which should be in any way repugnant to or inconsistent with the Mandate. It is under the authority conferred by this Order-in-Council that the Urtas Springs Ordinance was promulgated.

It is unnecessary to state in full the provisions of the Ordinance, which may be summarized as follows: By Section 2 the High Commissioner was empowered by order published in the Gazette to authorize the municipality of Jerusalem or such other authority as undertook the supply of water to Jerusalem (therein called "the Board") to take for a period not exceeding twelve months the water arising from the Urtas Spring and to use it for augmenting the supply in the reservoirs of the Board at Solomon's Pools, but it was provided that the Board should ensure that there should be available from the spring sufficient water for the daily

needs of the inhabitants of the village of Urtas for drinking and other domestic purposes and for their animals as well as for the irrigation of their lands which at the date of the order were planted with trees or other permanent plantations. By Section 3 it was enacted that if an order was made under the preceding section the Board might enter upon private land for the purpose of erecting at or near the spring a pumping engine and other machinery and might lay pipe lines from the spring to the reservoir at Solomon's Pools, provided that the Board should pay to the owner of such land compensation for any direct loss or damage thereby caused. By Section 4 it was provided that if any inhabitant of Urtas suffered loss by destruction of or damage to vegetables or other annual plants or crops planted on land irrigated by the spring, or by reason of his being prevented from planting vegetables and other annual plants or crops on land so irrigated, owing to the diversion of the supply of water to such land, the Board should pay to such inhabitant compensation for the loss so suffered. By Section 5 it was enacted that if any dispute should arise between the Board and any inhabitant of Urtas regarding the amount of water made available for him for any of the purposes provided for in Section 2 or as to the amount of compensation payable to him under Section 3 or Section 4, such dispute should be referred to a single arbitrator appointed by the High Commissioner, and the award of such arbitrator should be final; but it was declared that in any dispute which might arise as to the amount of water made available for any of the purposes specified in Section 2 the arbitrator should not award compensation in the form of a money payment, but should make an award determining the specific quantity of water which the Board was to make available for the use of the inhabitants.

The effect of this Ordinance was, first to secure to every inhabitant of the village of Urtas a sufficient supply of water for drinking and other domestic purposes and for his animals and for watering his trees and permanent plantations, and secondly to provide compensation for any loss which he might suffer by the use of his land for pumping machinery or the laying of pipe lines or the destruction of his vegetables or other crops or his inability to sow further crops, any question as to the sufficiency of the supply under the first category or as to the compensation payable under the second being referred to arbitration.

The Ordinance was held by the Supreme Court of Palestine

(Haycraft, C.J. and Corrie, J.) to be ultra vires and void on grounds which are fully stated in their judgments. They considered it to be their duty to examine the provisions of the Ordinance in order to determine whether it contained anything which was in any way repugnant to the terms of the Mandate, and in particular to Article 2 of that instrument, which made the Mandatory responsible for "safeguarding the civil and religious rights of all the inhabitants of Palestine irrespective of race and religion"; and they held that the Ordinance did contain terms repugnant to that provision, and was therefore wholly void. Both the learned judges recognized that the article quoted could not have been intended to prohibit all interference with any of the civil rights of any inhabitant of Palestine as they existed at the date of the Mandate, for to attach that meaning to the article would (as Corrie, J. said) be to render most of the work of government impossible. But they interpreted the article as requiring that where in the interest of good government the Administration interfered with the antecedent rights of any inhabitant he should receive full compensation for such interference, this being, as the learned Chief Justice said, a "recognized principle of sound legislation." Having arrived at this interpretation of Article 2, they proceeded to inquire whether full compensation was in fact provided by the Ordinance for the water taken; and they held, upon grounds to be hereafter referred to, that it was not, and accordingly that the Ordinance was an infringement of Article 2, and was therefore ultra vires and void.

In their Lordships' opinion the Supreme Court was fully justified in entertaining an argument as to the validity of the Ordinance. The Ordinance was made under the authority of the Order-in-Council of May 4, 1923, and if and so far as it infringed the conditions of that Order-in-Council the local Court was entitled and indeed bound to treat it as void. Among those conditions was the stipulation that no Ordinance should be promulgated which was repugnant to or inconsistent with the provisions of the Mandate, and in view of this stipulation it was the right and duty of the Court to examine the terms of the Mandate and to consider whether the Ordinance was in any way repugnant to those terms.

But it appears to their Lordships that the construction put by the Supreme Court upon Article 2 of the Mandate is not justified by its terms. The article stipulated that the Mandatory shall be responsible for (among other things) "safeguarding the civil and

religious rights of all the inhabitants of Palestine irrespective of race and religion." This does not mean — as the Supreme Court recognized — that all the civil rights of every inhabitant of Palestine which existed at the date of the Mandate are to remain unaltered throughout its duration; for if that were to be a condition of the Mandatory's jurisdiction no effective legislation could be possible. Nor does it, in their Lordships' opinion, mean that in every case of expropriation for public purposes full compensation shall be paid. Their Lordships agree that in such a case, and in the absence of exceptional circumstances, justice requires that fair provision shall be made for compensation. But this depends, not upon any civil right, but (as the Chief Justice said) upon principles of sound legislation; and it cannot be the duty of the Court to examine (at the instance of any litigant) the legislative and administrative acts of the Administration, and to consider in every case whether they are in accordance with the view held by the Court as to the requirements of natural justice. In their Lordships' opinion the key to the true purpose and meaning of the sentence quoted from Article 2 of the Mandate is to be found in the concluding words of the article "irrespective of race and religion," and the purpose of the article is to secure that in fulfilling the duty which is incumbent upon every Government to safeguard the rights from time to time belonging to the inhabitants of the territory the Mandatory shall not discriminate in favour of persons of any one religion or race. There is no suggestion that any such discrimination is to be found in the Ordinance now under consideration.

But even assuming (contrary to their Lordships' opinion) that any legislation providing for the appropriation of property to public uses without proper compensation would be an infringement of the Mandate, and therefore of the Order-in-Council, it does not appear to their Lordships that the Urtas Springs Ordinance would be invalid on that ground. The view apparently taken by the learned judges of the Supreme Court was that the Ordinance was open to objection, (a) because any question as to the sufficiency of the supply of water left to the inhabitants for domestic uses and the watering of animals and permanent plantations is under Section 5 to be determined by an arbitrator and not by the Courts, (b) because no compensation is provided for any failure to give a sufficient supply for those purposes, and (c) because the compensation which is to be paid for damage to or loss of crops is to be assessed (on principles which the learned judges refer to as generous) by an arbitrator and not by a Court. In their Lord-

ships' view the Ordinance is not open to criticism on any of these grounds. As to (a) the right to sufficient water for the purposes mentioned in the proviso to Section 2 of the Ordinance was specifically reserved to the villagers; and it was fully competent to the High Commissioner in reserving this specific right of a somewhat special character to provide for the determination by a specially designed person of any difference which might arise as to the limits of the right.

As to (b) their Lordships think that there is a misapprehension. It is true that no compensation is provided for a breach of the proviso in Clause 2 of the Ordinance; but this is because a breach of that clause would be a wrong for which the persons aggrieved would be entitled to recover full damages in the local Courts. As to (c) there is no question of ousting the jurisdiction of the Court. A Court may award damages for a wrong, but cannot (unless expressly authorized by statute to do so) award compensation for a lawful expropriation; and when a right to compensation is given by statute, there can be no objection to the amount being determined in such manner as the statute may provide. No doubt an arbitrator, like everybody else, may go wrong; but it would be contrary to the universal practice to provide compensation for the contingency of an error being made by the assigned tribunal.

It is only necessary to add that, even if objection could be taken to the provisions of Section 5 of the Ordinance, it may be doubted whether that objection would of itself be sufficient to render invalid the Ordinance as a whole; but upon this point it is unnecessary for their Lordships to express a final opinion.

For these reasons their Lordships are of opinion that this Appeal should be allowed, and that the Order of the Supreme Court should be set aside and the petition dismissed, and that the respondents should pay the costs of those proceedings, including the costs of this Appeal; and they will humbly advise His Majesty accordingly.

Delivered the 16th day of February, 1926.

VENUE.

In the High Court of Justice.

H.C. No. 15/30.

BEFORE:

The Chief Justice and Baker, J.

IN THE APPLICATION OF:

Hamzah El-Tafran — PETITIONER.

vs

Mahmoud El-Mali — RESPONDENT.

Application for change of venue on the ground of enmity of one of the judges of the District Court — Objection to member of the Court — No jurisdiction in High Court where other remedy available — Article 62, Ottoman Code of Civil Procedure.

ORDER.

The Court holds that evidence of enmity towards Petitioner by one of the judges of the District Court at Haifa (Said Bey) has been brought and that as there is a remedy under Article 62 of the Civil Procedure Code, the rule must be discharged.

The Court, in view of the name not only of Said Bey but also—incidentally—of Ali eff Hasna having been mentioned, is of opinion that the District Court in Haifa should, if possible, be constituted by the President of the District Court and another judge (or acting judge) other than the two mentioned in this application.

Delivered the 8th day of April, 1930.

In the High Court of Justice.

H.C. No. 51/31.

BEFORE:

The Acting Chief Justice and Baker, J.

IN THE APPLICATION OF:

The Acting Attorney-General — PETITIONER.

vs

Jamal Kasim,
Dr. Sidki Malhas,
Sheikh Sabri Abdin — RESPONDENTS.

Application to change venue of preliminary investigation from Nablus to Jerusalem — Application based on grounds that disorder might result if hearing held in Nablus.

ORDER.

The Court after hearing the Government Advocate on behalf of the Attorney-General and Adel Eff. Zu'eitar on behalf of Respondents orders that the order nisi given on the 24th day of August, 1931, be made absolute.

Delivered the 27th day of August, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 13/32.

BEFORE:

Baker, J., Jarallah, J. and Frumkin, J.

IN THE CASE OF:

S. M. & E. David — APPELLANTS.

vs

Amin El-Abweh — RESPONDENT.

Jurisdiction to grant declaration of bankruptcy refused by District Court of Nablus—Debtor resident in Nablus although debt accrued in Amman.

JUDGMENT.

The Respondent has his place of residence in Nablus and accordingly can be sued there and a bankruptcy petition brought there.

The District Court was wrong in refusing jurisdiction in the case, and their judgment must be quashed and the case remitted for trial.

Costs to be costs in the cause.

Delivered the 12th day of May, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 32/32.

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

IN THE CASE OF:

Vester & Co. APPELLANT.

vs

Latifeh Ziadeh RESPONDENT.

Action brought where Defendant resident — Jurisdiction of Magistrate — Article 9, Ottoman Magistrates' Law, 1331 — Section 1, Magistrates' Courts Jurisdiction Ordinance, 1924.

Appeal from the judgment of the District Court of Haifa, dated the 19th day of November, 1932.

JUDGMENT.

It is clear that the Defendant Jermas Warwar was resident at Tiberias at the commencement of these proceedings.

The judgment given by the Magistrate's Court related solely to ownership of the car and did not declare that the attachment thereon was removed.

The value of the car was fixed at £P.100.

It follows that the judgment given by the Magistrate's Court was within its jurisdiction, as determined by Article 9 of the Magistrates' Law and Section 1 of the Magistrates' Courts Jurisdiction Ordinance, 1924.

The appeal is allowed, the judgment of the District Court is set aside and the judgment of the Magistrate's Court affirmed.

The Respondent will pay all costs here and below other than the costs ordered to be paid by the Appellant by virtue of the judgment of this Court dated 21st November, 1932.

Delivered the 6th day of February, 1933.

In the High Court of Justice.

H. C. No. 98/32.

BEFORE:

The Senior Puisne Judge, Khaldi, J. and Frumkin, J.

IN THE APPLICATION OF:

Sadeq Ahmad El-Basyouni
Ata 'Uthman Abu Omar — PETITIONERS.

vs

The Attorney-General — RESPONDENT.

Committal for perjury committed in trial before District Court — No objection in general to trial being held before Court which committed — Circumstances in which change of venue granted — Sec. 51, Trial Upon Information Ordinance, 1924.

ORDER.

Where a person is committed for trial under Section 51 of the Trial Upon Information Ordinance, 1924, upon a charge of committing perjury, there is, in general, no objection to the trial being held before the Court by which the order of committal was made, if that be the Court having jurisdiction to try such an offence.

In the present case, however, the Committing Court, the District Court of Jaffa, had stated in its judgment that it believes that the Petitioners have committed perjury before it.

In these circumstances, we order that the charge against the Petitioners of having committed perjury be heard and determined by the District Court of Jerusalem.

Delivered the 19th day of April, 1933.

In the High Court of Justice.

H.C. No. 67/33.

BEFORE:

The Chief Justice and Corrie, J.

IN THE APPLICATION OF:

Faris Muhammad Abu Khadijeh
Mustafa Muhammad Ghazal — PETITIONERS.

VS

The Attorney-General — RESPONDENT.

Application for change of venue of criminal case — Grounds for the grant of such application — Action remitted to trial Court without direction that case should be heard by Court differently constituted — Court of trial on remittal not obliged to re-hear evidence—Sec. 69 (1) (a), Trial Upon Information Ordinance, 1924.

JUDGMENT.

We see no reason to accede to the application. The Court of Criminal Appeal remitted the case to the Court of trial, on definite legal grounds, and made no direction, as has been done on former occasions, that the case should be heard by a Court differently constituted from that which sat at the former trial.

It should be noted, moreover, that under Section 69 (1) (a) of the Trial Upon Information Ordinance, 1924, the Court of Assize is not bound in the absence of a direction from the Court of Appeal to hear again the evidence already taken.

The application is therefore dismissed.

Delivered the 30th day of November, 1933.

WAQF.

In the Supreme Court sitting as a Court of Appeal.

L.A. of 1925.

BEFORE:

The Chief Justice, Jarallah, J. and Khayat, J.

Jurisdiction of Land Court in all land cases — Plea that land is waqf and not within jurisdiction of Land Court — Jurisdiction of Civil and Religious Courts with reference to questions of waqf.

JUDGMENT.

After scrutinising the matter it was found that on the 19th of April, 1924, it was decided by this Court in Land Case No. 14/23* before the issue of the Law of 1925 which deals with the jurisdiction of the Religious Courts and the Civil Courts, that the Land Court has the jurisdiction to decide in all the land cases whether the parties claimed that the land is waqf or did not claim that.

In this case, it was proved that the Land Court has forgotten the said judgment, therefore it was decided to return the documents of the case to the said Court in order to hear it from the very beginning.

Delivered the 14th day of November, 1925.

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* Mughli vs Qanadilo, reported ante, p. 1112.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 75/26.

BEFORE:

The Chief Justice, Seton, J. and Frumkin, J.

IN THE CASE OF:

Hayim ben Abraham
Shlomo Zonnenfeld
and Others — APPELLANTS.
Ex-Parte

Application to convert non-Moslem waqf into charitable trust — Application made under Section 2, Jurisdiction of Civil and Religious Courts Ordinance, 1925 — Competence of persons to make such application — Meaning of majority of the waqf appointed in the Waqf deed — Two surviving of four guardians a "majority"

JUDGMENT.

It is not intended by Section 2 of the Ordinance to restrict the powers conferred on those guardians only who were originally appointed, because we find guardians appointed by the Sharia Court before 23rd July, 1925, equally competent. We have to consider the meaning of the words "majority of the guardians of the Waqf appointed in the Waqf deed." This is the only class of persons, apart from one surviving dedicator who is also one of the guardians, we can find in existence competent to make application in this case under the Ordinance. The Appellants are the existing guardians appointed in the Waqf deed and one is also a dedicator. Are they disqualified from acting because they are two survivors out of four persons originally appointed, and would not represent a majority had all four been alive? We have no means of knowing whether the deceased guardians would have been in favour of making application. We can only look to the present guardians; they are the only guardians who can be considered and they are both appointed in the Waqf deed.

The Judgment of the District Court declaring these persons not competent to apply to the Civil Court must be set aside and an Order made in the terms of Section 2 declaring that the property shall be held in trust in accordance with the provisions of the Charitable Trusts Ordinance, 1924, as though the charitable endowment had been created in accordance therewith.

Delivered the 29th day of November, 1926.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 160/26.

BEFORE:
The Senior British Judge, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Asher King — APPELLANT.

vs

Rivka Baruchin
Dr. Baruch Baruchin
Solomon Baruchin — RESPONDENTS.

Non-moslem waqf constituted before a Moslem Religious Court prior to promulgation of Palestine Order-in-Council, 1922 — Jurisdiction of Civil Courts to hear actions or proceedings concerning constitution or validity of non-Moslem waqf — Arts. 38, 52, Palestine Order-in-Council, 1922—Sec. 3, Jurisdiction of Civil and Religious Courts Ordinance, 1925.

Appeal from the judgment of the Land Court of Jerusalem, dated the 13th day of October, 1926.

JUDGMENT.

Under the Palestine Order-in-Council, 1922, Articles 38 and 52 and the Jurisdiction of Civil and Religious Courts Ordinance, 1925, Section 3, the Civil Courts have jurisdiction to hear actions or other proceedings concerning the constitution or validity of a non-Moslem Waqf constituted before a Moslem Religious Court prior to the promulgation of the Order-in-Council.

The judgment of the Land Court is therefore set aside and the case remitted for the Appellant's action to be heard and judgment given.

Costs to be costs in the case.

Delivered in presence the 25th day of November, 1926.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 173/26.

BEFORE:

Corrie, J., Jarallah, J. and Daudi, J.

IN THE CASE OF:

Sheikh Sadek Haj Abdel Ghani Anabtawi, and Others — APPELLANTS.

vs

Fares Shaker Darwish Ahmad, and Others — RESPONDENTS.

Mulk property declared waqf for life of dedicator with remainder to children — Dedicator as first mutawalli — Sale of waqf land by registered owner to bona fide purchaser without notice of dedication— Waqf land inalienable if dedication registered in Land Registry — No estoppel against mutawalli of waqf — Arts. 1652, 1659, 1661 Mejelle — Period of limitation of actions re waqf.

JUDGMENT.

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

In December, 1301 (Financial), the house in respect of which the action is brought was registered in the name of Haj Ismail Shaker Darwish Ahmad.

In 1310 A. H. Haj Ismail declared the house, together with other property, to be Waqf for himself for life with the remainder to his children for their respective lives with remainder to the descendants of his male issue. The declaration of waqf was embodied in a judgment of the Sharia Court of Jaffa dated the 16th Zil Kida, 1310. The dedicator was the first Mutawalli of the waqf.

In 1320 A. H. Haj Ismail died.

In 1322 (8th Safar) as a result of proceedings taken by the heirs, judgment was given by the Sharia Court of Jaffa declaring the dedication as Waqf to be void, and ordering partition of the properties.

Under the partition made in pursuance of this judgment, the house now in dispute fell to the share of the dedicator's sons Shaker and Taufiq.

In 1320 (Financial) Shaker and Taufiq were registered as owners in the Land Registry as heirs of their father Haj Ismail.

In September, 1320, Shaker and Taufiq sold by registered transfer to Abdel Ghani and Abdel Karim, sons of Ibrahim Anabtawi.

In 1326 Shaker died and his son Faiz took proceedings before the Fatwa Khane to have the Sharia judgment of 1322 set aside. On the 16th Rajab, 1327, the Fatwa Khane reversed the judgment of 8th Safar, 1322, and declared the dedication as waqf to be good.

Other heirs of Haj Ismail also took proceedings to have the dedication of 1310 set aside. These proceedings were unsuccessful and the judgment of 1310 was confirmed by the Fatwa Khane on the 15th Ramadan, 1327, and by the Mejlis El-Tadkikat on the 30th Zil Kida, 1327.

In 1926 this action was brought in the Land Court of Nablus by the Respondents, who are the Mutawallis of the Waqf of Haj Ismail, against the Appellants, who are successors in title to Abdel Ghani and Abdel Karim, sons of Ibrahim Anabtawi, asking for a declaration that the dedication as Waqf was valid, and that the sale by Shaker and Taufiq was invalid to pass an interest in the property and for an order for possession.

It is not denied that the Appellants and their predecessors in title have been in possession since the date of the sale.

No note as to the dedication as Waqf was ever entered on the register.

The Land Court on the 30th November, 1926, held that the property in dispute was validly dedicated as waqf and hence was inalienable and that the purported sale by Shaker and Taufiq was a fraud on the purchasers, and gave judgment for the Respondents,

On appeal from this judgment, the Appellants argue that the Respondents Ahmad and Fares, who are the sons of Shaker, one of the vendors, are estopped from denying the validity of the sale in accordance with Articles 1652 and 1659 of the Mejelle. This point was taken in the Land Court which held that, while the Plaintiffs might be estopped if they were suing in their personal capacity, "no estoppel can arise against them in their representative capacity as Mutawallis of Waqf."

We hold that this view is correct and that the Respondents are not estopped from suing.

The Appellants have also asked us to hold that the dedication as Waqf was invalid. This point was also taken in the Land Court, which considered carefully the various objections to the validity of the dedication and held that they could not be sustained.

A further point has been taken on appeal which does not appear to have been raised in the Land Court. It has been argued that while it may have been the case that the property was Waqf and hence that Shaker and Taufiq had no right to sell, the purchasers Abdel Ghani and Abdel Karim Anabtawi having become registered as owners by transfer from persons who were themselves registered as Mulk owners; there being nothing on the title to suggest that the property was waqf and no evidence before the Court that the purchasers had notice of the dedication, they must be held to have acquired a valid title to the property.

We hold that this view is correct. To hold the contrary would imply that no purchaser of registered Mulk property could satisfy himself that he was obtaining a good title, however carefully he might investigate the entries in the Register and the facts as to possession. Until the period of limitation of thirty-six years prescribed by Article 1661 of the Mejelle had expired, his title might be set aside on proof that the property sold to him was Waqf by virtue of a dedication of which he had and could have no notice.

It follows that we have not to consider whether the dedication as Waqf was or was not valid.

The appeal must be allowed, the judgment of the Land Court set aside and the Respondents' action dismissed with costs. Advocates' fees and expenses £P.9.

Delivered the 5th day of April, 1925.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 3/29.

BEFORE:
The Senior Puisne Judge, Baker, J. and Jarallah, J.

IN THE CASE OF:
The Attorney-General,
Said Ahmad Khalil and Others — APPELLANTS.
vs
Yusef Hamzeh Muhammad Awadallah
and Others — RESPONDENTS.

Claim of ownership to land in Ain Karem — Intervention as third party by mutawalli of waqf — Claim that land is Waqf — Right of Attorney-General to be admitted as third party — Intervention as third parties by persons remotely affected — Plea that mutawalli's claim barred by prescription — Whether prescription runs against Charitable Waqf — Articles 1661, 1675, Mejelle discussed — Government of Palestine bound by acts of Ottoman Government.

Appeal from the judgment of the Land Court of Jerusalem, dated 29th day of November, 1928.

JUDGMENT.

The Respondent Yusef Hamzeh Muhammad brought an action in the Land Court of Jerusalem against the Respondents Suleiman and Khalil, sons of Ismail Shekhami, claiming ownership by purchase of a plot of land in the village of Ain Karem.

During the action the Mutawalli of the Waqf of Abu Median intervened as a third party claiming that the land in suit formed part of the Waqf. Subsequently the Attorney-General applied to be admitted as a party on the ground that the land was miri land. This application was refused. As between the original parties and the Waqf, the Land Court by a judgment dated the 12th April, 1926, declared the land to be Waqf of Abu Median.

On appeal this Court by judgment dated the 25th November, 1926, held that the Attorney-General was entitled to be admitted as a party and remitted the case to the Land Court for re-hearing accordingly.

In the course of further proceedings in the Land Court, Said Ahmed Khalil and Others also applied to be admitted as third

parties on the ground that, while they claimed no interest in the land in suit, the findings of the Court might affect the title to other land in Ain Karem in which they were interested.

The Land Court held that this was not sufficient ground for admitting them as parties and refused their application. Against this refusal these interveners have appealed.

The Court holds that their right of appeal ran from the date when their claim to intervene was rejected, and hence that their appeal is not made within the period prescribed by law, and must be dismissed.

As between the other parties to the action, the Land Court held that the land in suit was proved to be Waqf of Abu Median, and gave judgment accordingly.

Against this judgment the Attorney-General has appealed. No appeal has been made either by Yusef Hamzeh Muhammad or the sons of Ismail Shekhami, though the former has filed a reply to the Attorney-General's appeal.

The first point raised by the appeal of the Attorney-General is that the Mutawalli's claim is barred by prescription.

The question of prescription was dealt with at great length by the Judges of the Land Court who held that the Waqf of Abu Median is a Charitable Waqf and that "the provisions of Article 1675 of the Mejelle to the effect that prescription cannot run with regard to places of public interest included Charitable Waqfs."

The view taken by the Land Court seems to be open to considerable doubt, as the case would appear to fall within the provisions of Article 1661 of the Mejelle but it is unnecessary to decide this question having regard to the fact that in the year 1331 litigation took place between the Waqf and the Ottoman Government in the Sharia Court which resulted in a judgment declaring the village of Ain Karem to be Waqf. This judgment was served upon the representative of the Government who did not appeal.

It follows that, whatever may be the position as between the Waqf and persons who claim that the land is their mulk or miri property, as between the Waqf and the Attorney-General, the Waqf's action is not barred even if, contrary to the view of the Land Court, Article 1661 applies.

The second point in the Attorney-General's appeal is that no

survey of the land in suit was made, although during the course of the proceedings the Land Court ordered this to be done.

The argument, as we understand it, of the Attorney-General is this:— The judgment of the Land Court is founded upon the judgment already referred to given by the Sharia Court in 1331 declaring the whole of the village of Ain Karem to be Waqf.

Now, in 1922 the District Court heard an action brought by the Boneh Bait Society against the Waqf of Abu Median with regard to the ownership of land in Ain Karem, and gave judgment in favour of the Boneh Bait Society and declared that the Waqf had no claim whatsoever to the land. Against this judgment the Waqf has not appealed.

This judgment, therefore, establishes the fact that within the boundaries of Ain Karem there is one piece of land which is not Waqf, and the Attorney-General's argument would appear to be that, such being the case, it may also be the case that within the boundaries of Ain Karem there are other pieces of land which are not waqf and that the land in suit is one of them.

No evidence, however, has been submitted by the Attorney-General to establish these facts: and in the absence of such evidence, it is difficult to see how the argument can be sustained.

The appeal filed by the Attorney-General contained the further ground that the Sharia judgment, having been given by default and not having been executed within six months, has become void.

This point was not taken by the Solicitor-General in arguing the appeal, and the statement made by the Respondent that the judgment had been executed was not contested.

It follows that, as regards the land in suit, the Sharia judgment of 1331 must be held to be effective, and the Attorney-General's appeal must be dismissed.

Delivered the 31st day of December, 1931.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 3/30.

BEFORE:

Corrie, J., Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Muhammad Saleh Reyad — APPELLANT.

vs

Mamur Awqaf, Jaffa — RESPONDENT.

Judgment of Land Court involving title to Waqf land — Appeal against such judgment made by beneficiary and not by Mutawalli — Mutawalli as proper person to act on behalf of Waqf.

JUDGMENT.

The Mutawalli of the waqf of Muhammad Reyad has not appealed; and the judgment of the Land Court on the question of title and on the position of the boundary must, therefore, be regarded as final.

The only question for this Court is whether judgment should have been given against the Appellant or whether it should have been restricted to the Mutawalli. Having regard to the fact that the Appellant — as he admits — was in possession of the land in dispute and built the wall which gave rise to this action, we hold that the Land Court was right in giving judgment against him as well as against the Mutawalli.

The appeal is dismissed with costs, including £.2 advocate's fees and expenses.

Delivered the 13th day of May, 1931.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 38/30.

BEFORE:

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

IN THE CASE OF:

Sheikh Mahmud ed Dajani,
Sheikh Yusef Wafa ed Dajani,
as Mutawalli of Dajani Waqf — APPELLANTS.

vs

Shafiqah Abder Rahman es Sadiq,
Raqieh Abder Rahman es Sadiq,
Yusef Slonim,
Afif Ashur,
Daud Salem Mustafa ed Dik,
Husein Mustafa Ismail,
Aisheh bint Abder Rahman Saleh,
Mariam bint Mustafa es Saheli,
Khaled Salem Omar,
Haj Hamed Abu Laban,
Salem Mustafa Ismail,
Mahmud Shatarah,
The Attorney-General — RESPONDENTS.

Allegation that land of village is sahiha Waqf — Prescription of rights in sahiha Waqf land — Proof of establishment of waqf — Waqfia sanads and mazbatas as evidence — Prescription against Mutawalli of Waqf — Documents issued by Sultan and Imperial official documents held conclusive as evidence — Arts. 1661, 1667, 1737, Mejelle — Nature of various types of Waqf — Waqf for children "from generation to generation"—Art. 142, Laws of Waqf.

Appeal from the judgment of the Land Court of Jaffa, dated the 18th April, 1930.

JUDGMENT OF THE LAND COURT.

KERMACK, J.: The contention of the Plaintiffs is that the village of Mejdel Baba (or Sadik) is sahiha waqf as fully as any other sahiha waqf land. The Defendants and third parties maintain that it is miri mewqufe land of which the Plaintiffs are merely entitled to the tithes and fees, and also that even if it is sahiha Waqf, the rights of the Plaintiffs in this respect have been prescribed.

The learned member of the Court finds that it is a Waqf sahiha land but that this merely implies that the Waqf has right to take a share of the produce and to prevent the fellahin from transferring their right of cultivation without the consent of the Waqf. He further finds that the sahiha Waqf rights of the Plaintiffs have been prescribed.

The Waqf produce from their own archives a copy of a document dated 908 purporting to be a creation of a Waqf sahiha of two-thirds of Bidia village and of the whole of Mejdel by Jamal El Din Yusef on his sons successively. They also produce a document dated 981 purporting to record the fact that the Sultan Suliman made waqf the taxes of Mejdel in favour of Ahmad Dajani who appears to have been the same person as one of the sons of Jamal el Din mentioned in the previous waqfia. The author of this document further implies that the Sultan also confirmed the previous Waqfia, and alludes to a registration in the Daftar Hakania.

Two extracts from the Daftar Hakania at Constantinople were also produced at the last moment. The only relevant registration is one of "part of one third of the crops" of Mejdel in the name of the Jamal el Din Waqf, but the extracts also contain what the Plaintiffs state to be taken from the Remarks Column of the Daftar. These purport to record that the crops and fees are for the sons of Ahmad Dajani. These extracts are very obscure, and I am unable to construe them as a registration of the village of Mejdel in favour of the Plaintiffs. It is curious that the reference is to crops and not to the village, while the Waqfia is of the village. It is not possible to make out what relation is to be maintained between the Jamal el Din Waqf and the Ahmad Dajani Waqf, nor why, contrary to the first waqfia, Ahmad Dajani Waqf has acquired part of the crops and, contrary to the second waqfia. Jamal El Din Waqf has acquired part of the fees. If it is permissible to see how sense could be made out of these extracts from the Daftar Hakania, it will be found that they would have a consistent meaning in one way. This is by cutting out the words in the first "that the crops of the village referred to had been entered Waqf of the children of Sheikh Ahmad Dajani" and in the other "The crops of the said village show by the old register that they belong to waqf Sheikh Ahmad Dajani", i. e. if these passages are treated as interpolations the extracts more or loss make sense and would result in the Waqf being rehr sahiha, as the "part

of the third of the crops" would seem to refer to the portion of the Bet-el-Mal which the Sultan was in a position to dispose of.

It is admittedly necessary to see what the more recent history of the Waqf has been. The most important occurrence was the Yoklama registration of the village in 1291. It was at first suggested that this was a purely arbitrary act on the part of the Government and the cultivators in fraud of the Waqf. This somewhat fantastic suggestion is devoid of any support and is contradicted by the facts that Mohamed Sadik the agent of the Waqf in the village took part in it, that the Daftar Hakania issued kushans on the strength of it, that numerous transactions, amounting we are told, to two thirds of the village, in addition to successions, took place on the strength of it in the Daimi Register. We are agreed that the registration represents the true position at the time.

It is at this point that the learned member and I are not in agreement. His view, as I understand it, is that it was quite competent to register a village in the name of the cultivators although it was Waqf sahiha, in respect that they had a right of cultivation and that this was what was done in this case. I can find no authority for this proposition. A waqf sahiha, I understand, is one which except in the case of Ijaraten, was let in theory from year to year, although in practice the same families might remain for generations. If this is correct, any registration in the name of merely yearly tenants would be contrary to the very basis of such a Waqf. On the other hand it is the common and proper procedure to enter the name of the Takhsisat Waqf affecting the lands in the register. It is important to note that waqf of entire villages is almost or entirely absent in Palestine. It further appears that the Waqf Department credited Ahmad Dajani Waqf with a proportion of the transfer fees, and if, as may be supposed, the Waqf received these, it was formally acquainted with the fact of transfers taking place. Haj Yusef Eff. Wafa, the Mutawalli, further admits that he was aware of the fellahin building and planting bayaras and took no action. It can only be supposed that he took no action because he knew of no right he had to do so. In addition the admission of Mohamed Sadik is as to his taking merely the iltiwam or tax farming of the village from the Waqf and not a lease of the village.

Less importance is to be attached to the verbal evidence on both sides as to possession, some of which is clearly fabricated,

but on the whole it supports the contention that the tithe was all that the Waqf ever got.

Practically no weight is to be attached to the various mazbatas recently taken from some of the villagers, principally to prepare the way for this case. Even the nominal and substantially collusive Defendant in the case Abdul Hadi Eff. in his evidence contradicts practically what he theoretically admits to the Plaintiffs. This theoretical admission is, however, sufficient to conclude the case against him personally.

On those facts I hold that the waqf is a Takhsisat one. If I were wrong in this conclusion, I would hold with the learned member that the alleged sahiha Waqf had been prescribed.

The Court therefore dismisses the claim of the Plaintiff except as regards Abdel Hadi in the terms of the formal judgment.

JUDGE: On careful consideration of the case raised by Sheikh Ragheb Dajany, Abcarius and Faiz Haddad, Attorneys of Plaintiffs Haj Yusef Wafa Dajany and Sheikh Mahmoud Dajani, in their capacity as mutawallis of waqf of their grandfather Sheikh Ahmad Dajani, raised against Defendants Abdel Hadi Eff. and sisters Shafika and Rakieh, and Yusef Slonil and Afif Ashour, and the Third Parties who entered and who are Daoud Salem Mustafa and Abdel Kader Suleiman and Salem Mustafa Ismail and others represented by Advocates Abdel Latif Salah, Aref Imam and Ragheb Imam and Mohamed Kanaan and the Government, the village of Mejdel Baba known as Mejdel Sadik are Waqf sahiha made waqf on his grandfather from his ancestors including all buildings, trees and lands and all its whereabouts in accordance with a kitab Waqf, and whereas one of them Sheikh Mahmud Eff, was appointed mutawalli of said Waqf recently since 1924 and that their principal was informed through Mamur Waqf, Jaffa that certain farmers of said village has made in year 1326 Tabu Kushans for right of transfer on a certain piece of land area of which is 8 dunams known as the land of Saghat El Wad and that in year 1329 mortgaged same in name of Yusef Slonil for sum of £.100 and then attachment was made on same in favour of Afif Ibn Badawi Ashur and tried to have a second mortgage but this second mortgage was stayed in accordance with a note from Mamur Awqaf, Jaffa since 15 days and called the persons upon whom the land was registered and mortgagees and they applied for judgment to cancel the Tabu Registration which was made illegally together with the mortgage which was made on same registration which was also

invalid with order to stop the transaction of mortgage about to be made with costs.

It has been noted from the evidence given in Court by both parties and from the documents produced and registration of Tabu that the circumstances of case are as follows:—

1. The Plaintiffs have produced a Waqfia sanad registered in Sharia Court by the attorney of Waqf then known as Sheikh Ali Abu Huisir in year 908 (A.H.) enacting that all the village is waqf of Mejdel Baba which has been made Waqf by Sheikh Jamal el Din Yusef, Shams el Din Ali and his son Mohamed Hassan Yasini and then to his son Ali el Din Ali and then to his son Shehab el Din Ahmad and this Waqfia deed is registered in the Ministry of Waqfs, Constantinople, as well as in the Sharia Registry given and the Plaintiffs have produced certified copies of same confirming the said registration upon which Ex. 1 is marked.

2. They also produced copy of Waqfia dated 981 made in Sharia Court enacting that Sultan Suleiman has made Waqf all the resum together with the resum of marriages and others of the village of Mejdel Baba made waqf on sons of Sheikh Ahmad Dajani then registered in Sharia Court, Jerusalem, by Ahmad Bek, Clerk of Vilayet of Jerusalem in accordance with orders of the Sultan of Constantinople.

And this Waqfia also is registered in the Ministry of Waqfs at Constantinople and in the official registry in Constantinople and the Naib Malek admitted it and the village of Mejdel Baba is waqf and its fees have been made waqf in accordance with the order of Sultan, and that this Waqfia was made and registered after a lapse of 73 years on Waqf of said Sheikh Ahmad or his sons. The waqfia marked Ex. 2.

3. The Plaintiffs have also produced registration from Daftar Hakania of Constantinople in name of Waqf Jamal El Din Yusef on his sons which says that one third of products of barley and corn and summer products and others and resum of sheep and bees 900 Akaha and mentioned on said old register that its products is Waqf on sons of Sheikh Ahmad Dajani and that its resum are made waqf by an honorable order and that the one-third of products together with resum should be to Waqf of Sheikh Ahmad Dajani. This document is marked Ex. 10. This document is clearly obvious that the village is made Waqf by Sheikh Jamal El Din on his sons and that Sultan Suleiman has made its resum waqf (sheep and bees and others) on sons of Sheikh Ahmad Dajani

and that it is after, since the date of the registration of the originial Waqfia. It is noticed from these documents that Sheikh Jamal El Din has made Waqf the village of Mejdel Baba before Turkish Occupation and was confirmed by Sultan Suleiman after occupation and has made the resum Waqf also on sons of Ahmad Dajani who was then living.

4. The Plaintiffs further produced a lease contract made by the mutawallis of Sheikh Ahmad Dajani's Waqf to a person known as Mohamed Sadek dated Sha'aban 1350 in presence of Sharia Kadi in Jerusalem and approved by him and same was given judgment for enacting that the said village and Bidia and Jequn El Khem to be leased for a term of 27 years for sum of P.T.1600 each year including the resum and fees and this Ilam is not marked by the Court.

5. The Plaintiffs have also produced deed dated March, 1295, given by the Mutawallis of Sheikh Dajani's Waqf to Mohamed Sadiq in which authority is given to collect what they possess in the products of all the village of Mejdel together with land of Jazairku Waqf of their grandfather Sheikh Ahmad for two years commencing from March, 1290, for amount of 180 Napoleons a year, and this document is marked by Court Exhibit 5.

6. The Plaintiffs also produce another document signed by Mohamed Sadik relating that as per his tax farming of the share of the Mutawallis and of the Waqf of Sheikh Ahmad Dajani for 8 years commencing from March, 1290 to February, 1303, for a sum of 1200 Napoleons for each year 150 Napoleons. This document marked Exhibit 6.

When orders were given by Turkish Government for the registration of all the villages situated on the Turkish domains by the Ministry of Tabou orders were given also for the registration of the Yoklama in the villages which were made Waqf through the knowledge of the officials of the Waqf. The registration of village of Mejdel Baba was made through the knowledge of the wakil Waqf Mohamed Sadik and the Mukhtars and a registration was made and every plot of said village was registered in the names of the possessors who were at that time farming and ploughing the lands and this Yoklama took place in year 1292, and this registration was submitted to the office of the Waqf and therefore sanadat Waqfia was given to all these possessors of lands in which it states their possession 10 years as well it says that said village with all its surroundings is Waqf of Sheikh Ahmad Dajani

attached to Imperial Ministry of Waqfs. The Court has seen the said Yoklama registration and also it has seen the kushans given at that time upon which is written sanad Waqf, and whereas the Turkish Government saw it necessary at that time to write the registration of the villages and lands which were Amiria and Mewqufa and gave orders to all officials of the waqf necessitating that all registers and offlcial records of the villages and the lands which are Waqf be handed over to Tabou and this was duly given over as seen from the Registry produced (copy) to the Court.

Since that date the Tabu commenced issuing official deeds other than the Waqf deeds to the persons upon whom the village of Mejdel are registered. It is also noted on the same sanad that it is waqf on sons of Sheikh Ahmad Dajani and a share used to be given from the transactions to the Tabu to be distributed to those who are entitled to the Waqf.

All documents mentioned above clearly show that the village of Mejdel Baba is Waqf Sahiha made Waqf by its owner Sheikh Jamal El Din and was made Waqf before the Turkish Occupation as seen from the dates mentioned in the Waqfia and was confirmed by Sultan Suleiman after occupation who has also made the resum as Waqf on the sons of the original man who made it Waqf, thus in this way two kinds of Waqf are combined namely Waqf Sahiha and Waqf Takhsisat, and it is legally authorized to combine two waqfs as stated in Article 139 of the Waqf Law.

These documents produced is hujjaj registration and Imperial official documents and Sultan's orders which should be dealt with as per Article 1937 of the Mejelle and preceding Articles.

This is from the point of view of the Waqf. I am confident it is waqf sahiha.

But as regards prescription, a period of 36 years has elapsed and the Mutawallis of said Waqf did not share the products mentioned in the Waqf Imperial registration, for the reason of their being divided among themselves and other reasons. It has been noticed from the registration of the Waqf that the beneficiaries of the said Waqf used to receive the tenth which used to be collected through the Maliye and to be handed over to the Waqf Department which Department used to distribute it to beneficiaries proportionately and no lease was made by the Mutawallis to the persons in possession of the lands of the said village for a period of 36 years.

And whereas the appointment of Mutawallis was continuous without being disturbed, and whereas during this period they did not object to those who are in possession of the land and did not take from them rent neither the one-third of the products of barley and corn and summer products, and whereas each beneficiary had the right to sue the possessors at that time and they had no excuse for not doing so, therefore the claim which says Sheikh Mahmud Eff. was not mutawalli of the Waqf but since a short period and that the waqf is morateb is not admissible, and legally dismissed.

And whereas the mutawallis and all the beneficiaries contented themselves by receiving the one-tenth which is collected by the Maliye and distributed among them by the Waqf Department and having not asked their shares in the products and being themselves satisfied with the Takhsisat have waived the hearing of their case, and whereas the witnesses produced by both parties as to Tasarruf and Ajara the Court is not convinced of it.

And whereas the one-tenth received by the Government and distributed among them is of Takhsisat Waqf nature of Sultan Suleiman and not of one-third products;

And whereas one of the Defendants Abdel Hadi Eff. admitted in Court that lands of Mejdel Baba is Waqf sahiha and that his testator used to lease all the village and to rent it to possessors, therefore it has been decided to admit the case of Plaintiff in respect of the man who admitted who is Abdel Hadi Eff. and that the lands under his possession is Waqf sahiha and to annul the kushans possessed by him in his name and to dismiss the case of Plaintiff in spite of my belief that it is Waqf sahiha in respect of the rest of the Defendants and 3rd parties with costs and £.20 advocates' fees for advocates of Defendants and 3rd Parties.

JUDGMENT.

This is an appeal against a judgment of the Land Court of Jaffa in an action brought by the Appellants as Mutawallis of a Waqf dedicated in the year 908 A. H. by Sheikh Jamal ed Din Yusef Muhammad el Yasini, against the Respondents who are inhabitants of the village of Mejdal Baba otherwise Majdal Sadek, claiming that certain lands of the village are included in the dedication and are Waqf Sahih.

The Land Court dismissed the Appellants' action on the

ground that it was barred by lapse of time under Article 1661 of the Mejelle.

The ground of this appeal is that the Waqf is moratab, a Waqf for children "from generation to generation" within Article 1667 of the Mejelle and Article 142 of the Laws of Waqf edited by Omar Hilmi Effendi; that is to say, it is a Waqf in which descendants of the dedicator of one generation have no right to participate while any descendants of the preceding generation are still alive.

The Respondents deny that such is the true interpretation of the Waqfia; and in support of their contention they allege that the two Mutawallis by whom this action was brought belong to different generations of the dedicator's descendants. On this point, however, there is no evidence before the Court.

The Appellants are asking that, if this Court is not satisfied that the Waqf is moratab, the case should be sent back to the Land Court to hear evidence as to the interpretation given to the limitations of the Waqfia by Sharia Law.

It is, however, clear that the claim that the Waqf is moratab was made in the lower Court, and was not accepted by the Court.

Further, it was alleged in that Court, and was not denied, that three of the witnesses who gave evidence for the Appellants were uncles of one of the Appellants, who if the Waqf were moratab, would thus not be a beneficiary in the Waqf and hence not qualified to be a Mutawalli.

The Appellants had the opportunity of adducing evidence to disprove this allegation and to show that the Waqf was moratab, if they were in a position to do so.

The limitations of the Waqfia are as follows:—

> "..... to his son Muhammad el Hussein el Yasini, then to his son Ali ed Din Ali, then to his son Sheikh Shehab ed Din Ahmed and to his male children and descendants for ever. Should they vanish then to the descendants of his brother Hassan, then to his children and descendants. Should these vanish then to the two sacred Mosques....."

In the absence of evidence as to any special meaning which Sharia Law would give to these limitations and applying the ordinary rules of construction, there is nothing which suggests that one generation of the descendants of Sheikh Shehab ed Din

Ahmad or of his brother Hassan were to benefit to the exclusion of the next generation.

We hold, therefore, that there is no ground for remitting the case to the Land Court and that the appeal must be dismissed with costs including £P.2 advocate's fees.

Delivered the 30th day of March, 1933.

In the High Court of Justice.

H. C. No. 29/31.

BEFORE:

The Acting Chief Justice and Frumkin, J.

IN THE APPLICATION OF:

Yehoshua Hankin — PETITIONER.

vs

The Chief Execution Officer, Jaffa,
Ahmed Salahi
Abdel Kader Salahi
Mohammed Salahi — RESPONDENTS.

Debt due from beneficiary of Waqf to Waqf or to beneficiary — Mutawalli not entitled to retain share of beneficiary to satisfy such debt — Attachment by creditor of share of beneficiary.

Application for an order to issue to the Chief Execution Officer in the District Court of Jaffa directing him to show cause why his order dated 29.1.31 in Execution Files No. 3353/30 and No. 3389/30 should not be set aside.

ORDER.

We know of no authority for the view that the Mutawalli of a Waqf is entitled to retain the share of a beneficiary in satisfaction of a debt due either to the Waqf or to the Mutawalli personally in priority to a creditor who has levied an attachment on such share, whether such attachment be provisional or otherwise.

The Order Nisi will be made absolute. Costs will be paid by the Respondents including £P.4 advocate's fees and expenses.

Delivered the 20th day of July, 1931.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 70/32.

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

IN THE CASE OF:

Sa'dat Kamel Hanum,
as Mutawalli of the
Waqf of Ali Pasha and
as Beneficiary thereof — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Application by Mutawalli of Waqf of Ali Pasha for a declaration that certain property belongs to Waqf — Plea of prescription — Evidence of witnesses to support such application not admitted — Waqf limited in favour of children from generation to generation — Application of Article 1667, Mejelle — Limitation of actions re Waqf — Articles 1661 and 1667 of Mejelle not inconsistent.

JUDGMENT.

This is an appeal against a judgment of the Land Court of Haifa in an action whereby the Appellant, Sa'dat Kamel Hanum, as Mutawalli of the Waqf of Ali Pasha, and as beneficiary thereof, claimed a declaration as against the Respondent, the Government of Palestine, that two buildings at Acre, known as the Kishleh and the Deboya were the property of the Waqf.

The Respondent raised the defence that the Appellant's action was barred by lapse of time.

Upon this question the learned Judges of the Land Court were divided in opinion, and the action was dismissed.

With regard to the Deboya, the Court was, however, unanimous that the action must be dismissed in view of the fact that the Appellant's case rested solely upon the evidence of witnesses, which the Court held was not admissible.

With regard to the question of prescription, the Appellant does not deny that if Article 1667 of the Mejelle is not applicable, her action is barred. She maintains, however, that the Waqf of which she is Mutawalli, is a Waqf limited in favour of children from generation to generation to which the second example given

under Article 1667 applies. In support of this claim the Appellant has quoted the limitations of the Waqf which direct that, subject to the provision of the expenses of El-Majadleh Mosque at Acre and of the drinking fountain, outside the town, the income shall be paid to:—

> "the Dedicator during his life, and then after his death, it shall be for his present children, namely, Abdallah Bey Salhashoor Khassa, Miriam Khanim and her sister Hanifeh Khanim, and for the children whom God will give to him (the Dedicator). Then, after them, it shall be for their children, then to their grandchildren and then to their great-grandchildren, etc., and so on, males and females, according to the Sharia distribution, namely, the share of a male shall be twice as much as that of a female and for their descendants after them as long as they live and continually as they generate, provided that any one of them who dies leaving after him a child, or a grandchild or a great-grandchild, his share shall pass down to his child or grandchild or great-grandchild. When one of them dies leaving after him no child, or a grandchild or a great-grandchild, then his share shall pass down to those who are of this category. The upper category (ascendants) shall enjoy it before the lower category (descendants) and the parents shall enjoy it before the children, but not before the children of other beneficiaries. When one of them dies leaving after him a child, or a grandchild or a great-grandchild, before becoming a beneficiary to anything in the Waqf, then this child, or grandchild, or great-grandchild shall become beneficiaries to the share of their father, as if he were alive."

The Appellant maintains that these limitations constitute a Waqf from generation to generation, having regard to the provision that parents shall enjoy the income before their children.

In determining, however, whether Article 1667 is applicable, we must take into account the exact terms of the example given in the article, upon which the Appellant relies.

The example reads (I refer to Judge Hooper's translation):—

> "An action is brought in regard to property dedicated to pious purposes limited to children from generation to generation. The period for limitation in respect to an action brought by children of the second generation begins to run

as from the date of the extinction of the children of the first generation, since the children of the second generation have no right to bring an action while the children of the first generation are alive."

In the present case, it is true that it is provided that "the parents shall enjoy it before the children," but the limitation continues, "but not before the children of other beneficiaries," and the limitations go on to provide that the issue of a child who dies before becoming a beneficiary shall take his ancestor's share. Thus, for example, if a person in enjoyment of a share in the income of the Waqf was to die leaving as sole issue a son, the son of a deceased son, and the grandson of another deceased son, such son, grandson and great-grandson would, under the limitation of the Waqfia, each take one-third of the share of their deceased ancestor. It follows that it is not the case in the Waqf under consideration that the "children of the second generation have no right to bring an action while the children of the first generation are alive."

We, therefore, hold that Article 1667 of the Mejelle does not apply in the present case, and that the appeal must be dismissed on the ground that the action is barred by lapse of time.

It follows that we need not consider the question of evidence affecting the claim to the Deboya nor the question which is not mentioned in the judgment of the Land Court but has been referred to by the Respondent in the proceedings before this Court, namely, whether the Respondent is in possession of the properties to which the Appellant's claim relates.

There is, however, one question arising on the judgment of the Land Court to which reference should be made. The Land Court appear to have taken the view that the provisions of Articles 1661 and 1667 of the Mejelle are irreconcilable. This is a view which we cannot accept, and we hold that there is no inconsistency between the two Articles. Article 1661 fixes the period of limitation in respect of all Waqfs at 36 years. Article 1667 does not deal with the length of the period of limitation, but with the date from which such period begins to run, in the case of Waqfs of a particular nature.

The appeal must be dismissed with costs.

Delivered the 30th day of November, 1933.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 136/32.

BEFORE:

The Acting Chief Justice, Frumkin, J. and Khayat. J.

IN THE CASE OF:

Salahi and Others — APPELLANTS.

vs

Salahi and Others
Haj Yusef Wafa Dajani — RESPONDENTS.

Action brought against Mutawallis of Waqf — Resignation of Mutawallis after first hearing — Personal liability of Mutawalli towards beneficiary — Application to amend claim against Defendants by naming new Defendants refused.

JUDGMENT.

The Appellants brought an action against the Respondents and Haj Yusef Wafa Dajani as Mutawallis of the Anabulsi Waqf. After the first hearing but before judgment the Respondents ceased to be Mutawallis of the Waqf.

The Appellants then applied to amend their statement of claim and to sue Respondents in their personal capacity. They rely upon the judgment of the Court in Budeiri vs Budeiri (C.A. 144/32).

In that case, however, the claim was framed against the Defendant in a personal capacity and not as Mutawalli and the Plaintiff was thus entitled to continue his action although the Defendant had ceased to be Mutawalli of the Waqf from which the sum claimed arose; the Plaintiff alleging that the Defendant had retained in his own hands the amount claimed.

The present case is clearly distinguishable; and the Appellants having sued the Respondents as Mutawallis are not now entitled to amend their claim so as to continue the action against the Respondents in their personal capacity.

WILLS.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 111/24.

BEFORE:

The Acting Chief Justice, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Jamileh, Wardeh, Labibeh
daughters of Butros Hanna
Waness Tabarani — APPELLANTS.

vs

Georgi Hanna Waness Tabarani
Samaan Ibn Hanna Asfur — RESPONDENTS.

Succession to mulk immovable property of member of Melchite Community — Validity of written will executed in presence of priest and mukhtar — Disposition by will to wife and after her death to other persons — Action between heirs not barred by prescription — Question as to validity of will in form to be decided by Court of Religious Community — Jurisdiction of Land Court to decide whether will valid in form and disposing of land can be executed in accordance with law — Validity of will in favour of only some of the heirs to the exclusion of others — Law applied in Religious Courts of Ottoman Empire.

Appeal from the judgment of the Land Court of Haifa, dated the 6th day of June, 1924.

JUDGMENT OF THE ACTING CHIEF JUSTICE.

This appeal concerns the mulk immovable property passing on the death of Hanna Butros Tabarani, a member of the Melchite Community, who died in January, 1909. (Dil Hijjah, 1326).

On the 21st day of December, 1908, the deceased executed a document in the nature of a will in the presence of witnesses, whereby he gave his house at Haifa to his wife for her life, and after her death to his three daughters in equal shares. The wife Khazna continued to occupy the house until her death in 1923.

After her death this action was commenced by Georgi the brother of the testator, and Samaan the brother of Khazna claiming shares in the property as heirs of the testator and Khazna respectively.

In the Land Court, the Appellants, who are the three daughters of the testator failed to appear and judgment was given by default in favour of the Plaintiffs, who are the Respondents in this appeal.

On appeal, this Court has held that as the action is between heirs, it is not barred by lapse of time.

The Appellants are asking the Court to hold that the document executed by their father is a valid will and enforceable against the other heirs.

The document was executed in the presence of a priest and the Mukhtar of the Melchite Community and was confirmed by an Archimandrite on the 21st day of March, 1909, and is registered in the books of the Community.

On the 29th August, 1923, after this action had been started, the will was confirmed by Archbishop Hajjar the head of the Melchite Community in Palestine.

It is beyond dispute that the question whether or not the will is valid in form, was one to be decided by the Court of the Religious Community, of which the testator was a member. Hence if the Respondents object to the will on the ground of informality, such objection must be made in the Court of the Religious Community.

The question which Court had jurisdiction in 1909 to decide whether a will of a Melchite valid in form was to be executed or not, might be one of considerable difficulty. In the present case however it does not arise.

In so far as title to land is at issue, the only Court which had jurisdiction in 1923 when this action was commenced was the Land Court.

Provided therefore that the will is not invalidated by action in the Religious Court on the ground of informality, it is for the Land Court to decide whether the will can be executed in accordance with the law in force at the date of death of the testator. The Court must ascertain whether there was at that date any law applying to a member of the Melchite Community restricting his power of testamentary disposition.

It has been argued before this Court, that the Sharia rules of testamentary disposition were applicable to all Ottoman subjects and hence that as the will is in favour of some of the heirs to

the exclusion of the remainder it is invalid, unless accepted by the excluded heirs.

I hold that the onus of proving that this rule did not apply to a member of the Melchite Community is upon the Appellants.

If the Appellants are successful in proving that this rule does not apply, the Court must ascertain whether there were any rules of the Melchite Community restricting the power of testamentary disposition. The judgment is set aside and the case remitted. Costs to follow the event.

Delivered in presence of Respondents, and in absence of Appellants the 1st day of April, 1926.

JUDGMENT OF MR. JUSTICE FRUMKIN.

When it comes to the question of jurisdiction of a certain Court in matters of wills, the Ottoman Law knows of no distinction between the validity of a will in form and the validity in law, i.e. whether or not it could be executed. Either a Court has no jurisdiction in matters of wills and could then not deal with any dispute or objection relating to it, or it had jurisdiction and would then go into all the particulars of the matter, and decide all points in issue according to the law applicable in such Court. It is an admitted fact that the Religious Courts in the Ottoman Empire applied the national-religious law of their community in all matters within their jurisdiction. No religious Court would declare a will to be good in form if it was invalid under the law to be applied by it.

It is beyond dispute that the question whether or not a will is valid in form was a cause to be decided by the Court of the Religious Community of which the testator was a member. It could not be disputed that such decision would not at the same time settle the question of the validity of the will altogether, including the point whether or not such will could be executed.

Any objection as to the validity of the will in dispute in this case is therefore to be brought before the Religious Court of the Community of the testator and unless after trial such objection will be accepted, and the will declared to be invalid by the Religious Court, the Land Court will have to order execution of the will.

Judgment of the Land Court is set aside, and the case remitted.

JUDGMENT OF MR. JUSTICE KHAYAT.

The Land Court by interfering in its judgment with the question of authenticity of the will and declaring that same is not a good will has exceeded its jurisdiction. It was the duty of the Land Court to call upon the Plaintiff to obtain a decree from the competent Court as to the invalidity of the will and give them the necessary delay. When such a decree has been obtained judgment may be given for their interest in the property in suit.

The judgment of the Land Court is therefore set aside, and papers remitted for the necessary action to be taken.

'Delivered in presence of Respondents, and in absence of Appellants the 1st day of April, 1926.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 26/27.

BEFORE:

The Chief Justice, Corrie, J. and Khayat, J.

IN THE CASE OF:

Samuel Webber
Joseph Deutche
Isaac Yaffe — APPELLANTS.

vs

Jacob Homa — RESPONDENT.

Validity of document purporting to be will — Probate of will not executed and attested in accordance with the requirements of the Succession Ordinance, 1923 — Interpretation of unambiguous documents — Revocation of former will.

JUDGMENT.

This is an appeal from the judgment dated the 30th December, 1926, of Judge Webb, Acting President of the District Court, Jerusalem, whereby he declared a document dated the 31st March, 1926, and entitled "Minute" to be the true last will of the testatrix Mrs. Ghayeneh Rachel Raby and decreed probate thereof to the Respondent Jacob Homa as executor.

The facts are somewhat curious:

On the same date but a few hours earlier, Mrs. Raby had executed a document headed "the last will of Mrs. Ghayeneh Rachel Raby," whereby she appointed the third party Rabbi Abraham Shorr to be executor thereof. After the death of Mrs. Raby, Rabbi Shorr propounded the will for probate. The application was dismissed by Judge Baker, President of the District Court, on the ground that the testatrix had made a subsequent will, namely the document dated the 31st March, 1926, and headed "Minute," which was in fact the last will of the deceased and that she thereby appointed Mr. Jacob Homa, the executor thereof, according to the tenor and that he was the proper person to whom probate should be granted and the said document was the proper document of which the Court should grant probate.

The Respondent Homa then propounded the Minute and probate thereof was granted to him.

Both in the District Court and in this Court the Appellants have argued that the Minute is not the last will of the deceased because

(a) it is not executed and attested in accordance with the requirements of the Succession Ordinance, 1923, and

(b) it is not intended to take effect on death but is a power of attorney taking effect upon execution.

With regard to the first objection we see no ground for questioning the finding of the Court below.

With regard to the second objection, reference should be made to the grounds upon which the President of the District Court based his judgment. He says: "It is the duty of the Court to carry out the intention of the testatrix if that can be discovered and the evidence of Dr. Danziger satisfies me that her intention was to revoke the will by which she had appointed Rabbi Abraham Shorr executor and to substitute Mr. Homa for him."

From the wording of the Minute itself it appears that Mrs. Raby intended to nullify the effect of the will of which she had appointed Rabbi Shorr executor, but it is not clear that she intended to revoke that will. Had that been her intention, the natural method of giving effect to it would have been by inserting in the Minute an express revocation.

In deciding what the effect of the Minute is, we do not think the Court is entitled to go outside the document itself unless there are ambiguities in it, and the meaning of the Minute seems to us to be free from any ambiguity. Whatever the intention of Mrs. Raby may have been, the powers conferred upon Mr. Homa were conferred upon him from the instant when the document was signed. Under the terms of the Minute it was his duty, and it would still be his duty if Mrs. Raby were now living and the Minute unrevoked, "to claim and collect from any person or any institution" all money belonging to her and to dispose of it as directed by the Minute.

We hold, therefore, that the Minute is a power of attorney and is not the last will of Mrs. Raby and the grant of probate thereof to the Respondent Homa must be revoked.

We have not in this appeal to deal with the question whether the revocation contained in Clause (a) of the Minute is operative, or whether the powers thereby conferred upon Mr. Homa are revoked upon Mrs. Raby's death, nor have we been asked to pronounce in favour of the will of which Rabbi Shorr was appointed executor.

The question of costs gives rise to some difficulty. Rabbi Shorr is clearly entitled to his costs out of the estate, but the position of the Appellants is different. On the face of it the effect of this judgment is to remove the only objection to a grant of probate to Rabbi Shorr, and if such grant is made, it would appear that by virtue of Clause (4) of the will of which he is appointed executor, the moneys and the property handed by Mrs. Raby to the Appellants become the property of the Jewish Aged Home.

It is therefore difficult to see how at this stage the Appellants have any interest in setting aside the judgment now under appeal. If they succeed in opposing the grant of probate to Rabbi Shorr the question of their costs may properly arise. In this appeal they are not entitled to costs.

Delivered the 16th day of December, 1927.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 85/28.

BEFORE:
The Acting Senior British Judge, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Nachum Ratzkovsky — APPELLANT.

vs

Mrs. Leontine Ratzkovsky — RESPONDENT.

Validity of will made in civil form under the Succession Ordinance, 1923 — Validity of will of foreigner made in Palestine — Law to be applied in distribution of estate of foreigner—Jurisdiction of Courts re matters of personal status — Sec. 2 (c) (ii), Succession Ordinance, 1923 — Article 64, Palestine Order-in-Council, 1922— Articles 913, 1025, French Civil Code applied.

Appeal from the judgment of the District Court of Jaffa, dated the 3rd day of May, 1928.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa deciding that:

1. By virtue of Section 4, para (c) Sub-Section (ii) (Bentwich page 352) of the Succession Ordinance, 1923, the will being in civil form must be held valid in form even though by French Law it might not be valid and that

2. The validity of the dispositions contained in the will of a domiciled Frenchman must be determined by reference to the National law of the deceased.

The Court then proceeded to order the distribution of the deceased's estate in accordance with Article 913 of the French Civil Code with the exception of miri property and to receive the will in accordance with the above mentioned Article of the French Code also to appoint an administrator to carry out the order of the Court.

Appellant submitted that deceased could make a will according to the law of Palestine and that French National Law did not apply.

The law however, is quite clear in my opinion on this point. Article 64 of the Order-in-Council prescribes, inter alia, that

matters of personal status shall be decided by the District Court which shall apply the personal law of the parties concerned in accordance with such regulations as may be made by the High Commissioner. The personal Law shall be the law of the Nationality of the foreigner concerned unless the law imports the law of his domicile, in which case the latter shall be applied.

It was argued that by virtue of Section 4 para (c) of the Succession Ordinance the will, having been made in civil form, and all it contained should be held to be valid. The said Section reads as follows:

> "The validity in form of any will left by the deceased and his capacity to make testamentary dispositions shall be determined in accordance with his National Law provided that if the will is made in civil form under this Ordinance it shall in all cases be held valid."

Interpreting this last paragraph in conjunction with Article 64 and the preceding paragraph I am satisfied that there can only by one construction of it, and that is, that if the will is made in civil form, it shall in all cases be held to be valid in form. I am therefore of opinion that the District Court were correct in applying French law, namely Article 913 of the French Civil Code and the will brought into conformity therewith.

The Appellant argued that the English doctrine of election should have been applied. This argument must be dismissed in that the lower Court were bound to apply French law.

Finally Appellant contended that the Lower Court were wrong in appointing an administrator in lieu of the executors appointed in the will. With this contention I am in accord, for the will being valid in form and the appointment of the executors being in conformity with French Law, Article 1025 of the Code Civil, I am of opinion that the appointment must stand.

Costs of the appeal will be paid out of the Estate.

Delivered the 31st day of July, 1929.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 11/32,

BEFORE:
The Senior Puisne Judge, Baker, J. and Frumkin, J.

IN THE CASE OF:

Heinberg — APPELLANT.

vs

Heinberg — RESPONDENT.

Appeal from judgment of District Court granting probate of will of foreigner — Proof of due execution of will — Authentication of affidavit made in foreign country for use in Palestine — Section 3 (2), Proof of Foreign Documents Ordinance, 1924.

JUDGMENT.

The only question for the District Court to determine was whether or not the will propounded was duly executed by the testatrix and whether it was read to her before execution. Affidavits from two attesting witnesses were filed, which proved due execution, and that the will had been read over to the testatrix.

We hold that these affidavits were duly authenticated by the British Consul as required by the Proof of Foreign Documents Ordinance, 1924, Section 3 (2) as amended. The evidence contradicting this was before the District Court, and we see no ground for holding that the District Court was not entitled to grant probate of the will in reliance upon them.

Since the District Court gave its judgment, affidavits have been filed by the Appellants, but they do not relate to the questions which were before the Court.

WORKMEN'S COMPENSATION.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 30/29.

BEFORE:

The Acting Chief Justice, Jarallah, J. and Khayat, J.

IN THE CASE OF:

Yehuda Shalizky — APPELLANT.

vs

N. Muller & Son — RESPONDENTS.

Injuries caused to workman in course of his employment — Compensation for such injuries assessed by three arbitrators appointed by the workman and employer — Sections 1, 2, Schedule III, Workmen's Compensation Ordinance, 1927, ignored — Question of liability to pay compensation settled by agreement — Section 2, Workmen's Compensation Amendment Ordinance, 1927.

Appeal from the judgment of the District Court of Haifa, dated the 21st day of September, 1928.

JUDGMENT OF THE DISTRICT COURT.

This is an application to the Court to enforce the award of three Arbitrators whereby the Respondent the employer was ordered to pay certain compensation for injuries caused in the course of his employment to the Applicant workman.

Schedule III, Sections 1 and 2 of the Workmen's Compensation Ordinance, 1927, state very definitely what must be the composition of an arbitration board, viz (1) an arbitral committee, if such exists (2) in the absence of such committee a single arbitrator, either appointed by the parties, or in case of their disagreement by the Chief Secretary.

In the case under consideration the provisions of the said Schedule were completely ignored, and three arbitrators, appointed by the workman and the employer, sat and made the award which it is now sought to enforce.

This board is certainly not such as is contemplated by the Ordinance, but is in fact one which is contrary to the definite provisions of the Ordinance.

On behalf of the Applicant it is urged that this is not an arbitration under the Workmen's Compensation Ordinance at all, but is an ordinary arbitration within the provisions of the Arbitration Ordinance, 1926.

We do not agree with this contention. Apart from the Workmen's Compensation Ordinance the Applicant had no legal cause of action against his employer for injuries arising out of his employment, and therefore, in our opinion could not have asked this Court to enforce an arbitration award based on no legal cause of action.

The Workmen's Compensation Ordinance established a cause of action subject to the terms of the Ordinance and the Applicant must abide by these terms.

We have a very elaborate Ordinance with a very elaborate machinery and we think it would lead to endless confusion if we were to allow this Ordinance to be ignored in the way the Applicant desires.

The application is accordingly dismissed with costs. We make no order as to advocate's fees.

JUDGMENT.

The Court by a majority holds that the agreement between the parties to submit the question of the amount of compensation to be paid by the Respondents to the arbitration of three arbitrators and the award of the arbitrators upon such submission constitutes a settlement by agreement within the meaning of Section 2 of the Workmen's Compensation Amendment Ordinance, 1927.

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

Costs of this appeal will follow the event.

Delivered the 23rd day of July, 1929.

In the High Court of Justice.

H.C. No. 12/31.

BEFORE:

The Senior Puisne Judge and Frumkin, J.

IN THE APPLICATION OF:

Eliezer Mar Haim
Yerachmiel Ben Zeev — PETITIONERS.

vs

The Chief Execution Officer, Jerusalem
Shlomo Huberman — RESPONDENTS.

Workmen's compensation award for payment of weekly instalments — Request by employers that workman submit himself for medical examination — Execution of award — Proof of improvement in physical condition of workman as ground for discontinuance of payments — Schedule II, Sections 10, 12, Workmen's Compensation Ordinance, 1927 — Jurisdiction of District Court to determine whether workman did or did not refuse to submit himself for examination,

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ORDER.

The Petitioners are employers, against whom an award has been made under the Workmen's Compensation Ordinance, 1927, requiring them to pay 750 mils weekly to the Respondent Huberman.

Payment of the weekly instalments was made until 14th September, 1930.

On that date the Petitioner Mar Haim asked the Respondent to submit himself to medical examination next day.

The Respondent answered that the Petitioner should arrange the matter with the Respondent's advocate, Mr. Barshira.

The same request was made and the same answer given on the 21st October, 1930.

On the 30th October, 1930, the Respondent applied to the Execution Officer to execute the award; and on 30th November, 1930, he made a similar application.

On 18th January, 1931, the Chief Execution Officer ordered the Respondent to submit to a medical examination; and this took place on the 30th of the same month.

On the 4th February, 1931, the Chief Execution Officer ordered that the date from which improvement in condition took place was to be submitted to arbitration if the employer was not satisfied.

> "Then an adjustment of weekly payments for the period in dispute can be made out of future payments. Arrears payments to be made."

On 5th February, 1931, the Petitioners applied to the Chief Execution Officer to vary his order of the previous day and to decide that the Respondent was not entitled to weekly payments as from the 14th September. This application was refused by the Chief Execution Officer on the same day.

It is the order of the Chief Execution Officer refusing this application which this Court is now asked to set aside.

The Petition is based upon Sections 10 and 16 of the Second Schedule to the Ordinance; the Petitioners, arguing that the Respondent refused to submit himself to examination on the 14th September; that in consequence, no compensation was payable to him from that date until the date when he was medically examined; and that it is for the Chief Execution Officer to order accordingly.

The first question, therefore, that arises is, what is the tribunal within whose jurisdiction it lies to determine whether the Respondent did or did not refuse to submit himself to medical examination.

Section 10 of the Second Schedule to the Ordinance is taken from Section 18 of the English Workmen's Compensation Act, 1927.

Under that Act, the question whether a workman had or had not refused to submit himself to medical examination is one for determination in accordance with Rule 58 of the Workmen's Compensation Rules, 1926. Under that Rule, application for suspension of the workman's right to weekly payments may be made by the Employer; and where, as in the present case, no proceedings for the review of the weekly payment are pending, the application is to be made to the Judge. (Rule 58 (4) (b).)

We feel no doubt that in an application of this nature under the Ordinance, where no proceedings for review are pending, the competent tribunal is the District Court which has jurisdiction in all civil actions not specifically assigned to another Court.

We, therefore hold that pending an Order to the contrary by the District Court, the Chief Execution Officer was right in ordering that the Petitioners should pay the full weekly payments until the date when the amount has been reduced either by agreement or by arbitration under Section 12 of the Second Schedule.

The Order Nisi is, therefore, discharged and the petition dismissed.

Delivered the 5th day of June, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 138/32.

BEFORE:

The Acting Chief Justice, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Haim Bauman — APPELLANT.

vs

Moshe Tagari — RESPONDENT.

Security not given as required by Article 186, Civil Procedure Code — Discretion conferred by Rule 2, Rules of Court, Civil Appeals, 1st June, 1921 — Payment of cash deposit in lieu of security accepted by Court at hearing — Arbitration award registered by Superintendent of Courts — Application to set aside such registration — Application of provisions of Arbitration Ordinance, 1926 to arbitration proceedings under the Workmen's Compensation Ordinance, 1927 — Application to rectify Register kept by Superintendent of Courts not an appeal nor an application to set aside an award — Application under Section 6 (c), Third Schedule to Workmen's Compensation Oridnance, 1927, not a step in arbitration proceedings within meaning of Section 15(2) Arbitration Ordinance, 1926, and therefore appealable as of right — Enforcement of award under Workmen's Compensation Ordinance, 1927 — Powers of District Court re such award.

INTERLOCUTORY JUDGMENT.

The Respondent asks that the appeal be dismissed on the ground that no security has been given as required by Article 186 of the Civil Procedure Code.

The Respondent, however, has filed a reply to the appeal in which he makes no mention of this point.

We hold, therefore, that he is not now entitled to have the

appeal dismissed on this ground and in exercise of the discretion conferred upon us by Rule 2 of Rules of Court, Civil Appeals, dated 1st June, 1921, we accept payment of a deposit in lieu of security and fix the amount of such at £P.5.

This is an appeal from a judgment of the District Court of Jaffa in an action brought by the Appellant, Haim Bauman, claiming with regard to an award given in an arbitration between him and the Respondent, Moshe Tagari, that the award registered by the Superintendent of Courts be set aside.

It is, in my opinion, clear that this was intended to be an application under the Third Schedule to the Workmen's Compensation Ordinance, 1927, for rectification of the Register, and not an application under the Arbitration Ordinance, 1926.

It has been treated by the District Court as coming under the first named Ordinance, upon which the judgment of the Court was based.

The preliminary objection has been taken that in view of the last paragraph of Section 2 of the 3rd Schedule to the Ordinance, — "Subject to the provisions hereof, the Arbitration Ordinance, 1926, shall apply to arbitration proceedings under this Ordinance," the provisions of the Arbitration Ordinance with regard to applications to the District Court must govern the action, and hence that an appeal against the District Court's judgment does not lie as of right, but only by leave of the District Court or of this Court. (Arbitration Ordinance, 1926, Section 15 (2)).

That is a view which cannot be accepted. An application to rectify the Register kept by the Superintendent of Courts is a matter totally distinct from application to set aside an award. It may, it is true, be based upon the ground that the award itself is improper; but it may equally be based on the ground that while the award is in order, the memorandum thereof recorded by the Superintendent is not a true record of the contents of the award.

That is to say, an application under Section 6 (c) is not a step in "arbitration proceedings under this Ordinance," to which and to which alone, the provisions of Section 2 above cited apply.

It follows that the District Court's judgment comes under the general rule as to judgments of a District Court, and is appealable as of right.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa in an action brought by the Appellant Haim Bauman, claiming with regard to an award given in arbitration proceedings between him and the Respondent, Moshe Tagari, that "the award registered by the Superintendent of Courts be set aside."

By a judgment given in the course of these proceedings, this Court has held that this was intended to be an application under the Third Schedule to the Workmen's Compensation Ordinance, 1927, for rectification of the Register, and not an application under the Arbitration Ordinance, 1926.

The application was treated by the District Court as coming under the first named Ordinance and was dismissed on the 28th July, 1932, the District Court holding that it was not competent to cancel the record "because such actions come within the competence of the President of the District Court, in accordance with Section 6 (e) of the Third Schedule to the said Ordinance."

Section 6 of the Third Schedule to the Workmen's Compensation Ordinance. 1927, provides as follows:

> "Where the amount of compensation has been ascertained, or any weekly payment varied, or where the person against whom a claim for compensation is made under the Ordinance disputes his liability to pay compensation, but makes an agreement (hereinafter referred to as a composition agreement) whereby in consideration of the payment of a lump sum the claim for such compensation purports to be precluded, or where any other matter is decided either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by regulations, by the committee or arbitrator, or by any party interested to the Superintendent of Courts at Jerusalem, who shall, subject to such regulations, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a judgment."

This is qualified by five provisos, three of which, namely provisos (b), (d) and (e) relate only to the record of a memorandum of agreement and do not apply to a record of an arbitrator's award. It is clear, therefore, that the District Court was mistaken in holding that the Appellant's application, which relates to an award, came within proviso (e).

The two provisos which apply to an award are as follows:— "(a) no such memorandum shall be recorded before seven days after the despatch by the Superintendent of notice to the parties interested; and (c) the District Court may at any time rectify the register."

With proviso (a) we are not now concerned.

The only question which we have now to determine is whether or not the District Court has power under proviso (c) to strike out from the register kept by the Superintendent the record of an award. It is in my opinion, clear that the authority conferred upon the District Court by this Sub-section is an authority to make the entry in the Register accord with the facts. If therefore the District Court is satisfied that no award has in fact been made, it can, under this authority, strike out from the Register an entry therein relating to such supposed award.

But it is not for the District Court, acting under this proviso, to determine questions such as those raised by the Appellant's application which relate to the conduct of the arbitrator and not to the record of the award.

Section 2, paragraph 3, of the Third Schedule to the Ordinance provides that "subject to the provisions hereof, the Arbitration Ordinance, 1926, shall apply to arbitration proceedings under this Ordinance," and there is nothing in the Schedule to prevent a party who is dissatisfied with an award given in an arbitration thereunder from taking the usual steps under the Arbitration Ordinance, 1926, to have the award set aside.

Unless an order setting aside the award is issued by the competent Court, the Superintendent is bound under Section 6 of the Third Schedule to record a memorandum of the matters thereby decided, on being satisfied as to its genuineness, and the District Court can only be called upon to exercise its powers under proviso (c), upon the ground that the memorandum does not accurately record the decision of the arbitrator.

In the present case, the memorandum takes the form of a copy of the arbitrator's award, and it is not suggested by the Appellant that it does not accurately record the decision of the arbitrator.

On this ground, therefore, the Appellant is not entitled to succeed and his appeal must be dismissed with costs and £P.5 advocate's fees.

In the District Court of Jaffa.

W.C.O. Ja. No. 2/33.*

BEFORE:

The President (Copland, J.)

IN THE CASE OF:

Chaim Prochovnik — PLAINTIFF.

vs

Palestine Potash Ltd. — DEFENDANT.

Claim by workman under Workmen's Compensation Ordinance, 1927 — Allegation that disease caused by chlorine fumes — Proof of such allegation — Doctor's certificates produced as evidence — Such certificates if contested held not to be evidence — Sufficiency of evidence to support finding of cause of illness.

JUDGMENT.

This case is brought by a workman who had been employed by Palestine Potash Ltd., as a plasterer. He complained on May 4, 1932, that whilst he was working in the factory of the Respondent Company he was gassed by chlorine fumes, and on that evening he was treated by a doctor. He says that he resumed work on the following day and continued working until May 12, 1932, when he was again treated and ordered to rest. He has now contracted bronchial asthma and is totally incapacitated from work. He claims that this incapacity arises from an accident which occurred during the course of his employment. The Arbitrator made an award and stated a case on several points of law. The main point, however, in this case is the question of medical evidence. As I stated on several occasions and in the rules which I have made for the guidance of Arbitrators, the question of medical evidence where it is arguable whether the disease arose out of an accident is of supreme importance.

In this case the medical evidence called by the workman consisted solely of certificates and these doctors did not give their evidence on oath. It has been stated to me, and it is not denied, that the medical referee declined to express any opinion as to the origin of the disease. He expressed no opinion whatsoever.

In these circumstances, I am compelled to hold that there was not sufficient medical evidence before the Arbitrator to justify

*) Confirmed on appeal to the Court of Appeal.

him coming to the conclusion that this asthma arose out of an accident in the course of his employment.

For that reason, therefore, the award must be set aside.

I have not dealt with the other points because the point I have decided makes it unnecessary to deal with the others.

It is unfortunate, but arbitration proceedings must be carried out more strictly. A medical certificate is not evidence and can never be evidence before a Court or an Arbitrator, unless it is uncontested. In this case it was contested.

The award must be set aside, or rather, the answer to the question stated by the Arbitrator is that there is no evidence to support the finding that the disease arose out of an accident.

Delivered the 1st day of December, 1933.

In the District Court of Jaffa.

W.C.O. Ja. No. 7/33.

BEFORE:

The President (Copland, J.)

IN THE CASE OF:

Aba ben Zwi Jacob — PLAINTIFF.

vs

1. "Hagalil" Transporting Co.
2. "Hagalil" Co-operative Society for the Carriage of Freight and Passengers
3. Mordechai Cohen — DEFENDANTS.

Case stated under Section 3, Schedule III of the Workmen's Compensation Ordinance, 1927 — Contract of joint ownership of lorry — Death of workman on lorry — Insurance effected by Co-operative Society under collective insurance policy — Validity of notice of accident given to employer — Limitation of actions for compensation — Right of one of several dependants of deceased to sue for compensation due — Choice of defendants by plaintiff — Secs. 4, 5, 6, Workmen's Compensation Ordinance, 1927 — Right of recourse by sub-contractor against his principal — Choice by workman of either contractor or principal as defendant — Appeal by way of special leave — Failure to serve on Respondents copy of decision granting leave to appeal — Failure to comply with Art. 186, Civil Procedure Code re security — Provisions of Arbitration

Ordinance, 1926, applicable to Workmen's Compensation Ordinance, 1927 — Decision of President on point of law re compensation held to be part of arbitration proceedings — Sec. 15 Arbitration Ordinance, 1926.

JUDGMENT OF THE DISTRICT COURT.

The facts as found by the arbitrator are as follows:

1. Defendant No. 3, the said Mordechai Cohen, together with a certain Mendel Belgorotzky (who does not figure in this case) bought a "Reo" motor-car of the "Reo" Company in virtue of a contract concluded with the said Company on the 8th December, 1930.

2. A contract of co-partnership was entered into between Cohen and Mendel Belgorotzky providing under article "h" as follows:—

> "The party of the first part, Defendant No. 3, shall assist personally on the car, and may engage another whomsoever he may choose to assist in his stead and at his expenses; and in the event of a refusal, (by him) Belgorotzky shall be entitled to engage an assistant at his expense."

3. Some time after the signing of this contract, Cohen engaged, the deceased, Zvi Jacob, to assist Mendel Belgorotzky in lieu of Cohen on the common machine aforementioned.

4. On the 11th October, 1931, an accident happened when the said automobile was turned upside-down, and the said Zvi Jacob was killed.

The mishap occurred "out of and in the course of the employment" on the said automobile.

5. From December, 1930, until the day of the casualty, the automobile was employed by a co-partnership known as "Hagalil" Transporting Company.

This co-partnership had two lorries of its own, which it used, as well as three others which it hired regularly; among which was the lorry of Defendant No. 3, and Mendel Belgorotzky. Whenever the said co-partnership would use this lorry it would get a commission of 7 per cent of the charge paid to the owners thereof.

The mishap occurred when the lorry of Cohen and Belgorotzky was so employed.

6. The said co-partnership had insured, under a collective insurance policy, ten persons without specifying their individual names, these being its own two drivers and their two assistants and the three drivers of the hired lorries aforementioned and their respective assistants.

The deceased paid the co-partnership his share in the premium out of a deduction of his wages and the co-partnership in turn paid the Insurance Company regularly until the date of the accident, the entire premium for ten persons.

7. Some time after the accident, the co-partnership turned into a Co-operative Society under the name of "Hagalil" Co-operative Society for the Carriage of Freight and Passengers, Ltd., which Co-operative have taken over all the assets and liabilities of the former Co-partnership. Belgorotzky (not Cohen) joined the cooperative as a member.

8. Following the accident, there was no notice given about it to Cohen either by the plaintiff or by any other relative. The first notice he received was from the plaintiff's advocate, Mr. Bar-Shira in the year 1933. The Manager of the "Hagalil" co-partnership aforementioned was informed by a friend of the deceased (however not being then empowered to do so by any of the relatives), a lawyer by the name of Mr. Aharonov, and then the co-partnership "Hagalil" immediately submitted its claim to the Insurance Company.

9. The plaintiff is only one of four other dependents upon the deceased, all of whom live in Soviet Russia..

10. The application to the Chief Secretary for the appointment of an arbitrator was submitted on the 27th March, 1933.

The following were the questions of law for the opinion of the Court:

(a) Whether the case brought before the Court was not prescribed both because of the failure of the notice to the defendants and because of the delayed institution of the claim (Section 4 of the Ordinance).

(b) Whether the plaintiff as one of the relatives of the deceased was entitled separately to claim compensation or only together with all other persons dependent upon the deceased, or if only the administrator of the estate of the deceased was entitled to do so.

(c) Whether all the defendants might be sued jointly and severally or the plaintiff should have selected one of them (the principal or the employer) to sue him for compensation (Section 5 of the Ordinance).

As to the question of notice of the accident, this point is now dropped by the Respondents since formal notice is not necessary and it is sufficient if the fact of an accident comes to their knowledge, which it is admitted was the case here. Section 4 (6) of the Workmen's Compensation Ordinance, 1927, is very clear.

The Respondents argue that no notice of a claim having been made within the statutory period of six months, they are not liable. Section 4 (1) of the Ordinance is in these terms:

> "Proceedings for the recovery under the Ordinance of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof, and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in the case of death, within six months from the time of death.
>
> "Provided always that the want of or any defect, or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if it is found that it was occasioned by mistake, absence from Palestine or other reasonable cause."

Notice of a claim does not mean the initiation of proceedings — notice is received when any communication reaches the employer from which he can see that a claim will be made against him in respect of an accident.

From the statement submitted by the Arbitrator the accident occurred on the 1st October, 1931. There is no evidence before me that any communication was sent to the Respondents or any of them that a claim would be made and the first intimation, on the evidence, of a claim is the application to the Chief Secretary dated the 27th March, 1933. Even if we treat this as a notice to the employer, and I am doubtful if it can be so treated, the fact remains that a period of 17½ months elapsed between the accident and the giving of the notice of the claim. Making every allowance for the fact that the applicant lives in Russia, yet

a year and a half seems a very excessive time, and I do not think that there was such reasonable cause as to bring the case within the terms of the proviso to Section 4. On this point therefore, the claim must fail.

On the second question, there is nothing in the law to prevent one dependent to bring a claim separately in respect of his own dependency. But the proper procedure is to cite the other dependants as respondents. The amount of compensation is in any case paid into Court, and claims of all persons who are dependents will be considered in paying out (See Knowles on Arbitration, 3rd Edition, page 304).

The point was taken before me that there is no proof that the applicant was a dependent. This however, must be taken before the Arbitrator, but I would remark that I have noticed a tendency to assume that every relative is a dependent:— the terms are regarded, quite wrongly, as synonymous. There is no legal presumption of dependency between spouses, or between parents and children or other relatives. Dependency is a question of fact and must be proved in each case.

On the third question of law, can all the Respondents be sued collectively or should the applicant have selected one of them, it has been argued before me that all the Respondents were engaged in a common venture — that in fact they were all members of a partnership. There is no evidence which could justify such a conclusion in law. On the facts, and particularly in view of the finding that the first Respondent got a commission on the amounts earned by the third Respondent when his lorry was used by the former, it seems to me that the relationship between the first Respondent on the one hand and the third Respondent on the other hand was one of agency, or possibly subcontracting.

Section 5 of the Ordinance provides for a right of recourse by a sub-contractor against his principal and a workman has the right to sue either the principal or the sub-contractor. It is, however, settled law that he cannot sue both at the same time: the liability is not joint and several. He must elect which one he will sue. This was laid down in Herd vs. Summers (1905), 7 F. (Ct. of Sess.) 870, a case which, so far as I am aware, has never been over-ruled and which has been for many years, and still is, good law. This application, therefore was wrongly brought. In any case it was wrong to sue both the first and second Respondents at the same time, since the second Respondent has taken over the assets

and liabilities of the first. The applicant's choice lay between the third Respondent and either the first or second Respondent. He had to elect which one he would sue — he has not done so, and the claim is therefore, bad.

For these reasons therefore, I am of the opinion that the claim fails and should be dismissed. Each side, in the circumstances, will pay their own costs.

Dated the 11th day of December, 1933.

LEAVE TO APPEAL.

The President granted leave to Appeal to the Supreme Court on the following grounds:—

(1) Whether the notice of claim given by Mr. Aharonov, as the next friend of the dependents, to the manager of the "Hagalil" co-partnership on the day following the accident, is sufficient to satisfy the requirements of Section 4 (1) of the Ordinance in respect of the period fixed for making the claim.

(2) Whether several respondents can be joined in one claim and whether the fact of bringing a joint claim against several respondents who cannot be joined in one claim, is fatal to the whole application, or the Applicant has still the choice to waive before the Arbitrator during the arbitration proceedings his claim in respect to one or two of the respondents and to limit it to one of them only.

JUDGMENT OF THE COURT OF APPEAL.

This is an appeal by way of special leave of the President of the Jaffa District Court under Article 3 of the Third Schedule to the Workmen's Compensation Ordinance, 1927.

The Arbitrator having submitted questions of law for the decision of the President, the President after having given his decision thereon, granted special leave to appeal to this Court as aforesaid.

Respondents, upon the hearing of the appeal, asked for its dismissal on the following grounds; (1) that the application to the President of the District Court for special leave to appeal to this Court under the beforementioned Article 3 of the Third Schedule of the Ordinance was not served on Respondents and was accordingly an ex parte application which is bad in law, (2) that no

security for the indemnification for the costs of appeal has been lodged in accordance with Article 186 of the Code of Civil Procedure and (3) that no copy of the decision of the President granting leave to appeal and upon what points of law leave was granted was served on the Respondents.

The Respondents argued that these formalities were necessary in that the last paragraph of Section 2 of the Third Schedule of the Workmen's Compensation Ordinance prescribes that: "subject to the provisions hereof, the Arbitration Ordinance, 1926, shall apply to arbitration proceedings under this Ordinance", and that the Arbitration Ordinance of 1926 by virtue of Section 15 (1) provides "all applications to the Court under this Ordinance shall be made by petition in accordance with the rules of procedure prescribed for civil actions."

Mr. Krongold for the Appellant submitted that the provisions of the Civil Procedure Code do not apply to the Workmen's Compensation Ordinance, that there is no provision in that behalf in the said Ordinance and that the beforementioned last paragraph of Section 2 only made the provisions of the Arbitration Ordinance applicable to arbitration proceedings under Workmen's Compensation Ordinance.

The question, therefore, for us to decide is whether an application to the President of a District Court for a decision on a point of law and a subsequent appeal therefrom to this Court under Article 3 of the Third Schedule of the Ordinance are part of the arbitration proceedings under the said Ordinance.

Now it is clear that the opinion of the President of the District Court or of the Court of Appeal on a point of law does not determine the arbitration proceedings. The arbitrator is still seised with the arbitration and the opinion, when finally decided, is remitted to the arbitrator to enable him to make his final award.

I am, therefore, of opinion that the submission of a question of law and the final determination thereof, in accordance with Article 3 of the Third Schedule of the Ordinance, must be construed as a part of the arbitration proceedings under the said Ordinance and within the meaning of the above quoted last paragraph of Section 2 of the Third Schedule of the said Ordinance, and therefore, Section 15 (1) of the Arbitration Ordinance of 1926 must apply.

With regard to Respondents' first ground for the dismissal of the appeal "that a copy of the application for leave was not served upon him," the judgment of this Court in Civil Appeal No. 144/31* (Ibrahim Khalil vs Jad el Khoury) has settled that a distinction must be made between an application for leave to appeal made to a Court and made to a President, and that in the latter instance it is not necessary to serve Respondent with the application for leave. Accordingly this ground for dismissal of the appeal must fail.

With regard to the 2nd and 3rd grounds of Respondents for the dismissal of the appeal (1) that no guarantee for costs of appeal has been lodged and (2) that no copy of the decision of the President granting leave to appeal and the points of law upon which leave was granted was served on him; now by virtue of Section 15 (1) of the Arbitration Ordinance the procedure laid down in Article 186 of the Civil Procedure Code must be followed, and although Respondents had called the attention of Appellant to the two beforementioned deficiencies. Appellant has taken no steps to remedy them, and in accordance with the many decisions of this Court in similar issues, the appeal must be dismissed with costs and advocates' fees assessed at £P.2.500 mils.

Delivered the 31st day of May, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 25/33.

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

IN THE CASE OF:

Joseph Barzilai — APPELLANT.

vs

Zwi Schwartz — RESPONDENT.

Point of law referred under Section 3 of the Third Schedule to Workmen's Compensation Ordinance, 1927 — "Undertaker" defined — House built by owner through contractors — Whether owner a contractor within meaning of Section 2 (b), Workmen's Compensation Ordinance, 1927.

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*) Reported ante p. 160

JUDGMENT OF THE DISTRICT COURT.

By virtue of his power under Section 3 of the Third Schedule to the Workmen's Compensation Ordinance, 1927, Mr. Laniado, who was duly appointed arbitrator in a dispute under the Ordinance, between Mr. J. Barzilai, of the one part, and Messrs. Schwartz, Itshaki and Ber of the other part, submitted to me as a question of law whether Mr. Schwartz was liable as an "undertaker" to Mr. Barzilai. A full history of the relations between the parties is contained in the file of this case.

I gave an opportunity to all the parties to argue their case before me and Mr. Olshan for Mr. Schwartz and Mr. Bar-Shira for Mr. Barzilai availed themselves of the opportunity offered.

Mr. Bar-Shira contended that Mr. Schwartz must be held in the circumstances to come within the definition of "undertaker" in Section 2 of the Ordinance. I regret I cannot see my way to agree with him. I understand that Mr. Barzilai is not likely to be able to collect from Messrs. Itshaki and Blum the sum awarded to him as compensation for his injury. The omission of Messrs. Itshaki and Blum to insure their workmen is not reprehensible, if, as I understand, they have no capital. In this case I cannot hold that Messrs. Itshaki and Blum are "men of straw." Had I been able to do so, I should have felt justified in supporting Bar-Shira's submission, if he could satisfy me that Mr. Schwartz was aware that they were men of straw.

If my decision is correct, and if, as a fact, Messrs. Itshaki and Blum are not in a position to pay to Mr. Barzilai the sum awarded to him by the arbitrator, the principal object of the Workmen's Compensation Ordinance, 1927, is defeated.

It appears to me that the Government would be well advised to consider very earnestly whether legislation should not be introduced to compel undertakers to insure their workmen against injury, or at any rate, to ensure that workmen will be able to gather the fruits of an award in their favour for injury suffered. I intend to take up the matter with the proper authorities.

I must, in the circumstances of this case, hold that Mr. Schwartz does not come within the definition of "undertaker" and that he is not liable under the Ordinance to Mr. Barzilai.

I make no award as to costs and I direct that a copy of this decision shall be served on the parties and on the arbitrator. I grant leave to appeal to the Supreme Court.

Delivered the 8th day of December, 1932.

JUDGMENT.

This is an appeal by way of special leave ftom the judgment of the President of the District Court (De Freitas, J.) in the matter of an arbitration under the Workmen's Compensation Ordinance, 1927, between Mr. Joseph Barzilai, the Appellant, and Mr. Zwi Schwartz.

The Arbitrator by virtue of the power contained in Section 3 of the Third Schedule to the Workmen's Compensation Ordinance, 1927, submitted the following question of law for the President of the District Court. The question of law contains the facts of the case and is as follows :

> "Whether an owner who builds a house for himself through conttractors and to some extent interferes in the supervision of the construction thereof either personally or through a third person can be considered an undertaker within the meaning of Section 2 (b) of the Workmen's Compensation Ordinance."

After hearing all the parties, the President of the Jerusalem District Court decided "in the circumstances of the case I must hold that Mr. Schwartz does not come within the definition of undertaker and that he is not liable under the Ordinance."

Against this judgment Barzilai now appeals and argues that Mr. Schwartz interfered with the building of the house to such an extent as to constitute himself an undertaker within the meaning of Section 2 (b) of the Ordinance. "Undertaker" is defined in the said Ordinance:—

> " . . . in the case of buildings . . . means the person undertaking the construction, alteration, repair or demolition of the building . . .

At the outset it must be remembered that Mr. Schwartz had contracted with Messrs. Itshaki and Ber to built him a house and that present Appellant Barzilai, was a workman employed by Messrs. Itshaki and Ber.

We have not had the advantage of hearing the Respondent Schwartz or anyone on his behalf, but I am of opinion that the only possibility of rendering Schwartz liable under the Ordinance would be by satisfying the Court that Schwartz in the course of or for the purpose of his trade or business contracted with Itshaki and Ber for the execution by or under them for the carrying out

of the work, and so fix Schwartz with liability under Section 5 (1) of the Ordinance. This however is not alleged.

Workman is defined in the Ordinance as a person who has entered into or works under a contract of service or apprenticeship with an employer whether by manual labour or otherwise and whether the contract is expressed or implied, is oral or in writing.

Appellant was at no time under a contract of service with Schwartz. He was employed by the contractors and as such was during the period of service presumably subject and subject only to the lawful orders and direction of the contractors, and therefore any interference he tolerated he did so at his own risk and it cannot be argued that such toleration affected the relations of the parties.

We are therefore of the opinion that Mr. Schwartz was not an undertaker within the meaning of Section 2 (b) of the Ordinance and the appeal must necessarily fail and the President of the District Court's judgment be upheld. In the absence of Respondent no costs are awarded.

Delivered the 24th day of July, 1933.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 196/33.

BEFORE:

Baker, J., Frumkin, J. and Khayat, J.

IN THE CASE OF:

Zadok Erlich — APPELLANT.

VS

Batia Shmuckler
Eliezer Shmuckler — RESPONDENTS.

Death caused to workman employed on dismantling of ship — Question whether dismantling of ship is employment under W.C.O., 1927 — Handling of goods by manual or mechanical means — Definition of "ship" — Definition of "goods" — Clauses 7, 8, First Schedule, Workmen's Compensation Ordinance, 1927.

JUDGMENT.

This is an appeal by way of special leave granted under Clause 3 of the Third Schedule to the Workmen's Compensation Ordinance, 1927. The President of the Jaffa District Court granted leave to appeal on the two following points of law :—

(1) Whether or not the workman was engaged in any one of the employments specified in the First Schedule to the Workmen's Compensation Ordinance, 1927; and

(2) Whether there is sufficient evidence that the death of the workman resulted from the accident.

The facts, as found by the arbitrator, are not disputed and for the purpose of the appeal are shortly :—

That sometime ago a ship named "The Ivan Gorthon" was wrecked and went aground on the rocks within the Jaffa Port Area. The wreck was in the course of being dismantled and the deceased was employed by Appellant to help in the removal of the ship's boilers. Whilst thus employed, he was hit on his head by an iron block which caused him to fall into the sea, he was taken out of the water and removed to the surgical ward of the Hadassah Hospital, Tel-Aviv. He remained there from December 3, 1932, to December 7, 1932, when he was presumably discharged. He was re-admitted to the Hospital on December 22, 1932, and eventually died of pleurisy there on January 10, 1933.

The learned President, in his judgment of the 30th October, 1933, decided that the vessel was not a ship and therefore the employment of deceased could not come within Clause 8 of the employment set out in the First Schedule to the Ordinance, but was of opinion that it came within Clause 7 of the said employment in that it was undoubtedly within the area of the port, and that the parts, when broken up, were goods. He was also of opinion that there was sufficient evidence to support the arbitrator's finding that the deceased died from an illness directly due to the accident.

With regard to the first point upon which leave to appeal has been granted, it is common ground that the work upon which deceased was engaged cannot be held or be considered to be employment within the meaning of Clauses 1, 2, 3, 4, 5 and 6 of the employments set out in the first Schedule to the Ordinance. Accordingly, we have to determine whether deceased was engaged

in the scheduled employments set out in Clauses 7 or 8 of the First Schedule to the Ordinance. The said clauses read as follows:—

Clause 7: The handling of goods by manual or mechanical means at docks, quays, wharves, or warehouses within the area of a Port.

Clause 8: — The handling of goods by manual or mechanical means on lighters at shipside and on board ships, when within the area of a Port, by persons other than members of a ship's crew.

To deal first with Clause 7. The first question for us to decide is whether boilers being dismantled from a wreck are goods within the meaning of Clause 7, and we are of opinion that they are: for we are of opinion the general meaning of goods are "things personal as distinguished from things real;" for in the case of Horwich v. Symond, 31 T.L.R. 212, Qua Bankruptcy Act, 1914, it was held that goods includes all chattels personal, and again in the case, of Behnke v. Bede Shipping Company, Ltd., 1927, 1 K.B.D. 649. a ship was held to be a chattel personal coming within the definition of goods in Section 62 of the Sale of Goods Act, 1893.

The Arbitrator in his findings of fact has stated that the vessel was wrecked on the rocks within the Jaffa Port Area, and this has not been disputed. Clause 7, however, limits the handling of the goods to docks, quays, wharves, or warehouses within the Port area.

The learned President of the Jaffa District Court, in his judgment with reference to this part of the Clause, states:—

> "Though not strictly on a wharf or quay yet the place was so closely connected therewith, the structure on which the workman was working might for the purposes of the work be described as a part of the port itself."

With this ruling we cannot agree. The language of the Clause is clear and definite and limits the place of handling to docks, quays, etc., in the port area; and it is not, in our opinion, susceptible of a more extended meaning, and any place of employment other than those specified in the said Clause brings the deceased workman outside the provision of Clause 7. We therefore, are of opinion that deceased when he met with his accident, was not engaged in employment within the meaning of Clause 7 of the First Schedule to the Ordinance.

With regard to Clause 8, we must first decide whether the wrecked vessel was a ship and with regard to this we agree with the learned President of the District Court's Judgment, and that she could not be held to be so for the reasons he there sets out. We are further strengthened in this opinion by the definiton contained in the Territorial Waters Jurisdiction Act, 1878, and the Foreign Enlistment Act, 1870, both of these Acts defining a ship as being some craft able and made to float on the waters and the judgment in the old case of Hill v. Patten (1807), 8 East 373, wherein it is stated, ship, technically taken, designates a particular species of sea going vessel square rigged, etc. It also has a generic sense as designating a vessel of burden irrespective of rig and without regard to the means of locomotion. We are therefore of opinion that when a vessel becomes a wreck, its power of locomotion having gone, it can no longer be defined as a ship and accordingly deceased's employment cannot be brought within the meaning of Clause 8.

Having arrived at the conclusion that the deceased, when the accident occurred, was not engaged in any employment within the meaning of any of the Clauses contained in the First Schedule to the Workmen's Compensation Ordinance, it is, therefore, unnecessary for us to enter into the merits of the second point of law upon which the appeal was granted.

The appeal will be allowed, the judgment of the lower Court quashed with costs and advocate's fees assessed at £P.4.—

Delivered the 14th day of May, 1935.

In the District Court of Jaffa.

W.C.O. of 1933.

BEFORE:

The President (Copland, J.)

IN THE CASE OF:

Moshe Adoumi — PLAINTIFF.

vs

Isaac Hos & Co. — DEFENDANT.

Case stated under Section 3, Schedule III of Workmen's Compensation Ordinance, 1927 — Sufficiency of power of attorney held by advocate — Subsequentt production of power of attorney held not to satisfy acts previously done.

JUDGMENT.

The facts in this case are simple. The Plaintiff on 27th March, 1933, filed a claim with the Chief Secretary against the Defendants Isaac Hos & Co. and asked for appointment of an arbitrator.

At that time his advocate was in possession of a Power of Attorney authorising him to bring a claim against "Isaac Hos."

If this were an ordinary civil action there would of course be no doubt, following the decisions of the Court of appeal in Sherwinter vs Sherwinter (Civil Appeal No. 60/31[1]) and Levy vs Sallum (Civil Appeal No. 115/31[2]) that there would be no action before the Court, inasmuch as the claim is signed by a person who is not authorised to bring the claim against the person whom he has cited as Defendant.

In my opinion the same rules must apply in the case of a proceeding under the Workmen's Compensation Ordinance as in an action in the District Court.

The advocate was not authorised by his power of attorney to bring a claim against Isaac Hos & Co. and therefore has exceeded his powers, and has acted without authority.

With regard to the further argument the Plaintiff has both before the Arbitrator and before this Court argued that he was authorized by a fresh power of attorney. I am bound by the decision of this Court in Histadruth Mitjashvim Society vs Adib Bamieh, where it was held that a subsequent power of attorney produced during the hearing of an action could not ratify acts already done in connection with the entry of the action.

There is therefore no claim before the Arbitrator and nothing on which to arbitrate. The claim must therefore be struck out.

Dated the 5th day of July, 1933.

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[1]) see ante p. 1502.

[2]) see ante p. 90.

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