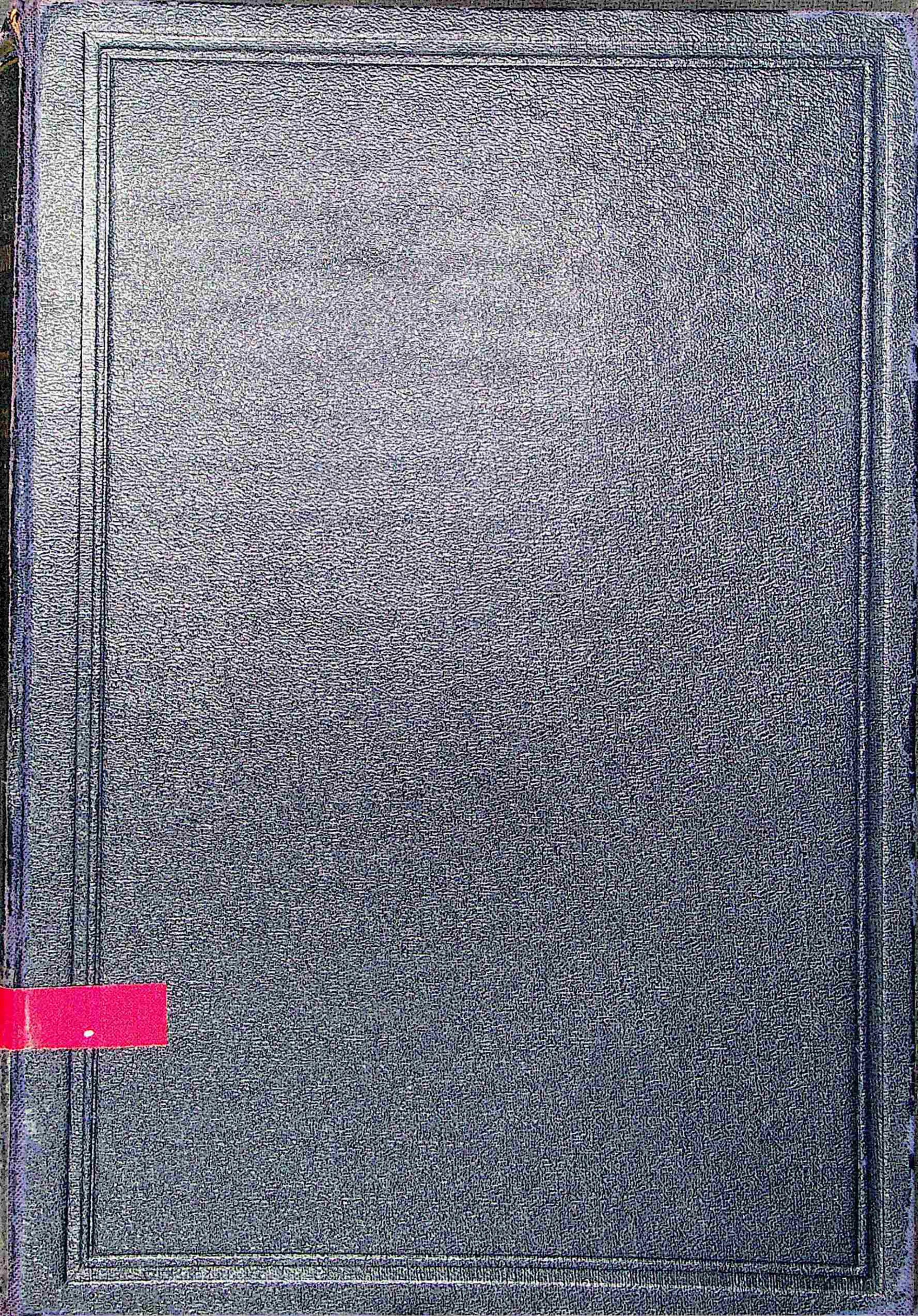

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COLLECTION OF JUDGMENTS

OF

THE COURTS OF PALESTINE

1919 — 1933

22027

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

VOL. III

ARRANGED
ACCORDING TO SUBJECTS
IN ALPHABETICAL AND CHRONOLOGICAL ORDER

WITH
COMPREHENSIVE AND DETAILED INDEX

Ref
KMQ
1003
.C6
1935
RBK
v.3.
c.1.

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

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 75/32.

BEFORE:

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

IN THE CASE OF:

Binza Rein — APPELLANT.

vs

Abraham Flint — RESPONDENT.

Claim for damages for breach of contract—Settlement of mutual claims effected by advocate by oral agreement—Admissibility of parol evidence to establish claim against written document—Leave to appeal on point of law—In absence of written evidence claim proved by verbal admission of Defendant made in Court—Art. 80, Civil Procedure Code.

JUDGMENT.

The Appellant, Mrs. Rein sued the Respondent, Abraham Flint in the Magistrate's Court, Jerusalem, on an undertaking in writing to deliver a house by a specified date.

The Respondent's defence was that an agreement had been made between the parties for the settlement of their mutual claim against one another which included the Appellant's claim under the undertaking. After hearing evidence the Magistrate was satisfied that the defence was proved and dismissed the action.

On appeal the Magistrate's Court's judgment was confirmed. The President of the District Court, has, however, granted leave to appeal to this Court on the points of law set out in para. 10 of the Appellant's application, which reads as follows:—

"Whereas the judgment affects the lawful interests of my client and whereas neither the judgment of the Magistrate's Court nor that of the District Court in its appellate capacity contains any reason for the provisions of the said Article 80 being disregarded, and whereas by virtue of the said Article 80 any claim against a written document can only be proved by evidence in writing, and whereas even supposing for a moment that verbal evidence given by Mr. Barshira did not prove anything against my client, and whereas alternatively it is at any rate evidence given by a single witness without any corroboration.

I now pray on behalf of my client and in accordance with Articles 5 and 6 of the Magistrates' Courts Jurisdiction

> Ordinance, 1924, for leave to appeal to be granted to her on the following point of law, viz: whether judgment could be given in this case or in any other case on the evidence of a single witness not corroborated by some other material evidence, and especially whether the clear provisions of Article 80 of the Code of Civil Procedure could be set aside in this case (or in any other similar case) and verbal evidence admitted against a written document confirmed by Defendant himself.
>
> The general rule under Article 80 of the Civil Procedure Code is clear, namely,– that an agreement varying an agreement in writing must be proved by evidence in writing or by the admission of the Defendant, or by his account books."

In the absence of written evidence, therefore, we have to see whether there was before the Court an admission by the Appellant. Now the Appellant gave evidence in the course of which he said:—

> "An agreement was arrived at on 17th day of March, 1929. I do not know what they said therein. I know the advocate to whom I entrusted the matter. Only the advocate knows the details of the agreement."

This amounts to an admission that there was an agreement and an authority to the advocate concerned, Mr. Barshira, to make admissions on the Appellant's behalf as to the terms of the agreement. Mr. Barshira stated in evidence:—

> "I arranged the agreement with Flint on behalf of Madame Rein (the Appellant) who knew very little and asked that the affair be dealt with. I apprised her of the gist of the agreement and she paid some money. She was satisfied with the agreement to reduce the amount she had to pay. This agreement covered all the disputes between the parties excepting a debt which Madame Rein remained owing to Flint, and in accordance with the said agreement I told Madame Rein that she would have to pay £P.24 to Flint."

This statement is an admission on behalf of the Appellant that her claim against the Respondent and the undertaking was included in the agreement. The appeal therefore fails and must be dismissed with costs, including £P.2 advocate's fees.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 77/32.

BEFORE:

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

IN THE CASE OF:

Bank for Agriculture and Industry,
Bnai Brak Co-operative Society — APPELLANTS.

vs

Shlomo Meir Halperin — RESPONDENT.

Party to action entitled to give evidence on own behalf or may be summoned to give evidence for the other party—Sec. 12, Law of Evidence (Amendment) Ordinance, 1924.

JUDGMENT.

The Law of Evidence (Amendment) Ordinance, 1924, Section 12, enables either party to give evidence on his own behalf or be summoned to give evidence for the other party. The lower Court was wrong in refusing the request of the Appellant to hear the respective parties. The judgment of the lower Court is, therefore, set aside and the case remitted for the parties to be heard and for the Court to establish, in the first place, what was the real nature of the transaction between the parties and after having established this issue to complete this case.

Costs to follow the event.

Delivered the 25th day of July, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 101/32.

BEFORE:

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

IN THE CASE OF:

Antoine M. Sioufi — APPELLANT.

vs

Giuseppe Gherardi — RESPONDENT.

Proof of appointment as liquidator of bankrupt firm held insufficient—Copies of judgments of foreign Tribunals produced as evidence—New evidence produced on appeal but case not remitted by Court of Appeal.

Appeal from the judgment of the District Court of Jaffa, dated the 20th June, 1932.

JUDGMENT.

We are clear that the circular letter produced to the District Court is not evidence as against the Respondent that the Appellant was duly appointed as liquidator of the firm of Asfar and Sara.

In this Court, the Appellant has produced further evidence, namely an "extract from a deed of dissolution and appointment of a liquidator of a firm" certified to be a true copy by the Chief Clerk of the Tribunal of Commerce of Damascus and a judgment dated 4th February, 1933, of the Court of First Instance of Damascus, neither of which was before the District Court.

Without expressing any opinion upon the value of these documents as evidence in the Courts of Palestine, we dismiss the appeal, leaving the Appellant at liberty to commence a fresh action if he thinks fit to do so.

The Appellant will pay the costs of this appeal, including LP.2.500 advocate's fees and expenses.

Delivered the third day of March, 1933.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 131/32.

BEFORE:

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

IN THE CASE OF:

Shurrab APPELLANT.

vs

Khass RESPONDENT.

Inability of witness to attend Court—Evidence taken on commission in the absence of one or both of the parties to the action—Evidence heard at witness' place of residence to be recorded in the presence of the parties—Art. 87, Civil Procedure Code—Right of parties and their advocates to attend at the taking of evidence on commission—Sec. 1, Rules of Court of 3rd November, 1926.

JUDGMENT.

Leave to appeal has been granted by the President of the Jaffa District Court on the following point of law:

"whether evidence on commission could be heard in absence of either or both parties to the action".

Article 87 of the Civil Code of Procedure prescribes, inter alia, that where evidence is heard for lawful reasons at witness' place of residence, such evidence shall be recorded in the presence of the parties.

Section I "Rules of Co urt" of the 3rd November, 1926 further prescribe that where a witness for the reasons there set out is unable to attend the Court to give evidence, he shall be examined on oath at his place of residence or at some other place that shall appear to be more convenient or in private in the chambers of the Court before a Judge or Magistrate in the presence of the parties and their advocates who shall have liberty to examine and cross-examine such witnesses as if in open Court.

It therefore follows that where evidence is taken on commission notification of the place and time of the taking of such evidence should be given to the parties to the action to enable them to be present, if they so desire. If however, after such notification, either or both parties choose not to appear evidence, may still be taken on commission, the Judge or Magistrate proceeding as if in open Court.

The case is accordingly remitted for compliance with the above ruling.

In the Supreme Court sitting as a Court of Appeal.

A. A. No. 4/33.

BEFORE:

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

IN THE CASE OF:

Ahmed el Badawi — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Findings of fact on which conviction based not recorded upon the notes of the proceedings by the Presiding Judge—Findings of fact unnecessary where facts are sufficiently established by the evidence—Secs. 37, 48 of Trial Upon Information Ordinance, 1924—Evidence of binding over to keep the peace under the Prevention of Crime Ordinances, 1920-1929—Evidence to show state of mind of accused at a time antecedent to the crime—Sufficiency of evidence to establish provocation and premeditation.

JUDGMENT.

With regard to the first ground of appeal, the facts in this case were sufficiently established by the evidence, and in consequence under the proviso to Section 48 of the Trial Upon Information Ordinance the conviction cannot be invalidated, even though there were no findings of fact upon which the conviction was based recorded upon the notes of the proceedings by the Presiding Judge.

As to the second ground of appeal, we need not stop to consider whether the conversation with the Mukhtar was admissible or not, since evidence to the same effect is to be found in the testimony of the brother of deceased and of Mr. Kyles.

With regard to the third ground of appeal, evidence of binding over to keep the peace under the Prevention of Crimes Ordinance is not evidence of a previous conviction of an offence under Section 37 of the Trial Upon Information Ordinance, 1924, and was clearly admissible as showing the state of mind of the accused at a time antecedent to the crime.

We are satisfied that there was not sufficient evidence to establish provocation by deceased, and that there was evidence on which the Court below could find that there was premeditation, and for these reasons we dismiss the appeal and confirm the conviction and sentence.

In the Supreme Court sitting as a Court of Appeal.

A.A. No. 13/33.

BEFORE :

The Chief Justice, Plunkett, J., Frumkin, J., Khayat, J. and Abdel Hadi, J.

IN THE CASE OF :

Ahmad Diab Ghalayini
Mustafa Ali Ahmad — APPELLANTS.

vs

The Attorney-General — RESPONDENT.

Death caused by throwing of bomb in Nahalal—Murder with premeditation in the prosecution of a common purpose—Criminal procedure—Validity of information containing two separate charges in separate counts—Probable consequences of prosecution of unlawful purpose—Notice of prosecution witness to be given to defence to prepare for his cross-examination—Witnesses not called at preliminary enquiry may be called at trial—Confession made under inducement of advocate—Inducement held out by a person not in authority

will not exclude confession—Illiteracy of accused person—Weight of circumstantial evidence—Rule 6, Judges Rules—Statement made by a prisoner before there is time to caution him is admissible—Effect of failure to administer caution to person in custody—Credibility of witness is question for Trial Court—Arts. 170, 174, Ottoman Penal Code—Secs. 3, 4, Criminal Law Amendment Ordinance, No. 2 of 1927—Secs. 26, 36, 62, Trial Upon Information Ordinance, 1924.

JUDGMENT.

The Appellants in this case were charged with three other men on an information containing two counts, one of murder with premeditation under Article 170 of the Ottoman Penal Code and Section 3 of the Criminal Law Amendment Ordinance (No. 2) 1927; and the other of murder with premeditation committed in the prosecution of a common purpose, under Article 170 of the Ottoman Penal Code and Section 4 of the Criminal Law Amendment Ordinance (No. 2) 1927.

Three of the five accused were acquitted on both counts; and the two Appellants were convicted on the first count.

We are asked to hold that the Court below erred in refusing to rule that the information must be amended so that the accused should be called upon to answer a charge under one of these counts alone.

The Appellants have cited to us the decision of the Court in Criminal Assize No. 37/32, Attorney-General v. Suliman Hassan El-Farah and others.

In that case the information had only one count charging Article 174 (3) of the Ottoman Penal Code and Sections 3 and 4 of the Criminal Law Amendment Ordinance (No. 2) 1927, and the particulars related only to a charge of common intention on the part of the accused to prosecute an anlawful purpose in conjunction with one another, in the prosecution of which the deceased met their deaths.

The Court of Assize held, that in view of the terms of Section 26 (1) (d) of the Trial Upon Information Ordinance, 1924, and the particulars of the offence contained in the information, the inclusion of Section 5 of the Criminal Law Amendment Ordinance (No. 2) 1927 was improper, and it was struck out of the information.

The information in the present case is clearly distinguishable. Section 3 and Section 4 of the Criminal Law Amendment Ordinance (No. 2) 1927 are charged along with Article 170 of the Ottoman Penal Code in separate counts and separate particulars relating to

the respective sections of the Ordinance of 1927 are set forth beneath each count.

Counsel for the Appellants has urged that Section 4 requires that two different offences must be specified in the charge and that the common intention must be to commit another offence than that which ensues, meaning thereby an offence of a totally different nature. I cannot assent to this argument.

The charge was that accused had a common intent to kill Jews, which is clearly an unlawful purpose, under Section 4 of the Ordinance of 1927, and that in the prosecution of that purpose they threw, or caused to be thrown, into the house of the two deceased who were Jews, a bomb, which caused their deaths.

I can conceive no act which could more exactly tally with the requirement of Section 4 of the Ordinance of 1927, which provides that in the prosecution of the unlawful purpose an offence is committed which is a probable consequence of the prosecution of such purpose.

With regard to the question of Taha Ahmad Taha being called without the defence having sufficient time in which to prepare for his cross-examination, written notice to call this witness was given; the law was therefore fully complied with and any practical disadvantages from which the defence suffered were in actual fact reduced to a minimum by the circumstance that this evidence was not concluded on the day upon which he was called and the defence had therefore time in which to prepare for his cross-examination on the second day.

We need not stop to discuss the argument that there was an irregularity, because several witnesses not heard at the preliminary inquiry were called to give evidence at the trial under Section 36 of the Trial Upon Information Ordinance. That section imposes no limit on the number of additional witnesses who may be so called, and it would be to go completely beyond the province of a Court and to usurp the functions of the legislature were we to rule that it was irregular to call more than a stated number of such additional witnesses.

As regards the evidence against the first accused Mustafa, no promise of any kind whatsoever was made to him by the police. If he spoke under the inducements of his advocate, it clearly comes under the decisions in Rex v. Row (1809), Nuss. and Ryan p. 153, Rex v. Gibbons (1823) 1 C. and F. 97 and Rex v. Taylor (1859) 8 C. and F. 753, which leaves no doubt that an inducement held out by a person not in authority will not exclude a confession,

even if such confession is made subsequently to a person who is in authority.

The case of Rex v. Frewin, 6 Cox. 530, Russell on Crimes, 8th edition, Vol. II p. 2005 (English and Empire Digest Vol. XIV p. 424 par. 4440), is also of interest in this same connection in view of the prisoner being illiterate, for it was a case in which a confession was induced by a person in fact not having any authority to make a promise, and the learned judge, Crosswell J., said that he was disposed to think the statement admissible even though the person making the promise was in a position that might reasonably lead the prisoner to believe that he had authority to make such promise.

After due consideration, we do not attach importance to the fact that in his confession Mustafa spoke of his visit to Nahalal being in the middle of Ramadan. His admitted visit was on a night on which an explosion, as he says, occurred in that Colony, and we are convinced that if there had been another explosion there in the middle of Ramadan the defence could have called evidence of it which would have immediately exonerated Mustafa from the charge.

The coincidence over a considerable distance near Nahalal of the route pointed out to the Police by Mustafa, with the footprints discovered by the tracker, and the numerous similarities between the fragments found at Nahalal and the bomb found behind Mustafa's house at Saffouria can leave no doubt in the mind af any reasonable man as to the weight of evidence against this accused.

In one particular only did the microscopic examination to which the lengthy record of trial was subjected by the Appellant, reveal any error in the conduct of the case so far as concerns Mustafa. Corporal Petrie, the 17th witness for the prosecution, deposed to seeing a bomb and a cigarette case lying two metres apart behind the Appellant's house. He picked them up went to the front of the house where Mustafa was in custody and said "I asked him if the cigarette box were his. He said yes". .

On the analogy of Rule 6 of the "Judges Rules" Archbold 28th Edition, p. 406, the Court of Assize, on objection being taken, admitted this answer to the policeman's question. In this the Assize Court erred. Rule 6 lays it down that "a statement made by a prisoner before there is time to caution him is not inadmissible by reason of no caution having been given".

Under Rule 3, "Persons in custody should not be questioned without the usual caution being first administered". Corp. Petrie

acted in breach of this rule and the answer should have been excluded. The Court was mistaken in applying Rule 6 inasmuch as Mustafa did not blurt out a statement before there was time to caution him, but, being in custody, he was deliberately questioned by the Corporal and his answer was therefore improperly admitted owing to Corporal Petrie's failure to comply with Rule 3.

Inasmuch, however, as the ownership of the cigarette case had no bearing upon the decision of the case, we hold that there was no miscarriage of justice, as contemplated under the proviso to Section 62 (1) of the Trial Upon Information Ordinance, 1924.

With regard to the second accused Ahmad Ghalayini, his purchase of components similar to those in the bomb, the finding in his shop of other components also similar to corresponding parts of the bomb, together with the evidence of Taha constitute the case against him.

Much stress was laid by the Appellant's counsel in this connection upon the following passage, which dealt with Taha's statement, in the judgment of the majority in the Court of Assize:

"Evidence of this kind is obviously of doubtful reliability. This witness, however, has been submitted to a lengthy cross-examination by the defence, who has also called evidence to disprove some of his statement. The impression made upon us is that Taha is not to be dismissed as a wholly unreliable witness and that his evidence may be accepted as corroborating the other evidence against the two accused".

It will be observed that the learned judges began in quite general terms: "Evidence of this kind is obviously of doubtful reliability". They say in effect "Evidence of this nature must be very carefully scrutinised before we accept it", they most emphatically do not imply, as Appellant's counsel suggested, that the evidence of this particular witness is unreliable. What they do say, as I understand it, is that, after hearing him tested by lengthy cross-examination and after weighing his testimony in the light of rebutting evidence they came to the conclusion, bearing in mind always that they view a witness of this class with suspicion, that this witness is not wholly unreliable and they accept his evidence as corroborating the other testimony which has been brought against Ahmad.

The dissenting judgment of Judge Rafiq Abu Ghazaleh emphasises the acceptance by the majority of three Judges of the evidence of Taha, for Rafiq Eff. expressly states "I am dissatisfied with the evidence of Taha Ahmad Taha which is a clear lie".

A majority of Judges in the Court of Trial being satisfied with the credibility of Taha, the Court of Appeal has no power to go behind that finding, and this being so we hold that there was sufficient evidence before the Assize Court to justify it in convicting the Appellant Ahmad.

For the above reasons both appeals are dismissed and the conviction and sentence of death in each case is confirmed.

Delivered the 22nd day of January, 1934.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 13/33.

IN THE CASE OF:

Hassan Badr et al — APPELLANTS.

vs

Fahima Hanem — RESPONDENT.

Procedure—Proof of claim to a right of pasture—Validity of title of registered owner who had taken transfer without notice of irregularity in title—Werko records produced as evidence—Use of land by village from time immemorial as pasture—Admissibility of oral evidence against Kushan.

JUDGMENT.

The Appellants, who are inhabitants of Mazraa village, claim that there are in the village uncultivated lands used from time immemorial as pasturages and for cutting wood for the people of the said village. The lands are known as "Dahra lands".

They base their claim on oral evidence, werko records and on the fact that it is the only pasturage in the village and that they pay the werko in the name of all the people of the village.

The advocate for the Respondent, Fahima Hanem, contends that the whole of the land in dispute is included in his clients' kushan dated July 20th, 1307, with an area of 210 dunams; and that the property had passed to her by way of purchase from Said Pasha on July 25th, 1923, who bought it from Selim Ayoub and Jubran Saad on June 30th, 1307. The original vendors acquired the property in 1285 in a public auction sale by virtue of a decision of the Mejlis Idara which stated that all lands of the village were sold except the Waqf land. He proves his allegation by the Tabu records in their hands as well as by the werko records.

In the present case there are involved three plots of land. The first marked "B" on the plan is of an area of 130 dunams; the second marked "C" is of an area of 90 dunams and the third marked "A" is of an approximate area of one thousand dunams. It is with plot "A" which is called the "Dahra" lands that the present dispute is concerned. The Appellants claim that it was included in the kushan illegally.

The Land Court decided not to accept the evidence of Plaintiffs' witnesses as it stood.

His Honour Judge Aziz Eff. was of opinion that judgment should be entered for Plaintiffs in respect of the rocky parts for the reason stated in his judgment.

His Honour Judge Seton, on the other hand, was of the opinion that as the Plaintiffs held no kushan he could not uphold their claim and that their case must be dismissed.

This Court holds that the general principle that as against a registered title of land rights in land cannot be proved merely by oral evidence applies. There is neither a tabu nor a werko record to show that the land in dispute is the land in respect of which werko is paid.

Secondly, although the people of the village have been accustomed to graze their flocks on part of the land in dispute, nevertheless, such grazing does not give rise to a right of pasture. The Respondent is registered at the tabu as the owner of the whole land in question.

Furthermore, the records of the Mejlis Idara dated 1285 support the statements of Respondent.

Moreover, with regard to the correction of registration which the Appellants allege resulted in the land in claim becoming wrongfully registered under the title under which the Respondent is now the registered owner, it is to be noted that the correction of registration took place prior to the purchase by the Respondent, who so far as the evidence before us shows bought in good faith from a registered owner under the corrected registration, without notice of any irregularity in the title. As against the Respondent, therefore, the Appellants cannot succeed, even if the correction were, as they allege, irregular.

The appeal is dimissed with costs including LP.5 advocate's fees and expenses.

Delivered the 14th day of June, 1934.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 42/33.

BEFORE:

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

IN THE CASE OF:

Fahideh bint Nimmer el Murshed — APPELLANT.

vs

Muhammed Abdel Razek Daoud
Elia Abraham Matalon — RESPONDENTS.

Right of creditor to attach property registered in debtor's name—Attachment of property of third party registered in execution debtor's name—Werko receipt held to be evidence of possession not ownership—Deed of sale not registered in Land Registry—Proof of genuineness of signature on document—Arts. 97-104 Civil Procedure Code—Sec. 7 (2), Land Courts Ordinance, 1921—Law of Evidence (Amendment) Ordinance, 1924—Registered title not set aside solely upon evidence of possession.

JUDGMENT.

As against the Respondent Matalon, the Appellant has nothing to put forward. Even if the land in dispute be the property of the Appellant, he has allowed it to remain registered in the name of another person, and he has no recourse against a creditor of that person who has attached the property in satisfaction of a debt. See Theodoule Zenobio & another v. Meirem Osman executors, 2 Cyprus Law Reports, 168.

As between the Appellant and Respondent Muhammad Abdel Razek Daoud, having regard to Section 7 (2) of the Land Courts Ordinance, 1921, it appears that the Land Court adopted the procedure prescribed by law in referring the question of the genuineness of the Appellant's hijjeh to determination by experts in accordance with Articles 97 to 104 of the Civil Procedure Code.

Article 103, upon which the Appellant relies, provides for statements by persons who saw the document in dispute written or saw the Defendant sign the document, or who have knowledge of circumstances which may elucidate the matter to be made to the experts. It does not impose upon the Court the duty of hearing such statements. And this is not affected by the Law of Evidence (Amendment) Ordinance, 1924.

The documents used for the purpose of comparison of the handwriting were indicated by the Appellant, and he cannot now be heard to say that they did not afford a fair basis of comparison.

The Appellant has further argued that the Court should have accepted receipts for Werko paid by Abdel Razek Daoud on behalf of Yousef El Abed Mansur, the Appellant's husband, as evidence of title, and should have heard the evidence of witnesses in support of it.

We hold, however, that such a receipt is evidence not of ownership but of possession, and that it thus falls within the general rule that a Defendant's registered title will not be set aside solely upon evidence of possesion by the Plaintiff.

As against both Respondents, therefore, the appeal fails.

The costs of the appeal will be paid by the Appellant including LP. 2.500 mils advocate's fees and expenses to the Respondent Matalon.

Delivered the 27th day of November, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 46/33.

BEFORE:

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

IN THE CASE OF:

David Moyal APPELLANT.

vs

Jacob Atieh, on his own behalf and as heir of Daniel Atieh, RESPONDENT.

Civil procedure—Evidence of parties—Right of party to call other party as witness—Waiver of rights by laches under agreement—Law of waiver discussed and "waiver" defined.

Appeal from the judgment of the District Court of Jaffa, dated the 24th day of January, 1933.

JUDGMENT.

After hearing Mr. Eliash for Appellant and Mr. Karwassarsky for the Respondent, we are of the opinion that the lower court was wrong in refusing the request of the Defendant (present Appellant) to call the Plaintiff (present Respondent) as a witness to enable him to prove by the Plaintiff's admission that when he accepted a transfer of part of the land he waived his right to the remainder.

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

Given the 16th day of November, 1933.

JUDGMENT OF THE DISTRICT COURT.

I do not propose to set out again the facts of this case—they appear sufficiently from the previous judgment of this Court. It will be enough for the purpose of this judgment if I say that the Plaintiff claims that by virtue of a contract dated 20th January, 1922, the Defendant was bound to transfer to him 1017 pics more than he in fact did transfer by virtue of this contract to the Plaintff on 1932, and he is therefore claiming damages for this failure to implement the agreement.

This case has been referred back to us for the sole purpose of allowing the Defendant to call the Plaintiff as a witness to enable him to prove, if he can, by the Plaintiff's admission that when he accepted a transfer of part of the land he waived his right to the remainder.

In accordance with the judgment of the Court of Appeal (C.A. No. 46/33) we have heard the Plaintiff on oath. He has been examined at considerable length and with considerable skill by the Defendant, and the following facts appear from his evidence. It is clear that the Plaintiff took possession of what I will call the "transferred area" some twelve years ago, soon after the date of the agreement. About a year later he built two houses on it and built a wall round the "transferred area". He gives as his reason for fencing off this area only, that the remainder of this land belonged to the Government. It does not appear that he sent any communication to the Defendant, after entering into possession of the "transferred area" calling his attention to the fact that a further area should be transferred to him under the agreement, nor did he receive from the Defendant anything to show that a further area remained to be transferred.

Affairs remained as stated above for approximately ten years, the Plaintiff was in possession of the "transferred area" and was occupying it, he sent no demand to the Defendant for any additional area, and he had no Kushan for the "transferred area".

The first positive act of the Plaintiff according to his own evidence to claim the extra 1017 pics was when he instructed his advocate to send a notarial notice to the Defendant claiming this area. This would be in February, 1932, because the notice was duly sent on the 15th February, 1932. Then on 28th February,

1932, Defendant wrote a letter to Mr. Gorodissky the advocate, who was acting as his agent in land affairs, instructing him to transfer in the Land Registry to the Plaintiff the two plots of land, which together comprise "transferred area". Plaintiff knew of this letter and of its contents of which he says he approved. He stated that he regarded the letter as referring to a part only of the land he had agreed to buy in 1922, and that he instructed Mr. Gorodissky accordingly to get a Kushan for that part.

There is nothing in the letter to show that any further area remainded to be transferred. This transfer was duly made. He did not send any letter or make any communication to the Defendant, at or about the time of transfer nor after the letter of 28th February, 1932, and his interview with Mr. Gorodissky, to the effect that any land still remained to be transferred to him under the agreement.

I should mention that the Plaintiff alleges that the Defendant demanded the sum of LP.40 from him before sending the letter of 28th February, 1932, to Mr. Gorodissky, saying that he would not send the letter unless he received this sum, and that eventually they compromised on LP.20 which latter sum was paid. The Plaintiff says that he paid this sum under compulsion, and regarded it as a form of blackmail or robbery. We express no opinion on the quality of this payment.

After the notice, the Plaintiff says he paid the Defendant the sum of LP.20 for Werko, alleging that the Defendant asked him for this sum, but says that he did not take any receipt for this amount. The Plaintiff is unable to point out on a plan the "transferred area" or the area which he claims stating that he is unable to read a plan. He says that he did not sign a plan with Mr. Kipnes, but cannot say if the plan produced to him is the one which he signed. The Plaintiff then gave instructions to enter this action. Lastly the Plaintiff denies that he ever waived his right to the further 1017 piccs under the agreement.

These are the findings of fact which we make after hearing the Plaintiff's evidence. On these findings of fact, it is now for us to determine whether there has been a waiver or not.

A waiver may be either explicit or implied, that is, the waiver of a right may be made by some formal document or some admission, oral or written, or, by his acts or omission, by his general conduct or attitude, in regard to a particular transaction a person may be held impliedly to have waived a right. It is clear

here that there is no explicit waiver, and we need therefore only consider the second form.

Now the outstanding facts which emerge from Plaintiff's evidence are that, soon after the date of the agreement he took possession of the "transferred area", fenced it, built on it, enjoyed all the rights of possession ten years, without even once calling upon Defendant to transfer to him or give him possesion of the additional area of 1017 pics. He appears, so far as his evidence goes, to have rested content with what he had got, and we place particular significance upon the fact that, even when actual transfer of the "transferred area" did take place, he admits that he never informed the Defendant that any additional area remained to be transferred. I quote from my notes of his evidence where the following passages occur: "I did not send any notification to Moyal at or about time of transfer" and further on "I did not send anything to you (i.e. the Defendant) after discussing with G. (Gorodissky) that any land still remained to be transferred". I should have thought that the time of the transfer of the "transferred area" would have been the time for the Plaintiff, if he claimed an additional area, to have made it quite clear that the "transferred area" was a part only of the land to which he was entitled under the agreement, and to have taken from the Defendant an acknowledgement to that effect, or else to have refused to take transfer of anything less than the whole area. All through, from the date of the agreement up to and past the date of transfer, the Plaintiff cannot point to one claim on his part to any additional area, but to all intents and purposes would seem to have been content with the "transferred area" of which he was in possession. It is not until the notarial notice of the 15th February, 1932, that he makes any claim to any additional area, and after that he accepted the transfer of the "transferred area" only.

For these reasons which are based on our findings of facts we have come to the conclusion that the Plaintiff must be held impliedly to have waived his right to any additional area when he accepted a transfer of part of the land. After all he has only himself to blame—a person who sleeps on his rights for so many years, who has made so many omissions, has been so careless in defence of his own interests and rights, must be held to have waived those rights.

This really disposes of the case, but in view of the fact that an appeal will almost certainly be brought against this judgment, I think it well to add a few words.

Except in so far as it is contradicted by this judgment the original judgment of this court on the legal points and findings of fact, excepting of course the conclusion and the finding in favour of the Plaintiff, is confirmed.

It has been represented by Defendant, that a principle laid down by this Court in that original judgment has been contradicted and overruled by the judgment of this Court in Shapiro vs. Frankel (C. D. C. Ja. No. 336/32).*

As to that I express no opinion since it is not necessary for the purpose of the present case. If and when it should be necessary to deal with this point I shall do so, and it may well be that it will be found on closer examination that there is no contradiction, and that the two cases may be distinguished and the difference, if any, satisfactorily explained.

In the result, judgment must be entered for the Defendant. As to the costs. The Defendant is entitled to his costs, such as they are, of the original trial in this Court, of the appeal, and of this present trial. He will also receive LP.5. advocate's fees for the hearing in the Court of Appeal. The provisional attachment granted in the case is cancelled.

Dated the 15th day of February, 1934.

In the Supreme Court sitting as a Court of Appeal.

CR.A. No. 73/33.

BEFORE:

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

IN THE CASE OF:

Mahmoud Abdel Kader — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Involuntary admission—Statement made to Police constable pursuant to cross-examination before accused was charged held inadmissible—Insufficient circumstantial evidence for conviction of wilful murder—Art. 171 (1) Ottoman Penal Code.

JUDGMENT.

The Court holds that the statement S.T. 4 tendered by Constable Sadi Tuffaha and put in evidence was a statement taken by the police constable before the accused was charged and hence

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* Appeal judgment reported ante p. 431.

was clearly inadmissible and it further holds that the only evidence against the accused was his omission, on his own showing, to report his having seen the deceased lying wounded; together with the fact that he explained the wound on his left arm as having been caused by a sickle which the medical evidence shows was untrue.

The Court therefore holds that there was not sufficient evidence upon which to base a conviction.

The conviction is quashed and the prisoner is discharged.

Delivered the 30th day of October, 1933.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 81/33.

BEFORE:

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

IN THE CASE OF:

Jum'a Zaghloul APPELLANT.

vs

Yacoub Yousef & another RESPONDENTS.

Bill tendered in evidence held to be insufficiently stamped—Opportunity given by District Court to Plaintiff to tender oath to Defendant—Refusal of Plaintiff to administer oath—Finding of fact not disturbed by Court of Appeal.

JUDGMENT.

There was evidence upon which the District Court could find that the bill tendered in evidence by the present Appellant was not duly stamped; and it is not for this Court to make a fresh finding upon this issue.

The Appellant might have called the Respondents to give evidence at the hearing in the District Court before it gave judgment. He did not do so, and he is not now entitled to have the case re-heard in order that he may call his witnesses. The appeal is dismissed with costs.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 89/33.

BEFORE:

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

IN THE CASE OF:

M. L. Gorodissky — APPELLANT.

vs

Eliahu Eliashar — RESPONDENT.

Admissibility of oral evidence as between relatives—Grandson-in-law held not to be included within scope of Art. 82, Civil Procedure Code—Oral evidence not admitted to prove that money secured by bill was actually paid to borrower—Oral evidence not admitted to prove consent to transfer of bill—Oral evidence admitted to prove authority of agent to sign bill on behalf of maker—Denial of payment of money secured by bill containing admission of receipt—Oath to be administered to person in whose favour admission made—Application of Article 1589 Mejelle—Hawale—Transfer of right to receive monies secured by document requiring consent of debtor—Consent to be in writing—Requirements of promissory note under Article 145, Commercial Code.

JUDGMENT.

In this case oral evidence was admitted in the Magistrate's Court on three points:

1. To prove that the bill in suit was signed on behalf of Esther Navon with her authority.

2. To prove that the money secured by the bill was actually paid to the borrower, Esther Navon.

3. To prove that Esther Navon consented to the transfer of the bill from Joseph to Isaac Eliasher.

The Respondent maintains that oral evidence is admissible because the relationship of the parties brought them within the scope of Article 82 of the Civil Procedure Code.

We cannot accept this view. In the first place the Respondent is not a descendant of Esther Navon, but the husband of a descendant, and thus the Article does not apply on him.

Further, even where the transaction is between persons who come within the terms of Article 82: if the transaction has been reduced into writing oral evidence is not admissible to rebut the terms of the document. See C. A. 72/31, Nasr vs. Nasr.*

So far, however, as authority to sign the bill on behalf of Esther Navon was in question, we hold, following C. A. 49/28,

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* See ante. p. 795.

Ahmad Muhammad El Habashi vs. Taufiq el Haj Omar, that oral evidence was admissible.

But with regard to the other two points, we hold to the contrary. If payment of the money secured by a bill containing an admission of receipt is denied, the provisions of Article 1589 of the Mejelle apply and the person in whose favour the admission was made is called upon to take an oath that the admission is not false.

Again where a transfer of the right to receive the moneys secured by a document requires the consent of the debtor, such consent must clearly be given in writing.

It follows that the Respondent can only succeed, if the document upon which he relies is a negotiable instrument transferable without the consent of the debtor.

The bill, however, provides for payment not only of principal and legal interest but also for damages for non-payment on the date of maturity and does not contain any provision for payment to the order of the payee.

We hold that this is not a promissory note under Article 145 of the Commercial Code, which was the law in force at the time when it was made, and hence the bill could not be transferred by endorsement. The appeal thus succeeds on both grounds. The judgment of the District Court is set aside and the case remitted to the District Court for completion.

Costs will follow the event.

Delivered the 30th day of October, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 106/33.

BEFORE:

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

IN THE CASE OF:

Misbah Muhammad and Another — APPELLANTS.

vs

Hajjah Ghusun bint Tamimi — RESPONDENT.

Notarial promissory note—Defeasibility of admision in document made before Notary Public—Complete failure of consideration for promissory note alleged—Proof of failure of consideration—Admissibility of oral evidence to rebut terms of document—Secs. 5, 12, Law of Evidence Amendment Ordinance, 1924—Evidence of material

corroboration in civil case—Admission before Notary Public held not to be analogous to admission before Land Registry—Proof by admission of Defendant of claim set up against document—Article 80, Civil Procedure Code—Interpretation of Bills of Exchange Ordinance, 1929, by reference to law of England.

JUDGMENT.

Appellants sued Respondent on a promissory note for £3000 made by Respondent in favour of Appellants and their brother Muhammed Rashed. The document was duly authenticated before the Notary Public of Nablus and Respondent admitted having caused her thumb print to be affixed to the note but set up the defence that the statement in the note that she had received value for the £3000 in cash was a false admission and that in fact there had been a complete absence and failure of consideration for the note. The lower Court held that Respondent could not rebut the terms of the document except by documentary evidence or by the evidence of the parties themselves and in the absence of documentary evidence applied Section 12 of the Law of Evidence Amendment Ordinance, 1924, which enables either party to giv evidence on his own behalf or be summoned to give evidence for the other party.

The Respondent gave evidence on commission denying the receipt of any consideration for the note and the two Appellants gave evidence in Court stating that they had each given the Respondent £1000, being the consideration stated on the note.

The lower Court then gave the following judgment:

"We are satisfied that neither of the Plaintiffs did hand or give to the Defendant the sum of £1000. Moreover in our opinion there is ample corroboration in the evidence of the two Plaintiffs to support Defendant's allegation that there was no consideration at all from either of the Plaintiffs for her signature on the document in question on which the Plaintiffs rely and upon which this claim is founded. The action must therefore be dismissed with costs".

Against this judgment Appellants have appealed submitting the following two grounds:

I. The promissory note having been duly attested by a Notary Public no defence of false admission can be heard against it, it being analogous in its legal effect to an admission made before a Land Registrar which this Court has held to be indefeasible.

II. That the lower Court was wrong is basing its judgment

on the single evidence of the Respondent, such evidence not being materially corroborated by the evidence of the Appellants.

With regard to the first ground of appeal no law has been quoted to us and we know of none, whereby a document authenticated before a Notary Public can be held to be indefeasible with regards to the admissions it contains and we cannot hold it to be analogous to admissions made before a Land Registrar.

With regard to the second ground of appeal Section 5 of the Law of Evidence Amendment Ordinance, 1924, must be borne in mind which prescribes that:

"No judgment shall be given in any case on the evidence of a single witness unless such evidence is in a civil case uncontradicted or is corroborated by some other material evidence which in the opinion of the Court is sufficient to establish the truth of it."

We have therefore to examine whether there is in this case material evidence (or evidence in some material particular which could satisfy the lower Court, for they, and not we, are the people to be satisfied). The judgment of the lower Court does not, unfortunately, state the grounds for the conclusion they have arrived at that Appellants' evidence materially corroborated that of Respondent, and it would be in a high degree dangerous to attempt to formulate the kind of evidence which should be regarded as corroboration, or to attempt any general definition of what constitutes corroborative evidence.

In my opinion, however, in cases of this nature where the law has laid down a first principle "that every claim set up against a document within the terms of Article 80 of the Civil Procedure Code shall be proved either by documentary evidence or by the admission of the defendant", and subsequently then allowed oral evidence limited to the parties to the action to be let in (sic) (Law of Evidence Amendment Ordinance, 1924) it is peculiarly necessary that the requirement of the Ordinance as to corroboration should be strictly complied with, and I do not feel that in the present case where Appellants repeatedly stated that they had each advanced £1000, the fact that their demeanour was bad and that the Court were evidently not satisfied from what source the moneyl was obtained, is evidence of material corroboration to a denia (sic) by a person that a document duly signed by her contains a false admission. Accordingly the appeal must be allowed, the judgment of the lower Court quashed and judgment entered for Appellants for the sum claimed with costs and advocate's fees assessed at LP.2.

JUDGMENT OF MR. JUSTICE FRUMKIN.

The defence maintain that there was no consideration for the bill which is the subject matter of the case. In support of the defence the Court heard evidence of the parties, each insisting on its own view.

Now the statement of the Defendant in her favour is certainly no evidence. The fact that the evidence of the plaintiff was not satisfactory is also not evidence in favour of Defendant, who must be considered as having failed to establish her defence that she never received consideration.

The appeal must be allowed and judgment entered for Appellant for the sum of LP.2000 with costs here and below.

JUDGMENT OF MR. JUSTICE KHAYAT.

I am of opinion that in this case reference must be made to Section 2 (2) of the Bills of Exchange Ordinance, 1929, which provides:

"This Ordinance shall be interpreted by reference to the law of England relating to Bills of Exchange, Cheques and Promissory notes save in so far as it is inconsistent with the provisions hereof".

Hence according to English precedent parol evidence is admissible to prove lack of consideration in respect of this note.

Even assuming that Section 5 of the Law of Evidence (Amendment) Ordinance, 1924, alone applies I am of opinion that Defendant's (Respondent's) evidence was corroborated by material facts established by the Appellant's own evidence. These facts are:
(a) The promissory note is payable on demand and is dated January 25, 1930, no claim was made on the note until 27th December 1932, i.e. three years later.

(b) The parties to the note are a mother and her children.

The Plaintiffs admitted that their third brother, Mohammad Rashed, had not paid anything on account of the LP.1000 acknowledged in his favour and that he was not in a position to pay such an amount.

(c) They alleged that although they were merchants they used to burn their books at the end of each year and that there was no entry or record of the amount they had paid.

(d) They alleged that they had the LP.2000 in their own safe while they had a current account with two banks and there is no trace of such sum.

(e) They confirmed the fact that they had a previous pro-

missory note which had been given as a security and in order to prevent the mother from disposing of her property.

(f) They alleged that they had paid the money in the morning and waited till the afternoon to make the promissory note.

(g) They admit that until 1930 and previous thereto, they had no profits, or such profits were very small.

These are all material circumstances in support of Defendant's evidence.

I am of opinion that the appeal must be dismissed and the judgment of the Lower Court dismissing the claim confirmed.

Delivered the 30th day of July, 1934.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 121/33.

BEFORE:

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

IN THE CASE OF:

Joseph Rivlin — APPELLANT.

vs

M. J. Mizrahi & Sons — RESPONDENTS.

Evidence of the parties not heard although requested — Section 12, Law of Evidence Amendment Ordinance, 1924—Article 80, Civil Procedure Code.

JUDGMENT.

The Lower Court was requested by the Appellant to hear the evidence of the parties to the action. The said Court, however, after hearing counsel, gave judgment on the documents before them without hearing the evidence of the parties.

Now, Section 12 of the Law of Evidence Amendment Ordinance, 1924, enables either party to give evidence on his own behalf or to be summoned to give evidence for the other party; and this Court has on several occasions decided that such evidence may be called by Defendant, even in cases where a written document within the meaning of Article 80 of the Civil Procedure Code is the subject-matter of the action. See C. A. No. 77/32 and C. A. No. 106/32.

The Lower Court was wrong in refusing the request of the Appellant to hear the evidence of the respective parties, and the

judgment of the Lower Court is therefore set aside and the case remitted for the evidence of the parties to be heard and for fresh judgment to be given.

Costs to be costs in the cause.

In the District Court of Jerusalem.

C. D. C. Jm. No. 134/33

BEFORE :

Sherwell, J. and Atallah, J.

IN THE CASE OF :

Elen Jabra Jamsel PLAINTIFF.

vs

The Attorney-General DEFENDANT.

Action for return of monies seized by Police in search of house—Proceedings in criminal case produced to Civil Court—Jurisdiction of Courts re disposition of stolen monies recovered by Police—Findings of fact not recorded by Court of Trial—Section 48, Trial Upon Information Ordinance, 1924—Res judicata—Judgment of Court of equal jurisdiction not reversed by Court.

JUDGMENT.

In this case the Plaintiff is suing the Police by the Attorney General for the sum of LP. 200 together with costs, interest and Advocate's fees, alleging that the police have wrongfully converted the said sum of LP. 200 which was her own personal property.

The facts of the case appear to be that in 1930 the Police whilst conducting a search in the house of Itzhak Ben Jabra Syriani, the husband of the Plaintiff, for goods and money stolen from the Morcos Hotel, found a purse containing LP. 200 with the Plaintiff. This amount was confiscated by the Police and, together with other money and articles, produced subsequently in evidence against the said Itzhak Jabra Syriani, during his trial on the criminal charges of theft and possession of stolen property, at the District Court of Jerusalem in May of 1931. The District Court convicted him of both these charges and sentenced him to three years' imprisonment with hard labour. The Court in delivering its judgment on 11th May, 1931. directed the "stolen property to be returned" i. e., to complainant. This judgment and sentence were confirmed by the Court of Appeal on 20th June, 1931, whereupon the

Police handed the articles as well as all the money including the LP. 200 in question to the complainant.

In her statement of claim the Plaintiff states that no allegation was made during the criminal proceedings that the amount in question was stolen by the accused Itzhak, that no finding was made as to the LP. 200 by the Court and further that the judgment of the Court contains no direction whatsoever as to its disposal.

The Attorney-General on the other hand denies this and submits that the District Court has found, as a fact, that this money was stolen and directed it to be returned to Complainant. It was pointed out by the Attorney General's representative before us that, whilst no specific mention was made of the LP.200 in the judgment, the only construction in the circumstances that could be placed on the direction of the Court to return the stolen property, is that the LP. 200 were included in the direction of the Court.

The proceedings in the Criminal Case have been produced before us in evidence and we have come from them to the following conclusions:—

1. There was an allegation by the prosecution in the Criminal Case that the LP.200 was stolen, and

2. That in the absence of any specific provision in the judgment of the Criminal Court to return the LP. 200 or part thereof to the Plaintiff, who in her evidence as witness for the accused before that Court claimed only LP.100 out of the LP.200 and in face of the allegation by the prosecution and the evidence which tended to prove that the LP.200 was stolen, this Court must construe the direction as including and intending to include the LP.200 confiscated by the Police from the Plaintiff.

3. Further fhe fact that the LP.200 was stolen seems to have been clearly and sufficiently established by the evidence at the trial to the satisfaction of the Criminal Court, which did not deem it necessary that any finding of facts on this point should be recorded having regard to the evidence given before it and to the proviso to Section 48(1) of the Trial Upon Information Ordinance, 1924.

It has been argued before us by the advocate for Plaintiff that whatever construction is placed on the judgment of the Criminal Court, such judgment cannot be considered as "res judicata" as far as the Plaintiff is concerned, and therefore is not binding on

this Court inasmuch as she was never a party to the criminal proceedings, but merely gave her evidence as a witness. We cannot, however, accept this view, for if it were correct, and this Court, after hearing the case were to find that the LP.200 were not stolen property, but were the property of the Plaintiff, then it would in effect be reversing a judgment of another Court of equal jurisdiction, which this Court has no power to do. Whatever remedy the Plaintiff may have, is clearly, therefore, not by action brought in this Court sitting in its civil capacity. For the above mentioned reasons therefore the action is dismissed.

Judgment appealable. Delivered in presence of parties the 4th day of April, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 183/33

BEFORE:

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

IN THE CASE OF:

Adib Bamieh — APPELLANT.

vs

Ziporah Lifschitz — RESPONDENT.

Promissory note endorsed after maturity and before enactment of Bills of Exchange Ordinance, 1929—Section 96, Bills of Exchange Ordinance, 1929—Oath administered under Article 1589, Mejelle—Request for evidence on commission—Article 125, Civil Proceduce Code—Failure of party to avail himself of right to administer oath—Section 12, Law of Evidence Amendment Ordinance, 1924—Information enabling issue of summons to be given to Court by party desiring the witness to be summoned.

JUDGMENT.

The action which gives rise to this appeal was brought by the Respondent, Ziporah Lifschitz, against the Appellant, Adib Bamieh, upon a promissory note for LE. 100 — drawn by the Appellant in favour of one Suliman Felman, by whom it was indorsed in favour of the Respondent.

The District Court held that such indorsement was made after maturity and hence that the Appellant must be taken to be the agent of the indorser, in accordance with the Ottoman law which was then in force.

It is not now contested that indorsement was made after maturity and before the enactment of the Bills of Exchange Ordinance, 1929.

Hence, in accordance with the proviso to Section 96 of that Ordinance and the judgment of this Court in Civil Appeal No. 35/30, Librecht vs. Bulgaro—Palestinian Bank Ltd., the ruling that the Respondent was to be treated as suing merely as the agent of Felman cannot be questioned.

In reliance upon that ruling the Appellant set up the defence that no consideration had been given by Felman for the note, and claimed that an oath should be tendered to Felman under Article 1589 of the Mejelle. The Court allowed this claim and propounded the form of oath to be administered.

Thereupon the Appellant desisted from this claim and claimed that Felman should be called as a witness under Section 12 of the Law of Evidence Amendment Ordinance, 1924, and as Felman was not then in Palestine, asked that his evidence should be taken on commission.

As the Appellant could not furnish the address of Felman, the Court refused to issue a commission and gave judgment for the Respondent, subject to the proviso that the judgment should not be executed unless Felman took the oath that consideration was given for the note forming the subject matter of the case; such oath to be taken either in the Execution Office, or in his place of residence before a Judge.

Against this judgment the Appellant is appealing on the ground that until Felman's evidence had been heard, the Court was not in a position to give judgment; and he further relies upon Article 125 of the Civil Procedure Code.

With regard to the latter argument, we see nothing in Article 125 to preclude the Court from ordering, if it sees fit, that an oath be administered in the presence of the Chief Execution Officer.

The argument that no judgment could be given until Felman's evidence was heard, seems to us to be based upon a misconception.

If the Appellant had elected to have an oath administered to Felman under Article 1589 or Article 1818 of the Mejelle, it may be arguable that no judgment could issue until such oath had been duly tendered.

But the Appellant has refused to avail himself of the procedure afforded by the Mejelle and has chosen to rely upon Section 12 of the Law of Evidence Amendment Ordinance, 1924.

He has thereby made Felman his own witness; and it follows that it is for the Appellant to furnish the Court with the information which would enable it to issue a summons or a commission to take evidence. The Appellant has failed to do this; he has thus failed to place before the Court the evidence upon which he relied and it follows that his defence fails.

The appeal must be dismissed with costs.

EXECUTION.

In the High Court of Justice.

H. C. No. 9/25.

BEFORE:

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

IN THE APPPICATION OF:

Dr. Markarian Ex-parte

Judgment debtor ordered by Chief Execution Officer to pay debt in instalments—Preference of execution creditors—Discretion of Chief Execution Officer to order postponement of execution.

Application for an Order setting aside the decision of the Chief Execution Officer whereby it was decided that the debts of Saliba Saad, proprietor of St. John's Hotel, Jerusalem, be paid in instalments.

JUDGMENT.

The Court holds—

1. That the fact that the Petitioner has an attachment on the goods of the debtor does not give him a preference over the other creditors who have obtained judgment.

2. That the Chief Execution Officer has a discretion to order postponement of the execution of a judgment and that the order made in this case was made in due exercise of such discretion.

The petition is dismissed.

Delivered the 12th day of March, 1925.

In the High Court of Justice.

H.C. No. 12/25.

BEFORE:

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

IN THE APPLICATION OF:

Mustafa Ali Aliyan and Others PETITIONERS.

vs

The Chief Execution Officer, Jerusalem RESPONDENT.

Stay of execution—Extension of time for payment of execution debt—Article 107, Law of Execution—Registration of immovable property in name of purchaser at execution sale—Registration in name of purchaser cancelled—Land registry fees ordered refunded.

Application for an order to issue to the Chief Execution Officer in the District Court, Jerusalem, directing him to stay execution in the case of Abdullah Jirius Abu Gosh vs. Mustafa Ali Aliyan and Others.

JUDGMENT.

We are of opinion that the order of stay of execution made by the Chief Execution Officer in Jerusalem on 12th February was made before the expiration of the notice required by Article 107 of the Law of Execution and had an immediate effect, which was to extend the time within which payment might be made. On the 21st February before the ten days had expired a settlement was effected and the creditor petitioned the Chief Execution Officer to stay execution for an unlimited period on the ground of the settlement.

On the 16th February an order had been made setting aside the order of 12th February and ordering registration in the name of the purchaser.

We hold that the settlement and petition of the 21st February was in time and should have been given effect to and that the order of the 16th February ought not to have been made because the order of 12th February, staying execution had been made in time.

Ordered that the order of the Chief Execution Officer of the 16th February be set aside and the registration in the name of the purchaser cancelled and the money paid by him returned by the Execution Officer and any fees paid on registration repaid by the Land Registry Office.

The Chief Execution Officer should deal with the petition of 21st February and order accordingly.

Delivered the 12th day of March, 1925.

In the High Court of Justice.

H. C. No. 2/26.

BEFORE :

The Acting Chief Justice and Jarallah, J.

IN THE APPLICATION OF :

Muhammad Adib Jaghlit — PETITIONER.

vs

Chief Execution Officer, Jerusalem
Ahmad Tahhan — RESPONDENTS.

Mode of settlement proposed by judgment debtor refused by Chief Execution Officer—Warrant of imprisonment of debtor ordered by Chief Execution Officer — Imprisonment ordered on insufficient evidence set aside.

ORDER :

Upon hearing the advocates of the Petitioner and the Respondent Ahmad Tahhan, and in default of appearance by the Chief Execution Officer, it is ordered that the Order of the Chief Execution Officer dated 22nd December, 1925, refusing approval of the settlement offered by the Petitioner and directing the issue of a warrant of imprisonment in the matter of the execution of a judgment of the Court, in the action brought by the Respondent Ahmad Tahhan against the Petitioner, be set aside as no evidence was submitted to the Chief Execution Officer to support his refusal.

Delivered the 23rd day of January, 1926.

In the High Court of Justice.

H.C. No. 19/26

BEFORE:

The Chief Justice and Jarallah, J.

IN THE APPLICATION OF:

Ragheb Osman El-Khawajah — PETITIONER.

vs

The Chief Execution Officer, Jaffa,
Solomon Jacobson, Administrator of the Estate of the late Joseph Bey Moyal — RESPONDENTS.

Default judgment obtained in 1910—Judgment by default invalid if not put into execution within six months— Order of imprisonment of judgment debtor—Judgment by Default Rules of Court.

ORDER:

A judgment was obtained by the late Joseph Bey Moyal against the Petitioner in 1328 (1910) by default.

In 1918 a Rule of Court was made rendering a judgment by default invalid after six months if no legal steps have been taken towards putting it into execution.

The judgment was not notified, and no steps were taken to execute it till 1920, when it was produced to the Execution Officer.

Execution was commenced on two occasions with some result and on 30th June, 1925, the representatives of the estate of Joseph Bey Moyal obtained an order of imprisonment against the Petitioner for the sum of £E. 270. At times during the execution proceedings the sum of £E. 55 is admitted to have been paid by the Petitioner.

Whatever may have been the effect of payments made on account of the judgment in keeping the debt alive, the judgment obtained by default in 1328 had become invalid before any execution proceedings were taken and could not be revived. Any proceedings taken in execution of such a judgment were illegal and the Execution Officer must be required to take no proceedings by way of execution of the judgment by default.

In this judgment we follow the ruling in the case of Muhammad Tewfiq Dajani v. The Chief Execution Officer for

the District of Jaffa bearing the same date although previous to this judgment.

Delivered the 14th day of June, 1926.

In the High Court of Justice.

H. C. No. 39/26.

BEFORE:

The Chief Justice and the Acting Senior British Judge.

IN THE APPLICATION OF:

The Anglo-Palestine Co. Ltd. PETITIONER.

vs

The Chief Execution Officer, Haifa RESPONDENT.

Chief Execution Officer ordered to execute judgment—Sale of immovable property in execution.

ORDER

The Court upon hearing Mr. Horowitz on behalf of the Petitioner, and Mr. Faraji on behalf of the Palestine Jewish Colonisation Association (formerly the Jewish Colonisation Association), the Attorney General not appearing to oppose the order.

It is ordered that the Chief Execution Officer in the District Court of Haifa do cause the judgments of the Petitioner against the Achouza Palestine Land Development Company of St. Louis U. S. A., given in the District Court of Haifa on the second day of January, 1923, and 29th March, 1923, to be executed against four plots of miri land sold by the Palestine Jewish Colonisation Association to the Achouza Palestine Land Development Company of St. Louis in U. S. A. aforesaid, consisting of 3545 dunams of land bounded as follows:

1) North—Tiberias Lands. South—Delaike (Bet-Jann), East-Tiberias Lands, Kinereth lands of I. C. A. D. of Keren-Kayemet Le-Yisrael. West—Tiberias lands, lands of Delaike (Bet Jann) and lands of Yamma.

2) North—Main Road. South—land of Proprietor, East—Road of the Maccses. West—Main Road.

3) North—land of Proprietor. South—Main Road, East—Road to the houses and gardens. West—land of Proprietor.

4) North—Proprietor. South—Main Road, East—Proprietor, West—Proprietor.
but remaining hitherto registered in the Land Registry Office in the name of the vendors, and to cause the same to be sold by public auction with the consent and co-operation of the said vendors and these proceeds to be paid, after all costs of execution and of this judgment and fees due in respect of such proceedings, to the Land Registry Office in satisfaction of said judgment, the residue, if any to be paid into Court to remain until further order to the credit of the Achouza Palestine Land Development Company of St. Louis, U. S. A. aforesaid.

Delivered the 30th day of July, 1926.

In the District Court of Jaffa.

C. E. O. Ja. No. 2713/26.

BEFORE:

The Chief Execution Officer, Jaffa.

IN THE CASE OF:

Geula Co.,
Ali Moustakim,
Abul Giben,
Abu Mubada — APPLICANTS.

vs

Sheikh Joussef Dajani — RESPONDENT.

Participation of execution creditors in proceeds of execution sale—Priority of creditors holding judgments based on documents of prior dates—Excess amounts wrongly paid to judgment creditors ordered by Chief Execution Officer to be refunded—Arts. 64, 122, 123, Execution Law.

JUDGMENT.

The contract made by the Defendant with Geula Co. is dated the 30th June, 1925, and judgment based upon the contract dated the 18th of April, 1926. Contract made by the Defendant with Ali Moustakim is dated the 27th of May, 1926, judgment was obtained upon it on 14th November, 1927. The contracts of the other two Defendants are dated later than the Ali Moustakim contract. The Geula Co. laid an attachment on the property of the Defendant and the crop of the Defendant was duly sold. The other Plaintiffs attached the same property and applied for participation with the first Plaintiff.

On the 6th of January, 1928, execution by the Geula Co. was stayed. The matter was taken to the High Court which on the 1st of May, 1928, reversed the order of the Chief Execution Officer and ordered execution to proceed. In the meantime and before the decision of the High Court was issued, the proceeds of the sale of the crop had been distributed among the various judgment creditors who had applied for participation. The Geula Co. now apply that the payments to these judgment creditors should be cancelled and the amounts which have been obtained should be repaid to the Execution Office.

Article 123 of the Execution Law has been the subject of a decision by the High Court (see H. C. No. 43/27, Zivlin and another vs. Chief Execution Officer, Jaffa, and Another). The High Court held that unless the documents on which judgments have been obtained are of about the same date then the holder of a judgment based upon a document of a later date than that which was the cause of action in the first judgment is not entitled to participate in a previously effected executory attachment.

Primarily, of course, Article 123 is designed to protect judgment creditors from the effect of fictitious actions brought against the judgment debtor by third persons but is not limited by any specific words to such instances. In the present case the document on which the Geula Co. obtained judgment is nearly one year in advance in date of the next judgment obtained against the Defendant. Following this High Court decision, therefore, I am bound to hold that the judgment creditors other than the Geula Co. are not entitled to participate in the attachment laid by the latter. The amounts paid out to them must therefore be refunded. A further point has been raised that an order of the Chief Execution Officer is not sufficient to compel recovery of the sums paid out wrongly but that actions must be brought against the respective payees. I do not think that this is correct. Article 122 of the Execution Law states that where an amount in excess has been recovered from the judgment debtor and paid to the creditor, the excess shall be refunded without the necessity of fresh decree. What does this mean? It must mean that where a sum has been paid wrongly to a creditor that creditor can be compelled to refund without the necessity of entering an action against him and obtaining judgment upon it. In this case amounts have been wrongfully paid though at the time of payment the payments were in order but were made wrongful by the High Court decision which appeared later.

Article 64 of the Execution Law may also perhaps be held to apply in the above sense.

I therefore am of opinion that the sums paid out must be refunded forthwith to the Execution Officer.

Ordered accordingly. Sums recovered to be paid as deposit into Court and to be paid out without further order. Liberty to apply.

Dated the 17th day of June, 1928.

In the High Court of Justice.

H.C. No. 52/27.

BEFORE:

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

IN THE APPLICATION OF:

Abd Es-Salam Aweidah
Hassan Aweidah — PETITIONERS.

vs

Chief Execution Officer, Jerusalem,
Jacobus H. Kann — RESPONDENTS.

Immovable property registered in name of highest purchaser at execution sale—Judgment debt paid in full at date of registration in purchaser's name—Annual rent of property in excess of amount due under the judgment—Article 91, Execution Law—Grounds for setting aside order of sale made by Chief Execution Officer—Jurisdiction of Land Court to set aside order of sale made by Chief Execution Officer—Jurisdiction of High Court—Sec. 2 (e), Land Courts Ordinance, 1921—Art. 43, Palestine Order-in-Council, 1922—Jurisdiction of local Execution Officer to effect registration.

JUDGMENT.

The Court holds by a majority that Article 91 of the Execution Law does not allow the sale of immoveable properties the annual income of which is sufficient to pay the debt. The word "unmortgaged" is intended by the legislator to remove this privilege as against the mortgagee; it cannot be construed otherwise inasmuch as if we say that mortgaged immovable property may be sold on the application of any creditor we would be exposing to danger the rights of the mortgagee without it being to the benefit of the creditor. The word "unmortgaged" which appears in Article 91 of the said law is a safeguard in favour of the mortgagee's rights and not in favour of other creditors.

We therefore hold that the Order for the transfer made before ascertaining this condition and after the debtors had paid the greater part of the debt is contrary to law and that the registration should be cancelled and that the matter should stand as it was and the proceedings be continued in accordance with Art. 91 of the Execution Law.

DISSENTING JUDGMENT OF MR. JUSTICE CORRIE.

The facts of this case are as follows:—

On the 11th January, 1927, the Chief Execution Officer, Jerusalem, ordered the sale of certain immovable property of the Petitioners in satisfaction of a judgment debt of £E.450 and costs. In pursuance of that Order, the property was put up for sale by auction and the Respondent Kann was the highest bidder.

On 9th June, 1927, the Chief Execution Officer ordered the property to be registered in the name of Respondent Kann and and such registration was effected on 14th June.

The Petitioners now ask us to set aside the Order for registration and the registration consequent thereon. The main reasons urged in support of this application are two:

(a) That at the date of registration the Petitioners had paid the judgment debt in full and that in consequence the rule in Ex-Parte Talamas (High Court No. 17 of 1924)* is applicable.

In that case the judgment debtor, after the order for registration had been made, but before actual registration, paid in full the amount due under the judgment. In the present case, out of a total sum of £E.542.085 due under the judgment for principal, interest and costs, a sum of £E.500 only had been paid before registration and the balance of £E.42.085 remained and still remains due. In these circumstances the Petitioners cannot take advantage of the rule in Ex-Parte Talamas.

(b) The other main ground of the application is that the order for sale of 11th January, 1927, was contrary to Article 911 of the Law of Execution, as the annual rent of property exceeded the amount due under the judgment.

On the 27th April, the Petitioners submitted an application to the Chief Execution Officer asking for stay of sale on the ground that the annual rent was sufficient to meet the amount due under the judgment. No order was made by the Chief Execution Officer on this Petition. It was clearly open to the Petitioners to apply to this Court for an order directing the Chief Execution Officer to

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stay proceedings, but the Petitioners failed to do so until the order for registration had been made and the property had actually been registered in the name of the purchaser.

In my opinion the Petitioners can only get the registration set aside upon satisfying the Court that the order for sale was not within the jurisdiction of the Chief Execution Officer, and that in consequence of such lack of jurisdiction, the registration is invalid. That, however, is a question on the title of the land which is within the jurisdiction of a Land Court under Section 2 (e) of the Land Courts Ordinance, 1921. It follows that it is not within the jurisdiction of the High Court which is limited by Article 43 of the Palestine Order-in-Council, 1922, to "Petitions or applications not within the jurisdiction of any other Court".

It is true that upon one occasion, in Ex-Parte Mustafa Ali Alyan (High Court No. 12 of 1925), this Court has set aside a registration in the name of a purchaser at a sale held in Execution proceedings. The facts in that case, however, were that, before the registration was effected, the Chief Execution Officer had made an order staying execution; hence, although the local Execution Officer by whom the registration was effected was not aware of the fact, as there had not been time to communicate the order of stay to him, he had not, when he effected registration, jurisdiction to do so, and an immediate application was made to the High Court to set aside the unauthorised registration.

In the present case the registration had been effected in accordance with the Chief Execution Officer's Order, and I hold that it is too late to raise before this Court the question whether the order for sale, made some five months earlier, was valid or not.

The Petitioners have their remedy in the Land Court anp the Petition must be dismissed.

Delivered the 23rd day of November, 1927.

In the High Court of Justice.

H. C. No. 57/27.

BEFORE:

The Chief Justice, Jarallah, J. and Aziz Daoudi, J.

IN THE APPLICATION OF:

Banna and Salem — PETITIONERS.

vs

The Chief Execution Officer in the Magistrate's Court of Nazareth — RESPONDENT.

Magistrate as Execution Officer in the Magistrate's Court—Order of Chief Execution Officer altered by the High Court.

ORDER.

On hearing Hassan Eff. Budeiri on behalf of the Petitioners, and the judgment-debtor, Shible El-Mazawi, in person, the Court orders and it is hereby ordered as follows:

That the Order of the Chief Execution Officer of Nazareth dated 12th February, 1927, allowing the judgment-debtor, Shible El-Mazawi, to pay monthly instalments of P.T.50, be set aside.

And that the Chief Execution Officer in the Magistrate's Court of Nazareth do direct the said debtor to pay £E.2 a month as had been originally proposed by him (the debtor) and accepted by the Petitioner. Costs, i.e., fees of Court only, to be paid by the judgment-debtor. No order as to advocates' fees.

Delivered the 5th day of October, 1927.

In the High Court of Justice.

H. C. No. 60/27.

BEFORE:

The Chief Justice, Frumkin, J, and Abdel Hadi, J.

IN THE APPLICATION OF:

—(Ex parte)—

Simon Hausmann — PETITIONER.

vs

Chief Execution Officer, Jerusalem
Israel Lebel — RESPONDENTS.

Participation of execution creditors in proceeds of execution sale—Priority of creditors holding judgments based on documents of prior

dates—Judgment based on written admissions not officially proved to have in fact been made on the dates appearing on the face of them—Discretion of Chief Execution Officer—Art. 123, Execution Law.

Application for an order to be issued to the Respondents to show cause why Petitioner should not share in the attachment laid on the properties of Shlomo Roth.

JUDGMENT.

In deciding this case we are guided by the decision given by this Court in H. C. No. 43/27.

On the 3rd February, 1927, Petitioner made an attempt to join in an attachment of the property of one Shlomo Roth, previously attached by one of his other judgment creditors, namely, the second respondent, Israel Lebel, on the 26th April, 1926.

Israel Lebel's judgment is based on a document dated 13th August, 1925, while Petitioner's judgment is based upon two documents, one being a contract of sale dated the 6th October, 1925, and the other a promissory note dated the 3rd December, 1924, both of them being of the nature of written admissions not officially proved to have in fact been made on the dates appearing on the face of them.

Following the rule established in H. C. No. 43/27 the application is to be dismissed.

It might, however, be noted, that as regards the contract of sale dated the 8th October, 1925, there appears now to be some proof as to the correction of its date, namely, a compromise made the following day before the Magistrate in which reference is made to the sale of the land which was the subject matter of the contracts of sale.

This compromise, however, was not before the Chief Execution Officer, who, in matters of this kind, exercises discretionary power, and we do not know what view he would have taken with regard to a debt proved to have been some two months after the debt which is the cause of action of the first attachment.

Application is dismissed with costs.

Petitioner may apply again to the Chief Execution Officer on the ground of compromise.

Delivered the 2nd day of December, 1927.

In the High Court of Justice.

H.C. No. 74/27.

BEFORE:

Corrie, J. and Frumkin, J.

IN THE APPLICATION OF:

Joshua Hankin — PETITIONER.

vs

The Chief Execution Officer, Haifa
Jacob Samsannoff — RESPONDENTS.

Attachment allowed of immovable property exempted from execution sale—Art. 90, Execution Law—Sale of attached property is question for discretion of Chief Execution Officer.

ORDER.

We hold that a judgment-creditor is entitled to an attachment on the immovable property of the judgment-debtor, even though owing to the provisions of Article 90 of the Law of Execution, the immovable property may not be liable to be sold, and we therefore have not to decide whether that Article applies to the present case or not. It follows that the Order releasing the Respondent's property from attachment should not have been made and must be set aside.

The question whether property so attached should be sold is not before us. It is a matter within the discretion of the President of the District Court and it does not appear that any Order has been made by him or any application made to him in this regard.

No order as to costs.

Delivered the 6th day of December, 1927.

In the High Court of Justice.

H.C. No. 47/28.

BEFORE:

The Chief Justice and Frumkin, J.

IN THE APPLICATION OF:

(Ex Pàrte)

Joseph Kandinoff,
Samuel Kandinoff — PETITIONERS.

vs

The Chief Execution Officer, Jaffa,
I. S. Daniels, Jaffa, — RESPONDENTS.

Notices sent by Chief Execution Officer directing tenants not to conclude lease agreements with landlord.

ORDER.

After heariug Mr. M. Dunkelblum on behalf of the Petitioners, the Court 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, to show cause why an order should not issue directing him to withdraw notices issued to the tenants of the Petitioners' properties, mortgaged by them to Mr. I. S. Daniels of Jaffa, requiring them not to conclude any contracts of lease with the Petitioners.

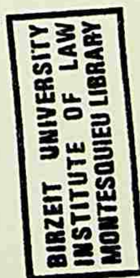
That notice of the application and of this order be given to Mr. S. O. Richardson, advocate of Jaffa, attorney for Mr. I. S. Daniels.

That the return day for the further hearing and final determination of this application be Thursday the 20th day of September, 1928.

Given this 18th day of July, 1928.

In the District Court of Jaffa.

C. E. O. Ja. No. 1996/28.



BEFORE:

The Chief Execution Officer, Jaffa

IN THE CASE OF:

Topelson & Stoupel — APPLICANTS.

vs

Rashid Dakkak,
Ottoman Bank,
Bank der Tempelgesellschaft,
Haffez Eff. Elsheikh Ali
Asem Bek Elsaid. — RESPONDENTS.

Participation of execution creditors in proceeds of execution sale—Priority of creditors holding judgments based on documents of prior dates—Attachments on money derived from the sale of land entilted to participate until property registered in Land Registry in name of purchaser—Art. 123, Execution Law—Chief Execution Officer to execute judgments, not determine their validity.

JUDGMENT.

This matter has been very fully and ably argued before me by the various counsel who have been of considerable assistance.

The question is how far attachments made on money of the judgment debtor lying in the Execution Office and derived from the sale of land are to rank with one another.

After very careful consideration I am of opinion that all attachments must prevail provided that they were made prior to the transfer in the Land Registry being made in the Land Registry Books.

The case of money derived from the sale of land is different from that where the funds came from movable property, because a purchaser can rescind if transfer be not effected into his name within one month from the date when the property is finally knocked down to him.

The money, therefore, paid by the purchaser to the credit of the judgment debtor does not become the property of the latter or his creditors until transfer is effected.

The causes of action in the case of Hafez Elsheikh Ali's judgments are not very far removed from that of the Applicant,—not far enough for me to say that Article 123 of the Execution Law should apply and in any case the receipts refer specifically to a transaction anterior in date to the cause of action of the Applicant.

The bills of Asem Bek are much prior in date to the claim of the Applicant. Whether or not the bills were prescribed is not a point on which I can decide as Chief Execution Officer. I have to execute the judgments so far as they are executable, not to determine if the judgments are right.

I cannot find any collusion between the claims of the Bank der Tempelgesellschaft and of Asem Bek, but of course claims cannot be executed twice. If the claims should be the same, then appropriate action can be taken in a criminal court. The matter must be determined by a Court,—not in execution.

I therefore order accordingly.

Dated the 15th day of December, 1928.

In the High Court of Justice.

H. C. No. 22/29.

BEFORE :

The Acting Chief Justice and Khayat, J.

IN THE APPLICATION OF :

Abdullah Muhles APPELLANT.

vs

The Chief Execution Officer, Haifa,
Hussni Kaseak RESPONDENTS.

Registration of property in name of purchaser at execution sale set aside—Irregular notice of sale by auction—Notice of sale to be exhibited on property to be sold—Article 102, Execution Law.

Application for an order to issue to the Execution Officer, Haifa, to show cause why his order in Execution Office File No. 1859/29 for the registration of Petitioner's property into the name of the second Respondent and the registration thereunder should not be set aside.

JUDGMENT.

On the evidence which has been given in the Court I am satisfied that notice of the sale by auction of the Petitioner's property in satisfaction of the judgment debt due from him was not exhibited on the property to be sold as required by Article 102 of the Law of Execution hence that the order by the Chief Execution Officer dated 8th of April, 1929, for the registration of the property in the name of the purchaser at the auction sale and registration consequent to such order must be set aside.

The order will issue as prayed.

Delivered the 4th day of June, 1929.

In the High Court of Justice.

H. C. No. 24/29.

BEFORE :

The Acting Chief Justice and Khayat, J.

IN THE APPLICATION OF :

Shafik Bey Shuqeiri PETITIONER.

vs

Chief Execution Officer, Haifa RESPONDENT.

Sale of immovable property of judgment-debtor—Property not to be sold if annual rent sufficient to pay the debt unless debt is preferred or debtor fails to pay over the rents when received by him—Article 91, Execution Law.

ORDER:

The meaning of Article 91 of the Law of Execution is that if the annual rent of the unencumbered property of the debtor—whether included in an Order for sale or not—is sufficient to pay the debt, no part of such property shall be sold in execution of a judgment debt unless such debt is a preferred debt, or the debtor fails to pay over the rents when received by him.

The Petition is therefore dismissed.

Delivered the 4th day of June, 1929.

In the High Court of Justice.

H. C. No. 72/30.

BEFORE:

The Chief Justice and Frumkin J.

IN THE APPLICATION OF:

Jamil Abiad — PETITIONER.

vs

Chief Execution Officer, Haifa
Socrate Tokatlides — RESPONDENTS.

Sale in execution of immovable property of judgment debtor—Effect of failure to comply with Sections 106 and 107 of the Law of Execution.

Application for an order to issue to the Chief Execution Officer in the District Court at Haifa to show cause why his order dated 6th August, 1930 for the final sale of Petitioner's property to the second Respondent should not be set aside.

JUDGMENT.

The Court after hearing Mr. Abcarius Bey for the Petitioner and the Respondent Socrates Tokatlides in person, orders and it is hereby ordered that owing to the failure of the Execution Officer to comply with Sections 106 and 107 of the Law of Execution, the Order Nisi granted on the 21st day of November,

1930, be and it is hereby made absolute with LP. 2.— advocate's fees and costs.

Delivered the 19th day of December, 1930.

In the High Court of Justice.

H.C. No. 88/30.

BEFORE:

Corrie J. and Jarrallah J.

IN THE APPLICATION OF:

Muhammad Ali Sheikh Ali
Khalil Yusef Lamadani
Ibrahim Yusef Lamadani PETITIONERS.

vs

The Chief Execution Officer, Jaffa
Rahmeh Ya'kub Farah
Joseph Cohen
Abdel Kader Abdel Jawad Ij'aitim RESPONDENTS.

Participation of execution creditors in proceeds of execution sale—Priority of creditors holding judgments based on documents of prior dates—Effect priority where judgment was by default and based on written admission of debtor—Article 123, Execution Law.

ORDER:

The rule laid down in Article 123 of the Law of Execution is that the creditor who makes an attachment upon property which has already been attached in favour of another creditor is to be postponed to that other creditor if his judgment is based upon "a written admission not officially proved to be of a date equal to the date of the cause of action of the first judgment."

The Petitioners' judgment is based on a written admission, dated 17th November, 1927.

The cause of action of the Respondent Rahmeh is a bill which matured on 30th April, 1928.

The cause of action of the Respondent Cohen is a notice of default given on 18th December, 1927.

The cause of action of the Respondent Abdel Kader is a bill which matured on 24th September, 1927.

In accordance, therefore, with the rule laid down in Article 123 of the Execution Law, the Petitioners are entitled to share

rateably in the attached property with the Respondents, Rahmeh and Cohen, but are to be postponed to the Respondent Abdel Kader.

It has been argued that the provisions of Article 123 do not apply, in view of the fact that all the judgments were given by default and based on the written admission of the debtor.

This view we are unable to accept. Article 123 provides that where a debt has not been contracted until after a cause of action has arisen, such debt is to be postponed; and it is immaterial whether the judgment for the earlier debt was based upon a written admission and given in default or not.

Order will issue accordingly.

Delivered the 31st day of December, 1931.

In the High Court of Justice.

H.C. No. 89/30.

BEFORE:

Baker, J., Khaldi, J. and Daudi, J.

IN THE APPLICATION OF:

Elias Yanekilyanous
Demitry Yanekilyanous PETITIONERS.

vs

Chief Execution Officer, Haifa
Haj Taher Karaman RESPONDENTS.

Sale in execution of immovable property of judgment debtor—Improper description of premises in advertisement for sale of mortgaged premises—Execution proceedings annulled by High Court—Article 103, Execution Law.

Application for an Order to issue to Respondent (1) directing him to show cause why the order of sale should not be set aside.

JUDGMENT.

We are satisfied that the two advertisements of the sale of the mortgaged premises did not properly describe the said premises.

We therefore annul the whole of the execution proceedings with regard to the publication and attempted sale of the premises and return the papers to the Chief Execution Officer for him to satisfy himself as to what in fact are the mortgaged premises and

whether the stores are part of the mortgaged property or not and afterwards to offer the said premises for sale in accordance with the Law of Execution. No costs.

Judgment in presence the 15th day of January, 1931.

In the District Court of Jaffa.

C. D. C. Ja. No. 259/30.

BEFORE:

Copland, J. and Mani, J.

IN THE CASE OF:

Isaac Gabrilovitch, Attorney for Abraham Aharon Spector — PLAINTIFF.

vs

Mrs. Emalia Humsi — DEFENDANT.

Mortgage foreclosed through Execution Office—Monies paid by Execution Officer to mortgagee sought to be recovered—Contract of musaqaat made by mortgagor after due date of mortgage held not to affect interest of mortgagee—Nature of contract of musaqaat—Entry of Syndics as third parties—Effect of bankruptcy of judgment debtor on monies in hands of Execution Office to the credit of mortgagee—Art. 157, Commercial Code.

JUDGMENT.

(Translated from Arabic)

This case is lodged by Mr. Abraham Aharon Spector against Mrs. Emalya Humsi requesting her to return a certain sum paid to her by the Execution Office, alleging that he has the right of priority on this sum in accordance with a contract entered into between him and Zarifeh and Sons.

The two Syndics in the bankruptcy of Zarifeh applied to be entered as third party in this case and the Court fulfilled their demand and their demand is that they have the right in these monies and the Defendant has no right in it, but the Defendant is asking for this amount in accordance with a Deed of Mortgage dated 30th March, 1928, entered into between her and Zarifeh. The sum secured under the mortgage was due on the 15th March, 1929.

And whereas the sum claimed under the mortgage was due and was not paid, the mortgage has been filed with the Execution Office and the decision of sale was given on the 10th May, 1929,

and the mortgagors knew about the mortgage whereas on the 10th May, 1929, they were informed that the mortgage is being foreclosed through the Execution Office and in spite of that information, on the 30th May, 1929, the mortgagors i.e. Zarifeh, entered into contract of Musakat with Mr. Isyako.

Defence was heard in this case and it was discussed whether this contract is a contract of Musakat or not.

In any event, this contract is a contract with the intention to possess the mortgaged property.

The intention of the contract is to give the right of possesion for a period exceeding one year in consideration of 1% in addition to LP.600.

Therefore this contract is considered as an interference with and an infringement of the rights of the mortgagee and it has been decided that after the date of the mortgage, the mortgagor is not entitled to give a right to anybody, just as the proprietor may not give a right if there exists a contract of lease and the same principle applies in this case i.e. it is impossible to the mortgagor to give a right over the mortgaged property by infringing the rights of the mortgagee.

Therefore the Court holds that this contract is cancelled as affecting the rights of the Defendant and the Plaintiff has no right to lodge the case against the Defendants and the Court decides to dismiss his case and to charge him with costs and LP.3 to the advocate of the Defendant.

In accordance with the request of the Syndics to be entered as hird party, it was decided to accept it and after hearing their defence the Court found that their claim must be dismissed whereas Article 157 of the Commercial Code does not apply to this case since it speaks about monies paid by a creditor and here the monies in dispute were not monies paid by the creditor and these monies were collected on account of the mortgage and were paid by the Execution Officer.

Therefore the Court decides to dismiss the claim of the third party and to charge them with costs.

Delivered in presence of the parties the 25th of July, 1930.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 3/31.

BEFORE:

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

IN THE CASE OF:

Eliyahou Zweig,
Managing Director of the Union
Tobacco and Cigarette Company — APPELLANT.

vs

Dr. Sabri Izzidim,
Hussein Karmin,
Haj Ahmed Manaki — RESPONDENTS.

Stay of execution—Procedure—First Instance application is to Court which gave the judgment and on appeal to Court of Appeal in Chambers—Sec. 12 (b), Judgment by Default (District and Land Courts) Rules of Court, 1926.

Application for stay of execution of the judment of the District Court of Haifa, dated the 4th December, 1930.

ORDER

No order refusing stay of execution made "by the Court which gave judgment or any judge thereof" is before us.

Without this we have no juristiction and this application must therefore be dismissed.

Delivered this 13th day of January, 1931.

In the High Court of Justice.

H.C. No. 35/31.

BEFORE:

The Chief Justice and Khayat, J.

IN THE APPLICATION OF:

Saliba Butrus Sayegh — PETITIONER.

vs

The Chief Execution Officer, Haifa,
Raji and Bahjat El Isa — RESPONDENTS.

Order of Chief Execution Officer set aside by High Court — High Court incompetent to adjudge on question of interest.

Application for an order to issue to the Chief Execution Officer in the District Court of Haifa directing him to show cause why his order dated the 15th May, 1931, refusing to allow Petitioner to retain the balance of the purchase price in excess of £P. 100 due to the second Respondents, should not be set aside.

JUDGMENT.

The Court after hearing Mr. Abcarius on behalf of Petitioner, there being no appearance by or on behalf of Respondents, orders that the order nisi granted to Petitioner by this Court on the 22nd July, 1931, be made absolute and that the order dated the 15th May, 1931, of the Chief Execution Officer in Execution case 4268/29 be set aside.

If the second Respondents claim interest, they must establish their claim by action in the competent court.

Delivered the 7th day of September, 1931.

In the High Court of Justice.

H.C. No. 38/31.

BEFORE:

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

IN THE APPLICATION OF:

Ouni Bey Abdel Hadi — PETITIONER.

vs

The Chief Execution Officer, Jerusalem
Friedrich Fast — RESPONDENTS.

Participation of execution creditors in proceeds of execution sale—Priority of creditors holding judgments based on documents of prior dates—Article 123, Execution Law.

Application for an Order to issue to the first Respondent directing him to show cause why his Order dated the 16th of April, 1931, issued in Execution Case No. 3538/30, whereby he refused Petitioner's application not to allow the second Respondent to share in the proceeds of the sale of the property of the judgment debtor Saliba Ibrahim Sa'ad, contrary to Article 123 of the Execution Law, should not be set aside.

JUDGMENT.

The Court rejects the argument relating to the jurisdiction put forward by Respondent and being satisfied that the date of the cause of action of the Petitioner was earlier than that of the cause of action of Respondent, therefore, in accordance with Section 123 of the Execution Law the Respondent cannot share jointly with former execution creditors. The petition is allowed and the rule nisi is made absolute with costs.

Delivered the 9th day of March, 1932.

In the High Court of Justice.

H.C. No. 52/31.

BEFORE:

The Senior Puisne Judge and Jarallah, J.

IN THE APPLICATION OF:

Abraham Elmaleh, as administrator of the estate of Jacob Danon — PETITIONER.

vs

Chief Execution Officer, Jerusalem,
Sheikh Bader Yunis el Husseini,
Sheikh Aref Yunis el Husseini,
Heirs of Mustafa Yunis el Husseini — RESPONDENTS.

Sale of immovable property in execution of judgment postponed by Chief Execution Officer—Power of Chief Execution Officer to revoke his own order—Financial circumstances of execution creditor to be considered—Sec. 2 (b), Transfer of Land Ordinance, No. 2 of 1921 (see Sec. 13 (2) (b) (as in Bentwich p. 62) of the Transfer of Land Ordinance, 1920-21).

Application for an Order to issue to the first Respondent directing him to show cause why his order of the 29th August, 1931, delaying the sale of the house of second, third and fourth Respondents for another three months, should not be set aside.

ORDER.

The Petitioner alleges that the Order of the President of the District Court dated the 29th August, 1931, was not in conformity with the requirements of Section 2 (b) of the Transfer of Land Ordinance No. 2 of 1921, in that when the President of the District Court made that order he had not before him any evidence as to "the needs of the creditors".

If there are any special reasons arising out of the financial circumstances of the creditors, why the sale should not be postponed, it is for the Petitioner to bring these before the Chief Execution Officer and to apply to him to revoke his own order.

The petition is dismissed.

Costs including LP.1 advocate's fees will be paid by the Petitioner.

Delivered the 18th day of November, 1931.

In the High Court of Justice.

H.C. No. 60/31.

BEFORE:

Baker, J. and JARALLAH, J.

IN THE APPLICATION OF:

Abdel Kader Shibel — PETITIONER.

vs

Chief Execution Officer, Haifa,
Badrieh Kurdi — RESPONDENTS.

Sum awarded by Sharia Court to divorced woman as "Iddeh"—"Iddeh" held to be alimony within the meaning of Arts. 133 and 141 of Execution Law—Husband and wife.

ORDER.

The Court holds that the sum awarded by the Sharia Court to the second Respondent for the period of three months following the divorce as "Iddeh", is alimony within the meaning of Articles 133 and 141 of the Execution Law.

The Order Nisi granted by this Court on the 22nd October, 1931, must therefore be discharged with costs and advocate's fees assessed at £P.2.

Delivered the 26th day of November, 1931.

In the High Court of Justice.

H. C. No. 74/31.

BEFORE:

The Chief Justice and Baker, J.

IN THE APPLICATION OF:

Khaya Tenenbaum — PETITIONER.

vs

The Chief Execution Officer, Haifa,
Joseph Harris Elkes — RESPONDENTS.

Advertisement by Chief Execution Officer ordered by High Court—Incorrect area of land under execution stated in registration—Correct area to be set out in advertisement for sale in execution.

Application for an order to issue to the Chief Execution Officer in the District Court of Haifa, to show cause why his order dated the 17th November, 1931, issued in Execution File No. 2155/30, refusing to grant a new advertisement to the effect that though the registered area is 250 dunams yet the true area is 388 dunams, should not be set aside.

JUDGMENT.

The order nisi, issued on the 11th December, 1931, directing the Chief Execution Officer in the District Court of Haifa to show cause why his order dated the 17th November, 1931, issued in Execution File No. 2135/30, refusing to grant a new advertisement to the effect that though the registered area is 250 dunams, yet the true area is 388 dunams, should not be set aside, is made absolute, with LP.2 advocate's fees and costs.

Delivered the 28th day of January, 1932.

In the High Court of Justice.

H. C. No. 15/32.

BEFORE:

The Acting Senior Puisne Judge and Frumkin, J.

IN THE CASE OF:

Fuad Jabran Sa'ad — PETITIONER.

vs

The Chief Execution Officer, Haifa,
George B. Kardahi — RESPONDENTS.

Stay of execution proceedings which have already been completed refused—Property registered in name of purchaser at execution sale—Serious defect in proceedings to be shown before registration set aside.

Application for an order to issue to the Chief Execution Officer directing him to show cause why his order dated 15th July, 1931, should not be set aside.

JUDGMENT.

The property has been registered in the name of the purchaser. No serious defect has been shown in the proceedings which would cause us to interfere with such registration.

The application must accordingly be dismissed following the decision in High Court No. 50/31.

Delivered the 11th day of May, 1932.

In the High Court of Justice.

H. C. No. 29/32.

BEFORE:

The Senior Puisne Judge and Frumkin, J.

IN THE APPLICATION OF:

Fuad Jabran Sa'ad PETITIONER.

vs

The Chief Execution Officer, Haifa,
Barclays Bank (D. C. and O.) « RESPONDENTS.

Sale of immovable property in satisfaction of mortgage debt—Discretion of Chief Execution Officer to accept small bid for property of great value—Discretion to postpone execution sale not interfered with by High Court unless decision is unreasonable—Improper description of immovable property in advertisement for sale under mortgage—Sec. 2, Transfer of Land Ordinance, No. 2 of 1921—Arts. 93, 96, 102, 103, Execution Law—Incorrect area of land to be sold set out in registration—Correct area to be set out in advertisement for sale in execution.

Application for an order to issue to the Chief Execution Officer, Haifa, directing him to show cause why his order, dated the 17th March, 1932, should not be aside.

JUDGMENT.

The Petitioner, Fuad Jabran Sa'ad, is seeking to have set aside an order by the Chief Execution Officer, Haifa, for the sale of immovable property of which the Petitioner is the owner. The property in question was mortgaged to Barclays Bank (D. C. and O.) and the order of sale dated the 17th March, 1932, was made upon the application of the Bank in satisfaction of the mortgage debt.

The first objection made by the Petitioner is that having regard to the estimated value of the property, it would inflict undue hardship on him if the sale were carried out at the price bid; and accordingly that the President of the District Court should have postponed the sale in exercise of the power conferred upon him by the Transfer of Land Ordinance, No. 2 of 1921.

With regard to this objection, we hold that it is not for this Court to interfere with the exercise of the discretion conferred upon the President of the District Court by the Ordinance cited, unless the Court is satisfied that on the evidence before him the decision of the President of the District Court was unreasonable, and there is no ground for so holding in this case. The Petitioner's objection on this ground, therefore, fails.

The Petitioner's second objection is made on the ground that the notice of sale contains a material misdescription of the property and is thus not in accordance with Articles 93, 96, 102 and 103 of the Law of Execution.

The property is registered under 31 kushans. In the Notice of Sale particulars of these kushans are stated giving the boundaries of the respective plots as mentioned in the kushans and their area as therein stated. The total area included in the 31 kushans is shown as 865 dunams. The Petitioner alleges that the actual area of the property is somewhat more than 6600 dunams and that this fact should have been stated in the Notice of Sale.

The Respondent Bank does not contest the Petitioner's estimate of area but argues that as the Notice of Sale contained particulars of the kushans and of the registered areas, there was no necessity for an estimate of the actual area to be given.

It is clear, however, that if the sale were in satisfaction of a mortgage debt, the provisions of the Execution Law quoted by the Petitioner would render it necessary for an estimate of the true area to be given in the Notice of Sale. It has been suggested that these provisions are not applicable where the sale is of a mortgaged property in satisfaction of a mortgage. This, however, appears to

be contrary to the decision of this Court in Elias and Dimitri Yanni vs Haj Taha Karaman (High Court No. 89/30) in which it set aside the sale for lack of adequate particulars in the Notice of Sale, and directed that the sale should be carried out in accordance with the provisions of the Law of Execution. On this ground therefore the Petitioner must succeed.

The order will issue as prayed with costs and LP.5 advocate's fees and expenses.

Delivered in the presence of both parties the 28th day of November, 1932.

In the High Court of Justice.

H. C. No. 55/32.

BEFORE:

The Senior Puisne Judge and Khayat, J.

IN THE APPLICATION OF:

Fuad Sa'ad — PETITIONER.

vs

Chief Execution Officer, Haifa,
The Ottoman Bank, Haifa — RESPONDENTS.

Sale in execution of planted land — Insufficient description of immovable property in advertisement for sale by Execution Office— Articles 93 and 103, Execution Law — Notice of Sale should state the fact of suitability of land for building purposes.

ORDER.

We hold that there was not a sufficient description of the property in the notice of sale to comply with the requirements of Articles 103 and 93 of the Law of Execution, in view of the fact that the notice contained no estimate of the number of trees included in the sale.

The Order of the Chief Execution Officer, dated the 26th June, 1932, for the final sale of the property, is therefore set aside.

While it is not a ground of this Petition, we desire to add that, in our opinion, where, as in the present case, the value of the land offered for sale depends in a large part upon its suitability for building, that fact should be stated in the Notice of Sale.

The costs of this Petition, including £P. 3 advocates' fees, will be paid by the Respondent.

Delivered the 23rd day of December, 1932.

In the High Court of Justice.

H. C. No. 71/32.

BEFORE :

The Senior Puisne Judge and Frumkin, J.

IN THE APPLICATION OF :

As'ad El-Ghusein PETITIONER.

vs

Chief Execution Officer, Ramleh,
Amin Nashasi RESPONDENTS.

Stay of execution by Chief Execution Officer granted — Applicant subsequently estopped from raising objection to such order in High Court—Article 274, Civil Procedure Code.

ORDER.

The question of applying the amendment to Article 274 of the Civil Procedure Code effected by Rule 7 of the Rules of Court, Civil and Commercial Procedure, published in the Palestine News Gazette No. 15, dated 19th December, 1918, was never raised before the Chief Execution Officer until the 5th or 6th of September, 1932; and a copy of his order made on that question has not been submitted to this Court.

Instead of applying to this Court for an order setting aside the order of the Chief Execution Officer, the Petitioner applied to the Chief Execution Officer for and obtained a stay of execution for one month. That is to say, he accepted the Chief Execution Officer's decision of the 5th or 6th of September, and he is thus estopped from questioning its validity now.

Even, however, if the Petitioner had not accepted the ruling of the Chief Execution Officer given on the 5th or 6th of September, there is nothing before us to show that such order was made more than 50 days before the maturity of the crop.

On these two grounds, the Petition must be dismissed with costs, including £P. 2 advocate's fees.

Delivered the 24th day of November, 1932.

In the High Court of Justice.

H. C. No. 79/32.

BEFORE:

The Senior Puisne Judge and Khayat, J.

IN THE APPLICATION of:

Muhamed Salih Muhamad Shibel
Abdel Amader Shibel
Muhamad Rajab Shibel
Ahmad Saleh Shibel
Fatmeh bint Saleh Shibel
Mariam PETITIONERS.

vs

The Chief Execution Officer, Haifa,
Haj Khalil Taha RESPONDENTS.

Estimated true area of property offered for sale by Execution Officer to be stated in Notice of Sale — Area as registered in Land Registry held insufficient — Sale in execution of large parcel of immovable land to be in separate plots if advantageous.

Application for an Order to issue to the first Respondent directing him to show cause why his order dated the 16th day of October, 1932, in Execution File No. 1268/32 for the sale of Petitioners' property, should not be set aside.

JUDGMENT.

This Court has held in ex-parte Khaya Tanaenbaum (H. C. No. 74/31) and in ex-parte Fuad Jabran Saad (H. C. No. 29/32)* that to comply with the requirements of Article 93 of the Law of Execution the particulars of the Sale of property offered for sale by the Execution Officer must state the estimated true area of the property. It is not sufficient to state the area as registered in the Land Registry. No attempt has been made in the present case to ascertain whether the registered area of the lands offered for sale fairly represents the true area; and on this ground the Order prayed must issue.

Another point arises out of the argument upon this application, upon which we feel that we should express our views.

The properties owned by the Petitioners are registered under 425 Kushans which, it is stated, are grouped into 14 separate plots of land.

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* Ante p. 856.

The particulars of sale set out the area registered in each Kushan and the total are registered in the 426 Kushans: there is no indication in the particulars that the property may be purchased in separate plots. It may be that the Execution Officer has considered the question and has arrived at the conclusion that the properties will sell most favourably if offered in one lot. But we feel that there is considerable force in the Petitioner's observation that there are not many people in this country who would be prepared to pay a deposit of over £P.900. in respect of an auction of land in Shefa Amr; and that the alternative method of sale in several lots merits careful consideration.

The Respondent Haj Khalil Taha will pay the costs of this application, including £P. 6 advocate's fees.

Delivered the 7th day of November, 1933.

In the District Court of Jaffa.

C. E. O. Ja. No.2858/32.

BEFORE:

The Chief Execution Officer, Jaffa.

IN THE CASE OF:

Ahmad Halaweh PLAINTIFF.

vs

Daoud Moyal DEFENDANT.

Application to re-open order of Chief Execution Officer—Documentary evidence to rebut evidence of judgment creditor produced after issue of order of Chief Execution Officer—Right of Chief Execution Officer to re-open order — Order of High Court to be varied only by High Court — Evidence available, but suppressed at original hearing not admitted at new hearing — Proof of rate of exchange in foreign country — Currency — Stay of execution pending further appeal refused as calculated to work hardship and injustice.

JUDGMENT.

By his petition dated 25th January, 1933, the judgment debtor has asked me to reopen this question, which I decided in my order dated 2nd October, 1932, on the ground that he is now able to produce documentary evidence to rebut the evidence which was produced by the judgment creditor.

I consented to hear arguments first as to whether I have the power to reopen, and, if I have the power, whether it is right in

the circumstances of this case that I should do so. But in view of the fact that whatever my decision an appeal will be taken to the High Court, I have thought fit not only to hear arguments on the above question, but also on the question as to whether the rebutting evidence sought to be produced is sufficient to outweigh the evidence tendered at the original hearing by the judgment debtor.

First as to the question whether I am entitled to reopen. In an ordinary case I should be of the opinion that I am, and by an ordinary case I mean where I have, after hearing arguments, made an order and that order has not been appealed from. In this case however, the judgment debtor appealed to the High Court for an order nisi to me, to show cause why my order dated 2nd October, 1932, should not be set aside, and after hearing arguments the High Court came to the conclusion that my order was correct. What I am now, therefore, being asked to do is, in effect, to reopen a matter which has been decided by a high tribunal, and in my opinion I have no power to do this. This judgment debtor's application to reopen should have been addressed to the High Court, which alone now has power to vary its order, confirming my order. On this point the present application must fail.

But it will also fail for this reason: At the time of the hearing of the motion before the High Court the judgment debtor had in his possession the documentary evidence which he now proposes to produce before me. These documents were deliberately suppressed before the High Court for reasons which may have appeared good to the judgment debtor. But, in my opinion, having suppressed evidence which he could have produced, it is not now open to him, when judgment has gone against him, to endeavour to reopen the question by tendering this evidence. No question of insufficiency of time arises. The judgment debtor had produced his proofs several months before I heard the original application. The judgment debtor, who is himself a lawyer, knew what evidence had to be rebutted, and he had ample time in which to obtain it. It was not until I had given my decision that he set about obtaining the necessary evidence. It is due entirely to his own default that this evidence which he tries now to produce was not before me originally, and this being so, I am not prepared to accept it now.

But in order to deal with all the points raised in his present application, I think it only right to consider the nature of the evidence sought to be produced by the judgment debtor in case I

should be held to be wrong in my conclusion on the question of reopening and I ought to hold, contrary to the view expressed by me, that I have power and that it is just I should exercise it.

The High Court has held that I had before me documentary evidence as to the rate of exchange in Turkey and that the judgment debtor had brought no rebutting evidence as to the rate in Constantinople, or as to the variation as between the rate in Konia and the capital.

In my opinion the evidence sought to be produced before me equally does not rebut the creditor's evidence as to the rate of exchange in Turkey, and it is interesting to note that exhibits "H" and "L" contradict each other. Exhibit "H" quotes a rate for Turkish bank note in Bale, which La Baloise Insurance Co. states that they obtained from a bank, whereas Exhibit "L" being a letter from Barclays Bank states that the Banque Commerciale de Bale replied that Turkish bank notes were not dealt with at ali in Bale in 1918, and therefore no rate of exchange was available. The further evidence, where it does not confirm the previous evidence, is directed to proving the value of the Turkish pound in various towns in Switzerland, which is not the same as proving the value of the Turkish pound in Turkey.

I do not agree with the contention of the judgment debtor that he is in the same position as if he had never been to the High Court. He is very far from being in such a position. The High Court has, by implication at any rate, confirmed my method of conversion of Turkish currency into sterling.

Furthermore, there was ample time, between the date when the judgment debtor obtained these further documents and the date of the hearing before the High Court of his motion to make the rule nisi absolute, for the judgment debtor to have applied to me to reopen the question on the ground of his having obtained this further evidence, and he could have applied to the High Court to postpone the hearing of this motion pending this further application to me. He did not see fit to do so. For all these reasons I am satisfied that this application must fail.

One further point remains to be dealt with, namely, debtor's application to me that, in the event of my decision being against him, I will give a stay of execution pending further appeal.

In this connection I will refer to the remarks of their Lordships in the last part of the judgment of the Privy Council in which they draw attention to the delays in the hearing of the appeal, which they attribute solely to the action of the Appellants

of whom the present judgment debtor is one. Their Lordships say that delays of the kind due to the Appellant "are calculated to work hardship and even injustice." I see no reason why further hardship or injustice should be caused to the judgment creditor.

Further, in his appeal to the High Court one of the debtor's arguments was that notice of judgment had not been given to him in contradiction to Article 19 of the Execution Law. This was untrue to the judgment debtor's knowledge, because the notice itself signed by the judgment debtor himself has now been produced to me.

I, therefore, have not the slightest hesitation in refusing any further stay, and order execution to proceed accordingly and payment out of the sums already obtained to the judgment creditor.

In the High Court of Justice.

H. C. No. 13/33.

BEFORE :

Baker, J. and Frumkin, J.

IN THE CASE OF :

Salim Khoury — APPELLANT.

vs

Chief Execution Officer, Haifa,
Suleiman Massif, Michael Khoury — RESPONDENTS.

Rights of judgment creditors to share in proceeds of execution sale—Priority of execution creditors—Holder of judgment based on documents of date later than cause of action held not entitled to participate in previously effected attachment — Article 123, Execution Law.

JUDGMENT.

This is a return to a rule nisi calling upon the Chief Execution Officer in the District Court of Haifa to show cause why the second and third Respondents, Suleiman Bey Nassif and Michael George Khoury, judgment creditors of one Amin Jubran Karam, should be allowed to share proportionately with Petitioner (also a judgment creditor) in the proceeds of sale of certain property belonging to the debtor.

Petitioner in the year 1927 brought an action against the aforesaid judgment debtor, Amin Jubran Karam, on two promissory

notes dated respectively 30th September, 1924, and 30th September, 1925, and upon filing his action, he obtained an order of conservatory attachment on certain property of his debtor.

He obtained judgment in 1927 and filed his judgment in the Execution Office the same year.

In the year 1929, the second and third Respondents filed separate actions against the judgment debtor claiming sums of £P.500 or thereabouts on promissory notes subsequent in date to those upon which Petitioner had obtained judgment. They obtained judgments for their respective claims on the 24th July, 1929, and the 9th September, 1929, and attachments which they had made upon filing their claims upon the property which Petitioner had attached, were confirmed in the said judgments.

Upon Petitioner's request, the property of the debtor which he had attached was put up for sale in satisfaction of his judgment debt. The proceeds of sale were not sufficient to satisfy the judgments of Petitioner and the second and third Respondents, and the said Respondents applied that the proceeds be shared by themselves and Petitioner proportionately. Petitioner objected and requested that the provisions of Article 123 of the Execution Law be applied and that his judgment be satisfied in full before the two other judgment creditors, claims, be satisfied.

The Chief Execution Officer ordered that the second and third Respondents were entitled to share because they had judgments of the Court to that effect and this order was communicated to Petitioner on 14th February, 1933, and it is against this order that he now asks relief.

Article 123 prescribes inter alia that judgments which, even if based upon writtens admissions, are not officially proved to have arisen from the same date as the cause of action of the first judgment prevents their holders from participating in a previously effected attachment.

Second and third Respondents' causes of action are admittedly of later date than that of Petitioner and it has been laid down by this Court, in case No. 43/1927, that:

> "Once it is not proved that documents have been made about the date of the cause of action of the first judgment and particularly when it is admitted that they have been made much later, their holder is not entitled to participate in a previously effected executory attachment, even if, on introducing his action, he obtained an order for conservatory attachment".

Accordingly, the order must be made absolute with costs and advocate's fees assessed at £P. 2.

In the High Court of Justice.

H. C. No. 22/33.

BEFORE:

The Senior Puisne Judge and Khayat, J.

IN THE APPLICATION OF:

Abd el Jawad Abdallah 'Iweiss PETITIONER.

vs

The Chief Execution Officer, Jerusalem
Musa el Handush RESPONDENTS.

Sale in satisfaction of execution debt—After new valuation of property to be sold is made, publication in acccordance with Execution Law to be made.

Application for an order to issue to the first Respondent directing him to show cause why his order dated the 26th October, 1932, should not be set aside.

ORDER.

As it is admitted by the Respondent that there had not been publication in accordance with law since the new valuation was made, the order of sale made by the President of the District Court on the 26th October, 1932, is set aside.

The costs of this petition will be paid by the Respondent.

Delivered the 25th day of October, 1933.

In the High Court of Justice.

H. C. No. 28/33.

BEFORE:

The Acting Senior Puisne Judge and Frumkin, J.

IN THE APPLICATION OF:

Moshe Taubenhaus PETITIONER.

vs

Chief Execution Officer in the
Magistrate's Court, Jerusalem RESPONDENT.

Participation of creditors in execution—Application for recovery of monies already distributed by Execution Office to the creditors—Jurisdiction of High Court re judgment already executed.

ORDER.

In reply to the Court, Petitioner states that money in the Execution Office has already been distributed amongst the several creditors.

Accordingly, following the numerous decisions of this Court to the effect that where money in the Execution Office has been distributed, we have no jurisdiction, the Petition must be dismissed.

Delivered the 19th day of September, 1933.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 41/33.

BEFORE:

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

IN THE CASE OF:

The Singer Sewing Machine Co., Jaffa APPELLANT.

vs

Eliahu Dorf RESPONDENT.

Sewing machine hired by execution debtor, seized by Execution Office— Title of purchaser at execution sale not indefeasible unless sale conducted in accordance with procedure—Irregularity of execution proceedings — Advertisement for sale irregular.

Appeal from the judgment of the District Court of Jaffa, dated the 22nd day of August, 1932.

JUDGMENT.

It is clear that the purchaser at a sale by the Execution Officer does not obtain an indefeasible title to the thing purchased unless the sale is conducted in accordance with the procedure prescribed by law.

In the present case it is alleged that the advertisements of the sale did not mention that the sewing machine would be offered for sale and hence that the procedure was irregular and this allegation is supported by production of an extract from the newspaper containing an advertisement of sale.

The question whether the sale was regular or not, however is not before us.

We, therefore, set aside the judgment of the District Court and remit the case for determination whether the procedure at the sale was regular or not and for a fresh judgment to be given.

Costs will follow the event.

Delivered the 1st day of December, 1933.

In the High Court of Justice.

H.C. No. 53/33.

BEFORE:

The Acting Senior Puisne Judge and Frumkin, J.

IN THE APPLICATION OF:

Michael Binia — PETITIONER.

vs

Chief Execution Officer, Jerusalem,
Rifka Janashwili — RESPONDENTS.

Priority of execution creditors—Execution of judgment of Rabbinical Court for ketuba — Judgment for ketuba held not based on oral admission or on refusal to take oath—Article 123, Execution Law.

ORDER.

Petitioner applies for an Order against the Acting Chief Execution Officer to show cause why his decision that a second judgment should participate in the attachment of debtor's property effected by Petitioner in satisfaction of his judgment debt should not be set aside as being contrary to the law laid down in Article 123 of the Execution Law.

The second judgment, the subject of this application, is one for Ketuba, and we are of opinion that it cannot be considered as a judgment based on oral admission or on refusal to take the oath; neither does the cause therefor arise subsequent in date to the formation of the grounds for the legality of the Petitioner's judgment.

Accordingly, the Petition must be dismissed.

Delivered the 20th day of September, 1933.

In the High Court of Justice.

H.C. No. 65/33.

BEFORE:

Baker, J. and Frumkin, J.

IN THE APPLICATION OF:

Shmuel Ashkenazi
Izhaq Saharoff — PETITIONERS.

vs

The Chief Execution Officer, Jaffa,
Benzion Aronovitch — RESPONDENTS.

Stay of execution granted by Chief Execution Officer on condition that deposit be made into Court or Bank guarantee produced — Amount of damages likely to be suffered by other party is a reasonable amount to be fixed in guarantee.—Jurisdiction of High Court where discretion of Chief Execution Officer unreasonably exercised.

JUDGMENT.

We are of opinion that the order of the Chief Execution Officer was reasonable in so far as he granted a stay of execution provided a deposit was made into Court or a bank guarantee was produced, but we do not consider that it was reasonable for the amount of such deposit or guarantee to be fixed at the amount involved. We consider that a sum of £P.500. would under the circumstances be a reasonable amount to deposit or to be guaranteed by a Bank to cover any or all damages likely to be suffered by the Respondents in view of the stay of execution.

The Chief Execution Officer's Order is therefore amended accordingly.

No costs.

Delivered the 27th day of October, 1933.

In the High Court of Justice.

H.C. No. 69/33.

BEFORE:

Baker, J. and Frumkin, J.

IN THE APPLICATION OF:

I. Isaharrof — PETITIONER.

vs

Chief Execution Office, Jerusalem,
Heirs of Khamara and Another — RESPONDENTS.

Valuation of seized property made by Execution Officer in absence of execution debtor—Area of property inaccurately stated in advertisement of sale — Rules of Court on Evidence taken out of Court of 3rd November, 1926, held applicable in execution proceedings—Waiver of rights by conduct— Effect of laches.

JUDGMENT.

The only material ground of the Applicant for an order absolute is that he was not given an opportunity to be present or represented at the taking of possession and the valuation of the property in issue, which was held as early as June 7, 1931. It was owing to his absence, he alleges, that the valuation resulted in the area of the property being inaccurately stated in the advertisement of sale. It might be stated at once, that the inaccuracy in the measurements, if any, consists according to the Applicant's own showing, of a difference of about 7% of the total area.

Now it was held in High Court No. 84/27 (Abdallah Ahmad el Jabbali vs The Chief Execution Officer, Jaffa and Others) that the Rules of Court of 3rd November, 1926, apply also in execution proceedings and it follows, therefore, that a judgment debtor ought to be given an opportunity of being present or represented at a valuation. But since the valuation, made in 1931, numerous steps were, to the knowledge of the Applicant, made in the execution proceedings including several extensions granted by the Chief Execution Officer, upon the Applicant's direct application; and it was not until August, 1933, that Applicant for the first time raised the question with regards to his absence from the valuation proceedings.

In High Court No. 80/33, the Court refused to give an Order where the Applicant slept on his rights for two or three months. In this case Applicant slept on his rights for over two years.

The order nisi is therefore discharged with costs and advocate's fees assessed at £P. 3 for the 2nd Respondent.

In the High Court of Justice.

H. C. No. 74/33.

BEFORE:

The Chief Justice and Frumkin, J.

IN THE APPLICATION OF:

Mohammad Shibl and Others PETITIONERS.

vs

Assistant District Commissioner of the Northern District,
Khalil Taha RESPONDENTS.

Order of possession of land made by Assistant District Commissioner under Section 2, Land Disputes (Possession) Ordinance, 1932 — Eviction from land — Jurisdiction of High Court to set aside order already executed — Execution of order improperly carried out — Procedure for execution of order under Land Disputes (Possession) Ordinance, 1932—District Commissioner not acting as a Magistrate—Notice of execution of judgment to be given to judgment debtor—Article 73, Magistrates' Law—District Commissioner to state grounds of his being satisfied that dispute likely to cause a breach of the peace—Sec. 2 (1) (10), Land Disputes (Possession) Ordinance, 1932.

JUDGMENT.

This is a return to a rule nisi by which the first Respondent, the Assistant District Commissioner of the Northern District is called upon to show cause why his order dated November 23, 1933, given under Section 2 of the Land Disputes Ordinance, 1932, (No. 12 of 1932) should not be set aside.

The order in question grants to the second Respondent the possession of certain land, the subject matter of a dispute, till evicted therefrom in due course of law.

A question arose in the course of argument before us as to whether the High Court had jurisdiction, for it was alleged that the order had been executed. To satisfy us upon this point, we adjourned for affidavits to be produced and the concluding words of the affidavit of Police Inspector, Mohammad Eff. Bedawi, satisfy us as to facts which in ordinary circumstances would be conclusive as to the ouster of the jurisdiction of the High Court.

In this case, however, a further point has been raised namely, that execution was not properly carried out because it was effected by a policeman at Mohammad Eff. Bedawi's orders and not through the normal Execution Office procedure.

It has been decided in High Court No. 92/32 that, in exercising the powers conferred upon him by the Land Disputes (Possession) Ordinance, 1932, a District Commissioner is not acting as a Magistrate, for, if he were, the provisions of Section 2 (10) would clearly be surplusage. It is clear, however, that in so far as they relate to matters covered by the provisions of the said sub-section, the proceedings are to be the same as if they were proceedings before a Magistrate.

The relevant words of that sub-section for the purposes of the present case run as follows:—

> "Proceedings under this Ordinance shall be deemed to be proceedings before a Magistrate as regards . . . . enforcement of orders and other like matters".

Under Article 73 of the Magistrates' Law a judgment or order cannot be executed until notice of the judgment has been given to the judgment debtor calling upon him to comply with the judgment or order within 48 hours. The procedure which applies to a judgment debtor must be taken to apply to any unsuccessful Defendant, a judgment or order against whom has to be executed: and, whether or no the ordinary machinery, of the execution office is employed, in proceedings before a Magistrate no judgment or order can be lawfully executed unless such 48 hours' notice has been given.

This being so, we hold that in the absence of such 48 hours' notice the order of the Assistant District Commissioner has not been legally executed and that hence we are entitled to canvass its validity.

We come, therefore, to the argument that the order was improperly given by the Assistant District Commissioner in that he did not state the "grounds of his being satisfied" that the dispute was likely to cause a breach of the peace, as required in Section 2(1) of the Land Disputes (Possession) Ordinance, 1932. We do not think there is any force in this argument, inasmuch as before making such an order he should, in view of the exceptional powers conferred by the Ordinance, be scrupulous to set out in as much detail as possible what are the grounds upon which he is satisfied that such dispute, likely to cause a breach of peace exists.

We see no other reason for setting aside the Assistant District Commissioner's order. The rule nisi is discharged with costs to include £P.6 advocate's fees.

In the High Court of Justice.

H. C. No. 78/33*.

BEFORE:

Baker, J. and Frumkin, J.

IN THE APPLICATION OF:

Haim Stuppel — PETITIONER.

vs

The Chief Execution Officer, Jaffa,
Miriam Feldman — RESPONDENTS.

Execution of judgment—Discretion of Chief Execution Officer to order payment in small instalments—Allegation by execution creditor that amount of monthly instalments was unreasonable.

Application for an order to issue to the first Respondent directing him to show cause why his order dated the 1st December, 1933, in Execution File No. 2402/33, should not be set aside.

JUDGMENT.

This is a return to a rule nisi issued by this High Court calling upon the Respondents to show cause why an order of the Chief Execution Officer dated the 1st December, 1933, in Execution File No. 2402/33 should not be set aside on the ground that the amount of the monthly instalments was unreasonable, and why an order for a larger amount to be paid per mensem by the second Respondent should not have been made by him.

The judgment debt in Petitioner's favour is for LP.89 plus costs; and second Respondent is a widow with three children ranging between the ages of six and sixteen and alleged to be dependent for her livelihood on a small orange grove alleged to produce in an average year an income of LP.200 or thereabouts. Petitioner alleges that the judgment-debtor is well able to pay the debt in full.

Debtor on 31st August, 1933, offered to pay the debt off by monthly instalments of 500 mils, and on the 27th October, 1933, the Chief Execution Officer made on order for the payment of 250 mils per mensem.

Before this Court Dr. Joseph on behalf of second Respondent, stated that his client was prepared, after the present year, to pay 25% of the income from the before-mentioned orange grove

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*Compare: H. C. No. :/29, A te. p. 283.

each year until the debt is paid off and in view of this offer and the fact that under the present order it would take thirty years for the debt to be liquidated, we make the order nisi absolute with costs to include LP.2 advocate's fees.

Delivered this 9th day of February, 1934.

In the High Court of Justice.

H. C. No. 80/33.

BEFORE:

The Chief Justice and Frumkin, J.

IN THE APPLICATION OF:

E. Krikorian — PETITIONER.

vs

The Chief Execution Officer, Jaffa,
P. Krikorian — RESPONDENTS.

Sale in Execution—Execution Law Art. 96—Waiver of rights by conduct—Effect of laches.

Application for an order to issue calling upon the Chief Execution Officer, Jaffa, to show cause why his Order dated December 22, 1933, calling upon the Applicant to pay a judgment debt of £P.1600 and in default of payment the property of Applicant to be attached and registered in the name of the last bidder therefor should not be set aside.

ORDER.

No Notice of Sale having been produced by the Applicant and the Applicant having, on his own admission, slept on his rights for two or three months, the application is dismissed.

EXECUTION—

SEE DEBTS

EXPERTS.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 147/26.

BEFORE:

The Acting Senior British Judge, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Johara bint Salim el-Fare
Lutof Hawa as attorney of Aatef
and Munirah, sons of Selim el-Fare APPELLANTS.

vs

Haj Ahmad Yasseen RESPONDENT.

Inspection of land by experts—Obscure report of experts—Necessity of plan—Inspection according to Rules of Court, Nov. 3, 1926.

Appeal from the judgment of the Land Court of Haifa dated 31st May, 1926.

JUDGMENT.

Upon the hearing of this case in the Court below experts were appointed to visit the land in dispute which they did and presented a report of their inspection to the Court. The report, however, did not contain a plan of the land and without such plan we find that the report is obscure, in fact too obscure to base a judgment upon.

We therefore decide that the judgment must be set aside and the case remitted for an inspection to be made in accordance with the new Rules of Court of 3rd November, 1926, Official Gazette No. 175, and a further report to be made of the disputed land accompanied with a detailed plan thereof, and judgment to be given.

Costs to follow the event.

Delivered in presence this 3rd day of March, 1927.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 162/26.

BEFORE:

The Acting Chief Justice, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Shukry El-Mousa APPELLANT.

vs

Antone Cassar RESPONDENT.

Experts appointed to examine accounts—Evidence heard by experts—Competency of experts to hear evidence—Art. 59, Civil Procedure Code and Art. 39 of Addendum thereto.

JUDGMENT.

We are of opinion that experts are not competent to hear evidence and to accept or refuse the demands of any of the parties, all that is required of them is to give a statement of the accounts and give their view of it. They should refer all matters in dispute to the Court to decide under Article 59 of the Code of Civil Procedure and Article 39 of the Addendum.

The judgment of the District Court is therefore set aside and the case remitted to enable the parties to prove their claims in Court. Costs to be costs in the case.

Delivered the 31st day of March, 1926.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 166/26.

BEFORE:

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

IN THE CASE OF:

Iskandar Kassab APPELLANT.

vs

Eleazar Elyashar,
Joseph Elyashar & Another RESPONDENTS.

Refusal by Court to accept report of experts — Power of Court to refuse report of experts and to appoint new experts for valuation of land — Experts agreed upon by the parties to be appointed by Court — Article 59, Civil Procedure Code and Article 39 of Addendum thereto—Rules of Court (Evidence taken out of Court) November 3, 1926.

Appeal from the judgment of the Land Court of Haifa, dated 21st day of September, 1926.

JUDGMENT.

We are satisfied that the Court has the power to refuse the report of experts, and that they were not exceeding their power when they did so and ordered that the land should be valued by new experts. The Court however should have followed the usual procedure, i.e. where the parties agreed amongst themselves to one or more persons, the Court to appoint him or them, in case of non-agreement each party to appoint one and the Court to appoint a third.

We know of no law enabling the Court of its own motion to appoint a Committee of experts.

Therefore the judgment must be quashed and the case returned for the Court to follow the proper procedure as to the appointment of experts.

Costs to be costs in the case.

Delivered in presence the 17th day of May, 1927.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 14/27.

BEFORE:

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

IN THE CASE OF:

Mohamed Abed Salem — APPELLANT.

vs

Khalil Issa Darakat — RESPONDENT.

Experts' report to be submitted by Land Courts to the parties— Art. 63 Civil Procedure Code—Rules of Court November 16, 1926.

Appeal from the judgment of the Land Court of Jerusalem dated 15th October, 1926.

JUDGMENT.

The Land Court has not acted in conformity with Article 63 of the Civil Procedure Code (which was in force until 16th November, 1926), in not giving to the parties a copy of the experts report so as to enable them to make submissions to the Land Court thereupon.

The case must be remitted to the Land Court which will now have to be governed by the Rules of Court published in the Gazette of November 16th, 1926 (Rules of Court, Nov. 3, 1926). The judgment of the Land Court is set aside.

Costs to follow the event.

Delivered in presence the 14th day of July, 1927.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 65/27.

BEFORE:

Corrie, J., Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Nicola Ibrahim Akel — APPELLANT.

vs

Gitano Vinch — RESPONDENT.

Inspection by experts not made in accordance with law—Experts, umpire, judge and parties to be present at inspection—Parties held entitled to submit observations on proposed instructions to experts—Sec. 4, Rules of Court (Evidence taken out of Court) Nov. 3, 1926.

JUDGMENT

It is clear that the inspection was not made in accordance with the law then in force, in that the experts and umpire did not make their inspection together in the presence of the judge delegated to make the inspection and the parties.

The parties should have been given the opportunity of having the expert witnesses called and put on oath by the Court, and of examining them, as provided by Section 4 of Rules of Court of November 3rd, 1926.

It appears further that there is a dispute as to the instructions which were given to the experts: and we hold that the proposed instructions should have been communicated to the parties and their observations thereon heard before they were issued.

The judgment of the District Court is set aside and the case remitted for a fresh inspection to be made according to law and judgment given.

Costs to follow the event.

Delivered the 23rd day of November, 1927.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 53/28.

BEFORE:

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

IN THE CASE OF:

El-Haj Abdul Rahman Tahbub,
Ismail Tahbub,
El-Haj Sheikh Yusef Tahbub — APPELLANTS.

vs

Hassan Nazir
Hussein Nazir — RESPONDENTS.

Inspection of land by experts made under supervision of Chief Clerk of the Court—Chief Clerk held to have no authority to administer oath or take testimony of witnesses—Expert witnesses to be called before Court and examined on oath.—Sec. 4, Rules of Court (Evidence taken out of Court) Nov. 3, 1926.

JUDGMENT.

The main question in this case depends upon the statements of the expert witnesses made on the land in dispute. The Land Court has ordered an inspection, which was made under the supervision of the Chief Clerk of the Court, by whom the oath was administered to the expert witnesses. The Chief Clerk has no authority to administer oaths and take statements upon oath.

The parties should have been given the opportunity of having the expert witnesses called and put on oath by the Court, and of examining them, as provided by Section 4 of Rules of Court of November 3, 1926.

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

Costs of this appeal wili follow the event.

Delivered the 25th day of February, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 107/28.

BEFORE:

Baker, J., Jarallah, J. and Khayat, J.

IN THE CASE OF:

Jibrin Abu Hajar APPELLANT.

vs

Haim Shmuel Cohen RESPONDENT.

Contract for purchase of machinery and goods held to be invalid—Purchaser ordered to return goods and pay for articles missing — Appointment of Chief Clerk as expert to value goods—Assessment of expert held by Court to be absurd.

Appeal from the judgment of the District Court of Jaffa, dated the 7th day of December, 1927.

JUDGMENT.

Appellant in this case originally contracted to purchase a factory and the machinery therein for the purpose of manufacturing bed-steads at the price of £P. 225.

The contract having been rendered invalid, Appellant was ordered to return to Respondent the machinery and articles contained in the schedule to the contract for sale and to pay for any articles missing.

There were articles missing for which Appellant was responsible and the District Court appointed the District Court Clerk to act as an expert and to assess the value of the missing articles.

The said expert, although the factory had been sold to Appellant for £P.225, estimated the articles contained in the schedule to be worth Piastres Egyptian 552.79 and the value of those returned to Respondent at P.T.351.88 more than they were originally contracted to be sold to Appellant and assessed the articles missing to be worth £P. 204. nearly the amount Respondent agreed to sell the whole for.

The assessment, for the above reasons, is clearly absurd, and the judgment must be quashed and the case must be returned for a fresh assessment to be made either by a person to be agreed on by both parties or each party to appoint an expert and the Court to appoint a third and when such assessment has been made for the Court to give a fresh judgment.

Costs to be costs in the cause.

Delivered the 2nd day of May, 1929.

In the District Court of Jaffa.

C. D. C. Ja. No. 434/29.

BETWEEN :

Mohd. Saadat el Dajani — OPPOSER.

vs

Ali Eff. el Mustakim — DEFENDANT.

Liability of heirs for debts of deceaced —Third party opposition under Article 161, Civil Procedure Code—Judgment against one heir held to bind all the heirs—Arts. 1610, 1642, Mejelle—Appointment of experts to determine validity of contested signature—Estoppel by conduct—Syndics in bankruptcy as real Representatives of estate of bankrupt — Contradictory plea inadmissible in law— Value of medical evidence given four years after death of deceased.

JUDGMENT.

This is an opposition entered on behalf of Saadat el Dajani, an heir of the deceased Sheikh Yousef el Dajani, against a judgment given by this Court in favour of Respondent Ali Eft. el Mustakim against the said Sheikh Yousef el Dajani. This opposition is a Third Party opposition within the meaning of Article 161 of the Civil Procedure Code.

The original judgment, which is the subject matter of this opposition, was given in presence of one of the heirs of the said Sheikh Yousef el Dajani, namely Abdalla el Dajani. It appears

from the perusal of the judgment that the Defendant in that case, though admitting as correct the signature of Sheikh Yousef el Dajani on the bills and the contract, contested strongly the debt and yet judgment was entered against him after the Plaintiff proved his claim. The judgment is therefore binding upon all the heirs according to Article 1642 of the Mejelle. Consequently the opposition could be dismissed on this ground without entering into the merits of the case. But as this was not argued at the beginning of the case and whereas the Opposer's contention was that the signatures on the documents upon which the Court based its judgment were not those of the deceased Sheikh Yousef el Dajani, experts were appointed by consent of the parties and now the Court is to pass decision on the merits of the case.

The decision of the majority of the experts is that the signatures on the documents in question are the signatures of Sheikh Yousef el Dajani. The experts came to this conclusion, not only after a technical comparison between the contested signatures and those officially proved as genuine but also after hearing witnesses especially the witnesses who were present when the documents in question were actually signed by the deceased Sheikh Yousef el Dajani.

After consideration the Court reached the same conclusion as the majority of experts and this conclusion is based not only on the report of the experts but on the following facts :

a) The signatures in question were admitted to be genuine and those of the deceased Sheikh Yousef el Dajani by one of the heirs at the previous trial before this Court.
b) The very same Opposer Saadat el Dajani paid to Respondent a certain sum on account of the very same bills the signatures of which are now contested.
c) The judgment opposed, which is still unsatisfied, was produced to this Court in order to have the judgment debtor, Sheikh Yousef el Dajani, declared bankrupt. And in fact he was declared bankrupt by judgment of this Court dated the 3rd July, 1929. The heirs of the bankrupt including the present opposer appealed against the judgment and they never argued, either before the Court or on appeal, that the signatures on the documents upon which the unsatisfied judgment is based, are not the signatures of the bankrupt.
d) The Syndics of the Bankruptcy who are the real representatives of the estate of the bankrupt did not deem it necessary to join the Opposer in this opposition.

For all these reasons, the Court refused to hear any more evidence with regard to the signatures of the documents in question.

As to the plea that the deceased Sheikh Yousef el Dajani was of unsound mind when the documents were signed by him, the Court is of opinion that this is a contradictory plea which is inadmissible in law, having regard to Article 1610 of the Mejelle and the case of Jusef Jirius el Nafel vs Miriam Aisa Abdo in her capacity as guardian of her minor daughter Rasmia, Civil Appeal No. 93/25*.

Besides, this last allegation is not supported by any reliable evidence. The medical reports produced by the Opposer, even if they were confirmed on oath before this Court, were given four years after the death of the deceased. Furthermore, there is contradictory evidence about the exact date of the death. At any rate, the medical certificates produced do not refer to the date of the 29th December, 1926, the date on which the documents in question were signed.

The Court is satisfied that this is a fictitious opposition brought for the purpose of delaying the proceedings of the Bankruptcy.

The opposition is therefore dismissed with costs and LP.15 advocate's fees.

Delivered the 2nd day of February, 1931.

EXPROPRIATION.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 92/22.

BEFORE:

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

IN THE CASE OF:

Ya'qub, Isbir and Andrawus, the children of Saliba Dallal — APPELLANTS.

vs

Asem Bey Said in his capacity as Mayor of Jaffa — RESPONDENT.

Property expropriated by Military Authorities for public road — Municipality not liable in damages.

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* see Ante, p. 58

JUDGMENT.

The Court holds:—

1. That whereas the property in question was included in the public road by order of the Military Authority, the Municipality is not liable as having expropriated the land in question according to law.

2. That the document upon which it is sought to make the Municipality liable is not an agreement by the Municipality to pay for the property.

3. Hence that an action for damages will not lie against the Municipality in respect of the property.

On these grounds, the appeal is dismissed with costs.

Delivered the 18th day of January, 1923.

In the High Court of Justice.

H. C. No. 17/25.

BEFORE:

The Chief Justice and Corrie, J.

IN THE APPLICATION OF:

Said Darwish,
Izzat Darwish,
Khasho Kancashian — PETITIONERS.

vs

The District Officer, Jerusalem — RESPONDENT.

Injunction against Government forbidding the expropriation of land refused—Land expropriated for purpose of making a road—Application to High Court made after land taken and road made—Relief refused after act executed—Action for trespass.

Application for an order to issue to the District Officer, Jerusalem, forbidding him from taking the land of the Petitioners for public purposes without lawful cause.

ORDER:

The Court after hearing Counsel for Petitioners and the Government Advocate for the District Officer holds:—

That the application should have been brought when the land was taken for the road and not after the road was made.

The order prayed for must therefore be refused and the petition dismissed. The Petitioners ought to be left to their remedy by action for trespass.

Delivered the 26th day of June, 1925.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 44/30.

BEFORE:

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

IN THE CASE OF:

The Hebrew University,
Keren Kayemeth Le-Israel Ltd. APPELLANTS.

vs

Sheikh Said El Khatib
Muhied Din Shihabi
Hassam Nusiben on behalf of the heirs of his mother Badrieh,
Abdalah Khatib on behalf of the heirs of Badr ed Din Khatib,
Jamal Khatib on behalf of the heirs of Walid ed Din Khatib RESPONDENTS.

Expropriation of land required for undertaking of public nature—Secs. 3, 10 (3), Expropriation of Land Ordinance, 1926—Failure by parties to agree as to amount to be paid as compensation—Experts examined by Land Court to report as to value of land—Estimates of value made by experts on visit to land in presence of Court—Two of three experts heard in evidence and cross-examind—Third expert absent from Palestine—Jurisdiction of Court to appoint experts—Procedure in Land Court—Sec. 7 (2), Land Courts Ordinance, 1921—Rules of Court (Evidence taken out of Court) Nov. 3, 1926—Inspection of land—Procedure under Acquisition of Land (Assessment of Compensation) Act, 1919—Rules for determining value of land to be expropriated—Order for payment to certain Bank included in judgment held invalid as being order for execution and therefore in excess of jurisdiction.

JUDGMENT.

The Appellants are the promoters of an undertaking known as the Jewish National and Hebrew University Library, a part of the Hebrew University on Mount Scopus, Jerusalem, which by a certificate dated 15th November, 1926, and published in the

Official Gazette No. 175 dated the 16th November 1926, was certified by the High Commissioner to be an undertaking of a public nature within the meaning of Section 3 of the Expropriation of Land Ordinance, 1926.

The Respondents are owners of land expropriated for the purpose of the undertaking.

The parties having failed to agree upon the amount to be paid as compensation in respect of the land expropriated, such amount has been determined by the Land Court under Section 8 of the Expropriation of Land Ordinance, 1926.

By its judgment dated 23rd May, 1929, the Land Court directed that compensation should be paid at the rate of P.T. 17 per pic, that the costs should be paid equally by both sides and that the price should be paid into Barclays Bank, to await withdrawal by the person or persons authorised by the Court. Against this judgment the promoters have appealed.

The first ground of appeal is that the Court committed an error of procedure and acted contrary to the requirements of the Expropriation of Land Ordinance, 1926, in appointing experts to report to them as to the value of the land instead of forming a decision on the basis of their own investigation.

The procedure adopted by the Court was that three persons were appointed, one by each of the parties and one by the Court to make a valuation of the land. These three commissioners visited the land in the presence of the Court and made statements as to their estimates of value, which were recorded in writing in the form of a report and signed by the commissioners and the Judges of the Court. Subsequently, two of the three commissioners, namely those appointed by the Court and the Respondents, gave evidence and were subjected to cross-examination. The commissioner appointed by the Appellant, Dr. Thon, was absent from Palestine at that time, and the Court did not regard it necessary to adjourn for him to appear.

The inspection report contains a full statement by Dr. Thon of the grounds upon which his valuation was based, and the fact that he was not called upon to give evidence is not a ground of appeal. The essential point in this objection is that the Court on its own motion, appointed a valuer, Mr. Hughes, and made his valuation the basis of their judgment. The Appellant's contention is that this is a civil matter and that, in the absence of any express provision to the contrary, the Court must give judgment upon the evidence submitted to it by the parties.

Section 24 of the Ordinance, empowers the High Commissioner to make regulations generally for the application of the Ordinance, but no regulation affecting this question appears to have been framed.

In determining the question, therefore, the rules ordinarily applicable to an action in the Land Court would apply, and by Section 7 (2) of the Land Courts Ordinance, 1921, "The procedure to be followed by the Land Court shall, subject to any Rules of Court, be that laid down in the Code of Civil Procedure as amended, provided that the Court shall not be bound by the Rules of Evidence contained in that Code or in the Civil Code."

Rules of Court dated 3rd November, 1926, were published in the Official Gazette No. 175 of the 16th November, 1926. Rule 4 provides:

> "Inspection of places or things may for the purpose of an action be ordered by the Court or a Judge. By agreement of the parties one or more persons may be appointed to make the inspection. In default of agreement between the parties the inspection shall be made by three persons, one appointed by each party and one by the Court. A report of the proceedings and the opinion of the persons appointed to inspect shall be drawn up by the person directed by the Court so to do, and may be read in Court as part of the evidence, but if either party or the Court so requires, one or more of the persons who have inspected shall be called into Court to give the evidence.
>
> Notice of the date and place fixed for the inspection shall be given to the parties, who shall be entitled to be present at the inspection together with their advocates."

Rule 5 declares that these Rules shall apply in all civil courts.

In my opinion, therefore, the Land Court was entitled, if it thought fit so to do, to accept the procedure prescribed by this rule. The rule contemplates that the report of the proceedings shall be drawn up by some person other than the Court. It is, however, a common, and in my opinion, a desirable practice that the person appointed to draw up the report shall be one of the Judges of the Court, and it cannot be suggested that the procedure in the present instance was invalidated by the fact that both members of the Court were present at the inspection. In my opinion, therefore, this objection fails.

It may be added that under the English Statute from which the provisions of the Expropriation of Land Ordinance, 1926, are derived, namely the Acquisition of Land (Assessment of Compensation) Act, 1919, the question of compensation is referred to arbitration by one of a panel of official arbitrators who are "persons with special knowledge in the valuation of land"; and who thus, in determining the amount of any compensation payable, are not wholly dependent on the evidence submitted by the parties.

The second point raised by the appeal is that the Court, in assessing the value of the land, took into account the needs and requirements of the promoters, contrary to Section 10 (3) of the Ordinance. I am unable to find any passage in the judgment which supports this objection. Before this Court it was alleged that Mr. Hughes stated in evidence that he took this consideration into account. This does not accord with the note of Mr. Hughes' evidence from which it appears that in cross-examination Mr. Hughes said, "I am not concerned to know whether the land is essential to the promoters or not".

The third point raised in the Notice of Appeal is that "the Court committed an error in failing to take into account the return for taxation purpose made by the claimants which would have served as the surest indication to the Land Court as to the value of the said land".

This ground of appeal has not been touched upon in argument before this Court, and it is obvious that in the case of land such as this, which is stated in evidence to have little value for agricultural purposes, as computed with its value as a building site, the returns for taxation are practically worthless as a guide to its value.

The fourth point raised in the appeal is that the Court "committed an error in basing its decision as to the value of the land upon offers alleged to have been made to agents for some of the claimants by one Mr. Selig Weisman, notwithstanding the fact that the Appellants denied that the said gentleman had any authority to make any offers on behalf of them and no evidence was produced by the Respondents of any such authority". The negotiations to which Mr. Weisman himself and other witnesses testified, we re-examined at considerable length. And the Land Court after reviewing the evidence arrived at the conclusion that "it enables us to regard as proved the fact that a provisional agreement to sell at P.T.20 was reached in the manner stated".

The importance of this conclusion lies in the fact that, although it is not expressly so stated in the judgment, it is clear that the Land Court regarded this "provisional agreement" as confirming the estimate of value made by Mr. Hughes. It is necessary, therefore, to deal with the question as to what is the effect of the negotiations in which Mr. Weisman was concerned. In my view, these negotiations resulted in nothing more than an offer by the Respondents to sell at P.T.20 a pic, an offer which either was refused by the Appellants or, as Mr. Weisman states in evidence, was never submitted to them by him. Clearly such an offer cannot be made the basis of an estimate of value.

The fifth point raised in the appeal is that "the Court committed an error in law in determining the price of the land to take into account the unsuitability of the land for the purpose for which it was required". I am unable to find any ground for this objection. The defects in the land considered as a building site are the ridge which runs across it, and the great depth of rubble through which it is necessary to dig for the purpose of the laying of foundations. It is clear from Mr. Hughes' evidence that both these features were present in his mind when making his valuation. He says, "There is one line of sudden drop on the land, but for the rest it is fairly level. This did not impress me as a feature which should influence the price. It does not influence the fact that all foundations in this neighbourhood have to be made deep so as to reach the solid formation under the flint scale. One has to go down often 15 metres, often 10 to 122 feet.

Finally it is submitted in this appeal that the Court "was wrong in deciding to disregard the positive evidence produced by the Appellants as to the actual price paid by numerous purchasers for land in the vicinity and as to the fact that land in the vicinity which is better suitted than the land in question was expropriated under the Expropriation of Land for Army Ordinance, for the purpose of the War Cemetery at a price which was fixed by valuers according to that Ordinance, at P.T.5 per sq. pic". With ragard to the latter part of this objection it may be pointed out that the War Cemetery is situated at a distance of about 700 metres from the Hebrew University.

In connection with these proceedings a plan (Exh. 10) was put in which shows a portion of Mount Scopus including the University, and the prices paid for a number of plots of land purchased on Mount Scopus from 1914 onwards.

The figures given support the view that as regards purchase made since the British Occupation, the land tends to increase as

its distance from the University decreases. Bearing this fact in mind, I am of opinion that no objection can be taken to the view which the Land Court evidently held, that prices paid for land in the neighbourhoud of the Cemetery, 700 metres away from the University, afford no guide to the value of a plot of land situated, as is the land in question, in the immediate neighbourhood of the University. It is obvious that the Respondents' land, which at one point is less than 2 metres from the road upon the opposite side of which the University abuts, must, quite apart from the needs of the University itself have a special value as a possible site for a restaurant, shop or other amenities for students.

One other point remains for discussion. Mr. Hughes, upon whose valuation the judgment of the Land Court is based, stated in evidence "I was guided by the fact that there are two prior sales in the neighbourhoud at P.T.20, one a long strip adjoining the road from Mr. Halab and the other from Greek priests on the west of the road".

It was argued before this Court that in the case of those purchases, the University was bound to acquire the land and therefore paid a price greatly in excess of that which could be obtained from any other purchaser, and subsequently that these two transactions do not afford a trustworthy measure of value having regard to the provisions of Section 10 (3) of the Ordinance. It is however, to be noted that this point was not put to Mr. Hughes in cross-examination and under the circumstances, we see no reason why the Land Court should not have accepted Mr. Hughes' valuation.

The appeal also raised the question of an order given by the Land Court on the 14th June, 1930, requiring the Appellants to pay into a bank the amount of compensation awarded with interest.

The judgment being set aside, the order for payment falls with it. But in any case the order was, in our opinion, in excess of the jurisdiction of the Land Court, being in fact an order for execution of the judgment.

Costs will follow the event.

Delivered this 26th day of April, 1932.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 71/32.

BEFORE:

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

IN THE CASE OF:

The Bayside Land Corporation Ltd. APPELLANT.

vs

Mendel Segal & Others and RESPONDENTS.

Rahel Selhoun and Others. THIRD PARTIES.

Expropriation of land belonging to several owners—Necessity of separate action against each owner for determination of the value of his interest—Section 9(1), Expropriation of Land Ordinance, 1926—Article 15, Civil Procedure Code.

Appeal from a judgment of the District Court of Haifa, dated August 12, 1932*.

JUDGMENT.

The Appellant's claim was to have the compensation assessed in respect of the land comprised in the certificate under the Expropriation of Land Ordinance, 1926, published in Official Gazette No. 266 on 1st September, 1930.

This is a single claim in respect of a single piece of land. The Ordinance provides in Section 9(1) that "the owners and occupiers and any other person who proves to the Court that he has a registrable interest in the land specified in the Notice to Treat shall be entitled to appear before the Court either personally or by an advocate". But there is nothing in the Ordinance which confers upon such owner, occupier, or other person the right to have the value of his interest determined by a separate action.

Land Court has relied upon Article 15 of the Civil Procedure Code in dismissing Appellant's claim,

We are unable to see that this Article has any bearing upon the matter, which is governed solely by the Expropriation of Land Ordinance.

The judgment of the Land Court is set aside and the case is remitted for the Court to determine, in accordance with the provisions of the Expropriation of Land Ordinance, 1926, the value of the land comprised in the certificate of the Officer Administering

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*Reported Ante, p. 33.

the Government, dated 15th August, 1930, and published in Official Gazette No. 266 dated September 1, 1930,

Costs will be paid by the Respondents and the Third Parties who have appeared in support of the judgment, namely Zalman Berzel, Eliahu Klinger, Rachel Sethon and Hinda Kalich, including each advocate's fees.

This judgment is subject to opposition on the part of the Respondents, Mandel Segal, Moshe Berzel, Rifka Frankel, Jacob Berzel, Miriam Berzel, Zilo Berzel and Israel Wartshaver.

EXTRADITION.

In the Court of the Magistrate
sitting under the Extradition Ordinance, 1924.

CR. C. Jm. No. 14/24.

BEFORE:

Baker, J.

IN THE CASE OF:

Application for extradition of
Amir Mahmoud of el Faour.

Extradition of fugitive offender—Nationality of offender—Automatic acquisition of Palestinian citizenship under Treaty of Lausanne—Article 7(6) Agreement for Extradition of Offenders between Syria and Palestine—Application for extradition to be accompanied by authentic copy of depositions taken on oath.

JUDGMENT.

I find that the only question for me to decide is whether the said Amir Faour is a Syrian or a Palestinian, and after hearing the arguments of the Representative of the Attorney-General and the advocates for the said Amir Faour I find that the said Amir Faour resides and has for the last 20 or 30 years had his place of residence in Khasas in the District of Huleh which District was taken over by the Palestine Government on the 1st, April, 1924 and that by virtue of Article XI, page 665, of the Official Gazette of the 15th May, 1924, which stipulates that the nationality of the inhabitants of this District shall be determined in accordance with provisions 30-36 of the Treaty of Lausanne the said Amir Faour at that date became automatically Palestinian.

Now by virtue of Article 7(6) of the Agreement for Extradition of Offenders between Syria and Palestine where the application concerns a Palestinian or foreign subject the application for Extradition shall (inter alia) be accompanied with an authentic copy of the depositions or statements taken on oath certified by the Magistrate who conducted the investigations of the charge. No depositions, etc., have been forwarded with the application and as I hold that the word Palestinian must in this action be interpreted as an inhabitant of Palestine, therefore for these reasons I decide that the application must fail and the Amir released.

Dated the 24th day of November, 1924.

In the High Court of Justice.

H. C. of 1925.

BEFORE:

The Chief Justice and Corrie, J.

IN THE CASE OF:

Ex. Parte: Manas Kornblum
Rudolf Patt, and
Yankel David Sapir

Persons detained by warrant of President of District Court pending surrender for trial in Germany—Extradition on charge of fraudulent bankruptcy—Law of extradition from Germany—Extradition treaty, 1872, between United Kingdom and Germany—Operation of treaty suspended by War — Sec. 4 Extradition Ordinance, 1924 — Ordinance held not inconsistent with provisions of Art. 10 of the Mandate—Offence not included in treaty not extraditable—Approval by Secretary of State of Ordinance promulgated by High Commissioner need not be published — Art. 17 (1) (c), Palestine Order-in-Council, 1922—Acts charged must constitute offence against law of Palestine—Concealment of assets of partnership and destruction of books of firm as criminal offence— Rendering false accounts of assets of bankrupt — Arts. 292, 294, Ottoman Commercial Code — Art. 239, German Bankruptcy Law, 1898 — Art. 47, German Penal Code — Art. 281, Ottoman Penal Code.

JUDGMENT.

Warrants have been granted by the President of the District Court of Jaffa under the Extradition Ordinance, 1924, for the detention of the Petitioners pending their surrender for trial in Germany.

As regards Kornblum and Patt the offence charged in the warrants issued in Germany is fraudulent bankruptcy. Sapir is charged as an accomplice.

A large number of grounds for ordering the release of the Petitioners have been urged upon us in support of the petition.

Some of the grounds have been disposed of in the course of the argument, but there remain some points with which this Court must deal.

1. The Petitioner allege that there is no law authorising extradition from Palestine to Germany.

A copy of the Order-in-Council dated 25th June, 1872, reciting and putting into force the Treaty of Extradition signed on the 14th of May of that year between the United Kingdom and Germany was before the Magistrate. The operation of this Treaty was, it is true, suspended by the War, but by notice dated 25th June, 1920 published in the London Gazette of the 23rd July, 1920 the Treaty was revived as from the date of notice.

This notice was sufficient to bring the Treaty into operation again between the United Kingdom and Germany without any further Order-in-Council being required.

Section 4 of the Extradition Ordinance, 1924, extended the operation of the Treaty to Palestine and thus enabled the German Authorities to demand extradition from Palestine of a fugitive offender, subject to the terms of the Treaty and those of the Ordinance. And that is all that is necessary in the present case.

2. It has been argued that the Ordinance is invalid on the ground that it is incosistent with Article 10 of the Mandate for Palestine.

The substance of this objection is that the Mandate provides that until fresh agreements have been made existing Treaties between the United Kingdom and Foreign States shall apply to Palestine.

Now the Anglo-German Treaty specifies arson as an extradition offence, while the Ordinance does not include arson in its schedule of extradition offences: on the other hand the schedule includes certain offences, for example, bribery, which do not appear in the Treaty.

These differences, however, do not render the Ordinance repugnant to the terms of the Mandate. As regards bribery and the other offences not included in the schedule the position is simply that the Ordinance allows for extradition on grounds additional to those specified in the particular Treaty and this addition would

not entitle the German Government to obtain extradition for an offence not included in the Anglo-German Treaty.

As to the offence of arson: while it may be that the omission of this offence from the schedule to the Ordinance renders the Ordinance incomplete as a fulfilment of the terms of Article 10 of the Mandate, it does not make the Ordinance repugnant to that Article. So far as the Ordinance goes it is consistent with the Article, though the former may not give full effect to the latter.

3. Objection has also been taken to the Ordinance on the ground that neither the Ordinance itself nor the Order promulgating it shows that a draft of the Ordinance was submitted to and approved by the Secretary of State before promulgation as required by Article 17(1)(c) of the Palestine Order-in-Council, 1922, as amended by Article 3 of the Palestine (Amendment) Order-in-Council, 1923.

There is, however, no requirement that the giving of such approval should be published, though no doubt it would be convenient if the fact were recited in the Order of promulgation. All that is required is that such approval should have been given, and had the Petitioners troubled to make necessary enquiries they could have ascertained that the draft of the Ordinance was approved on the 15th April, 1924, prior to promulgation.

4. The Petitioners also argue that as Germany is not a party to the Mandate, Article 10 of it is not binding on her, and hence there is no obligation upon her to try the accused only for the offence for which extradition is requested. Even if this were so, it would not affect the question of liability to extradition which depends solely upon the Anglo-German Treaty and the Extradition Ordinance.

5. It has been argued for the Petitioners that the acts charged against them do not constitute an offence against the Bankruptcy Law of Palesine.

The acts charged against Patt and Kornblum are

(1) concealment of the assets of the partnership, by transporting them out of Germany,

(2) destruction of the books of the partnership.

As regards (1) it would appear that the physical concealment of assets is not an offence against Article 292 of the Ottoman Commercial Code though it is an offence against the Article of the French Code from which the Ottoman Code is translated.

In Article 292 the Ottoman legislator, by a transposition of phrases has limited the offence of concealment of assets to one

which in effect consists of rendering false accounts of the assets of the bankrupt.

That there has been some omission from the Code may be inferred from Article 294 which renders any person other than the bankrupt who assists him to conceal his assets guilty of an offence; and it is clear that the bankrupt who conceals his own assets is equally culpable. But the Code does not appear to provide for his punishment.

It is, however, unnecessary to decide this point, as charge (2) destruction or concealment of books of accounts, is an offence of fraudulent bankruptcy in Palestine, under Article 292 of the Commercial Code.

It was suggested that the Petitioners had not been charged with this offence, but such is not the case. The warrant for their arrest is laid under Article 239, Sections (1) and (4) of the German Bankruptcy Law of 17th May, 1898, and Article 47 of the German Penal Code.

Article 239, Section (4), as endorsed on the warrant reads as follows:

"Those who have destroyed their commercial books or concealed them or have kept or changed them in such a way that they do not give a summary of the assets".

There is evidence on which both Kornblum and Patt may be charged with this offence.

The Petitioner Sapir is charged as an accessory in the concealment of assets.

This, as already mentioned, is an offence against Article 294 of the Ottoman Commercial Code and Article 281 of the Ottoman Penal Code.

As shown by the endorsement on the warrant it is also an offence against Article 239, Section (1) of the German Bankruptcy Law, and Article 49 of the German Penal Code.

This objection therefore fails as regards all three Petitioners.

6. It is also argued on behalf of the Petitioner Sapir, that an accessory to an offence against the Bankruptcy Laws is not subject to extradition; and in support of this view the English case re Counhaye has been cited. That was a case under the Anglo-Belgian Extradition Treaty, and it was held that a wife was not liable to extradition as accessory to her husband's fraudulent bankruptcy.

Shortly after that judgment was given, however, an Act was passed (Extradition Act, 1873) amending the Law by declaring an

accessory in a fraudulent bankruptcy to be liable to extradition; and that Act is still in force in England.

It is clear therefore that an accessory to a fraudulent bankruptcy would to-day be liable to extradition from England to Germany; and in view of the provisions of Section 4 of the Extradition Ordinance and the inclusion of accessories in the schedule, the same must be the case as between Palestine and Germany.

7. With regard to Sapir however, it is to be noted that while in the German Warrant the offence charged against him is that of being accessory to fraudulent bankruptcy, the warrant of the President of the District Court directs that he be detained pending surrender "on the ground of his being accused of the commission of the offence of fraudulent bankruptcy".

This is clearly by an oversight, and the Petitioner can only be surrendered for trial as an accessory.

The proper course would appear to be that the Petitioner should be brought up before the learned Judge for an amended Warrant to be issued.

In the High Court of Justice.

H.C. No. 67/26.

BEFORE:

The Chief Justice and Corrie, J.

IN THE APPLICATION OF:

Faris Kadamani — PETITIONER.

vs

The Attorney-General — RESPONDENT.

Extradition to Syria—Criminal facts charged omitted from warrant of arrest—Sufficiency of warrant to justify arrest—Extradition on charge of murder under Article 170, Ottoman Penal Code—Crime charged not to be of political character.

JUDGMENT.

The warrant of arrest as originally issued for the purpose of extradition to Syria, although it did not contain the facts charged but only the category of the offence, was in our opinion sufficient to justify an arrest and the bringing of the prisoner before the Magistrate.

When, however, the case came before the Magistrate, he had two questions to deal with:

1. There was not on the face of the warrant or in any other document forwarded by the Government of Syria any information as to what crime was charged except the geneal statement that he was charged with murder under Article 170, Ottoman Penal Code. That is not a charge on which a man can be committed. Neither the time nor the place nor any indication as to who was the victim appeared and the prisoner was not shown what accusation he had to meet, nor could the Magistrate know how to draw up a warrant of commitment.

2. In the second place the Magistrate had to be satisfied that the crime charged was not of a potitical character as pleaded by the prisoner. He had no information as to what the crime was, but did know from the laissez-passer issued by the Syrian Authority and produced by the prisoner that he came from a Druze village in the Lebanon which had been a centre of political disturbance.

Nevertheless, the Magistrate committed the prisoner for extradition.

When the case came before this Court there was no evidence forthcoming, but we were informed that the Government had received a telegram from the Government of Syria to the effect that the charge against the prisoner was not concerned with military operations.

The commitment cannot be upheld and an order must go for the discharge of the prisoner.

Delivered the 27th day of August, 1926.

In the High Court of Justice.

H.C. of 1926.

IN THE APPLICATION OF:

Ezra Goralshvili
Shabtai Tschikashvili PETITIONERS.

In Re: The Extradition Ordinance, 1924.

Treaty between Great Britain and Italy for mutual surrender of fugitive criminals—Sufficiency of evidence to justify committal for trial—Bankruptcy offence committed in Italy by persons in Palestine—Fraudulent bankruptcy of partnership—Jurisdiction of Court to try accomplices in Palestine where act committed abroad—Secs. 4, 13, 15, Extradition Ordinance, 1924—"Fugitive offenders" defined—Proof of nationality—Value of Provisional Certificate of Palestinian Citizenship—Extradition of British Subjects—Sovereignty

of power residing in Mandatory—Duties owing by Mandatory to League of Nations—"Palestinian citizens" held not to be British Subjects—Issue of writ of habeas corpus—Necessity of Order-in-Council for making Ordinance effective—Extradition Act 1870—Powers of Legislative Authority for Palestine—Necessity of assent of His Majesty to Ordinance—Sec. 26, Palestine Order-in-Council, 1922, held ineffective—Judges of District Court invested with Magisterial power—Sec. 72 (6) Trial Upon Information Ordinance, 1924—Ex-Ottoman subjects as British Subjects—Legal existence of "Palestinian citizen" doubted.

JUDGMENT OF COMMITTAL: COPLAND, J.

First, as to whether there is sufficient evidence before me to justify the commital of the two Defendants for trial.

The evidence contained in the Italian depositions and other documents sent from Italy show that the firm of Raphael Goralshvili in Milan have been declared bankrupt by the competent Court and that by a further judgment Ezra Goralshvili and Shabtai Tschikashvili were also declared bankrupt.

There is also evidence to the effect that the three persons in Milan and the two Defendants in Jerusalem were all in partnership and that the office in Milan and Jerusalem belonged to the same business, that Jerusalem was a branch office of the business in Milan.

The report of the Syndic of the bankruptcy given on oath is also furnished.

The evidence produced before me here of the witnesses who have been called shows that large sums of money were remitted from Rafael Goralshvili in Milan to Shabtai Tshikashvili here, and that further sums were sent by Ezra Goralshvili and Shabtai Tschikashvili to Rafael Goralishvili in Milan.

Goods amounting in value to Lire 3,493,329 have been invoiced to Shabtai in Jerusalem and remittances amounting to £36,150. Sterling have been sent from Jerusalem to Rafael Goralshvili in Milan, £22,000 being also remitted from Milan to Jerusalem.

Copies of telegrams sent from Milan to Shabtai Tshikashvili have been produced and also original telegrams sent by the Defendants in Milan.

I am satisfied on the evidence that the Defendants were partners in the Milan firm and that there is sufficient evidence before me to justify their committal for trial according to the laws in force in Palestine.

The existence of a Treaty of Extradition between Italy and the United Kingdom has been proved and this Treaty has been

applied to Palestine by Section 4 of the Extradition Ordinance, 1924.

It has been proved that the Imperial Courts have the jurisdiction to try accomplices and accessories, where acts may have been committed in Italy.

In R. v. Nillins (1884) 53 L. J. (M. C.) 157, it was decided that a person residing in England and obtaining goods from traders in Germany by false pretence contained in a letter written and posted in England was a fugitive criminal, within the meaning of the Extradition Act, and liable to be surrendered to Germany even though he had never been in that country.

Following the principle here enunciated I hold that the Defendants are "fugitive offenders" within the meaning of the Extradition Ordinance, 1924. And complicity in fraudulent bankruptcy is an extraditable offence being included in the Treaty between the United Kingdom and Italy and also being incorporated in the Schedule of the Extradition Ordinance, 1924, and punishable under the provisions of the Ottoman Penal Code.

The only remaining question is that of the nationality of the Defendants.

They have produced provisional certificates of Palestinian Citizenship and it has been argued:

1. That Palestinians are now British subjects and therefore they cannot be extradited.

2. That since the Treaty exempts each country from surrendering its own Nationals, and since the Treaty has been applied to Palestine, therefore Palestinians are also not extraditable.

The preamble to the Palestine Order-in-Council, 1922, states that "Whereas the Principal Allied powers have agreed . . . . . to entrust to a mandatory selected by the said Powers the administration of the Territory of Palestine . . . . . ."

The question as to what is a Mandate has, so far as I am aware, never been judicially determined, but I do not think that sovereign power resides in a Mandatory.

The duties of a Mandatory are to administer the territory entrusted to its charge—certain limitations are imposed and there are duties owing by the Mandatory to the League of Nations. A limited or qualified Sovereignty is a contradiction in terms,—there can be not such thing. I hold that Palestine is not a part of the British Dominions though I am not prepared to say what its exact status is and Palestinians are not therefore British Subjects.

Neither do I think that Palestinians are protected by the Extradition Treaty between the United Kingdom and Italy.

British subjects in Palestine cannot be extradited to Italy for an offence committed there, but that is the extent to which the protection conferred extends.

The last point is to be considered. What meaning if any can be attached to the provisional certificates of Palestinian Citizenship which have been produced. These were conferred in order to carry out the requirements of the Palestine Legislative Council Election Order, 1922.

Now this Order-in-Council is headed: "An Order-in-Council to provide for the election of the Palestine Legislative Council" and all the provisions of this Order-in-Council deal with matters concerning the election, such as system of election, qualification of voters, publications of registers and such kindred matters.

Section 2 of the Order-in-Council says "for the purposes of this Order and pending the introduction of an Order-in-Council regulating Palestinian Citizenship the following persons shall be deemed Palestinian Citizens" and then goes on to describe these persons.

I do not think that the words "pending the introduction of an Order-in-Council regulating Palestinian Citizenship" overrides the previous nationality held by a man.

The Order itself deals solely with elections, and the definition of those who are to be regarded as Palestinians is subject to the qualification "for the purposes of this order". The remaining words of the sentence are in my opinion added to deal with the situation which would have arisen supposing the second Order-in-Council regulating Palestinian Citizenship which was contemplated had been published before the date of elections.

This Palestine Legislative Council Election Order is not an order determining general Palestinian Nationality.

I therefore come to the conclusion that the Defendants are not Palestinians and are not British Subjects.

All the requirements of the Extradition Ordinance, 1924, have therefore been complied with.

I commit the Defendants Ezra Goralshvili and Shabtai Tschikashvili for trial on a charge of complicity in the fraudulent bankruptcy of Raphael Goralshvili and others in Milan, their offence falling under the provisions of Articles 231 and 45 of the Imperial Ottoman Penal Code, and being also contrary to Italian Law.

They are committed pending extradition.

The Warrants will not be executed until 15 days have elapsed from the date of this commital and they have the right to apply for Habeas Corpus.

Given at Jerusalem the 21st day of November, 1924.

JUDGMENT OF THE ACTING CHIEF JUSTICE.

This is the first petitition to this Court in a case in which a British Treaty of Extradition has been applied in Palestine under Section 4 of the Extradition Ordinance, 1924.

On the 21st November, 1924, an order was made by a judge of the District Court under the Extradition Ordinance, 1924, and the Treaty signed on the 5th February, 1873, between Great Britain and Italy for the mutual surrender of fugitive criminals, for the committal of the Petitioners to prison pending their surrender to the Italian Government for trial in Italy upon a charge of complicity in fraudulent bankruptcy.

Under Section 15 of the Extradition Ordinance, the Petitioners have applied for and obtained the issue of a writ of Habeas Corpus, and the return to the writ having been duly made, they are now seeking an order of release.

The first point in their petition with which we are called upon to deal is that the provisions as to extradition in the Mandate for Palestine and the Extradition Ordinance, 1924, do not become operative until put into force by an Order-in-Council.

In support of this contention it has been argued that to hold otherwise would involve holding that other British Extradition Treaties, which (unlike the Treaty with Italy) provide for the surrender to a foreign country of British subjects, were operative in Palestine; and that such could not be the case without an Order-in-Council applying the statutory powers conferred by the Extradition Act, 1870. It was further pointed out that the general pratice in Crown Colonies supports this view.

It is, however, to be observed that statutory powers of Government in foreign territories are vested in the Crown under the Foreign Jurisdiction Act, 1890, and that in exercise of such powers, Orders-in-Council have been issued constituting a Legislative Authority for Palestine. The Extradition Ordinance, 1924, is an act of that Authority and is subject to disallowance by the Crown under Section 3 (e) of the Palestine (Amendment) Order-in-Council, 1923. It cannot, therefore, be maintained that an Ordinance of this Legislative Authority, which has not been disallowed by the

Crown, has not behind it whatever statutory powers may be required; and there can be no necessity to have recourse to the Extradition Act, 1870, for statutory powers of extradition from Palestine. In so far as the argument of the Petitioners rests upon precedent, while it may be true that the more usual practice has been to issue an Order-in-Council applying the provisions of the Extradition Act, 1870, to the territory concerned, this practice has not been invariable; thus in the Federated Malay States and the Nyasaland Protectorate arrangements made between the King and a Foreign State for the mutual surrender of fugitive criminals have been carried into effect by Ordinance of the Local Legislature.

It has also been objected by the Petitioners that the Extradition Ordinance, 1924, cannot take effect until the assent of His Majesty has been signified in the Official Gazette as required by Section 26 of the Palestine Order-in-Council, 1922. It is, however, clear from the amendment to Section 17(2) contained in Section 3 of the Palestine (Amendment) Order-in-Council, 1923, that Section 26 of the 1922 Order is not now in force.

It has also been urged that the provision of Section 13 of the Extradition Ordinance that extradition proceedings shall be taken before a Judge of a District Court, is in excess of the powers of constituting Courts conferred by the Palestine Order-in-Council, 1922. Under Section 72(b) however, of the Trial Upon Information Ordinance, 1924, Judges of District Court are invested with magisterial powers; and the effect of Section 13 is merely to limit the class of Magistrates before whom extradition proceedings can be taken.

It has also been objected by the Petitioners that the extradition proceedings are irregular in that the evidence in support of the application for extradition was presented by the Foreign Government applying for extradition and not by the Attorney-General on behalf of the Government of Palestine.

It is true that any prosecution for an offence alleged to have been committed in this country must be brought by the Attorney-General, and it would appear more convenient that extradition proceedings should also be conducted by him. There is however, no provision in the law requiring this, and the proceedings cannot be held invalid on the ground that they were conducted by a representative of the Foreign Government concerned.

Another point raised by the Petitioners is that they are exempt from extradition under the Anglo-Italian Extradition Treaty, Article 3 of which provides that "no subject of the United

Kingdom shall be delivered up by it to the Italian Government". The argument on behalf of the Petitioners is that under the terms of the Mandate for Palestine and the Treaty of Lausanne, the Petitioners, who are Ex-Ottoman subjects, have become British subjects; and, alternatively, that the Anglo-Italian Treaty can only be applied to Palestine mutatis mutandis, that among the necessary changes must be the substitution of "Palestinian citizen" for "Subject of the United Kingdom"; and that the Petitioners are Palestinian citizens and hence cannot be delivered up.

But even assuming that the Petitioners were, as alleged, Ex-Ottoman subjects resident permanently in Palestine--and on this the evidence is inconclusive—to hold that the Petitioners are British Subjects would involve holding that the Crown, having accepted the responsibility of governing Palestine as a Mandatory, has thereby acquired sovereignty, a view for which no authority has been cited. As regards the alternative plea, it may be doubted whether a "Palestinian citizen" has at present any legal existence. But it is unnecessary to consider that question, as I hold that in applying the Anglo-Italian Treaty to Palestine, Article 3 of the Treaty is to be taken to exempt from extradition only British Subjects.

It is further objected that the offence alleged against the Petitioners is not one for which extradition is possible, because it is not an offence within (a) the Extradition Act, 1890, (b) the Italian Penal Code, (c) the Anglo-Italian Treaty, (d) the schedule of the Extradition Ordinance, 1924, and (e) at the same time an offence that would be punishable in Palestine. (a) As regards the Extradition Act, 1890, I hold that it has not been applied to Palestine, and it is therefore unnecessary to consider its provisions. The offence with which the Petitioners are charged must however satisfy requirements (b), (c), (d) and (e).

The charge against the Petitioners is that they (inter alia) assisted three persons Raphael Goralshvili, Aaron Goralshvili and Abraham Reginashvili, who were carrying on business in Milan in partnership, to dispose of the assets of the partnership so as to defraud the creditors of the firm.

The warrant for the arrest of the Petitioners, issued in Milan charges them (inter alia) with complicity in and with facilitating the execution of fraudulent bankruptcy, which is an offence under Article 64 of the Italian Penal Code.

The Anglo-Italian Treaty, Article 2 (7), includes fraudulent bankruptcy among the crimes for which extradition is agreed; and by subsection (19) of the same Article "accomplices before the

action in any of these crimes shall also be delivered up; provided their complicity be punishable by the Laws of both the Contracting Parties".

The first Schedule to the Extradition Ordinance, 1924, includes among extradition offences "offences against the bankruptcy laws punishable on information". Article 231 of the Ottoman Penal Code and Article 294 of the Commercial Code provide that persons convicted of having, in the interest of the bankrupt, removed or concealed any part of his goods, movable or immovable, shall be punished with penal servitude; that is to say, the offence is one punishable in Palestine on information. I am satisfied, therefore, that complicity in the fraudulent removal or concealment of the assets of a bankrupt constitutes an offence within the Italian Penal Code, the Anglo-Italian Extradition Treaty, and the Extradition Ordinance, 1924, and would be punishable by the law of Palestine if committed in relation to a bankruprcy occurring here.

It was also argued that the acts alleged against the Petitioners even if proved, were committed in Palestine, and that there was not within the period of two months from the date of arrest prescribed by Article 12 of Treaty, evidence before the learned Judge upon which he could hold that an act committed outside the jurisdiction of the Italian Courts was punishable by the Italian Law.

What is alleged against the Petitioners however is complicity in the fraudulent transfer from Milan to Palestine of assets of a bankrupt firm. This is an offence committed partly in Palestine. In the absence, therefore, of proof to the contrary, I hold that the learned Judge was right in treating the offence alleged as within the competence of the Italian Court.

I come now to the question whether there was sufficient evidence to justify the issue of a Warrant of Committal. Under Section 14 of the Extradition Ordinance, 1924, there must be such evidence as would, according to the law of Palestine, justify the committal for trial of the Defendants if the offence of which they are accused had been committed in Palestine. This must be read with Section 12 of the Extradition Treaty which provides that "if within two months from the arrest of the accused sufficient evidence is not produced for his extradition he shall be liberated".

The Defendants were arrested on 15th September and the two months mentioned by the Treaty therefore expired on 15th November. The learned Judge gave his decision on 21st November; and between the 15th and the 21st, that is, after the expiration

of the two months, he heard fresh evidence, holding himself entitled to do so because a substantial portion of the two months has been consumed by adjournments at the request of the Petitioners.

I hold, however, that the learned Judge was not entitled to hear fresh evidence after the expiration of the two months, because the terms of the Treaty are peremptory; and our duty now is to consider whether there was on 15th November sufficient evidence before him to justify his issuing a Warrant of Committal; or in the terms of the Extradition Ordinance, was there such evidence as would, according to the law of Palestine, justify the committal for trial of the Petitioners if the offence of which they are accused had been committed in Palestine?

On the 15th November, the facts before the learned Judge were as follows:

The firm of which Raphael Goralshvili, Aaron Goralshvili and Abraham Reginashvili were partners carrying on business in Milan, had been declared bankrupt and criminal proceedings had been commenced against them for fraudulent bankruptcy.

Judgment had been given by the Civil and Criminal Court of Milan on the 29th September, 1924, declaring that the Petitioners were partners in the bankrupt firm and extending the bankruptcy to include them.

The Syndic of the bankruptcy had deposed upon oath that the Petitioners had been concerned in disposing of the assets of the firm; in particular that while they were consignees of goods to a considerable value despatched from Italy, they had also received from Raphael Goralshvili sums of money to a total amount of L.E.22,000; against which they had remitted to him L.E.10,000.

No explanation whatever of these transactions had been furnished by the Petitioners.

Under these circumstances I hold that there was evidence upon which the Petitioners could be committed, and I see no ground for ordering that they be released.

The petition must be dismissed.

In the High Court of Justice.

H.C. No. 89/27.

BEFORE:

The Chief Justice and Corrie, J.

IN THE APPLICATION OF:

Maadad Charouf — PETITIONER.

vs

The Attorney-General — RESPONDENT.

Extradition to Syria—Sufficiency of warrant for arrest—Name of alleged victim of offence of "Assassinat" not set out in warrant.

ORDER.

Following the judgment of this Court in H.C. No. 67/1926*, the Court holds that the legality of the Petitioner's detention on a warrant which does not set out the name of the alleged victim of the offence of "assassinat" cannot be supported.

The writ must therefore issue and the prisoner must be discharged.

Delivered the 13th day of January, 1928.

In the Supreme Court sitting as a High Court of Justice.

H.C. No. 92/27.

BEFORE:

The Chief Justice and Corrie, J.

IN THE APPLICATION OF:

Muhammad Saleh Ibn Hassan El-Bakri — PETITIONER.

vs

The Attorney-General — RESPONDENT.

Extradition to Syria—Certificate from competent judicial authority that the judgment, on basis of which extradition is applied for, is executory, not produced—Article 9(d), Provisional Agreement with Syria for Extradition of Offenders, dated July 11, 1921—Petitioner released on habeas corpus.

ORDER.

The Court holds that Article 9 (d) of the Provisional Agreement with Syria has not been complied with, in that there is not

*see Ante, p. 897.

a certificate from a competent judicial authority that the judgment, on the basis of which extradition is applied for, is executory.

Accordingly the Petition is allowed and the Petitioner is ordered to be released unless detained on some other ground.

Delivered the 20th day of February, 1928.

In the High Court of Justice.

H.C. No. 12/33.

BEFORE:

The Senior Puisne Judge and Baker, J.

IN THE CASE OF:

George Edward Oliver PETITIONER.

vs

The Attorney-General RESPONDENT.

Extradition to France for offence of theft—Accused committed by President, District Court, but discharged by High Court—Application for habeas corpus granted—Insufficiency of evidence according to law of Palestine to justify conviction—Sec. 12 (1) Extradition Ordinance, 1926.

JUDGMENT.

There is not before the Court such evidence as (subject to the provisions of the Extradition Ordinance, 1926) would according to the law of Palestine, justify the conviction of the crime of which he is accused had it been committed in Palestine. It follows that there is not such evidence as would, according to the law of Palestine, justify the committal for trial of the prisoner, and in accordance with Section 12 (1) of the Extradition Ordinance, 1926, we order that he be dismissed.

FEES.

In the High Court of Justice.

H. C. No. 19/27.

BEFORE:

The Senior British Judge and Baker, J.

IN THE CASE OF:

Moise Valero and Others
Executors of the will of
Haim Valero, deceased PETITIONERS.

vs

The Chief Execution Officer,
Jerusalem RESPONDENT.

Exemption from payment of action and judgment fees—Mortgage debt collected by Execution Officer—Fees payable thereon—Proceedings to enforce payment under Transfer of Land Ordinance, No. 2 of 1921—Rules 11, 19, Rules of Court, Court Fees, 28th November, 1918.

Application for an order to issue to the Chief Execution Officer in the District Court of Jerusalem requiring him to proceed with the recovery of a mortgage debt without payment of 3½% of the amount thereof.

ORDER.

The Court upon hearing Mr. Daniel Auster on behalf of the Petitioners, and the Government Advocate on behalf of the Attorney-General, orders and it is hereby ordered as follows:

That the Chief Execution Officer in the District Court of Jerusalem do refrain from requiring the Petitioners to pay the Court fees prescribed by Rule 11 of the Rules of Court, Court fees' published on 28th November, 1918, and the Judgment Fees, published by Rule 19 of the same Rules, before proceedings to enforce payment under the Transfer of Land Ordinance No. 2 of 1921, of a debt due to the Petitioner on mortgage, are commenced.

Given and delivered in presence the 19th day of May, 1927.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 15/30.

BEFORE:

Corrie, J., Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Sheikh Abdel Qader El-Muzafar APPELLANT.

vs

Abdel Hamid Dirhalli RESPONDENT.

Time for lodging appeal—Civil procedure—Fees for appeal tendered on last day for appeal when Chief Clerk absent and cash closed—Court closed on Friday for payment of fees—Appeal held to be out of time.

JUDGMENT.

The Respondent, Abdel Hamid Dirhalli, has taken the objection that the appeal has not been made within the period prescribed by law.

The facts are that on the 31st January, 1930, the last day for lodging an appeal, the Appellant's brother attended in the Office of the District Court and tendered payment of the appeal fees. The 31st January, 1930, was a Friday. In consequence, the Chief Clerk was not in the Office and the registers were not open. The Appellant's brother handed the fees to a clerk in the Court, Suliman Ansara, who was not authorised to receive payment of fees and who having been absent from the Office for some days through sickness, did not hand the amount to the Chief Clerk until some days later, when it was entered in the cash register.

The Appellant relies on the decision of this Court in Taufiq Ayub vs. Issa Hazboun, Civil Appeal No. 60/29.

In that case also the fees were paid on the last date for appeal, a Friday, and the cash registers were not open. The Chief Clerk, however, was in the Office and received the fees. The Court held that the appeal was made within the legal period.

In the present case, however, there is one important distinction to be noted. Not only were the cash registers closed, but there was no one in the Office who had authority to receive payment of fees. So far as payment of fees was concerned the Office was closed on the 31st January, 1930; and hence the rule laid down

in Ibrahim Hakki El-Taji v. Ali El-Nakib, Civil Appeal 254/23, applies, and the appeal is not made within time.

The appeal is therefore dismissed with costs.

Delivered the 24th day of December, 1931.

In the High Court of Justice.

H.C. No. 32/31.

BEFORE:

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

IN THE APPLICATION OF:

The Palestine Mortgage
and Credit Bank Limited — PETITIONER.

vs

The Chief Execution Officer, Haifa,
Benzion Gafni,
Amrah Hazanoff,
William Goldsmith — RESPONDENTS.

Payment of execution fees—Property sold at request of third mortgagee—Proceeds sufficient to satisfy only first two mortgages—Whether in such circumstances execution fees are payable by first mortgagee—Rule for satisfaction of successive mortgages.

ORDER.

Petitioners were the first mortgagees of a property which has recently been sold at the request of a third mortgagee. The property has realised sufficient to pay both the first and second mortgagees their moneys advanced by them by way of mortgage, but not sufficient to pay the third mortgagee the whole of the sum he advanced on third mortgage.

Upon paying the mortgage moneys advanced by the first mortgagee (the present Petitioner), the Execution Officer has retained therefrom the sum of £P.7.800 in respect of execution fees and it is against this deduction or retention that this Petition was made.

After hearing counsel for Petitioner and the third mortgagee, the Court is satisfied that in view of the fact that the mortgaged property did not realise sufficient to pay all the mortgagees the moneys owing on their respective mortgages in full, the Execution Officer should retain 2½ per cent of the whole of the moneys

obtained from the sale of the mortgaged premises and to be paid to the respective mortgagees; and after such deduction of all costs, including execution fees, the balance should be paid to the third mortgagee.

The Execution Officer was wrong in calling upon the first mortgagee to pay £P.7.800 in respect of execution fees: the same being chargeable on the balance payable to the third mortgagee. The order is therefore made absolute.

No costs.

Delivered the 22nd day of October, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 127/32.

BEFORE:

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

IN THE CASE OF:

Yousuf Assaf APPELLANT.

vs

Hassan Badr RESPONDENT.

Exemption from payment of Court Fees—Application for exemption held wrongly made to District Court—Civil procedure—Rule 7, Rules of Court, Court Fees, 28th November, 1918—Time for appeal—Statement of appeal containing grounds filed 13 months after Notice of Appeal.

Appeal from the judgment of the District Court of Haifa, dated the 18th January, 1932.

JUDGMENT.

The judgment under appeal was delivered on 18th January, 1932.

The present Appellant lodged his appeal on 17th February, 1932, and applied for exemption from Court fees to the District Court which made an order for exemption on the same day.

It is clear from the terms of Rule 7 of Rules of Court, Court fees, published in Palestine News Gazette No. 16 on 28th November, 1918, that application for exemption must be made to and exemption granted or refused by the Court which is seised of the case; so that no lawful order for exemption has been made in favour of the present Appellant.

The date upon which the order of the District Court was notified to the Appellant is not recorded. The notice of appeal did not specify any grounds of appeal.

A statement of appeal containing grounds was not filed until the 7th March, 1933, fourteen months after the judgment and nearly thirteen months after the notice of appeal; and this was clearly out of time.

On both these grounds, the appeal is dismissed with costs.

Delivered the 24th day of October, 1933.

FIREARMS.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 7/30.

Before:

Baker, J., Jarallah, J. and Khayat, J.

In the case of:

The Attorney-General — Appellant.

vs

Ibrahim Mohammad Shibel — Respondent.

Secs. 1, 3, Firearms Ordinance, 1922—Unlawful possession of unserviceable firearm—Interpretation of "firearm".

JUDGMENT.

We are of opinion that Section one of the Firearms Ordinance has but one interpretation, that is, that a firearm includes any part of a firearm from which any shot, bullet or other missile can be discharged. If it were otherwise a person being in possession of the smallest part or portion of a firearm would be liable under this section. As the law is, in its present form we are satisfied that the judgment of the lower Court was correct and the judgment must be upheld and the appeal dismissed.

Delivered the 4th day of June, 1930.

FOREIGN JUDGMENT.

In the High Court of Justice.

H.C. No. 31/26.

BEFORE:

The Chief Justice and the Acting Senior British Judge.

IN THE CASE OF:

Eidelman PETITIONER.

vs

The Chief Execution Officer
in the District Court of Jerusalem RESPONDENT.

Execution of judgment of American Consular Court—Judgment for alimony against American citizen—Jurisdiction of Consular Courts in Turkey abolished—International obligations or agreements not to be observed by Courts of Law when repudiated by legislating authority—Grounds on which Court may question validity of laws—Reconstruction of Courts at time of Occupation—Constitution of Courts for actions concerning foreigners—Legal authority of letter from Legal Secretary—"Foreigner" defined—Abolition of Capitulations—Arts. 38, 58-67, Palestine Order-in-Council, 1922.

Application for an Order to issue to the Chief Execution Officer in the District Court of Jerusalem to show cause why an Order should not be made setting aside his Order of 23rd March, 1926, and forbidding him to execute the judgment of the American Consular Court dated 5th February, 1924, against the Petitioner for alimony to his wife.

ORDER.

The Court upon hearing Mr. Ben-Aharon on behalf of the Petitioner it is ordered as follows:

That the Chief Execution Officer in the District Court of Jerusalem do appear, if he so desires, on Wednesday the 21st day of April, 1926, to show cause why an order should not issue forbidding him to execute the judgment of the American Consular Court.

That notice of this application and the hearing thereof be given to the Attorney-General and the judgment creditor.

That copies of this Order be served on the Attorney-General and the judgment creditor.

That the return day for the hearing and determination of the application be Wednesday the 21st day of April, 1926.

Interim Order to stay execution until further Order.

Given and delivered this 21st day of April, 1926.

JUDGMENT.

By this Petition an Order is prayed forbidding the Chief Execution Officer of Jerusalem to execute a judgment of an American Consular Court against an American Citizen.

It has not been shown to us that at any time, even before the abolition of the Capitulations, it was the Law or practice of the Execution Officers of the Civil Courts to execute judgments of Consular Courts except in respect of immovable property. In other cases the Consular Courts appear to have executed their own judgments against their own citizens.

The jurisdictions of Consular Courts in Turkey was abolished in August, 1330, by an Imperial decree and they have never been reestablished. It is said that these jurisdictions, having been established by agreements between Turkey and the foreign Governments concerned, could not be abolished by one party to the agreement, namely Turkey, without the consent of the other parties, and that America never consented. That is a general principle of Law which ought to be observed by Governments, and which if not observed may give rise to diplomatic disputes or more serious quarrels, but the right of a sovereign to legislate for his own territory is not affected so far as the Judges are concerned, by international obligations, and the Law Courts are bound to observe Laws made by the legislative authority which they obey, and are not at liberty to question their validity on the ground that they violate some constitutional relation made between their sovereign and foreign Governments.

That was the state of affairs when the British Military Occupation of Palestine began. The Military Authority in command of the King's Forces made rules and regulations under various descriptions and titles in the interest of public security and good government and for the purpose of the Occupation, and among other matters reconstituted the Courts of Justice with certain modifications by a Proclamation of June, 1918, and by Rules made under Article 15 of that Proclamation it was declared how Courts were to be constituted for cases in which foreign subjects were concerned. By rules published in the Official Gazette of 1st August,

1918, Order VIII, Rule 1, it was laid down that "The expression foreign subjects" means subjects of any European or American State". It is clear that on the establishment of the Military Government it was not intended to revive the Consular jurisdictions.

Later the question of its rights under the Capitulations was raised by the American Government and in consequence of some arrangement with the American Consulate a letter was addressed by the Legal Secretary of Government to the President of the District Courts direting them to adopt a certain procedure in regard to American Defendants in civil cases and accused persons in criminal cases which would reserve them for trial by the American Consular Court. When the effect of that letter came to be discussed in the Court of Appeal it was held not to have any binding authority over the Courts.

On 10th August, 1922, the King by an Order-in-Council assumed Civil Authority over Palestine as Mandatory of the League of Nations, and the temporary arrangements made during the Military Occupation were superseded, although little changed, by Part V of that Order in which it was declared as follows: "The Civil Courts hereinafter described shall, subject to the provisions of this part of the Order, exercise jurisdiction in all matters and over all persons in Palestine (Article 38) and in Article 58 "The Civil Court shall exercise jurisdiction over foreigners subject to the following provisions". The Order sets forth that Civil Courts should be established and Articles 59 to 67 provided for the constitution of Courts in cases where foreigners were concerned. Article 59 declared as follows: "For the purpose of this Order the expression "foreigner" means any person who is a national or subject of a European or American State or of Japan". Article 64 deals with "matters of personal status affecting foreigners other than Moslems' which "shall be decided by the District Court which shall apply the personal law of the parties concerned". The same Article enables Consuls to sit as assessors in Courts to advise on their law of personal status. This Article has the effect of exempting foreigners from the jurisdiction in matters of personal status conferred by other Articles of the Order on certain Religious Courts. Alimony is declared to be a matter of personal status by Article 51 of the same Order, and it is clear that a suit for alimony like all other civil suits brought against a foreigner was made triable by the Order of 1922 by the Civil Courts and by none other. This is emphasised in Article 67 which runs as follows: "Notwithstanding anything in this Part of the Order a Consul in Palestine may

execute such non-contentious measures in relation to the personal status of nationals of his State as the High Commissioner with the approval of the Secretary of State, may from time to time prescribe by regulation".

Later on, probably in consequence of some fresh difference with America about the Capitulations, a letter was addressed to the Chief Justice by the Chief Secretary to Government in which an arrangement between the local Government and the American Consulate as to a certain renewal of Consular jurisdiction was set out, and the Chief Justice was asked to give the necessary instructions to all the Courts in Palestine. It was not possible for such instructions to be given because the Courts of Justice were bound by Order-in-Council which could not be set aside in the manner proposed. No legislative act has ever revived the Consular jurisdiction and the dispute with America has since the date of the judgment in question been settled between the two Governments.

The Order prayed for will issue against the Chief Execution Officer.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 92/30.

BEFORE:

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

IN THE CASE OF:

Nasri Farah — APPELLANT.

vs

Jack Bordougo — RESPONDENT.

Execution of foreign judgment—Procedure—Certified copies of the judgment and translations thereof to be filed—Sec. 6, Foreign Judgment Rules, 1928.

Appeal from the judgment of the District Court of Haifa, dated 31st March, 1930.

JUDGMENT.

Section 5 of the Foreign Judgment Rules dated 15th September, 1923, now replaced and re-enacted by Section 6 of the Foreign Judgment Rules, 1928, required that:

"The Judgment creditor shall file with the Court two certified copies of the judgment of which execution is demanded together

with certified translations thereof in English and Arabic or English and Hebrew as the Court may require".

The Respondent has filed only one uncertified copy of the judgment.

The appeal is therefore allowed and the judgment of the District Court is set aside and the Respondent's action is dismissed with costs here and below. Advocate's fees and expenses, £P.3.

Delivered the 15th day of July, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 121/30.

BEFORE :

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

IN THE CASE OF :

Yaqub Muradian APPELLANT.

vs

Yaqub Murad Tuma Tabbakh RESPONDENT.

Civil procedure—Execution of foreign judgment—Constitution of Courts—Secs. 3, 5, Reciprocal Enforcement of Judgments (Egypt) Ordinance, 1929.

JUDGMENT.

Upon the application of the Respondent, Yaqub Murad Tuma, the President of the District Court of Haifa on the 16th September, 1930, ordered that a judgment by the Civil Court of Ezbekieh, Egypt, in favour of the Respondent against the Appellant Yaqub Muradian be registered in the District Court of Haifa, under the provisions of the Reciprocal Enforcement of Judgments (Egypt) Ordinance, 1929.

The Appellant applied to have the registration set aside. The application was heard and dismissed by the President of the District Court of Haifa sitting alone.

The Appellant now appeals on the ground that an application under the Reciprocal Enforcement of Judgments (Egypt) Ordinance, 1929, to have a registration set aside, is to be heard by the District Court as ordinarily constituted, and not by the President of the District Court sitting alone.

We hold that the appeal must be allowed.

Section 3 of the Ordinance requires that application for

registration shall be made to the District Court: and it is clear that the Ordinance contemplates the same procedure as in force under the Civil Procedure (Reciprocal Enforcement of Judgments) Ordinance, 1922; namely, that an order for registration shall be made ex-parte and notified to the judgment-debtor, who shall have the right to apply within the period specified in the order to have the order set aside.

Section 5 of the 1929 Ordinance provides that the order in the ex-parte proceedings shall be made by the President of the District Court sitting alone; but the application to set aside the order must clearly be an application to the District Court, and in the absence of provision to the contrary must be heard and determined by the District Court as ordinarily constituted for the hearing of civil actions.

The appeal must be allowed, the judgment of the President of the District Court set aside, and the case remitted to the District Court for hearing.

Costs of this appeal will follow the event.

Delivered the 28th day of September, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 20/31.

BEFORE:

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

IN THE CASE OF:

Abdel Hamid Shuman — APPELLANT.

vs

Abd Yusef — RESPONDENT.

Execution of foreign judgment—Independent action brought on foreign judgment disallowed—Procedure for enforcement of foreign judgment—Sec. 3, Foreign Judgments Rules, 1928.

JUDGMENT.

The Court holds that the Appellant having obtained a foreign judgment in the U.S.A. must follow one or other of the forms of procedure laid down in Section 3 of the Foreign Judgments Rules, 1928.

The appeal is therefore dismissed with costs to include £P.2 advocate's fees.

Delivered the 19th day of May, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 22/31.

BEFORE:

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

IN THE CASE OF:

Badawi Abella Hould — APPELLANT.

vs

Raji Ahmad — RESPONDENT.

Proof of foreign document—Sec. 3, Proof of Foreign Documents Ordinance, 1924.

Appeal from the judgment of the District Court of Jerusalem, dated the 31st December, 1929.

JUDGMENT.

The Appellant appeals against the judgment of the Lower Court deciding that the document produced is not a document provided for in the Proof of Foreign Documents Ordinance, 1924.

We are satisfied that such is not the case and that the document in question is one which the execution thereof must be deemed to be sufficiently proved under the Proof of Foreign Documents Ordinance, 1924, Section 3.

The case is accordingly remitted for the Lower Court to give judgment on the merits. Costs, costs in the case.

Delivered the 19th day of October, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 68/32.

BEFORE:

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

IN THE CASE OF:

N. Muller & Son — APPELLANTS.

vs

Abdel Karim Zaghlul — RESPONDENT.

Action to enforce foreign judgment brought before Magistrate—Jurisdiction of Magistrate—Secs. 3, 4, Foreign Judgments Rules, 1928.

JUDGMENT.

We hold that the Magistrate was right in holding that the action was one to enforce a foreign judgment and therefore not within his jurisdiction: the judgment of the District Court is therefore set aside and the judgment of the Magistrate's Court is confirmed with costs to Appellants to include £P.2 advocate's fee.

Delivered the 4th day of January, 1933.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 118/32.

BEFORE:

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

IN THE CASE OF:

Rifa'at Rashid El-Habbab APPELLANT.

vs

The Junior Government Advocate, Jaffa, on behalf of the Government of Trans-Jordan RESPONDENT.

Action to enforce Trans-Jordan judgment—Foreign Judgments Rules, 1928—Reciprocal Enforcement of Judgments Ordinance, 1922, held not extended to Trans-Jordan.

JUDGMENT.

We are satisfied that the action was rightly brought under the Foreign Judgments Rules of 1928, in that the High Commissioner has not declared by Order-in-Council that the Reciprocal Enforcement of Judgments Ordinance, 1922, shall extend to Trans-Jordan, which he is empowered to do by Section 5 (1) of the said Ordinance.

The judgment of the lower Court is therefore affirmed and the appeal dismissed with costs and advocate's fees assessed at £P. 2.

Delivered the 9th day of March, 1933.

In the District Court of Jaffa.

C.D.C. Ja. of 1932.

BEFORE:

The President and Toukan, J.

IN THE CASE OF:

Rose Katz	PLAINTIFF.
vs	
Morris Katz	DEFENDANT.

Registration of foreign judgment—Grant of Exequator—Foreign Judgments Rules, 1928—Proof of foreign judgment—Proof of Foreign Documents Ordinance, 1924, held not to refer to foreign judgment—Copies of judgments exempt from stamp duty—Rules of Court held to be rules of procedure and not rules of law.

JUDGMENT.

The Plaintiff in this case, Mrs. Rose Katz, obtained from the Supreme Court of the State of New York final judgment against her husband Mr. M. Katz, the Defendant in this present case. Judgment was to the effect that she was granted judicial separation from her husband, awarded the custody of the three children of the marriage, and payment was ordered of alimony and maintenance at the rate of $55.00 weekly. Judgment not having been satisfied the Plaintiff now applies to this Court, under the Foreign Judgment Rules, 1928, for the grant of an exequator so that the said judgment may be made executory in this country. The sum due in respect of alimony up to the date of the filing of this action amounts to $9185.00 and execution is asked for this amount.

Three preliminary objections in this action have been advanced to us.

First, that the copies of the American judgments filed in this Court are not properly legalized. Reference has been made to the Proof of Foreign Documents Ordinance, 1924, in support of that contention. This Ordinance, however, refers only to "Deeds, Powers of Attorney and any other kind of instrument in writing" and does not apply to judgments which do not come under any of these descriptions.

In England foreign judgments are proved by an authenticated copy of the same which must purport to be sealed with the seal of the Court to which the original document belongs, or if the Court has no seal, to be signed by the Judge of the Court who

must attach to his signature a statement in writing that the Court has no seal.

The judgments produced to us comply with these provisions and are further legalised by a British Consul. This point therefore fails.

The second objection taken is that these copies of the American judgments are inadmissible inasmuch as they are not stamped under the Stamp Duty Ordinance with a stamp of 50 mils being copies of judgments. This point also fails because under Item 13 of the Schedule of the Stamp Duty Ordinance as amended, copies of the judgments of Civil Courts, do not require stamping even if they are judgments from a Palestine Court: ipso facto therefore a copy of a foreign judgment does not require to be stamped.

We now come to the third and last and much the most interesting and difficult point, namely, that in the existing state of the law of this country there is no means by which an exequator can be granted in respect of this foreign judgment. It has been argued that the Rules of Court, 1928, made by the Chief Justice under Section 21 of the Courts Ordinance, 1929, are ultra vires—that a rule of Court cannot alter the law or create law but can only lay down rules of procedure and of practice for the application of an existing law.

Now, in order to understand the argument, I must refer to the practice and the law as applied in England because a certain amount of the legislation of this country for the enforcement of foreign judgments is based upon the English law and procedure.

The general rule in England is that a foreign judgment is not per se, enforceable in England. That is to say, that a foreign judgment cannot be handed straight to the sheriff, who is executing officer, and executed without being supported by some other procedure. That rule is taken so far that judgments of Scottish Courts and of the Courts of Northern Ireland are treated as foreign judgments in England, though Scotland and Northern Ireland are a part of the United Kingdom. If one wishes to enforce a foreign judgment in England, if it is a judgment of a Court other than a Colonial Court, one must bring an action on the judgment. If it is a Colonial judgment then there are certain powers of registering that judgment after which it can be put to execution. In other words, a foreign judgment, other than the judgment of a Colonial Court is only of evidential and not of executory value. The action on the judgment is brought and the foreign judgment

is prima facie evidence that a debt exists; but the foreign judgment itself has no other value.

Now in this country we have a mixture of procedure which I do not think was altogether, when compiled, very carefully thought out. We have the Civil Procedure (Reciprocal Enforcement of Judgments) Ordinance, 1922, by which judgments in any part of the United Kingdom or British Dominions may be registered in this country and can then be executed subject to certain conditions as to reciprocity. We have also a somewhat similar Ordinance passed in 1926, with regard to the reciprocal enforcement of Egyptian judgments. Certain special arrangements also exist with regard to judgments given by Syrian and Iraqian Courts but there is no other Ordinance or treaty which refers to, or deals with, in any way, the judgments of any other foreign countries. And there are the Foreign Judgments Rules, 1928. We have been asked to say that the Rules of Court, Foreign Judgments Rules, 1928, are invalid inasmuch as the Chief Justice had no power to make them. I would not go so far as to say that they are invalid or ultra vires. I think that they are very good rules and lawful rules with regard to proceedings under the Civil Procedure (Reciprocal Enforcements of Judgments) Ordinance, and with regard to judgments which come under the arrangements with Egypt and other specially mentioned countries. Because under that Ordinance and the other arrangements the foreign judgment when registered becomes a Palestinian judgment, and in any case, therefore, these Rules made under the Courts Ordinance are valid for the enforcement of those judgments.

The position is not quite so simple with regard to other foreign judgments as to which no enforcing Ordinance exists. There is a difference, and not merely a slight difference, between bringing an action on a judgment and granting an exequator to a foreign judgment. The granting of an exequator to a foreign judgment means that that foreign judgment itself is put to execution. The bringing of an action on a judgment means that a judgment of the District Court must be obtained and that that judgment will be put to execution, and not the judgment of the foreign Court.

We are of opinion that, in the absence of a supporting Ordinance, you cannot apply in the District Court for an exequator on a foreign judgment. It is perfectly correct, as the defence argues, that a Rule of Court cannot create law but can only apply a law. The Foreign Judgments Rules apply to these "foreign" judgments which are made enforceable in Palestine by Ordinance,

Treaty, or convention having the force of a Treaty, but in the absence of such Ordinance or Treaty or convention, they have no application and they have not a dual capacity, that is to say, they do not have the place of an Ordinance or Treaty, and by themselves make a foreign judgment enforceable and at the same time lay down a procedure for enforcing that foreign judgment. Their only function is to lay down a procedure for enforcing a foreign judgment that is enforceable otherwise— by Ordinance, or Treaty as the case may be.

This action is brought for the grant of an exequator—it is not an action on a foreign judgment. We are of opinion that as brought it must fail and the application for the grant of an exequator is therefore dismissed with costs and £P.10. advocate's fees to be paid by the Plaintiff.

The provisional attachment is rescinded.

Dated this 16th day of December, 1932.

FOREIGNERS.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 18/23.

BEFORE:

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

IN THE CASE OF:

Zaslavsky — APPELLANT.

vs

Goldberg — RESPONDENT.

History ot establishment of Courts in Palestine by O. E. T. A.—Ottoman Law in existence at time of Occupation applied by Courts—Publication of laws in Official Gazette—Abolition of Capitulations—Jurisdiction over Defendants being American citizens—Letter by Government of Palestine to Presidents of District Courts held not to have effect of law—Jurisdiction of Courts "Foreign Subjects"—Difference between order limiting jurisdiction and order purporting to change ordinary law.

JUDGMENT OF MR. JUSTICE FRUMKIN.

When the Turks evacuated Palestine in 1917 the majority of the judges of the existing Ottoman Courts went with them and the Courts ceased their functions. The Courts were re-

established by the Occupied Enemy Territory Administration (South) of the Egyptian Expeditionary Force partly by virtue of the Proclamation of the Chief Administrator of the 24th June, 1918, and partly by a later proclamation dated 1st November, 1918. The first Proclamation contained provisions that the Courts so re-established should apply Ottoman Law as in existence at the time of the Occupation and as may be amended by the Administration.

By these the O.E.T.A., and later the so called Civil Government of Palestine, got for themselves the right to amend, repeal and replace existing Ottoman Law.

Whatever may have been the position according to International Law of the Military Administration and the Civil Government of Palestine up to the promulgation of the Order-in-Council of September, 1922, it is clear that the Courts established by this Administration could not challenge or question the right of legislation taken by the Administration. At the same time the Courts were bound to apply any Ottoman Law in existence at the time of the Occupation unless repealed. Among the Ottoman Laws binding upon the Courts there was also the Law on the method of publishing and proclaiming laws and rules of 11 May, 1327, which provides that Laws and Rules are to be published in the Official Gazette before coming into force.

The Military Administration by practice substituted "the Gazette" (a supplement to the Palestine News), and later the "Official Gazette" for the Official Gazette of Constantinople, and in fact since June, 1918, all proclamations and orders intending directly or indirectly to amend, repeal or replace Ottoman Law, were published.

It has already been held by this Court that under the Ottoman Law in existence at the time of the Occupation there were no Capitulations (Araman v. Shertok. The judgment now appealed against is however not based upon an agreement entered into between the Government of Palestine and the American Consulate of Jerusalem which provides that the Palestine Courts should have no jurisdiction over defendants being American citizens. Had this provision been published in the Official Gazette, the Courts would not be entitled to question the rights of these two bodies under International Law to enter into agreements of this kind. It was however, not published. A confidential letter was sent by the Government of Palestine to the Presidents of the Courts, informing them that such an agreement has been entered into without clear instructions that this agreement is to be acted

upon. But even if it is supposed that this letter is an order which goes to alter existing Law, it was not published, and in my opinion should not be binding.

I cannot agree with the view that in matters of jurisdiction the Government could instruct the Courts by private documents, not to hear cases against certain persons or classes of persons. If it is admitted that an administration based upon the sword may prevent its Courts by private documents from hearing cases against certain persons, or certain classes of persons, because there is no law behind the sword, why should the same Administration for the same reason not be entitled to instruct its Judges not to apply a certain Law against a certain person. That would amount to turning the Courts established as Courts of Law for administration of justice into an administrative instrument, and that indeed would be against what was intended by the Administration establishing the Courts itself.

The appeal is therefore to be allowed, judgment of the District Court to be set aside, and the case sent back for trial.

Delivered the 2nd day of August, 1924.

JUDGMENT OE MR. JUSTICE JARALLAH.

I do not deem it necessary to discuss the source of authority by which the Courts of Palestine are established because I maintain that the Court of First Instance, now the District Court, whether this Court was set up by the Military, a lawful or an unlawful power, or whether it was set up by the Military power or the Occupying Power, is a Court bound by the law and cannot go beyond it under any circumstances, whether, too, that Court is a Court with full jurisdiction or with jurisdiction limited in time, place or nature of work.

The one point at issue is whether the mere communication of a copy of the agreement to the District Court makes its law binding on the District Court.

There were rules made by the Occupying Power which defined a foreigner and his judicial privileges and these were published as law binding on all Courts. These Rules whether they are valid internationally or not or whether or not the authority making them was justified in making them in view of the Ordinance of 1918 by General Money which sets out the limits within which the Ottoman Law may be altered or amended, the Court is bound

by them, because they were communicated to them in the form of law.

The agreement between the Legal Secretary and the Consul of United States which excludes subjects of the United States from the said Rules is not law but a proposal or a step to alter the said Rules. Rules ought to have been drawn up amending these in view of the said agreement whereby American subjects would be excluded. These Rules should then be published in the proper way. The Court would then have been bound to obey them. On the other hand the Court cannot look upon a proposal to alter the Rules as law or to look upon such a proposal as a final step so long as there is a possibility of altering or cancelling the agreement before any law is made to that effect.

I am therefore of opinion that the judgment of the District Court on appeal is not based on law and should be set aside.

DISSENTING JUDGMENT OF THE CHIEF JUSTICE.

On the 15th August, 1922, the case came on for trial in which Zaslavsky, an Ottoman subject sued Goldberg, an alleged citizen of U. S. A. for £E. 22.326 the balance of an account. The District Court of Jerusalem refused to try the case on the ground that in accordance with an agreement between the British and American Governments American nationals were to be judged at their Consulate.

The Plaintiff has appealed against this decision and we have to determine what was the duty of the District Court at the date in question as to accepting or refusing jurisdiction.

At the time of the Occupation the judicial privileges enjoyed by foreigners in Turkey under the Capitulations had been abolished by an Imperial Irade of 26th August, 1330. We are not informed of any agreement between the Sultan and the American Government by which an exception was made in favour of American citizens. Whatever may have been the view of international lawyers as to the propriety from an international point of view of the Imperial Irade as regards foreign enemies such as the English, and foreign friends such as the Americans, the judges of the Turkish Courts would have been bound to obey the order and accept jurisdiction in the case of foreigners as in the case of Ottoman defendants.

When the British army took possession of Palestine there began that Military Occupation which continued until the day when the Palestine Order-in-Council, 1922, came into effect on

1st September, 1922, and it was declared that His Majesty "by treaty, capitulation, grant, usage, suffrance, and other lawful means has power and jurisdiction within Palestine". Up to that time the King had not pretended to be the lawful prince, but had occupied and held by the power of the sword and governed the country by means of his servants, among which where the Judges of the several Courts set up by the local government.

These Courts were established by a Proclamation of Major-General Money, Chief Administrator, dated 24th June, 1918, the object of which, as stated in the preamble, was "to re-establish an administration of Justice". Article 2 runs as follows:— "Subject to the provisions hereinafter contained the Civil Courts shall be re-established as Courts of general jurisdiction and will apply the Ottoman Law in force at the date of the Occupation with such modifications as may be proper having regard to International Law and the better administration of Occupied Territory." One of the courts re-established was the Court of First Instance at Jerusalem now known as the District Court.

It would have been difficult in any case for the Court to decide how Ottoman Law should be properly modified in regard to International Law, but it was spared this task as far as regards the Irade of 26th August, 1330, by the Proclamation itself, which empowered the Senior Judicial Officer to make Rules of Court "which shall define the expression "foreign subjects" and shall set out the manner in which the Court shall be constituted in proceedings to which a foreign subject is a party". (Articles 15 and 28).

Rules of Court were made under the above authority headed "VIII. Foreign Subjects". The words "foreign subjects" were to include subjects of any European or American state together with certain corporations and other bodies. Rule 5 reads as follows:— "In civil actions over £E. 50 in value foreign subjects may claim that the final judgment in a Court of First Instance should be given by a Court the composition of which includes at least one British Judicial Officer".

This Proclamation was confirmed by an instrument called an Ordinance issued by Major General Bols, Chief Administrator, dated March, 1920. The Court of First Instance became the District Court and its constitution was defined as it remains today.

The documents above quoted were the order of persons placed in command of the territory of Palestine by the King. The Courts were set up and the Judges appointed by that authority

which was the fount and origin of their jurisdiction. In my opinion their position was not at all the same as that of judges appointed by one who claims to be the lawful prince of the country, or under his authority. In that case a judge may enquire into the lawfulness of an order he receives from any less authority than that of the sovereign or his duly authorised representative acting in authority in conformity with some instrument of government. The jurisdiction of the Judges was not more nor less than that conferred upon them by the authority set up for the time being by the King as military occupier. There was no instrument of government and they were bound to conform in the matter of jurisdiction to the orders issued from time to time whether such orders were called ordinances or proclamations or rules of court or were instructions in some other form issued to courts or judges. There was no legal authority behind the sword to which they might refer,

It is quite clear from the Proclamation of 1918 that foreign subjects including Americans were not intended to be excluded from the general jurisdiction of the Civil Courts although a safeguard was provided in certain cases. A foreign Defendant could not have successfully pleaded the Capitulations in the civil courts because these had been abolished by law. The Judges had found no Capitulations in force when they were appointed, and which they might have construed as part of the Ottoman Law which they were directed to administer. They had been moreover furnished with special rules directing them as to the manner in which Courts should be constituted when foreigners were Defendants.

That state of things had not been altered up to the date when the Defendant objected to the jurisdiction of the District Court in the present case, by any formal document.

There was, however, a memorandum signed by the Legal Secretary and addressed to the Presidents of the District Courts and dated 8th February, 1922, of which the first paragraph reads as follows:— "The question of the arrangements for the trial of persons claiming to be American citizens and, therefore, to be entitled to have their cases referred to the American Consulate, has been discussed with the American Consul in Jerusalem and the following agreement has been reached":

Then followed the agreed procedure in civil cases:

"1. The summons shall be served on the Defendant according to the regular procedure of the Civil Courts and not through the Consulate.

"2. The Defendant shall appear before the Civil Court and plead that he is an American citizen and produce the necessary proof of his plea.

"3. If the Court is satisfied that the Defendant is an American citizen it will refer the papers to the Legal Secretary, who will submit them to the American Consulate in order that the case may be tried by the Consular Court.

"4. If the Defendant does not raise the plea of jurisdiction before the Civil Court and a judgment is given against him he shall not be entitled to resist execution on the ground that he is an American citizen. The plea of jurisdiction must be made to the Court at the first hearing of the case".

There was an agreed procedure as to criminal cases which need not be here mentioned.

The Legal Secretary was the mouthpiece of the High Commissioner in all matters concerning legal affairs, and this memorandum may be taken as an information to the Civil Courts issuing from the Supreme Authority in Palestine as to an agreement in the matter of jurisdiction to which that Authority was pledged. The Judges were not entitled to question the authority of this document, nor to discuss such a question as to whether an agreement with a consulate created an international obligation, nor whether such agreement should be put into practice by some document having legislative form.

The memorandum was clearly intented as an order that the Civil Courts should under certain circumstances refuse jurisdiction. The Judges were entitled to question an order limiting their jurisdiction which was not issued by the Supreme Local Authority but this, although not in usual form, was in my opinion undoubtedly an order, and it reached the Courts through the ordinary channel of communication used by the High Commissioner. It has been objected that all orders of this nature should be published in the Official Gazette or otherwise notified to the public according to Ottoman procedure, and it is unfortunate that an order which in substance repealed a provision in the Public Proclamation of 1918 and Rules of Court made under its authority should have been issued in such an informal style and manner. The answer to the objection is that the Local Authority in Palestine was not bound by any rule of procedure, and that the Judges were not entitled to go into any such question in the case of an order issued directly to them limiting their jurisdiction.

There is in my opinion a difference between an order limiting jurisdiction and an order which purports to change the ordinary law. Judges, even under a military occupation would consider themselves justified in objecting to follow in their judgments an order which purported to change the ordinary law unless it took the form of a public document because they are appointed to administer the ordinary law, which according to universal practice can be changed only by some document of a public nature having the form of law. There may be no known limit to the powers of a military administration in enemy territory, but the Judges would refuse to conform to an order issued in such a manner as to be repugnant to universal practice when it came to giving judgment between litigants.

Nevertheless, their refusal would not be an appeal to the law because there is no law behind the sword. It would be rather that assertion of invincible prejudice which professional judges display when it comes to a matter of general judicial tradition. They would also be mindful that it was the practice of the administration to support the judgments of its temporary Courts even when inconvenient to itself just as if those Courts were sitting under the authority of a lawful sovereign and issuing judgments to which the local administration was bound to conform.

But jurisdiction is another affair. It has to do with convenience and was in this case a political matter. The judges were appointed not by the direction of a sovereign claiming to have legal authority but by an occupying power acting for the general convenience of the people and the administration. The Courts were set up and given their jurisdiction not by any law because there was no law-making authority in Palestine but by an order of the Military Authority which could be made or unmade as that Authority found expedient. An order which required them to withold jurisdiction in a certain class of cases should not, in my opinion, have been disobeyed although it reached them in a form not in accordance with any known practice. The Judges would not insist on trying cases which they were forbidden to try by the authority to which they owed their temporary jurisdiction.

There is another way of regarding the question. The persons who ruled Palestine during the Occupation were a body organised under a regular system of subordination under the general control of a Chief Administrator. When the title was altered to that of a High Commissioner the change was one of form rather than substance although the administration assumed the garb of a

regular civil government, but it was always a body working in accordance with its own rules.

Had it been a Government in which the administrative officers and judges were apointed by a sovereign of Palestine not only would have they been all bound to obey the laws and rules made by that authority, but the local government would have been bound to observe its own laws sanctioned and approved by the King. Had it been found advisable to change a rule about jurisdiction that would have been done by the enactment of another rule of equal authority and having the effect of law and could not have been done by means of an informal document which the Judges would not consider themselves bound to obey because they would know that the sovereign does not allow laws to be made and unmade in that way. Why then, it may be said, should there be any difference between the legal effect of an informal document, issuing from a government based on military authority and one issuing from a legislative government since both are creatures of rule and order.

The difference to my mind is that under a regular government the Judges can appeal to well-known constitutional rules under which the informal document would be disregarded; whereas under a government based on military authority there was nothing to prevent the central authority however closely it may imitate the style and manner of a civil administration, from making and unmaking rules in its dealing with political affairs in whatever manner it chooses. It did so notoriously in the case of the Ordinance for the Organisation of Civil Courts which was never published in the Gazette but reached the Courts through the Post Office and which nevertheless everybody concerned was bound to obey. The administration of Palestine was a political affair and the making of arrangements about jurisdiction was a part of it. The local government making temporary arrangements for the administration of Palestine during the military occupation was not bound by British constitutional rules or Ottoman law, although the Judges were to apply Ottoman law in their judgments.

This judgment is not arrived at without some hesitation and I must admit that, had the District Court decided to exercise jurisdiction I should have felt some reluctance in disagreeing with it. Had the Court decided in the following sense "We are Judges and are entitled to assume the authority and independence of Judges, and to that end notwithstanding the peculiar circumstances in which we find ourselves, we must play the part

as best we can. This document which is said to be in fact an order is not in form of an order at all, although that may be its intention, and we are moreover justified in refusing to be bound by any instruction which has not some recognised legislative form. We shall continue to exercise our jurisdiction over all foreigners as heretofore until we receive from the High Commissioner an order to the contrary either under the guise of a Proclamation or an Ordinance signed by him, or under the guise of a Rule of Court made by the Legal Secretary and approved by the High Commissioner." That would be a difficult case to answer. But in my opinion, it is more sound to admit once for all that when there is no legitimate sovereign in control there can be no laws made strictly speaking, that whatever rules or orders the occupying power makes for the public convenience, these are only temporary expedients and should not be examined too critically. It is therefore almost trivial to make distinctions of value between documents of different forms, all of which are but the expression of the will of an occupying power holding the country for the time being by force of arms.

It is with some regret that I differ from my learned brethren and hold that the judgment of the District Court should be confirmed.

The judgment will be a judgment by the majority of the Court. The order will be that the case be returned to the District Court to be tried.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 20/29.

BEFORE:

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

IN THE CASE OF:

Yeta Karnovsky — APPELLANT.

vs

Joshua Reichman — RESPONDENT.

Nationality of foreigner changed after commencement of action held immaterial — Proof of foreign law by statement of Consul — Expert evidence as to foreign law.

JUDGMENT.

The judgment of the District Court is based in part upon the statement of the Polish Consul-General that the law applicable is the Polish Civil Code.

In the absence of evidence to the contrary the Court was entitled to rely upon that statement so far as it went.

In ascertaining, however, the provisions of the Polish Civil Code, the District Court had before it neither the evidence of an expert witness nor even a written statement by any competent authority.

We hold that it had not evidence before it upon which to make a finding as to the relevant provisions of Polish law.

The judgment must be set aside and the case sent back for evidence to be submitted and a fresh judgment given.

The Respondent's advocate states that his client has since the judgment of the District Court become a Palestine Citizen.

The judgment, however will have reference to the status of the parties at the time the action commenced, and any subsequent alteration of status is immaterial.

Costs will follow the event.

Delivered the 5th day of July, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 513/20.

BEFORE:

The Acting Chief Justice and Frumkin, J.

IN THE CASE OF:

Mayer Segal — APPELLANT.

vs

Ishaq Rosenbeck, on behalf of the Jewish Colonisation Association — RESPONDENT.

Appointment of arbitrators in foreign country held to be void — Arbitration clause in contract enforced — Jurisdiction of Courts restricted to Palestine territory.

JUDGMENT.

1. The Court holds that the action arises out of the contract between the parties as the Plaintiff's claim rests upon Article 1

of the contract and hence that Article 10 of the contract is applicable and the question at issue must be referred to arbitrators.

2. That the appointment of an arbitrator resident outside the Ottoman Empire was null and void ab initio in accordance with the principles of the Law of the 13th of Safer 1284 giving foreigners the right to hold immovable property in the Ottoman Empire.

3. The Court therefore sets aside the judgment of the Civil Magistrate and declares that the Magistrate has not jurisdiction to hear the case and directs that arbitrators resident within Palestine be appointed to decide the question in dispute. In the event of the arbitrators nominated by the parties failing to agree on the appointment of an umpire the question of such appointment shall be referred to the Civil Magistrate.

Losing party to pay costs.

Delivered the 15th day of July, 1920.

In the District Court of Jaffa.

C.D.C. Ja. No. 39/32.

BEFORE:

Copland, J. (President).

IN THE CASE OF:

Haya Freida Lipchitz — PETITIONER.

vs

Eliahu Joseph Lipchitz — RESPONDENT.

Action against foreigner for alimony— Right of foreigner to obtain divorce in Palestine—Constitution of Court.

JUDGMENT.

On January 31, 1932, Petitioner, Mrs. Haya Lipchitz, lodged a petition in this Court praying for an order for alimony and maintenance for herself and her daughter against the Respondent, her husband, Eliahu Lipchitz.

In the petition the Respondent is stated to be a British Subject, and reference is made to divorce proceedings in April, 1931. The Petitioner contended that a foreigner within the meaning of the Order-in-Council cannot obtain a divorce in Palestine.

As defence was not filed when the hearing of the petition commenced, no objection was taken to the composition of the

Court and it was not suggested by the Respondent or his Advocate that Respondent was not a British Subject.

I felt justified in hearing the petition although when the Respondent gave his evidence he did state he was a South African Subject, but did not produce his passport.

In March, 1933, the Respondent's advocate submitted written pleadings in which he, inter alia, objected to the constitution of the Court. Respondent on being called upon to do so by me, produced his passport and I am now satisfied that Respondent is not a foreigner within the meaning of the Order-in-Council. If follows that the Court is improperly constituted and the petition must be tried de novo by a properly constituted Court.

In the District Court of Jerusalem.

C.D.C. Jm. No. 57/32.

BEFORE:

De Freitas, J. (President).

IN THE CASE OF:

Mrs. Esther Feinstein PETITIONER.

vs

Estate of David Feinstein RESPONDENT.

Certificate of succession in respect of estate of foreigner— Art. 59, Palestine Order-in-Council, 1922— Onus of proof of nationality of deceased—Loss of nationality.

JUGDMENT.

Mrs. Esther Feinstein the widow of the late David Feinstein who was for a considerable number of years employed at the American Consulate General, Jerusalem, is seeking a certificate of succession in respect of the Estate of her late husband who died in Tel-Aviv on the 3rd of March, 1929.

Petitioner alleges that her late husband was born and died a British Subject and was therefore a foreigner within the meaning of Article 59 of the Palestine Order-in-Council, 1922. Respondent opposes that petition on two grounds (1) that deceased was not a foreigner and (2) deceased left a will.

In my judgment the onus of proving that at the date of his death deceased was a foreigner lies on the petitioner. In support of the petition Mrs. Feinstein lodged (1) a certificate issued by

the American Consulate General to the effect that the records of the Consulate show that the late David Feinstein was born in England in 1852, and that he was a British subject by birth; (2) a death certificate in which deceased nationality is shown as Palestinian.

Respondent filed documents from the Immigration Department which disclose that in 1922 the deceased applied for a Provisional Certificate of Palestinian Citizenship and declared that he was a citizen of the United States of America and that he was born in Warsaw. Respondent admits that deceased was not (1) a native inhabitant of territory protected by or administered under a mandate granted to a European State; (2) An Ottoman Subject; (3) A person who had lost Ottoman Nationality and had not acquired any other nationality, but contends that immediately prior to his death deceased was one of the unfortunate class of persons who had no nationality and was not a foreigner within the meaning of Article 59 of the Palestine Order-in-Council, 1922, and as a consequence the Rabbinical Court under Article 51 of the Order and not this Court has jurisdiction to confirm the will.

I am not satisfied that deceased was born in England or that he was a British Subject at the time of his death. Petitioner does not support deceased's declaration that he was a citizen cf the United States of America and the American Consulate General Records show that deceased was a British Subject. As a fact I am of opinion that deceased was born in Warsaw and that at one period of his life he came within the category of 'persons who could be classed as foreigners under the terms of the Article 59 of the Palestine Order-in-Council. He was a person who had lost a foreign nationality and had not acquired any other nationality.

I have considered very seriously whether the words in Article 59 "Persons who have lost Ottoman nationality and have not acquired any other nationality" can by analogy assist the Petitioner but I unable to convince myself that they do assist her.

Therefore on the evidence before me, I hold that at the time of his death the deceased was not a foreigner within the meaning of Article 59 and that I have no jurisdiction to grant the certificate of succession sought.

The petition is dismissed; I do not see how I can order that the costs of petition be paid out of the estate of the deceased so I make no order as to costs.

Given the 12th day of February, 1933.

GIFT.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 157/23.

BEFORE:

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

IN THE CASE OF:

Ibrahim & Tewfik el Khalel — APPELLANTS.

vs

Heirs of Mustafa el Aydi — RESPONDENTS.

Gift of inherited share of immovable property confirmed by Sharia Court—Gift to brother held to be irrevocable—Subsequent sale of property given to brother revocable though effected in Land Registry—Arts. 865, 866, Mejelle.

JUDGMENT

Whereas it was proved in accordance with the legal and confirmed document of the Sharia Committee dated 1321 which was confirmed by the Fatwah Khanah, produced by the third party. that the claimant Hilweh bint Mohd. Ali el Aydi has gifted her inherited share which is now under dispute to the testator of the third party, heirs of Mustafa el Aydi, and whereas a gift to the brother cannot be withdrawn and that in conformity with Article 866 of the Mejelle, and whereas the Plaintiff is not entitled to sell the gifted property and not to recover it back after the receipt of the money even in ordinary conditions, except by order of the Court, in accordance with Article 865 of the Mejelle, and whereas the legal and confirmed document is in force and according to it the sale could be set aside after it was effected at the Land Registry, it was therefore decided to confirm the judgment.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 116/24.

BEFORE:

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

Gift of immovable property—Gift to be completed by delivery—Proof of possession of donee as proof of delivery.

JUDGMENT.

On consideration it was found that in order that a gift be completed the garden should be delivered and the Land Court has to hear the evidence of the parties proving whether the garden was under the final possession of the donee from the date of the gift or not.

Therefore it was decided to set aside the judgment of the Land Court and to return it to the Land Court together with the documents for doing the necessary action.

Delivered the 14th day of April, 1925.

GUARANTEE.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 74/24.

BEFORE:

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

IN THE CASE OF:

Central Kupat Milveh APPELLANTS.

vs

Isaac Hayman RESPONDENT.

Liability of joint guarantors—Liability presumed to be several unless expressed to the contrary—Omission to alter word "I" to "We" in printed undertaking held unimportant — Liability of several guarantors apportioned—Art. 647, Mejelle.

JUDGMENT.

We hold that this is not a negotiable instrument even if it is a commercial transaction of some other sort in the general sense—that does not take it out of the application of the Mejelle, Article 647.

It is therefore a several liability unless it shows the contrary. If the guarantees are separate transactions, then each guarantees the whole amount.

It is said that the use of the word "I" shows that each guarantor undertakes a separate liability. But this is a printed word and has been left as it stands. The signatories have not even taken the trouble to mention the name of the debtor but have left the vacant space as it is. The omission to alter the word "I"

is in our opinion unimportant. The signatures appear one after the other as if written at the same time.

There is no reason why the signatories should be held liable for more than a proportional liability and we affirm the judgment of the District Court and dismiss the appeal.

Delivered the 19th day of March, 1925.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 146/24.

BEFORE :

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

IN THE CASE OF :

The Texas Company — APPELLANT.

vs

Saker and Bromberg
S. Friedman & Sons
S. Kreisbaum, Haifa — RERPONDENTS.

Appeal from the judgment of the District Court of Haifa, dated 24th day of October, 1924.

Extension of credit by letter of creditor to debtor held not to operate as release of guarantors—Extension of credit held to be indulgence and not to prejudice rights of creditor to demand strict performance of contract—Guarantee continued for further term.

JUDGMENT OF DISTRICT COURT.

In this case the Plaintiff Co. claim against Messrs Itin, Gafni and Gavriely, hereinafter called the purchasers, the value of certain quantities of oil, receptacles thereof etc. supplied to them by the Plaintiff.

A defence was orginally put in to this claim, but apparently the Defendants have thought better of it for at neither of the two hearings of this case have they put in an appearance either personally or by advocate. There is ample support for the Plaintiff's case against the Defendants, and as has already been intimated there will be a judgment in default against these Defendants for the amount claimed, namely - £ 1,199.626 with costs.

But the Plaintiff has not rested content with its legal remedy against the purchasers, but has also sued the other Defen-

dants who guaranteed the purchasers. These guarantors have been represented by advocates, and this is therefore a contested judgment as regard the guarantors.

The guarantors' case has been argued at great length, and, we say it to the credit of the advocates representing them, that there is no conceivable argument on the facts which they have omitted to raise.

We very much regret, therefore, to have to say that, in our opinion there is only one argument which has been raised by these advocates which is worthy of any serious consideration.

We proceed to deal with this argument and this alone.

On the 28th May, 1923, the purchasers entered into the following agreement with the Plaintiff: "We the undersigned hereby undertake to pay you or to your order through any of the local Banks and against receipt signed by us all sums due on goods withdrawn by us, sixty days after withdrawal.

Our engagement is not to exceed the amount of £ 1,500. (One Thousand and Five Hundred Egyptian Pounds) and holds good as from to day up to June 1st, 1924. (sgd) J. Itin, B. Gafny, N. Gabriely".

At the botton the guarantors affixed the following:

"We the undersigned, merchants of Haifa are fully responsible for the fulfilment of the above engagement.

(Sgd) Sàker & Bromberg
S. Friedman & Sons
S. Kreisboum".

An exactly similar engagement was furnished again on May, 27th, 1924, for the year terminating 1st June, 1925.

So far so good. In our opinion if the Plaintiff had chosen to abide by the terms ot these agreements it would have been adequately protected and could quite well have enforced the guarantee.

But did the Plaintiff so abide? At the request of the purchasers he by a letter dated 17th January, 1924, extended the period within which debts were to be paid from sixty days to three months, and this without any notice to the guarantors.

Let us consider the position of the guarantors under these circumstances. They were entitled, if the purchasers did not pay within sixty days to themselves pay the debt and sue the purchasers. And here without even their knowledge is the Plaintiff saying to the purchasers "Never mind about the sixty days I will extend this to three months". This difference of some thirty days might

well have made all the difference to the guarantors as to whether they were able to recover from the purchasers or not.

Certainly, in English law, and we think in Ottoman law too, a Plaintiff is not entitled to increase the risk of guarantors in this way, and if he does so he must take the consequences which are that the guarantors thereby are exonerated from any liability on their guarantee.

The Plaintiff's claim against the guarantors is therefore dismissed with costs. This judgment is capable of appeal.

Delivered the 24th day of October, 1924.

JUDGMENT.

On the question as to whether an extension of credit given by the creditor to the debtor operates as a release for the security we have to find out whether there has been an alteration in the contract between debtor and creditor, prejudicial to the guarantor. We are of opinion that the extension of credit from two to three months mentioned in the letter of 17th January, 1924, is no more than an indulgence on the part of the creditor. Read in relation to Article 10 of the contract between the parties it is clear that such an indulgence does not affect or prejudice the right of the Company to require strict and full performance by the agent of the terms of the contract.

It must be remembered also that this is a continuing guarantee for a year and not a guarantee for any particular debt. As it turned out the debtor owed a considerable sum at the end of the year after this indulgence had been granted and that the guarantors with knowledge of that fact continued their guarantee for another year.

Appeal allowed and judgment of the District Court dismissing the Appellant's claim on the guarantee set aside.

Judgment to be entered for amount due under guarantee.

Delivered in presence of Appellant and in absence of Respondent the 20th day of October, 1925.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 80/28.

BEFORE:

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

IN THE CASE OF:

Hussein Khalil Damyati APPELLANT.

vs

Fatmeh Abdallah El-Attal RESPONDENT.

Guarantee given to secure amount payable under promissory note "at maturity"—Guarantee held not limited to day of maturity only.

JUDGMENT.

A guarantee to pay the amount secured by a promissory note "at maturity" is one which does not take effect until maturity of the note. It cannot be argued that the liability under guarantee continues for a single day only.

The appeal is dismissed with costs, including £P. 2.500 mils advocates' fees and expenses.

Delivered the 26th day of February, 1928.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 63/31.

BEFORE:

The Acting Senior Puisne Judge, Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Ayesheh bint Ahmad Hleilah APPELLANT.

vs

Salim Hassan Jibrin RESPONDENT.

Nakhleh Jiryes el Kubti THIRD PARTY.

Guarantee altered by guarantor to exclude damages originally contained in guarantee.

Appeal from the judgment of the District Court of Jaffa, dated the 29th day of March, 1931.

JUDGMENT.

The guarantor having qualified his guarantee by excluding the damages which originally were contained in the text of the

guarantee, and the Appellant having failed to make good the omission, the Court orders the appeal to be dismissed with costs and advocate's fees assessed at £P. 2.

Delivered the 18th day of July, 1932.

GUARANTEE—

SEE ALSO SECURITY FOR COSTS.

GUARDIANS.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 149/22.

BEFORE:

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

IN THE CASE OF:

Ali Abdul Rahman Bibi — APPELLANT.

vs

Khalil Ahmad Murdaa el Ush (guardian of Muhammad Juma' Ahmad) — RESPONDENT.

Sale by guardian of minor's property declared null and void — Minor to act on his own behalf after obtaining majority — Lack of authority of guardian to bring action.

Appeal from the judgment of the Land Court, Jaffa, dated 17th November, 1922, whereby the sale of the orange grove known as Abu Khashabeh involving 1360/7776 shares was declared null and void and the guardian ordered, according to his own undertaking in Court, to refund the price amounting to 220 French Napoleons to the Appellant inasmuch as the vendor was at the time of the sale still a minor and had not obtained majority, with costs and advocate's fees assessed at P. 100.

JUDGMENT.

Upon consideration, the Court holds that the guardian has no power to exercise the rights vested in the ward by instituting proceedings relating to his rights after becoming of age, but the

major must apply either in person or through a representative. Hence the admission of the guardian's claim was wrong.

The judgment of the lower Court is therefore set aside on the ground of lack of authority to sue and the guardian's action dismissed.

The Respondent is ordered to pay the costs with £E. 7 travelling expenses and advocate's fees.

Delivered the 7th day of June, 1923.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 117/29.

BEFORE:

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

IN THE CASE OF:

Eliahu Gurgi Tweig — APPELLANT.

vs

Ketzia Mavashoff
Abba Hai Mavashoff — RESPONDENTS.

Mortgage of property inherited by infants authorized by Rabbinical Court on application of guardian—Right of mortgagee to sell mortgaged property in satisfaction of mortgage debt—Action brought by minor heirs on obtaining majority—Jurisdiction of Rabbinical Court to appoint guardian over infant foreigners—Jurisdiction of District Court to hear all civil actions not expressly assigned to another Court—Sale of mortgaged premises not a question within jurisdiction of President of District Court—Transfer of Land Ordinance, No. 2 of 1921—Jurisdiction of Court to decide question of personal law — Article 42, Palestine Order-in-Council, 1922—Question of validity of mortgage of land is question of title to land and within jurisdiction of Land Court — Incidental matters of personal status within jurisdiction of Land Court.

JUDGMENT.

The Respondents, Ketzia and Abba Hai Mavashoff, are registered as owners of 9/24 shares in certain immoveable property by inheritance from their father.

On the 11th January, 1925, Miriam Mavashoff, the mother of the Respondents, was appointed guardian of her infant children, including the Respondents, by the Rabbinical Court, which on 28th Sivan, 5686 (the 10th June, 1926), authorised her to mort-

gage the whole property to the Appellant, Eliahu Tweig, as security for a sum of £E.2,000.

Accordingly, on the 17th June, 1926, the Appellant was registered as mortgagee of the whole property, under a deed of mortgage executed by Miriam Mavashoft as guardian.

On the 11th July, 1928, the Appellant obtained from the President of the District Court, Jerusalem, an order for the sale of the mortgaged property failing payment of the principal sum within 30 days.

The Respondents, having then attained majority, brought an action in the District Court for an order staying the sale of their shares, on the ground that they were foreigners and that, in consequence, the appointment of their mother as guardian, was not within the jurisdiction of the Rabbinical Court, and hence that the purported mortgage of their shares was invalid.

The Appellant denied the jurisdiction of the District Court to make the order claimed, but the Court held that it had jurisdiction and that the order made by the Rabbinical Court was not within the competence of that Court, and accordingly gave judgment staying the sale of Respondents' shares.

In appealing against that judgment the Appellant raises again the question of the jurisdiction of the District Court.

Now it is clear that the powers conferred upon the President of the District Court by the Transfer of Land Ordinance, No. 2 of 1921, do not include that of deciding whether a mortgagee is legally entitled to have mortgaged property sold or not. That Ordinance merely confers a discretion to direct that under certain circumstances the exercise of the legal right of the mortgagee shall be postponed. The question whether the mortgagee is legally entitled to exercise his power of sale or not is one for determination by a Court, and as no other Court has been given authority to hear actions of this nature, it follows that jurisdiction must be vested in the District Court which has jurisdiction to hear all civil actions not expressly assigned to another Court.

In the present case, however, the question whether the Appellant is or is not entitled to have the Respondents' shares in the property sold is dependent upon a decision of the question whether the Respondents' shares were validly mortgaged to the Appellant or not; and that, in turn, depends upon whether the orders of the Rabbinical Court were not within the competence of that Court.

The latter question is one of personal law, and if it were the only question to be decided, it would clearly be within the competence of the District Court to decide it, in view of the provisions of the second paragraph of Article 47 of the Palestine Order-in-Council, 1922.

But the question whether the mortgage to the Appellant of the Respondents' shares is or is not valid is a question of title to land, and that is a matter in which the Land Court alone has jurisdiction. (See Land Appeal 136/26, Abdel Rahim and Muhammad Saleh Hamdan v. Mamur Awqaf Nablus.)

The proper course, therefore, for the District Court was to adjourn the hearing of the Respondents' action pending the production of a judgment of the Land Court as to the validity of the mortgage of the Respondents' shares, and to order an interim stay of sale.

In determining the question of the validity of the mortgage, it will be for the Land Court itself to decide any incidental question of personal status which may arise.

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

Delivered the 24th day of August, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 68/31.

BEFORE:

Baker, J., Jarallah, J. and Khaldi, J.

IN THE CASE OF:

Nasrallah Haddad — APPELLANT.

vs

Laya, widow of Khalil Suleiman and her daughters Sumya, Ojuni Emely and Rose, daughters of the said Khalil Suleiman. — RESPONDENTS.

Undertaking given by guardian to pay interest contrary to Sharia Law—Guardian as trustee of monies in his hands—Usurious interest deducted as from date of commencement of action.

Appeal from the judgment of the District Court of Haifa, dated 2nd December, 1930.

JUDGMENT.

The heirs of Khalil Suleiman claimed against Nasrallah Haddad, their guardian, a sum of L.E.825.

The Defendant did not deny the principal claim neither that accounts had been taken. He however pleaded that there was excessive interest and that payments were made after the accounts had been taken. Counsel for Plaintiffs admitted both the excessive interest and the payments in question. The Court reduced the claim to LP.363.763 and entered judgment for the said sum with interest from the date of the action.

Both parties have appealed against the said judgment.

The Defendant bases his appeal on the following grounds:

1. The money was in his hands by way of trust and as a trustee he could not be charged interest at all in accordance with the Moslem Sharia Law.

2. The Court deducted the excessive interest only from the date of the taking of the accounts in 1924 whereas it should have been deducted as from 1920.

The Plaintiffs appeal on the following grounds:

1. The share of the Defendant's mother was deducted by the Court from the amount claimed while in fact his share was not included in the statement of account which was limited to their share and to the share of their sister and the daughter of one of them Ellen and that his mother's share had already been paid.

2. The Appellant had from the outset undertaken to pay interest and the Court should have given judgment for interest from the date of the transaction and not from the date of action.

3. There was an error in calculating the excessive interest and the amount of the judgment should have been £P. 573.030.

On consideration of the appellate grounds of both parties, we hold that the Defendant's contention regarding the date as from which the excessive interest should be deducted must be upheld in that once usurious interest has been proved it should be deducted from the date of its commencement.

As regards the allegation that he should not be ordered to pay interest at all, being a guardian, he cannot go back on his undertaking to pay interest once he had undertaken to do so.

As regards the cross-appeal of the Plaintiffs, all the grounds are relevent and must be considered and examined.

Since the judgment of the Court does not give details

showing how the sum awarded in the judgment was arrived at, we are of opinion that the judgment must be set aside and the case remitted to the District Court for examination and a fresh judgment given in compliance with this judgment.

Costs to be costs in the cause.

Delivered the 31st day of December, 1931.

GUARDIANS.

SEE ALSO CHILDREN.

HABEAS CORPUS.

SEE ALSO EXTRADITION.

In the High Court of Justice.

H.C. No. 49/29.

BEFORE:

The Chief Justice and Corrie, J.

IN THE APPLICATION OF:

Shahin Suleiman Salman PETITIONER.

vs

The Attorney-General RESPONDENT.

Application for habeas corpus—Application for extradition not referred by High Commissioner to English Magistrate—Article 10(1) Provisional Agreement between Palestine and Syria for Extradition of Offenders, July 11th, 1921—Deportation order made by Commandant of Police under Sec. 8 (1), Immigration Ordinance, 1925—Powers of Inspector-General of Police and Prisons not vested by Statute in Commandant of Police.

ORDER.

The Court holds that the words in Article 10 (1) of the Provisional Agreement of July 11th, 1926, "The High Commisioner for Palestine will refer the application and the document to an English Magistrate" involves, as under the Extradition Ordinance, reference by the High Commissioner to the Magistrate and that as this necessary sine qua non was omitted the President of the

District Court had no jurisdiction to hear the case or issue a warrant of committal pending extradition.

The warrant must therefore be discharged. We have also had placed before us a deportation order made by the Commandant of Police purporting to be authorised by the High Commissioner under Sec. 8 (1) of the Immigration Ordinance, 1925. The High Commissioner, by an Order of 31st August, 1925, authorised under this section the Inspector-General of Police and Prisons to exercise the powers vested in him by Sec. 8 (1) of the Immigration Ordinance.

We hold that in the absence of statutory vesting of the powers of the Inspector-General of Police and Prisons in the Commandant of Police, the powers conferred by such order cannot be exercised by the Commandant of Police.

We therefore order the release of the Petitioner unless detained on other authority than the President of the District Court's warrant or the Commandant of Police's order.

Delivered the 12th day of September, 1929.

In the High Court of Justice.

H. C. No. 23/33.

BEFORE:

The Chief Justice and Baker, J.

IN THE APPLICATION OF:

J. Lapin,
I. Goldner, and Others — PETITIONERS.

vs

Inspector-General of Police,
Director of Immigration,
Asst. District Superintendent of Police — RESPONDENTS.

Tourists with valid travellers visas arrested at port of entry — Issue of writ of Habeas Corpus — Secs. 6 (2), 8 (1), Immigration Ordinance, 1925 — Person arrested without warrant on criminal charge to be brought before a Magistrate within 48 hours of arrest — Sec. 8 (1) Arrest of Offenders and Searches Ordinance, 1924—Permission to remain permanently in Palestine — Power of Inspector-General of Police and Prisons to issue order for deportation—Secs. 3 C. (1), 6, 7 (d), Interpretation Ordinance, 1929—Interpretation of Statutes—

Ordinance repealed and other provisions not substituted therefor — Necessity of gazetting statutory order of High Commissioner — Retrospective effect of legislation.

JUDGMENT.

We issued a writ for Habeas Corpus in this case on March 31st on the strength of the twenty-three would-be immigrants having been in custody for 15 days. According to Dr. Eliash, on the application for the rule, he was aware of no authority for their detention save the right conferred on an Immigration Officer temporarily to detain a person refused admission under Section 6(2) of the Immigration Ordinance, 1925, (No. 32 of 1925), and a detention for 15 days, on such authority alone, appeared to call for immediate explanation, especially when we consider that a person arrested without a warrant on a criminal charge has, under Section 8(1) of the Arrest of Offenders and Searches Ordinance, 1924, to be brought before a Magistrate within 48 hours of his arrest.

On the return to the writ we learn that the Deputy Inspector-General of Police, an officer legally authorised, as we are satisfied, by the High Commissioner to make a deportation order under Section 8(1) of the Immigration Ordinance, 1925, made a deportation order under Section 8(1)(c) and issued a warrant for the detention of these twenty-three persons.

Before dealing with this order and warrant, we wish to consider Dr. Eliash's argument that under Section 6 (2) of the Immigration Ordinance, 1925, these persons having physically entered Palestine cannot subsequently be refused permission to enter it.

We cannot accept this argument for, if the option to grant or refuse permission had to be exercised before would-be immigrants entered Palestine, how could the High Commissioner, when permission was refused, effectually detain, as the Section empowers him to do, persons who had never come within his jurisdiction.

Dr. Eliash again quoted to us Section 1 of the regulations contained in Schedule to the Immigration Ordinance, 1925, Gazette 15th June, 1925, p. 270—and suggested that, under it, permission must be given at the place of the immigrant's entry into Palestine and not after he has entered the territory. We cannot import this limitation into the section which obviously does no more than lay down that permission must be granted by the Chief Immig-

ration Officer, or by that Immigration Officer who is on duty at the place of the immigrant's entry into the country.

To come now to the Deputy Inspector-General's order. It is not disputed that he has the powers of the Inspector-General who has been authorised under Section 8 (1), and we cannot agree that Section 8 (1) (c), which empowers him to deport persons "found in Palestine not having obtained legal permission to enter" must, as counsel appears to suggest, be limited to cases in which clandestine entry has been effected, or be held to mean anything more than that he is in Palestine, to the knowledge of the authorities, without legal permission.

We now come to the last point, namely, that the Order of Lord Plumer of 20th April, 1926, empowering the detention in custody of persons who are the subject of a deportation order, was made in virtue of the Immigration (Amendment) Ordinance, 1926, and that the Deputy Inspector-General's warrant was made in virtue of this order, whereas the Ordinance in question, No. 20 of 1926, has been repealed by the Immigration (Amendment) Ordinance, 1928, No. 24 of 1928.

Ordinance No. 20 of 1926 has only one operative section which was re-enacted in precisely similar words in Section 3 of Ordinance No. 24 of 1928; and we are of opinion that Section 6 of the Interpretation Ordinance, 1929, is relevant to this point. This section says that where an Ordinance repeals and re-enacts another Ordinance, references in an Ordinance to the repealed provision shall, unless the contrary intention appears, be construed as references to the provision so re-enacted.

Now, Lord Plumer's Order of 20th April, 1926, is by virtue of the definition in Section 3 C. (1) of the Interpretation Ordinance, 1929, included in the term "Ordinance" as used in the Interpretation Ordinance: so we reach the point that references in the Order of 10th April, 1926, to the repealed Ordinance of 1926 must be construed as references to the still operative Ordinances of 1928, and when the Deputy Inspector-General of Police cites the Ordinance of 1926 in his warrant, that also must be taken to import a reference to the Ordinance of 1928.

What effect, we must now consider, did the repeal of the Ordinance of 1926 have upon Lord Plumer's Order of 20th April, 1926, which was made thereunder. To determine this, we must look at Section 4 (2) of the Interpretation Ordinance by which, "when an Ordinance or part of an Ordinance is repealed, and

any other provisions substituted therefor, all orders, etc., made in virtue thereof shall be deemed to be repealed unless saved".

In the present case the Ordinance of 1928 repealed that of 1926 but did not substitute other provisions therefor—on the contrary, it re-enacted in exactly the same terms the provisions of the Ordinance of 1926: and in consequence of there being no substitution of new provisions in lieu of the old, any orders made under the Ordinance are not to be deemed to be repealed: so Lord Plumer's Order of 20th April, 1926, must be deemed to be in force.

It would have been more obviously free from the risk of having its validity canvassed if a new order under the new Ordinance had issued, and it was obviously desirable that a statutory order by the High Commissioner, such as this, should have the publicity of gazetting, as is now required by Section 7 (d) of the Interpretation Ordinance, which calls for gazetting of subordinate legislation as from the date of its operation, but provides that this shall not be retrospective as regards subordinate legislation made before the date of the Ordinance.

We therefore come to the conclusion that the temporary detention on the 16th of March by the Immigration Officer was followed up on March 19th by an order for deportation, lawfully made by an officer duly authorised by the High Commissioner, and that the warrant issued by that officer was lawfully made and we therefore discharge the writ.

We feel that it is most desirable that the Executive should make every effort to deport, at the earliest possible opportunity, these twenty-three persons of both sexes who have now been in custody for nearly three weeks, but in saying this we are not oblivious of the fact that Government had made provisions for their embarkation on a ship on Saturday, April 1st, and that, had these proceedings not been initiated, they would now have been, for four days, at liberty.

Delivered the 5th day of April, 1933.

HEIRS.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 142/24.

BEFORE:

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

IN THE CASE OF:

Nadim Abdul Rahman Abu El-Nasri for himself and on behalf of his brother Faiz and his sister Munira — APPELLANTS.

vs

Abdallah Seilan — RESPONDENT.

Action by heirs for title to land in possession of third person by virtue of oral agreement of sale—Proof of possession held insufficient to establish ownership as against heirs—Rights between co-heirs—Heir not barred by prescription.

JUDGMENT.

We hold that the rights of inheritance of Appellants from their grandfather Mahmud through their mother Halimeh cannot be defeated by verbal evidence of a sale not proved by the production of any document, nor by evidence of possession by Abdallah who was himself one of the heirs of an undivided property.

The judgment of the Land Court is set aside and the appeal allowed. The registration in the name of the Appellants is confirmed.

Delivered the 24th day of June, 1925.

In the District Court of Haifa.

C. D. C. Ha. of 1927.

BEFORE:

Litt, J. (President)

IN THE CASE OF:

The Succession of Emanuel Beilharz, deceased.

Administration of estates — Sale of property of minor heirs — Sec. 20 (a), Succession Ordinance, 1923—Authority granted by President of District Court to sell.

Application made by Christian Beilharz, in his capacity as the appointed administrator of the above named estate, by deed of appointment made by the President of the District Court on the 8th day of November, 1926.

ORDER.

Whereas by a petition dated the 2nd January, 1927, the aboved named Petitioner sheweth:

A. That three of the heirs of the above named deceased namely, Gustav, Emanuel and Hilda are minors and under the age of eighteen years,

B. That amongst the estate of the deceased is a piece of property in the Bazaar in Haifa registered under Kushans Nos.62, 63 and 64 of 1325, and in which the deceased owned one-quarter,

C. That thereby each of the said minor heirs has three shares out of one hundred and sixty eight shares of the whole property,

D. That the said property is to be sold,

E. That it is in the interests of the minor heirs that their small shares in the property be sold.

Whereas the said application is made under Section 20 (a) of the Succession Ordinance, 1923, order is hereby made that the said Petitioner, Christian Beilharz in his capacity as the duly appointed administrator of the estate is hereby authorized to sell the share of the said minor heirs Gustav, Emanuel and Hilda in the said property of the late Emanuel Beilharz, referred to in paragraph B. of this order.

Given under my hand this day of 1927.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 65/27.

BEFORE:

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

IN THE CASE OF:

Khadra El-Malik and Others — APPELLANTS.

vs

Descendants of Muhamed Mahmud El-Malik — RESPONDENTS.

Prescription between heirs—Limitations of rule that "possession by one heir is possession by all heirs"—Limitation of actions.

JUDGMENT.

This appeal raised the question whether in actions between heirs the rule that possession by one heir is possession by all heirs, is subject to any restrictions.

The Respondents, who were the Defendants, are direct descendants of Muhamed Mahmud El-Malik, the original owner of the land in claim. The Appellant Khadra is the second wife of Muhamed Ahmed El-Malik whose first wife, Rakia, was a daughter of Muhamed Mahmud El-Malik. The Appellant Jumma' is the son of Muhamed Ahmed El-Malik by Khadry. The third Appellant, Yousef Muhamed El-Malik, is a direct descendant of Muhamed El-Malik through his daughter Fatmeh.

The Land Court dismissed the Appellants' claim on the ground that the period of limitation of action has expired and "that the rule that no prescription exists between heirs is confined only to the members of the family, the head of one member of which administers and takes charge of its disposition, and the daughters of which family are considered at all events co-owners with their brothers, on the natural ground that the woman cannot take actual part in the disposition of land".

This view cannot be sustained and this Court has, on several occasions, given judgments applying the rule as between more distant relatives.

In the present case one of the Appellants is a direct descendant of the original owner. The other two Appellants are the wife and daughter of his nephew who, in absence of direct descendants, would be entitled to a share in the estate in his own right.

This is thus not a case of an action between entire strangers and we see no ground for limiting the rule that possession by one heir is possession of the other heir in the manner adopted by the Land Court.

The appeal must be allowed, the judgment of the Land Court set aside, and judgment entered for the Appellants in respect of the shares to which they are entitled by inheritance from Muhamed El-Malik.

The costs of this appeal and action to be paid by Respondents.

Delivered the 1st day of November, 1927.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 66/28.

BEFORE:

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

IN THE CASE OF:

Musa Hassan Abu Shehadeh — APPELLANT.

vs

Salim El-Omari
Abdul Rauf El-Bitar — RESPONDENTS.

Claim by heir against co-heirs—Adverse possession not to be relied upon as defence in an action between co-heirs—Heir not barred by prescription—Art. 20, Land Code—Antecedent contradicting statement of claimant in Land Court.

JUDGMENT.

The Appellant was entitled to part of the property as heir of his father Hassan Shehadeh.

The Respondents claim through vendors, who, if they inherited as heirs of Saada, were co-heirs with the Appellant of Hassan Shehadeh. As between such co-heirs, adverse possession cannot be relied upon as a defence to an action, and the provisions of Article 20 of the Land Code are thus inapplicable.

The Court had, therefore, to determine the question whether the alleged sale to the Appellant was valid or not.

The sanad is dated 1318. The Court had before it an extract from the Land Registry, proving that in 1331 the Appellant claimed not as purchaser from his sister, but as heir of his father and his sister. This was an "antecedent statement contradicting his claim" in the Land Court, and accordingly the Land Court was right in rejecting Appellant's claim.

The appeal is dismisstd with costs, including advocates' fees, £P.2.500.

Delivered the 5th day of March, 1929.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 131/28.

IN THE CASE OF:

Anis Eff Houri — APPELLANT.

vs

Heirs of Hassan Sheirek — RESPONDENTS.

Liability of heirs for debts incurred by deceased — Damages for breach of contract—Waiver of right by creditor to receive satisfaction from heirs.

JUDGMENT.

The Court holds that the sum of £. 3000 due from Respondents, ancestor Hassan under Clause 3 of the contract is a debt due from his estate for which his heirs are liable.

The judgment of the District Court is based in respect of that sum cannot be maintained.

It is however alleged that the Appellant has waived his right to receive the sum from the heirs. This is an issue upon which the District Court has made no finding.

The judgment of the District Court is set aside and the case remitted for the Court to find whether or not the Appellant has waived his right to receive the sum of £. 3000 from the Respondents under Clause 3 of the contract and to give judgment.

Costs will follow the event.

Delivered the 25th day of April, 1929.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 36/30.

BEFORE:

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

IN THE CASE OF:

Musa Muhammad Sha'ban — APPELLANT.

vs

Abdel Aziz Abbas El-Far'awi — RESPONDENT.

Claim of land by heir— Possession of one heir is possession by all heirs—Action of heir not barred by prescription—Art. 20, Land Code—Son-in-law held not to be heir of ancestor after death of

his wife—Division of estate on application of heirs—Effect of adverse possession for period exceeding period of prescription.

JUDGMENT OF MR. JUSTICE CORRIE.

The Appellant, Musa Muhammad Sha'ban, claims as heir of his late wife, Kadrieh bint Mahmud Abdel Aziz, a share in lands formerly owned by and registered in the name of her father Mahmud. The Respondent Abdel Aziz Abbas El-Far'awi is the grandson of Mahmud and the nephew of Kadrieh.

After the death of Mahmud the lands standing registered in his name were transferred in the Land Registry into the names of his heirs other than Kadrieh. The shares to which Kadrieh would have been entitled by inheritance were registered in the name of Respondent's father "by inheritance."

Kadrieh died about twenty years ago. By the Appellant's own admission neither he nor Kadrieh have ever been in possession of a share in the land nor in its produce. This is clear from the Appellant's statement that he was under the belief that Kadrieh had sold her share to her brother, and that it was only recently that he had discovered that the Respondent's father was registered as owner by inheritance and not by purchase.

The Land Court has held that the Appellant's action is barred by lapse of time under Section 20 of the Land Code.

The general rule in actions for title to land, where the Plaintiff claims by inheritance from an owner who is also an ancestor of the Defendant, is that possession by one heir is possession by all the heirs; and hence, that the action is not barred by lapse of time.

This rule is based on the fact that the land of a family is frequently cultivated by one or more of the members of the family to the exclusion of the other members, who, however, receive a share of the produce.

In such a case the possession by the cultivating members is not adverse to those who do not cultivate, and the latter cannot set up a plea of prescription.

Such, however, is not the position in the present case. The Appellant is not a member of the same family as the Respondents. He admits that he has not cultivated any part of the land and has not received any share of the produce since the death of his wife twenty years ago.

Under these circumstances, I hold that the possession of the Respondents was possession adverse to the Appellant's claim, and that in consequence his action is barred by lapse of time.

In my opinion the appeal must be dismissed.

JUDGMENT OF MR. JUSTICE JARALLAH.

The rule that no prescription runs between the heirs is an exception to the general principle of law. It was made on the assumption that there is a sort of a partnership between the heirs in respect of an estate before its distribution. Therefore, the possession of one of the heirs to the exclusion of the others does not affect the rights of those not in possession. There is an implied agency, destined to safeguard the rights of the family. This exceptional rule should not be interpreted widely, especially when the reason for which it was intended was lacking.

In this case it is proved that Kadrieh, the ancestress of Plaintiff, was not, in her life-time, in possession of the property. Likewise, the husband was not in possession and he did not claim that right, knowing that his wife had sold to her brother, the father of Defendants, her inherited share. Twenty years have passed since the death of Kadrieh.

There is no doubt that Kadrieh did not transfer her rights at the Tabu in the proper manner. She was not even mentioned amongst the heirs, which shows that the estate was distributed to the heirs to the exclusion of Kadrieh whose share did not pass only to her brother but to all the heirs excluding herself.

The fact that the transfer was not based on a title deed does not prevent its being carried out in the customary way. Further, the admission of Defendants that the share of Kadrieh was in their occupation by inheritance from their father, disproves the contention that her share passed to all the heirs.

The failure of Defendants to prove the sale, after the lapse of all this long period, does not prove that it did not take place so long as Plaintiff admits it. Had it not been for the fact that there are no Tabu Registers recording that sale, he would not have brought this case.

Therefore, the points to be determined in this case are these:

(a) Can the Plaintiff, after knowing that his wife, through whom he claims, had sold her share to her brother and his silence thereafter for a period exceeding very much

that of the prescription, now contend that that sale was not registered at the Tabu?

(b) Whether or not prescription in this case runs or is suspended in the light of the law which says that it does not run as between the heirs when one of them has in his possession the inherited property only?

I hold that the non-registration of that sale at the Tabu does not create for Plaintiff a right to bring an action so long as private sales carried out under the Turkish Regime are now considered as valid. Further, I hold that prescription is not suspended because Plaintiff was not originally from the family of the ancestor.

Therefore the judgment of the Land Court, in so far as the result is concerned, is in accordance with the law.

The appeal is dismissed and the judgment of the Court below confirmed with costs.

JUDGMENT OF MR. JUSTICE FRUMKIN.

The rule that there is no prescription as between heirs emanates from the principle that possession by one heir is possession by all heirs, and not adverse possession. It applies mainly in cases where the elder or male members of the family are cultivating land inherited from a common ancestor, or otherwise administering the estate of the deceased person. When after a number of years one of the heirs is not satisfied with the administration of the estate in common and applies for his share in the inheritance, it cannot be said that, having allowed the elder or male heirs to be in undisturbed possession for a period exceeding prescription, his action is barred by lapse of time, inasmuch as their possession was not adverse possession.

This rule applies in cases where the Plaintiff claims by inheritance against other descendants of a common ancestor. It would also apply in certain other cases where there is no blood relationship between the co-heirs. So, for instance, when a widow continues to live with the parents or brothers of her deceased husband as a member of the family.

But there must be cases in which this rule cannot stand the test, such as when under all the circumstances it appears that possession by one heir is adverse to the interests of the others, when it cannot be said that possession by one heir is possession by all heirs.

The present case is one in which exception must be made to the rule that there is no prescription as between heirs.

There is no blood relationship between the parties in this case. Upon the death, without issue, of the wife of Appellant who was the aunt of the Respondent, there was nothing in the nature of a common interest left between them. It is most unreasonable to assume that the husband considered the possession of his deceased wife's estate by her brother and later by her nephew as possession on his own behalf, and not adverse possession, although they became quite strangers one to another.

In fact, Appellant does not allege it; he does not say that he did not mind Respondent being in possession because they were co-heirs; what he says is, that he never knew that his wife left him this property, and until recently, he thought that she sold it to her brother when she was still alive. He did not take the trouble to verify such sale.

In my view, possession of Respondent is no less adverse possession than it would be if he were a total stranger to Appellant and his deceased wife.

One cannot, after twenty years of undisturbed possession, come and say, "I was under the impression that you had purchased the land from my deceased wife, now that I learned that you are only a trespasser, I claim my land back."

The judgment of the Land Court is therefore to be affirmed and the appeal dismissed with costs.

Delivered the 24th day of December, 1931.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 9/31.

BEFORE:

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

IN THE CASE OF:

Warda Khayat — APPELLANT.

vs

Sheikh Mahmud Dajani
Darwish Dajani,
Ester As'ad Khayat,
Victoria Khayat — RESPONDENTS.

Inheritance of land—Action by heir for recovery of land— Conflict between certificate of Sharia Court and certificate of Maronite Court—Application for cancellation of registration in Land Registry—Sharia Court held not to possess jurisdiction over non-Moslems.

JUDGMENT.

The Appellant in this case, Warda Khayat, is the niece of the deceased Assad Khayat, a late member of the Maronite Christian Community and who died in 1917. Among the latter's heirs who inherited his estate was his nephew Khalil, the brother of Appellant. Khalil died in 1918, prior to the distribution of Assad's property; and it is Appellant's claim that she is one of the heirs of her late brother and as such entitled to a share in the property of her uncle, including a share in a certain house in Jerusalem which is the subject matter of the present action. The said house was registered in 1921 in the Land Registry in the names of heirs of Assad Khayat by virtue of a certificate of inheritance issued by the Sharia Court of Jerusalem, and dated 14th March, 1921. The name of Warda was not mentioned in the said certificate as being one of the heirs of her brother and in consequence also of her uncle, and no share was, therefore, registered in her name. Since then, part of the property in issue was, by way of sale, transferred by some of the heirs to the first and second Respondents.

In 1923 Warda applied to the Land Court of Jerusalem asking the said Court to cancel the registration of the house in dispute, and for an order entitling her to a share in the said house. To prove her right to a share in the said house she produced a certificate of inheritance issued by the Jaffa Sharia Court dated 18th August, 1923, showing that she is one of the heirs of her deceased brother Khalil. The Land Court was not satisfied that this would give her a right to inherit a part of her uncle's estate and directed her to produce a fresh certificate from the Jerusalem Sharia Court relating directly to the estate of her uncle. Upon her failure to do so, the Land Court, on 5th June, 1924, dismissed her action with liberty for her to apply again.

On the 6th of January, 1928, Warda brought the present action before Land Court, and produced a certificate of inheritance issued by the Ecclesiastical Court of the Maronite Patriarchate dated 7th October, 1927, showing that Khalil is one of the heirs of Assad, and Warda is one of the heirs of Khalil.

In its judgment of the 2nd June, 1929, the Land Court held that it cannot cancel a registration made by virtue of a certificate issued by the Sharia Court on the basis of a certificate issued by the Maronite Court, but insisted on a certificate issued by a Sharia Court, and dismissed Warda's action. In that judgment the date of the first certificate of inheritance issued by the Sharia Court was erroneously taken to be the 14th March, 1923.

The Court of Appeal, on 9th July, 1929, held that in 1923 the Moslem Sharia Court had ceased to possess jurisdiction over non-Moslems, and for that reason set aside the judgment of the Land Court and remitted the case for completion.

Upon rehearing the case before the Land Court it was established that the proper date of the first certificate of inheritance upon which the registration is based was the 14th March, 1921, and not 1923 as held before; and whereas at that date the Sharia Court still possessed jurisdiction over non-Moslems, the Land Court, on the 6th December, 1929, gave a fresh judgment to the same effect as its previous judgment.

Against this judgment Warda is now appealing.

The Land Court had before it two contradicting certificates of inheritance issued by different Courts, each possessing at the time of issue jurisdiction. Both Courts being of equal jurisdiction, the Land Court was right in holding that merely because it is later in date the certificate issued by the Maronite Court cannot supresede or cancel a certificate issued by the Sharia Court at the time when it had jurisdiction. There is, however, this difficulty that inasmuch as the Sharia Courts have ceased to have jurisdiction over Maronites, there is no Court which could set aside the Sharia Court certificate of March, 1921.

The contradiction between the two certificates of inheritance is due not to a conflict of law, but to a difference on a point of fact. It is common ground that Khalil, the brother of Appellant, was the father of one child only, namely Ibrahim, who died some time before the issue of either of the certificates of inheritance. The dispute is as to the exact date of death of the child and in particular, whether he survived his father or died in his father's lifetime. If Ibrahim was alive at the time when Khalil died, Warda would be no heir, but if Khalil died without issue Warda must be one of his heirs.

Now, under the Sharia Certificate, Ibrahim died on the 19th of April, 1919. In the Maronite Certificate however, the date of his death is stated to be February, 1915. From both certificates it

appears that Khalil died in April, 1918. The preference of either certificate over the other would therefore depend on a finding of fact as to the correct date, and we do not see why the Land Court should not under the circumstances of this case itself try this issue, and as a result of its finding decide which of the two certificates should be acted upon.

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

Costs to follow the event.

Delivered in January, 1932.

In the Land Court of Haifa.

L. Ha. No. 36/32.

BEFORE:

Seton, J. and Shafik Dajani, J.

IN THE CASE OF:

Gustav Beilharz for all the heirs of Emanuel Beilharz PLAINTIFF.

vs

Frieda Shmalzried on behalf of all the heirs of Adam Shmalzried, Haifa. Heirs of Jacob Shmalzried DEFENDANTS.

Action by one heir o behalf of all heirs — Land sold in 1905 to ancestor of heirs not registered in Tabou — Registration in Land Registry cancelled by order of Court — Judgment against absentee Defendants.

JUDGMENT.

This case was brought by the Plaintiff Gustav Beilharz on behalf of all the heirs of Emanuel Beilharz, deceased, through his attorney Mr. P. Margolin, advocate, Haifa, against the heirs of Jacob Shmalzried, of unknown residence, claiming that the Plaintiffs are in possession of a plot of land, which is the subject matter of this case, situated in Haifa, Monater Locality, measuring 1221.17 sq. metres, the boundaries of which being fully described in the statement of claim. They, the Plaintiffs, further claim that the said plot of land was purchased in the year 1905 by their testator Emanuel from Katherine wife of Johannes Beilharz, the latter having purchased it from the Defendants' testator, the above

mentioned Jacob, and that since that date (1905) up to the present, they are in possession of the same. Fifty years ago this plot of land, which makes part of a bigger piece, was registered in the name of Jacob and Adam Shmalzried. A partition was subsequently executed between them and Jacob obtained the western half, which represents the plot forming the subject matter of this case, and Adam obtained the second half being to the east.

Emanuel, the last purchaser, during his lifetime and after his death, his heirs, the present Plaintiffs, were in possession of this land and are still possessing and using it as declared by Katherine, one of the witnesses in this case, in her sworn statement and as proved by the evidence of the other witnesses. Therefore and owing to the fact that the registration in the Tabu is still in the name of the original owners viz: Jacob and Adam Shmalzried, they (the Plaintiffs) request to have the said registration cancelled as far as Jacob's share is concerned and have the same registered in their names.

Taking into consideration the facts of this case the evidence of the witnesses and the written sworn statement of the widow Katherine, wife of Johannes, the above mentioned, the Court finds that the plot in question was sold in 1905 to Emanuel Beilharz, the Plaintiff's testator, who during his lifetime was in possession of it and after his death passed to his heirs the Plaintiffs, who were in possession of the same up to this date without hindrance or interruption on behalf of anybody. The Court unanimously decides therefore to order the cancellation of the original registration in the Land Registry Office, and to register the plot in question, that belonging to Jacob only, in the name of the heirs of Emanuel Beilharz, each having his respective share as per certificate of inheritance from the Ecclesiastical Court.

The Court further orders the Defendants not to interfere with Plaintiffs' rights of enjoyment in the land in question, the area of which is 1221.17 sq. metres, the boundaries of which are N. D. Jeuter; S. Road; E. Shmalzried; W. Christian Beilharz, and in accordance with Article 1818 of the Mejelle.

This judgment has to be published three times in the newspapers within 3 months, the Defendants being of unknown residence. Judgment delivered in the absence of Defendants, the heirs of Jacob Shmalzried, subject to opposition and in the absence, as if in presence, of Frieda Shmalzried on behalf of the heirs of George Adam Shmalzried, subject to appeal, this 6th day of February, 1933.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 83/32.

BEFORE:

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

IN THE CASE OF:

Abdallah Shareef — APPELLANT.

vs

Moyli el Husseini — RESPONDENT.

Action against heirs for damages for breach of contract made by ancestor—Sale of land—Liquidated damages— Failure of vendor to effect registration into name of purchaser — Service of notarial notice—Period of notice for completion held unreasonable— Power of heirs to effect registration of property sold by ancestor— Period for completion to be fixed by Court.

JUDGMENT.

I hold that the Court was justified in finding that the period of the notice was unreasonable and insufficient for completing the registration of originally unregistered lands. The Court, however, should have ascertained whether such a transaction could be performed by the heirs and whether an accrued right of action for its breach survived against his heirs or is it a matter that could only be performed by the predecessor in title. Should the Court find that it is in the heirs' power to effect the registration and transfer, it should fix a reasonable period for that purpose and give the heirs a delay. On the other hand should the Court find that the transaction is impossible to perform by the heirs and after considering the excuse, it should order the refund of the price.

The judgment of the Lower Court must therefore be set aside and the case remitted to the District Court to comply or to give a fresh judgment.

Costs to follow the event.

In the High Court of Justice.

H. C. No. 91/32.

BEFORE:

The Acting Chief Justice and Khayat, J.

IN THE CASE of:

Faiz Yunis El Husseini and Another PETITIONERS.

vs

Chief Execution Officer, Jerusalem,
A. E. Elmaleh RESPONDENTS.

Execution proceedings—Service of notice on heirs—Order of Chief Execution Officer for service not strictly adhered to — Irregularity of execution proceedings—All proceedings subsequent to irregularity held invalid — Costs not allowed to successful petitioner whose default caused the defect of procedure relied upon by him.

ORDER.

The order made on the 4th August, 1930, by Judge Tute, then acting as Chief Execution Officer, Jerusalem, was that the heirs of the late Sheikh Mustafa Yunis whose names were known were to be served personally: and in the event of their failing to submit the names of the other heirs within one week, such other heirs were to be notified by publication in the press and by affixing a notice to the house where Sheikh Mustafa had resided.

This order was not duly carried out as no notice was affixed to the house.

It follows that there was not due notification in accordance with the order and all proceedings subsequent thereto must be set aside. Notification will be made in accordance with the order cited.

As the defect in procedure was not due to the default of the Respondent and as the situation would never have arisen but for the failure of the Petitioner to inform the Execution Office as to the names of Sheikh Mustafa's heirs, we make no order as to costs.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 173/32.

BEFORE :

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

IN THE CASE OF :

Sa'adat Dajani — APPELLANT.

vs

Ali Mustakim — RESPONDENT.

Third party opposition lodged by heir in action against estate—Promissory note alleged to have been signed, when maker was in a state of insanity and mortal illness—Burden of proof of authenticity of signature of deceased person—Reduction of excessive interest—Procedure in District Court on remittal from Court of Appeal.

JUDGMENT

This case has been before this Court on a previous occasion, and on the 24th August, 1931, the Court gave judgment concluding in the following terms:

"The judgment, other than that part of it deciding the authenticity of the signature of the late Sheikh Yousef el Dajani to the documents, the subject matter of the action, must be set aside and the case returned to the Lower Court:

1. To hear evidence as to the state of deceased's mind at the time he signed the documents (for this purpose it is material that the Court should decide the date of deceased's death); and

2. To decide after hearing whatever evidence may be produced to the Court whether excessive interest has in fact been charged and to give a fresh judgment."

The Appellants argue that under this judgment they were entitled to reopen the whole case, except so far as the authenticity of the signatures was in question.

We hold, however, that such is not the true interpretation of the judgment and that the District Court rightly held that their inquiry was to be restricted to the points specified in the judgment of this Court.

As regards the first of these points, the state of the deceased's mind when he signed the documents, the burden was upon the Appellants of proving that the deceased was incapable of understanding what he was doing when he signed the bills upon which

the action is based, and they have failed to discharge this burden to the satisfaction of the District Court.

We see not reason why the judgment of the District Court on this point should be set aside. The Appellant's claim that excessive interest was charged has now been withdrawn.

The appeal is, therefore, dismissed with costs, including £P.2 advocate's fees.

HEIRS—

SEE ALSO PRESCRIPTION.

HIGH COURT.

In the High Court of Justice.

H.C. No. 16/24.

BEFORE :

The Senior British Judge and Frumkin, J.

Provisional order for attachment made ex-parte by Judge of Land Court—Jurisdiction of High Court to set aside such order—Appeal to be against final judgment—Art. 43, Palestine Order-in-Council, 1922—Remedy of damages for injury by attachment of property.

JUDGMENT.

This application raises the question whether the Supreme Court sitting as a High Court has jurisdiction to set aside a provisional order of attachment made ex-parte by a Judge of the Land Court and confirmed by the Land Court at the hearing of the action.

The amendment dated 26th February, 1312, to the Civil Procedure Code provides that "No decision delivered by a Court shall be subject to appeal except with an appeal against the final Judgment in the suit". The Petitioner argues that as until such final Judgment no other Tribunal is competent to deal with the question, this Court must have jurisdiction under the provisions of the second part of Article 43 of the Palestine Order-in-Council, 1922.

We hold that such is not the case.

The decision of the Land Court will be capable of appeal to the Supreme Court sitting as a Court of Appeal so soon as

the final Judgment of the Land Court has been given, and we hold that it is not the meaning of the Order-in-Council that a matter which can be brought before the Supreme Court in its appellate capacity, should be decided by the Supreme Court exercising its original jurisdiction as a High Court.

If the Petitioner is injured by the attachment, his remedy is by way of damages.

The Petition is dismissed.

Delivered the 8th day of December, 1924.

In the High Court of Justice.

H.C. No. 51/27.

BEFORE:

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

IN THE APPLICATION OF:

Haj Hussein Mahmad — PETITIONER.

vs.

The Mayor and Municipal Council of Jerusalem — RESPONDENTS.

Agreement repudiated by Municipality—Right to sue for damages—Refusal of High Court to accept jurisdiction where there is other remedy—Article 43, Palestine Order-in-Council, 1922.

Application for an Order to issue to Respondents requiring them to revoke their decision dated 16th June, 1926, whereby the Municipal Council repudiated an agreement entered into between the Petitioner and Respondents dated 11th January, 1926.

JUDGMENT.

The Court after hearing Mr. Faiz Haddad dismisses the Petition.

The Petitioner can sue for damages, and hence the matter is not within the jurisdiction of the High Court, Palestine Order-in-Council, 1922, Article 43.

Delivered in presence of Petitioner the 21st day of June, 1926.

In the High Court of Justice.

H.C. No. 84/28.

BEFORE:

The Acting Senior British Judge, Frumkin, J. and Khayat, J.

IN THE APPLICATION OF.

Frosine Tannous Nasr
Julia Tannous Nasr PETITIONERS.

vs.

The Chief Execution Officer, Jaffa,
Heirs of George Egger RESPONDENTS.

Refusal by Chief Execution Officer to execute judgment of Supreme Court—Opposition to judgment of Ottoman Court of Appeal—Judgment by default not presented for execution within six months—High Court cannot cancel judgment of Court of Appeal.

Application for an order to issue to the Chief Execution Officer in the District Court of Jaffa to show cause why his order refusing to execute the judgment of the Supreme Court sitting as a Court of Appeal dated September 2nd, 1926, should not be set aside.

JUDGMENT.

This is an application asking us to order the Chief Execution Officer of Jaffa to execute a judgment of the Supreme Court sitting as a Court of Appeal dated 2nd September, 1926.

This judgment in itself cannot be executed, as its operative part merely amounts to a dismissal of an opposition against a judgment of the Ottoman Court of Appeal dated 13 January, 1910. Accordingly Petitioners desire the execution of the beforementioned Ottoman judgment.

The execution of the judgment, however, has already been dealt with by this Court, which on the 5th of March, 1928, ordered as follows:—

> "That the Chief Execution Officer in the District Court of Jaffa do refrain from proceeding with the execution of the judgment of the Ottoman Court of Appeal dated 13th January, 1910, against George Egger, now deceased".

The Chief Execution Officer in refusing execution under his orders dated 8th September and 20th October, 1928, respectively, which said orders are the subject matter of this application, acted in conformity with the said judgment of the High Court.

Now it is argued that the judgment of the High Court is in contradiction to the judgment of the Court of Appeal. I do not think that such contradiction exists, because dismissing an opposition is one thing and the execution of a judgment which on the face of it is a judgment by default "which had not been presented to the Execution Officer for execution within six months from its date" is another thing. But even if such a contradiction existed there is no authority in Law for the Supreme Court sitting as a High Court of Justice to remedy such contradiction, nor to cancel a judgment previously given by itself.

Our previous decision of the 5th of March, 1928, therefore stands, and the order nisi is discharged and the application dismissed with costs.

This disposes of the application of George Egger for an order directing the Chief Execution Officer to cancel the proceedings, as the cancellation of such proceedings follows as a matter of course.

£P.2 allowed as advocates' fees to Respondent. Judgment by majority, Francis Eff. Khayat, dissenting.

Delivered the 23rd day of July, 1929.

In the High Court of Justice.

H.C. No. 87/28.

BEFORE :

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

IN THE APPLICATION OF :

Mrs. Rosa Ginzberg PETITIONER.

vs

His Honour the Chief Justice
and Chairman
and Members of the Legal Board RESPONDENTS.

Jurisdiction of High Court over Chief Justice and Legal Board—Application for admission to Foreign Advocates' Examination refused on grounds of sex—Sections 4, 7, 26, Advocates' Ordinance, 1922-1929—Licence to practice as advocate—Advocates' Rules, 1926—Failure by Public Body in performance of Duty made subject of application to High Court—"Instructions of Home Government" held not to have force of law except when enacted in Ordinance.

Application for an Order to issue to the Chairman and Members of the Legal Board to show cause why Petitioner should not be admitted to the Foreign Advocates' Examination and for an Order to His Honour the Chief Justice to show cause why she should not be granted an Advocate's licence to practice before the Civil Courts in Palestine.

JUDGMENT.

The Petitioner Mrs. Rosa Ginzberg is asking for an Order to the Chief Justice and to the Chairman and Members of the Legal Board "to show cause why the Applicant by reason of her sex alone and subject to her being or becoming otherwise duly qualified should not be admitted to the Foreign Advocates' Examination and subsequently to the granting of a licence for practice".

The Law regulating the examination and licencing of advocates is contained in the Advocates' Ordinances, 1922-29. Section 4 (1) of the Ordinance of 1922 provides:

> "There shall be constituted a Legal Board consisting of not less than three persons and charged with the duty of advising the Chief Justice with reference to the granting of licences to practise as Advocates and examining applicants for licences".

Section 7 reads:

> "So soon as the Legal Board is satisfied that the applicant is qualified for a licence in accordance with this Ordinance, the Board shall report accordingly the Chief Justice who, upon consideration of the report and if he approves of the same, shall issue a licence to the applicant, subject, nevertheless, to his compliance with the provisions of this Ordinance and the Regulations made thereunder".

Section 26 provides that:

> "The Chief Justice may make rules and issue orders under and subject to the provisions of this Ordinance as to any of the following matters:
>
> (a) the form and procedure in connection with application for licences, dates of examination and procedure thereat, subjects to be taken at examination, appointment and remuneration of examiners and assistants;
>
> (e) any other matter requiring regulation under this Ordinance for which provision is not otherwise made.

Provided that the Chief Justice may delegate to the Legal Board the exercise of his powers so far they relate to examinations".

In exercise of his rule-making power the Chief Justice issued the Advocates' Rules, 1926, containing, inter alia, Regulations for the Foreign Advocates' Examination. These Regulations, however, do not affect the question of the admission of women to examinations.

From the Sections quoted it is clear that it is the Legal Board and not the Chief Justice upon whom the duty of examining applicants for licences is laid and in the absence of any rule it is for the Legal Board and not the Chief Justice, to determine whether an applicant is or is not to be admitted to the examination.

So far therefore as admission to the Foreign Advocates' Examination is concerned, there does not appear to be any ground for making the Chief Justice a Respondent to this application. The question for granting a licence cannot be made the subject of Petition to this Court by a person who has not yet obtained the necessary qualifications by examination and at this stage therefore we are not called upon to consider whether the exercise by the Chief Justice of his power under Section 7 can be made the subject of an application to this Court or not. As against the Chief Justice no order will issue.

The Legal Board, on the other hand, can be made Respondent upon evidence being submitted as to the manner in which Petitioner alleges that they failed to perform their duty towards her.

The only document, however, filed in support of this petition which emanates from the Legal Board is a letter dated 31st October, 1922. In that letter permission to sit for examination is refused on the ground that it "would be in direct conflict with the instructions of the Home Government".

That letter, however, was written very shortly after the issue of the Palestine Order-in-Council, 1922, which established a constitution for Palestine and two years before the establishment of the Courts.

At that time it was not so generally recognised as it is at present that "the instructions of the Home Government" have not the force of Law in Palestine except in so far as they are embodied in a formal legislative instrument. The instrument to which reference is to be made in the present case is the Advocates' Ordinance, 1922, which must be presumed to embody the

views of the "Home Government" since its enactment had not been disallowed. It has been stated in argument that the Petitioner has recently renewed her application to the Legal Board. We think that before any Order is issued the Petitioner should file evidence that the Legal Board maintains the view that upon the proper interpretation of the Advocates' Ordinance she is not entitled to present herself for examination.

Delivered the 3rd day of April, 1929.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 22/31.

BEEORE:

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

IN THE CASE OF:

Ibrahim Ibn Rahim El-Oufi — APPELLANT.

vs

Keren Kayemeth Le-Jsrael — RESPONDENT.

Decision of High Court followed by Land Court—Judgment of High Court held binding on Court of Appeal and all inferior Courts.

Appeal from the judgment of the Land Court of Nablus dated the 7th May, 1931.

JUDGMENT.

The judgment under appeal was given by the Land Court of Nablus in accordance with the judgment of the High Court in Saleh Ibrahim Oufi and Others vs Chief Execution Officer, Nablus and Others, High Court No. 25/30.

The Appellant argues that decisions of the High Court do not bind the Land Court or the Court of Appeal.

This is a view that cannot be accepted. The judgments of the Supreme Court sitting as a High Court of Justice bind the Supreme Court sitting as a Court of Appeal and all inferior Courts.

The appeal is dismissed.

Delivered the 19th day of November, 1931.

HIRE-PURCHASE.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 34/31.

BEFORE:

The Chief Justice, the Senior Puisne Judge and Frumkin, J.

IN THE CASE OF:

Barclays Bank
(Dominion, Colonial & Overseas) APPELLANT.

vs

Jaffa Iron Works, Ltd. RESPONDENTS.

Declaratory judgment of District Court as to ownership of machinery—Machinery sold under agreement providing that property remain in sellers until instalments paid in full—Right to pledge property of third person—Effect of bill given in satisfaction of indebtedness being replaced by new bill—Payment for goods by bill held to be conditional payment.

JUDGMENT.

This is an appeal against a judgment of the District Court, Jaffa, whereby the Respondent Company, The Jaffa Iron Works, Ltd., was declared to be the owner of certain machinery which was delivered by the Respondent to the firm, Awad Habbab et Fils, third party to the action, under an agreement dated 24th December, 1925.

The Appellant, Barclays Bank (Dominion, Colonial and Overseas), to which the machinery was pledged by the third party in June, 1927, claims to have the judgment set aside and a declaration made that the pledge to the Appellant be given priority over the alleged rights of the Respondent.

The agreement between the Respondent and the third party provided for payment of the price by instalments, for which bills were given, and Clause 9 of the agreement provided that:

"The Motor engine and all parts delivered by the first party (Respondents) shall remain their property until all the price thereof is paid, the second party has not right to sell, lease, or give it to anybody. Should the second party fail to comply with the foregoing condition or use the same in any other way, he shall be liable nnder Article 236 of the Ottoman Penal Code."

It is clear therefore, that until payment of the purchase

money in full, the third party could not make valid pledge of the machinery.

The Appellant contends that the bills originally given in payment of the instalments of purchase money have been renewed and that it is the fresh bills given in substitution for the original bills that are now outstanding. The Appellant argues that the fact that the original bills have thus been replaced by fresh bills constitutes satisfaction of the debts due under the original bills. This is a view which cannot be accepted.

The general rule is that payment by bill is only conditional payment, and this is not affected by the fact that a bill on falling due has been renewed.

It is further alleged that some of the bills have been negotiated with the Anglo-Palestine Bank, Ltd.

This, however, is immaterial so long as some of the bills remain due and owing to the Respondent.

From the statement filed in this Court by the Respondent it appears that bills for LE.376.650 and LE.265.920 are still unpaid and in the Respondents' hands.

It follows that the Respondents are still the owners of the machinery, and that as against them the pledge in favour of the Appellant is invalid.

The appeal must therefore be dismissed.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 66/31.

BEFORE:

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

IN THE CASE OF:

Hamawerk (Kaltenbach, Frank Wagner) APPELLANTS.

vs

Haj Houssein Abou Sara
Muhammad Haj Naser Hussein RESPONDENTS.

Sale of machine—Property reserved to seller until bills given for payment are paid in full—Chattel seized for non-payment of purchase price—Action to establish ownership of machine—Sale by possessor of machine owned by third party held invalid—Property retained although possession parted with.

Appeal from the judgment of the District Court of Nablus dated 29th March, 1931.

JUDGMENT.

By virtue of an agreement dated 19th July, 1929, and made between the Appellant of the one part and Abdel Jaber El Omar of the other part, Appellants sold to Abdel Jaber El Omar a motor, the subject matter of this appeal.

By virtue of Article 9 of the said agreement, it was agreed that:

> "The property in the said motor should be reserved to the seller until such time as the bills given in settlement or the value thereof had been paid in full".

Abdul Jaber El Omar failed to meet the bills (the agreed consideration for the motor) in accordance with the contract, and Appellants suing upon them obtained two separate judgments for the sums of LP.50 and LP.250 respectively. On the 16th October, 1930, the said motor was seized in satisfaction of the before mentioned judgment debts.

The present Respondents allege they bought the said motor from Abdul Jaber El Omar on 7th October, 1930, and raised an action in the Nablus District Court requesting that the motor be released from the attachment effected by the Appellants.

The Nablus District Court after holding in an interlocutory judgment that Section 9 of the agreement for sale was valid, in their final judgment presumably reversed this interlocutory decision and found that the sale by Abdul Jaber El Omar to Respondents was a valid sale and ordered the release of Appellants' attachment of the motor.

From this judgment Appellants now appeal.

We are satisfied that Clause 9 of the original sale agreement is a valid and legal agreement and that Appellants by virtue of the said Clause retained the dominion or ownership of the motor, and therefore Abdul Jaber El Omar was never in a position nor had he any right or title to sell the said motor, he at no time being vested with ownership in the said property. Accordingly, the purported sale to Respondents was null and void.

Therefore, the appeal must be allowed and the judgment of the Lower Court quashed, and the Respondents' original action dismissed with costs.

Respondents are to pay the costs of this appeal, together with advocate's fees assessed at LP. 3.

Delivered the 11th day of February, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 15/32.

BEFORE:

The Chief Justice, the Acting Senior Puisne Judge and Frumkin, J.

IN THE CASE OF:

The Singer Company — APPELLANT.

vs

Shimon Herbstein

Haim Grobman — RESPONDENTS.

Sewing machine purchased on instalment agreement destroyed—Liability of purchaser for destroyed machine—Property retained although possession parted with.

Appeal from the judgment of the District Court of Haifa, dated the 10th March, 1931.

JUDGMENT.

The Court holds that under Section 3 of the contract entered into in Hebrew by the parties, the Respondents are liable for the value of the machine which was destroyed.

The judgment of the District Court confirming that of the Magistrate's Court is therefore set aside and we remit the case to the Magistrate's Court for completion of the case.

Delivered this 17th day of June, 1932.

In the District Court, Jerusalem.

C.D.C. Jm. No. 78/32.

BEFORE:

De Freitas, J. and Plunkett, J.

IN THE CASE OF:

Awad — PLAINTIFF.

vs

The Syndic in Barsky's Bankruptcy — DEFENDANT.

Hire-purchase agreement for two machines—Return of machines claimed on failure to pay instalment due under hire-purchase agreement—Property in machine retained although possession parted with.

JUDGMENT

This case depends upon the construction of an agreement dated the 15th July, 1929, between the Plaintiff and Mr. George Barsky who has been adjudged bankrupt by this Court. In accordance with the terms of the said agreement the Plaintiff supplied two machines to the bankrupt. The bankrupt at the commencement of the bankruptcy, has committed a breach of contract by not paying for the machines according to the terms of the contract. The Plaintiff is now claiming the return of the machines.

Now, we are of opinion that there is no provision in the law of Palestine which debars persons from entering into an agreement in the terms of the agreement of the 15th July, 1929, on which the Plaintiff bases his claim. The language of the agreement is very clear and there is nothing in the agreement inconsistent with the expressed intentions of the parties that the property in the machine should remain in the Plaintiff's possession until the purchase price is paid.

It seems abundantly clear to us that the property in the machines did not pass to the bankrupt, and it has never been suggested that the Syndic can succeed to greater rights in the machines than the bankrupt possessed. It is true that there is no provision in the agreement giving the Plaintiff the right to resume possession of the machines; but in the circumstances we are of opinion that the Plaintiff is entitled to resume possession of his property.

We, therefore, order the Defendant to return the two machines (described fully in the statement of claim) to the Plaintiff and to pay the Plaintiff's costs and advocate's fees assessed at LP.3.

HOLY PLACES.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 53/32.

BEFORE :

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

IN THE CASE OF :

Aziz Daumat — APPELLANT.

vs

Shoghi Rabbani — RESPONDENT.

Cause or matter in connection with Holy Places—Question to be referred to High Commissioner for decision—Art. 3, Palestine (Holy Places) Order-in-Council, 1924.

JUDGMENT.

A question has arisen whether this action is a "cause or matter in connection with the Holy Places or religious buildings or sites in Palestine".

It follows that under Article 3 of the Palestine (Holy Places) Order-in-Council, 1924, such question must be referred to the High Commissioner for decision.

The judgment of the Land Court to this effect is affirmed.

We hold, however, that the Land Court was wrong in dismissing the action pending the issue of the High Commissioner's decision to that effect.

The appeal is therefore set aside, and the case remitted to the Land Court to proceed therein in accordance with the High Commissioner's decision.

Costs will follow the event.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 2/33.

BEFORE :

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

IN THE CASE OF :

Subhi Khadra — APPELLANT.

vs

Rt. Rev. Bishop Hajjar — RESPONDENT.

Meaning of "Holy Place"—Allegation by party to action that land in dispute is Moslem cemetery—Necessity of instructions from High Commissioner—Courts prohibited from hearing actions involving ownership of "Holy Place"—Arts. 2, 3, Palestine (Holy Places) Order-in-Council, 1924.

JUDGMENT.

The present Appellant in claiming the ownership of land, the subject matter of this appeal, alleges that it is a Moslem cemetery. The Respondent argues that it is a cemetery, but at the same time objects to the jurisdiction of the Land Court, alleging that a cemetery is a "Holy Place" within the meaning of Article 2 of the Palestine (Holy Places) Order-in-Council, 1924, and that accordingly the Courts of the country are prohibited by virtue of the said Article from hearing or determining a cause or matter in connection therewith.

The Land Court held that:

> "The land was in fact used as a burial ground and therefore was a Holy Place or religious site within the meaning of the said Order-in-Council, and that accordingly they had no jurisdiction to hear the case and the Plaintiff was at liberty to apply to His Excellency the High Commissioner to designate the Court which he will choose for the determination of the case".

Now this Court in Land Appeal No. 52/32 Aziz Daunat vs Shoghi Rabbani decided that where a question arises whether an action is a cause or matter in connection with the Holy Places or religious buildings or sites in Palestine such question must by virtue of Article 3 of the Palestine (Holy Places) Order-in-Council, 1924, be referred to the High Commissioner for decision and that pending the issue of the High Commissioner's decision the action should not be dismissed.

In accordance with the said decision, we hold that the Land Court was wrong in dismissing the action pending reference to the High Commissioner, and the issue of his decision thereon, and the order of the Land Court to that effect is, therefore, set aside and the case is remitted to the Land Court to proceed therein in accordance with Section 3 of the beforementioned Order-in-Council of 1924, and in accordance with the High Commissioner's decision.

Costs will follow the event.

Delivered the 15th day of March, 1934.

HUSBAND AND WIFE.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 176/26.

BEFORE:

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

IN THE CASE OF:

Joseph Calandra	APPELLANT.
vs	
Mrs. J. Calandra	RESPONDENT.

Application of Italian national for decree of separation and custody of child—Husband and wife—Desertion of husband by wife—Proof of foreign law—Right of father to custody of his child—Arts. 154, 220, Italian Civil Code—Considerations in determining custody of child.

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa refusing the Appellant's petition for a decree of separation from the Respondent and the custody of the child of the marriage.

It is admitted that the Respondent has deserted the Appellant, but the Court has held that the Appellant's conduct justified the Respondent in deserting him.

It is argued for the Appellant that in order to justify desertion, the Respondent must prove such conduct on the part of the Appellant as would entitle her to a decree of separation, and this she failed to do in the action previously brought by her for alimony.

The passages from the Italian Civil Code which have been cited to us appear to support this contention, and the Respondent now admits that the Appellant is entitled to his decree.

We have therefore only to consider the question of custody.

So long as no decree of separation has been made the father is entitled to the custody of his child. Italian Civil Code, 220.

Upon making an Order for separation, however, the Court acquires jurisdiction under Section 154 of the Italian Civil Code to make an Order as to custody,

The District Court appears to have held that the fact that the child was of tender years was sufficient to decide the question of custody in favour of the mother.

We are of opinion that the matter does not admit of so simple a solution.

Although we have had the assistance of an assessor from the Italian Consulate-General, who has directed our attention to the relevant parts of the Italian Civil Code, we are not satisfied that merely from perusal of those sections, and without evidence as to the practice of the Italian Courts, we can arrive at any conclusion as to the manner in which this question is to be decided.

On the one hand it would appear that the father, who would have been entitled to custody if no decree of separation were made, should not be deprived of his right on being granted a decree in consequence of his wife's desertion.

It may be, however, that the welfare of the child is the paramount consideration; and that in deciding this question, an Italian Court would take into consideration not only the characters of the parents but also their respective financial positions.

Again, it may well be that account should be taken of the fact that the parents are now of different religious communities.

We hold, therefore, that the Court should hear evidence as to the principles which govern a decision as to custody in Italian Law, and should give judgment accordingly.

The question whether the party found not to be entitled to custody of the child has any right of access has not been raised.

The judgment of the District Court is set aside.

The Appellant is granted a decree of separation against the Respondent.

On the question of custody the case is remitted to the District Court for determination in accordance with this judgment.

One half of the costs of this appeal will be paid by the Respondent. The remainder will be subject to the Order of the District Court on determination of the question of custody.

Delivered the 29th day of April, 1927.

IMMIGRATION.

In the High Court of Justice.

H.C. No. 43/26.

BEFORE:

The Chief Justice and Corrie, J.

Application for stay of execution of deportation order—Sec. 8 (1) (f), Immigration Ordinance, 1925—Mandatory order to public officer—Right of High Commissioner to expel alien from Palestine—Arts, 18, 69, Palestine Order-in-Council, 1922.

JUDGMENT.

This is a petition made by a foreign subject for an order to issue to the Commandant of Police requiring him not to proceed with the execution of an order made by the High Commissioner for deportation of the Petitioner.

The Order has been made under Section 8 (1) (f) of the Immigration Ordinance, 1925, which enables the High Commissioner or any officer authorised by him to require a foreigner to leave Palestine if the High Commissioner deems such action to be conducive to the public good and authorises such order to be followed by expulsion from the territory if necessary.

The Petitioner pleads that the Order-in-Council of 1922 by Article 69 has laid down the conditions under which a person, whether native or foreign, may be expelled by order of the High Commissioner and that the authority conferred by the Ordinance of 1925 is in excess of and consequently repugnant to, or in conflict with, the terms of the Order-in-Council and that the Ordinance is so far invalid, and that an order made under it cannot be supported.

Whether an alien has the right to insist on remaining in this country against the will of the executive authority acting under statutory powers and to require a Court of Justice to decide on the validity of an Ordinance is a large question which we may fairly avoid because the more narrow issue is not a difficult one.

It is not contested that the sovereign power may decide what aliens it will retain in its hospitality, and no alien can successfully impose himself on an unwilling host. The King in Parliament makes Laws for the exclusion and deportation of aliens and in regard to Palestine he may and does legislate directly in the

Privy Council, and has in Article 69 of the Order-in-Council, 1922, given to the High Commissioner a power to deport aliens together with Palestinians for certain purposes relating to good government and public security. He also, by the same Order (Article 18), enabled the High Commissioner with the advise of a Legislative Council to make such Ordinances as might be necessary for the peace, order, and good government of Palestine. The powers conferred by Article 69 of the Order of 1922 are conferred directly by the King in Council together with other powers considered to be of primary necessity or utility so as to be at the disposal of the High Commissioner on his assuming office. Further powers were obtainable by means of Ordinances for the making of which he would require the cooperation of a Legislative Council, subject to the right of disallowance retained by the King. A further Order of May, 1923, substituted an Advisory for a Legislative Council.

There is no authority for the proposition that wherever the Order-in-Council has dealt with a certain subject matter and conferred on the High Commissioner certain powers by direct legislation, further powers may not be acquired if necessity or utility of Government requires, by way of Ordinance. We find no authority for the contention that the extended powers contained in the Ordinance of February, 1925, are in conflict with the Instrument of Government because they are extended powers, and not the same powers as those already conferred by that Instrument.

The only argument therefore on which the Petitioner can base his claim to resist the Order of the High Commissioner, fails, and the petition must be dismissed.

In the High Court of Justice.

H.C. No. 29/27.

BEFORE:

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

IN THE APPLICATION OF:

Antoine Francis Kattaneh — PETITIONER.

vs

Controller of Permits — RESPONDENT.

Application for order enforcing issue of passport—Discretion of High Commissioner to grant or withhold travel documents—Refusal of Court to express obiter opinion—Sec. 3 (2) Passport Ordinance, 1925.

ORDER.

This is an application for an Order to the Controller of Permits to show cause why he should not be directed to issue a Palestinian Passport to the Petitioner.

We are satisfied that the application must be dismissed since the Controller of Permits is not by law invested with the power to issue passports, and the High Commissioner, who is so invested, is by Section 3 (2) of the Passport Ordinance given an absolute discretion to grant or withhold such travel documents.

A misconception may have arisen in the mind of the Petitioner through the fact that the letter of 3rd April, 1927, by the Acting Chief Immigration Officer was written in a strain suggesting that the discretion was vested in the Chief Immigration Officer and not, as it seems to us wold have been more correct, "by direction."

We have been asked by the Government Advocate to stray outside the short point on which we have decided this case and express an opinion, which he admits would be obiter, on the merits of the refusal, which he suggests would be a useful guide for the Permits Section.

We must decline to assent to this proposition which amounts to a request to us to usurp the functions of the Law Officers of the Crown, upon whose advice and opinions as to the law, departments of Government should act unless and until contrary decisions have been given on the merits of cases arising before the Courts.

So also must we decline to agree to the request of counsel for Petitioner to amend the application, for Petitioner is at liberty on paying the prescribed fees to file new petitions in the sense of his proposed amendments.

Delivered the 1st day of July, 1927.

In the Supreme Court sitting as a Court of Appeal.

CR.A. No. 57/27.

BEFORE:

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

IN THE CASE OF:

Mahmud ben Muhammad Awad El-Masri,
Muhammad Ibn Muhammad Shata,
Hassan Hassan Abu Samra,
Hassan Hussein Baya
Badr Khalil Abu Rissass — APPELLANTS.

vs

The Attorney-General — RESPONDENT.

Accused persons sentenced by District Court and ordered deported—Court entitled only to recommend High Commissioner to order deportation — Sec. 8 (1) (a) Immigration Ordinance, 1925—Palestinian citizen not to be deported.

JUDGMENT.

The conviction and sentence are confirmed, except that part running "Nos. 1 to 4 to be deported at expiration of sentences". Vide terms of Sec. 8 (1) (a) of Immigration Ordinance, 1925, by which the Court can only recommend the High Commissioner to make an Order of deportation.

Prisoners 1 to 4 to be brought up again for the Court to hear what the Government Advocate has to say as to whether these convicts are Palestinian citizens, since if so, such recommendation cannot be made.

Delivered the 14th day of September, 1927.

In the High Court of Justice.

H.C. No. 77/28-

BEFORE:

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

IN THE APPLICATION OF:

Yacoub Palevitch — PETITIONER.

vs

The Chief Immigration Officer — RESPONDENT.

Refusal by Chief Immigration Officer to grant certificate of naturalisation—Absence of applicant's wife from Palestine—Jurisdiction of High Court to hear application against public officer—Art. 7, Mandate—Facilitation of acquisition of Palestine citizenshtp by Jews—Qualifications for Palestinian citizenship—Art. 7 (1) Palestine Citizenship Order, 1925—Wife of Palestinian citizen deemed to be Palestinian citizen.

JUDGMENT.

The Petitioner in this case has obtained a Rule Nisi against the Chief Immigration Officer to appear and show cause why an Order should not issue directing him to proceed with Petitioner's application for naturalisation.

The Petitioner applied for naturalisation on the 10th January, 1927. On 3rd December, 1927, according to Petitioner's application, his wife left for Italy and is not expected to return to this country for two years. On the 16th December, 1927, the Petitioner received from the Immigration Officer at Haifa a letter stating:—

> "With reference to your application dated 10.1.1927, I have to inform you that as your wife was granted an Emergency Certificate for travel to Italy on 3.12.1927, your application for naturalisation will not, therefore, be proceeded with until your wife's return to Palestine."

By Article 23 of the Palestine Citizenship Order, 1925, the powers of the High Commissioner under that Order with certain exceptions may be exercised by a person acting under the authority of the High Commissioner. On the 14th September, 1925, the High Commissioner authorised the Controller of Permits Section to exercise any of the powers conferred upon the High Commissioner by the said Order with certain exceptions. These exceptions did not include Article 7 (3), which runs:—

> "The grant of a certificate of naturalisation shall be in the absolute discretion of the High Commissioner, who may, with or without assigning any reason, give or withhold the certificate as he thinks most conducive to the public good; and no appeal shall lie from his decision."

We are satisfied that the discretion is now vested in the Chief Immigration Officer who legally stands in the shoes of the Controller of Permits Section, and we hold that an application of this sort, when the Controller of Permits Section has assigned a reason for his refusal of a certificate, concerning the validity of the exer-

cise of his discretion, is not an appeal in the sense of Article 7 (3), and can be properly heard by the High Court.

The arguments addressed to us by Mr. Joseph on the interpretation of Article 7 of the Mandate, which were, in effect, that the occurrence therein of the words "so as to facilitate the acquisition of Palestinian citizenship by Jews", means that every facility must be given to all Jews to acquire Palestinian citizenship, appears to us to lose sight of the meaning of the whole Article. The Article is concerned with the enactment of a nationality law in which, so says this Article of the Mandate, there are to be included provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine. This has been done by the passing of the Palestine Citizenship Order, 1925, in which there are embodied, in Article 7 (1), a number of qualifications which are required before the High Commissioner may grant a certificate of naturalisation. These qualifications comprise:—

(1) A term of two years' residence in Palestine.
(2) Good character.
(3) Knowledge of one of the three official languages.
(4) Intention to reside in Palestine.

Those are the necessary qualifications, and only one of them, namely, the previous residence of two years, can be waived by the High Commissioner in any special case under Section 7 (5), while under Section 7 (3) it is in his absolute discretion to give or withhold the certificate as he thinks most conducive to the public good.

It will be noticed, therefore, that under Article 7 of the Mandate, the intention to take up permanent residence in Palestine is a sine qua non in the case of those Jews whose acquisition of Palestinian citizenship is to be facilitated, and Article 7 (1) (c) of the Palestine Citizenship Order, 1925, reasserts the intention to reside in Palestine as a condition to the grant of a certificate.

Now, by Article 12 (1) of the Palestine Citizenship Order, the wife of a Palestinian citizen shall be deemed to be a Palestinian citizen. The wife of the Petitioner in this case proceeded to Italy shortly before the refusal of the Petitioners' application and her return to Palestine is a condition which the Chief Immigration Officer requires before the grant to her husband of the certificate, which will have the effect of conferring upon her Palestinian citizenship.

I do not think it can be said that the exercise of this discretion has been arbitrary, vague, fanciful or capricious.

In my opinion, the refusal has been for substantive reasons and on judicial grounds, and for this reason I hold that the Order should be discharged with £P.2 costs,

Delivered the 28th day of February, 1929.

In the High Court of Justice.

H.C. No. 28/30.

BEFORE:

The Senior Puisne Judge and De Freitas, J.

IN THE CASE OF:

Lea Sheindel Brandstetter PETITIONER.

vs

Chief Immigration Officer, Jerusalem RESPONDENT.

Petitioner refused permission to enter Palestine although in possession of return visa—Return visa held not to be permission to re-enter—Section 5, Immigration Ordinance, 1925 — Person unsuitable for admission into Palestine.

Application for an Order to issue to the Respondent to show cause why an Order should not be given directing him to permit the Petitioner and her child to enter Palestine.

JUDGMENT.

Section 5 of the Immigration Ordinance, 1925, provides that: "No person other than a Palestinian Citizen shall enter Palestine except by permission of the Chief Immigration Officer", but that claim has now been withdrawn. What she now claims is that she is a "permanent resident" in Palestine; that before leaving Palestine temporarily she obtained permission to return in the form of a return visa available for one year; and that reading Section 5 of the Immigration Ordinance and Regulation 3 of the Regulations made under the Ordinance together, the Chief Immigration Officer has now no authority to prevent her from entering the Territory.

The Immigration Regulations, 1925, were by Section 11 of the Ordinance made part of the Ordinance; and it may be that the effect of Regulation 3 as then framed was that a permanent

resident in Palestine could obtain the permission of the Chief Immigration Officer to re-enter the Territory before leaving it temporarily.

Regulation 3, however, has been repealed by Section 2 of the Regulations made on November 29th, 1927, and published in Official Gazette No. 200 on 1st December, 1927, and replaced by a Regulation in the following terms:

> "1. Every permanent resident, not being a Palestinian citizen, shall, if he leaves Palestine for any purpose but intends to return there, obtain before departure a return visa from the Chief Immigration Officer, and such visa may be granted or withheld at the absolute discretion of the High Commissioner.
>
> 2. Every permanent resident, not being a Palestinian citizen, who, having left Palestine without complying with paragraph 1 of this Regulation, desires to return thither, shall apply to the Chief Immigration Officer either direct or through a British Consul or Passport Control Officer for a return visa; and the Chief Immigration Officer shall, if he sees no reason to the contrary, authorise the British Consul or Passport Control Officer to grant the return visa on payment of the fees prescribed by Regulation under the Passport Ordinance, 1925".

Under this amended Regulation what a permanent resident can obtain before leaving Palestine is not a permission to re-enter but merely a return-visa. An inspection of the Petitioner's passport shows that a return visa is what she in fact obtained.

The extension of the visa granted by the British Consul-General, Vienna, clearly does not give the Petitioner any greater privilege than was granted to her by the original return-visa.

Such a return-visa does not place the person to whom it is granted in any better position than any other recipient of a visa for Palestine; and she is still subject to the necessity of obtaining the permission of the Chief Immigration Officer to enter the Territory, as provided by Section 5. That Section prescribes certain conditions which limit the Chief Immigration Officer's discretion; it provides (inter alia) that

> "such permission shall not be granted to any person to whom this Ordinance applies who—
>
> (e) is deemed by the High Commissioner, from information officially received by him, to be an unsuitable person for admission into Palestine . . ."

In the case of the Petitioner the High Commissioner has made a declaration under this provision which is contained in a letter dated 15th March, 1930, numbered 14821, written by the Chief Secretary to the Commandant of Police and communicated to the Chief Immigration Officer.

Accordingly the Chief Immigration Officer had no alternative but to refuse to grant the Petitioner permission to enter Palestine.

The petition must be dismissed.

Delivered the 17th day of April, 1930.

INJUNCTION.

In the High Court of Justice.

H.C. No. 49/25.

BEFORE:

The Chief Justice and the Senior British Judge.

IN THE CASE OF:

J. L. Penhas — APPELLANT.

vs

Pessach Felam
Dov Weiman — RESPONDENTS.

Failure to comply with injunction order granted by District Court—Sec. 5, Contempt of Court Ordinance, 1924—Injunction held to be form of order known to Ottoman law—Art. 46, Palestine Order-in-Council, 1922—Arts. 1197, 1212, Mejelle—Necessity for importation of English law—Remedy for non-compliance with Order of Court pending appeal—Sec. 21 (b), Courts Ordinance, 1924—Injunction under Sec. 23 (7), Trade Marks Ordinance, 1921.

Appeal from the judgment of the District Court of Jaffa dated 16th July, 1925, whereby the Appellant was convicted under Section 4 of the Contempt of Court Ordinance, 1924.

JUDGMENT.

The Petitioner has been found guilty of contempt of Court on the ground that he failed to comply forthwith with an order of the District Court prohibiting him from continuing to build upon the house leased by him to Messrs. Felam and Weiman.

The defence set up by the Petitioner is that the District Court did not order provisional execution of its judgment pending

appeal that no notice of appeal against the judgment of the District Court had been given, and consequently that the Petitioner was not bound to comply with the judgment until it had been affirmed by the Appellate Court and notification to that effect had been served upon him in due course of execution.

For the Respondents to the Petition Messrs. Felam and Weiman, in whose favour the judgment of the District Court was given, it is argued that the order was an injunction; a form of order unknown to the Ottoman Code of Procedure, and with regard to which it was therefore necessary under Article 46 of the Palestine Order-in-Council, 1922, to apply the English procedure and practice.

The argument might be accepted if it were the fact that in Ottoman Law a Court could not make an order prohibiting a party from doing a specific act.

Such however, is not the case. The Ottoman Law does empower the Courts to give such order.

The general authority to issue orders in the nature of injunctions as regards uses of Mulk property is contained in Article 1197 of the Mejelle; and the Articles 1198 to 1212 contain specific instances in which this power is to be applied as between neighbouring owners.

Such being the fact, there is no occasion to import any procedure of English law.

It is true that the provisions of Articles 130 and 131 of the Civil Procedure Code which afford a means of executing a judgment pending appeal, do not apply to immovable property and it would appear that as regards immovable property the Ottoman Law does not provide a method of enforcement pending appeal of an order to refrain from doing a certain act.

The petition as regards immovable property is that apart from the special power of ordering execution of a judgment of a Land Court pending appeal conferred upon the President of the Land Court by Rule 9 of Rules of Court, Land Courts, issued on 15th May, 1921, in any case in which an order has been made prohibiting the doing of a certain act, the remedy for non-compliance pending appeal is to be found in damages for which the Appellant is bound to give security.

That a modification of this rule is contemplated in the Courts Ordinance, 1924, appears from the fact that under Section 21 (b) power is conferred upon the Chief Justice with the concurrence of the High Commissioner to make rules for (among other matters)

"Injunctions and the appointment of Receivers". No rules for this purpose have yet been made, and until this is done the remedy by way of injunction by the District Court can only be executed in accordance with the procedure of Ottoman Law.

It does not affect the position that by Section 23 (7) of the Trade Marks Ordinance, 1921, the Court was given power to grant an injunction against a repetition of any offence committed under the article.

There was at the time no provision corresponding to Article 46 of the Palestine Order-in-Council 1922, and it must have been intended that the Court in proceeding under that Section should apply the Ottoman Procedure, exercising its power under Articles 130 and 131 of the Civil Procedure Code if necessary.

It follows that the act of the Petitioner in continuing to build pending the hearing of his appeal, while it may involve a liability in damages if his appeal is unsuccessful does not constitute a contempt of Court. The petition must therefore be allowed and the order of the District Court set aside.

Delivered in presence of Petitioner the 1st day of September, 1925.

In the High Court of Justice.

H. C. No. 32/27.

BEFORE:

The Acting Chief Justice and Frumkin, J.

IN THE CASE OF:

The Anglo-Palestine Co., Ltd. APPELLANT.

vs

The District Commissioner and
Police Inspector Duff. RESPONDENTS.

Barrier erected by owner across private road — Barrier ordered by District Commissioner to be removed — Injunction obtained against District Commissioner and Inspector of Police.

Application for an order to issue to Respondents to show cause why an order should not issue restraining them from interfering with any barrier placed on the authority of Petitioner and others on a part of property used as a road connecting the Suburb of Talpioth with the Jerusalem Bethlehem Road.

ORDER.

The Court upon hearing Mr. Samuel on behalf of Petitioner it is hereby ordered as follows: that Mr. Keith-Roach, District Commissioner, Jerusalem, and Police Inspector Duff do appear before this Court if they so wish, to show cause why an order should not issue restraining them from interfering with any barrier placed on the authority of the Petitioner and being on that part of the property of the Petitioner which is used as a road connecting the Suburb of Talpioth with the Jerusalem-Bethlehem Road.

That pending the further hearing of this application Respondents do refrain from interfering with any such barrier placed.

That notice of this application and order be given to the Attorney-General.

That the return day for further hearing and final determination of this application be the 6th of May, 1927.

Given the 21st day of April, 1927.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 73/28.

BEFORE:

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

IN THE CASE OF:

The Mayor of Nablus — APPELLANT.

vs

Kamil Yamin — RESPONDENT.

Trespass on land — Land Court held incompetent to issue injunction to restrain trespass — Land Court to adjudicate on question of ownership — Objection to Inspection Report to be made at trial, not on appeal.

JUDGMENT.

The proper form of judgment in favour of a Plaintiff in an action in the Land Court is a declaration that, as against the Defendant, the Plaintiff is entitled to the land in dispute and to be so registered, on payment of the prescribed fees, if he is not already on the register as owner. It is not for the Land Court to issue an order restraining the unsuccessful party from trespassing on the land.

The judgment of the Land Court is, therefore, amended by substituting therefor a declaration that the Respondent is entitled, as against the Appellant, to be registered, on payment of the prescribed fees, as owner of the land in dispute.

The objection now made to the Inspection Report was not taken in the Land Court, and hence cannot now be considered.

The appeal is dismissed with costs, including £P. 1 expenses.

Delivered the 11th day of March, 1929.

In the Land Court of Jaffa.

L. A. Ja. No. 4/30.

IN THE CASE OF:

Ibrahim Hassan Makki — PLAINTIFF.

vs

Mohamed Saleh Darwish Najjar — DEFENDANT.

Claim for injunction to prevent unlawful interference with land — Possession of land under agreement of muzaraa—Arts. 1587, 1588, 1651, Mejelle — Art. 69, Code of Civil Procedure.

JUDGMENT.

The Court holds that whereas Defendant admitted in plain words before the Magistrate's Court that Plaintiff is the owner of the Karm sued for by stating textually that the Karm in suit is in his possession under an agreement of Muzaraa with Plaintiff for a period of ten years on the understanding that one half thereof will be his property after the plantation of trees, the Plaintiff cannot recall what he has already admitted nor claim the ownership of the land involved or paid down, on Sections 1587, 1588, 1651 of Mejelle and 69 of the Code of Civil Procedure.

The Court, therefore, decides that in so far as Defendant is concerned Plaintiff is the actual reputed owner of the Karm in suit and accordingly Defendant is ordered to refrain from interfering with Plaintiff in respect of the land sued for.

The Court also holds:—

That if Defendant has any right to the land in question under the contract of cultivation entered into with Plaintiff, as pleaded in the Magistrate's Court (although he had not put forward such a claim before this Court as he confined his defence to the ownership of the land), that the Defendant, however, may

substantiate such right if he so desires by suing for the expenses incurred on the land and for any other damages and remedies he likes before the competent Courts.

Defendant is ordered to pay costs and one Pound towards advocate's fees.

Judgment in presence and capable of appeal.

Delivered the 5th day of November, 1929.

In the High Court of Justice.

H.C. No. 57/32.

BEFORE:

The Chief Justice and Frumkin, J.

IN THE APPLICATION OF:

Jacob Hasid — PETITIONER.

VS

The Returning Officer of the Electoral Committee of Ramat Gan,
The Chairman of the Electoral Committee of Ramat Gan — RESPONDENTS.

Petitioner's name omitted from voting list—Application for injunction against Electoral Committee—Injunction against Electoral Committee requested two days before election day refused—Effect of laches.

Application for an Order to issue to the Respondents directing them to show cause why they should not insert the name of Petitioner in the list of electors.

JUDGMENT.

The application is on a matter of fact which it is possible might have been listened to by us if the Petitioner had taken the necessary steps within a reasonable time. He applied to the Electoral Committee on June 30th, the last day. They replied on the 3rd and the Petitioner lodged his affidavit on July 15th and he comes within two days of the election day and asks for an injunction.

A Rule Nisi without an injunction would be worth less to Petitioner.

In the circumstances of the Petitioner's delays, we decline to grant an injunction and for this reason we dismiss the petition.

Delivered the 18th day of July, 1932.

In the High Court of Justice.

H.C. No. 99/32.

BEFORE:

The Senior Puisne Judge and Khaldi, J.

IN THE APPLICATION OF:

Yitzhaq Raym,
Abraham Ben Zeev,
Israel Mehulal,
Zvi Pirkess,
David Kurzweil,
Eliyahu Mizrachi PETITIONERS.

vs

Hadar Hacarmel Co-operative Society Ltd. RESPONDENTS.

Water supply discontinued by Co-operative Society—Jurisdiction of High Court to grant injunction to restrain threatened injury—High Court not to interfere where remedy is in Petitioners own hands—Art. 46, Palestine Order-in-Council, 1922—Who is public body within meaning of Sec. 6 (2), Courts Ordinance, 1924—Art. 1197, Mejelle—Jurisdiction of District Court to grant injunction.

JUDGMENT.

The relief which the Petitioners in this case are seeking is expressed by them in the following terms:—

"Your Petitioners therefore humbly pray that an Order Nisi be issued calling upon the Hadar Hacarmel Co-operative Society Ltd. to show cause:—

(1) Why they should not charge the same price for water to those who do not pay as to those who pay the house and other taxes unlawfully levied.

(2) Why they should not be restrained from levying house or other duties on members of the Society.

(3) Why they should not be restrained from cutting off the water or threatening to cut off the water from the houses of those who refuse to pay the said duties."

As regards the first and second paragraphs, it is open to the Petitioners to refuse to pay for water at a higher rate than other consumers and to refuse payment of "the house and other taxes' which they allege to be "unlawfully levied". The remedy being in the Petitioners' own hands, there is no ground for the issue of an Order by this Court. (See Elliman v. Carrington (1901), 2 Ch., p. 275, at p. 279.

We have therefore only to consider the third paragraph of the Petitioners' application.

The relief that the Petitioners are seeking is an Order in the nature of an injunction to restrain threatened injury, and the question at once arises whether this Court has power to make such an Order.

The Petitioners' argument is twofold.

In the first place they say that District Courts have no power under the Mejelle to issue an injunction save in certain cases: that under Article 46 of the Palestine Order-in-Council, 1922, the Courts of Palestine have the same power to grant injunctions as are exercised by the High Court of Judiciature in England; and that it follows that such powers must, in the absence of Regulations conferring them upon District Courts, be exercisable only by the Supreme Court sitting as a High Court.

Alternatively, the Petitioners argue that even if a general power to issue injunctions is vested in the District Courts, the Respondent Society is a public body within the meaning of Section 6 (2) of the Courts Ordinance, 1924; and accordingly, that jurisdiction to issue an Order against the Respondent in a matter relating to its public duty is vested exclusively in the High Court.

To deal with the first of these contentions: it seems clear, in view of the terms of Article 1197 of the Mejelle, that under Ottoman Law the power of a Court to issue an Order in the nature of an injunction was not limited to the cases expressly mentioned in the Mejelle.

For an Order to issue, however, it was necessary under Article 1197 that the Plaintiff should prove "excessive damage".

It follows that there is no power under this Article to issue an Order in respect of threatened injury; and in so far as the Courts of Palestine have power to issue such an Order, it can only be by virtue of Article 46 of the Palestine Order-in-Council, 1922.

Assuming that the effect of that Article is that the Courts of Palestine can grant a remedy that was not available under Ottoman Law, I am unable to see any ground for holding that the powers conferred by that Article are exerciseable only by the High Court. An injunction against threatened injury is a remedy which might well be sought at the same time and from the same Court as an

Order for payment of damages for injury already inflicted; and there is no reason for holding that the position is different where the application to restrain future injury is not accompanied by a claim for damages.

We have therefore to consider the Petitioners' alternative argument that the subject-matter of this Petition is taken out of the jurisdiction of the District Court by the fact that the Respondent is a public body, and the matter one relating to the performance of its public duty.

The ground upon which it is argued that the Respondent Society is a public body is that it controls the only water supply in the area in which the Petitioners reside, and thus owes a duty to that section of the public which resides in that area.

This argument, however, is open to the objection that the Respondent Society apparently owes no duty to supply water either to the Petitioners or to any other member of the public, except in so far as a contractual obligation to do so has been laid upon it, under its constitution or otherwise.

The Petitioners' right to a supply of water from the Respondent Society arises from the fact that the Petitioners are members of the Society.

This appears to me to be fatal to the Petitioners' claim that Section 6 of the Courts Ordinance applies to the Respondent Society, and we therefore see no ground for holding that the District Court has no jurisdiction.

It follows that this Court has no jurisdiction and the Petition must be dismissed.

Delivered the 7th day of April, 1933.

INSANITY.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 32/28.

BEFORE:

Baker, J., Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Ibrahim Khoury Farah — APPELLANT.

vs

Elias Mitry Iskafy
Hilaneh Farah — RESPONDENTS.

Consent of insane person sought to be inhibited—Jurisdiction of Ecclesiastical Court — Article 54 (ii), Palestine Order-in-Council, 1922—Consent necessary to confer jurisdiction on Ecclesiastical Court in matters of personal status.

JUDGMENT.

We cannot agree that all the parties agreed to the jurisdiction of the Ecclesiastical Court, as prescribed in Article 54 (ii) of the Order-in-Council.

The question before the Ecclesiastical Court was one of inhibition which required the consent of all the parties to give the Ecclesiastical Court jurisdiction. The Appellant in the action was an interested party, in fact the most interested, as the judgment of the Ecclesiastical Court was capable of annulling contracts entered into between Hilaneh and himself.

Hilaneh was undoubtedly a party but if this lady was adjudged to be insane it cannot be argued that she could give her consent.

Accordingly, the District Court has jurisdiction and the case must be remitted to the said Court for the issues in the case to be tried.

Judgment in presence of Appellant and absence of Respondents. Costs of this appeal to be paid by Respondent and advocates' fees allowed at £P.3. Liberty to apply to the lower Court for fees of Appellant's advocate there.

Delivered the 1st day of November, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 42/31.

BEFORE:

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

IN THE CASE OF:

Mohammad Sa'adat Dajani APPELLANT.

vs

Ali Mustakim RESPONDENT.

Third party opposition—Plea of denial of ancestor's signature, or of insanity of ancestor — Experts appointed to examine signatures on bills—Contradictory plea held inadmissible by virtue of Art. 1610, Mejelle—Contradictory plea distinguished from alternative plea—Failure of Trial Court to deal with plea of excessive interest—Arts. 1610, 1642, Mejelle—Art. 63, Civil Procedure Code repealed.

JUDGMENT OF MR. JUSTICE BAKER.

This is an appeal against the decision of the Jaffa District Court given in a third party opposition against a judgment given by the same Court in favour of present Respondent against the estate of the Appellant's father.

The original judgment, which Appellant opposed, was a judgment in favour of present Respondent for the sum of £P. 4592.811 held to be owing on certain bills and a contract drawn in favour of present Respondent and alleged to have been signed by the Appellant's late father.

The grounds of Appellant's opposition were that Appellant's father had not signed the contract and bills; that Appellant's father was of unsound mind at the time the bills were signed, and that there was excessive interest.

The Jaffa District Court, with the consent of both parties, appointed experts to examine the signature on the bills and contract, and these experts, after hearing witnesses, came to the conclusion that the signatures on the bills and contract were in fact the signatures of Appellant's deceased father.

With regard to the plea that deceased was of unsound mind when he signed the said documents, the District Court decided that this was a contradictory plea and was inadmissible in law, having regard to Article 1610 of the Mejelle, and the decision in Civil Appeal No. 93/25,* and heard no evidence in support of the

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* Ante, p. 58

contention; nevertheless, the Court did say in their judgment "the allegation of insanity is not supported by any reliable evidence. The medical reports produced by opposer, even if confirmed on oath before the Court, were given four years after the death of deceased and, furthermore, there is a contradictory evidence about the exact date of the death". The question of excessive interest the Court failed to deal with.

The District Court for the above reasons dismissed the opposition on the 2nd February, 1931. On the 1st of March, 1931, Appellant appealed against the decision whereby his opposition was dismissed on the grounds:—

1. That his witnesses with regard to his plea that deceased was not of sound mind were not heard:

2. Failure to summon the experts on handwriting before the Court so that Appellant might cross-examine them;

3. The failure of the Court to deal with the plea that there was excessive interest.

With regard to the first ground of appeal, Appellant in his original statement of opposition states:—

1. "That he denies that the bills were signed by his father."

2. "The deceased was insane and lunatic, had no control of his senses and was of unsound mind during the ten days preceding his death. Four days before his death he lost his eyesight. The death took place on 3rd January, 1927, and the defendant alleged that the deceased had signed for him the bills in claim on the 29th December, 1926, three or four days before his death, when he had no eyesight and was completely of unsound mind and irresponsible for his acts and words, and in his final pleadings (third para.) Appellant requests that Respondent's original action be dismissed, inasmuch as it is not founded on a legal basis involving liability on the deceased, especially because on the date of the writing of the bills in claim he was insane and of unsound mind ànd not responsible for his acts, that his evidence of insanity was that of doctors who examined the deceased on his death bed, and several persons who visited and saw the deceased on his death bed".

1. I am of opinion that the District Court's finding that the contract and bills were signed by the late Sheikh Yousef el-Dajani was correct and that there was proper and lawful evidence before

them to make this finding, and accordingly this part of the judgment must be confirmed.

2. With regards to the Court's decision that the plea of insanity was a contradictory plea and was inadmissible in law, having regard to Article 1610 of the Mejelle and the decision in Civil Appeal No. 93/25, I do not agree, in view of all the circumstances, that the plea can be construed as a contradictory plea, but we are of opinion that it is an alternative plea.

The circumstances differ from those obtaining in Civil Appeal No. 93/25 where, according to the judgment, Appellant first denied the authenticity of the signature and seal and, when this was proved, he set up the further defence that the admission was false, and also claimed that the admission was made in mortal sickness.

Appellant in the present appeal has always put forward the plea of insanity as an alternative plea, and did not advance it when his plea with regard to the authenticity of the signature had failed, as was the case in Civil Appeal No. 93/25. We are therefore of opinion that it cannot be considered as a contradictory plea but a plea which the lower Court should have entered into.

3. With regard to the plea that there was excessive interest, the Court do not appear to have dealt with this part of Appellant's case.

The judgment, other than that part of it deciding the authenticity of the signature of the late Sheikh Yousef el-Dajani to the documents, the subject-matter of the action, must be set aside and the case returned for the lower Court:—

1. To hear evidence as to the state of deceased's mind at the time he signed the documents (for this purpose it is material that the Court should decide the date of deceased's death); and

2. To decide, after hearing whatever evidence may be produced to the Court, whether excessive interest has in fact been charged and to give a fresh judgment.

Costs in the cause.

JUDGMENT OF MR. JUSTICE FRUMKIN.

The case now on appeal was brought before the District Court in the form of an opposition by a third party and a judgment issued against the estate of the deceased father of the opposer.

In his statement of opposition the Appellant has shown three alternative grounds for setting aside the opposed judgment, namely:

1. that his father never signed the documents in claim;

2. that his father was insane at the time of the execution of the documents; and

3. that even if he signed the document, and even if he was not insane, the amount in claim included usurious interest.

The Court below found as a fact that the deceased did sign the documents, and with this decision we cannot interfere. The Court, however, refused to hear evidence as to the state of mind of the deceased at the time of the execution of the documents on the ground that such plea was in contradiction to the denial of the signature. It also did not hear evidence as to usurious interest. In my opinion the Court was wrong on both points.

This case differs from El-Nafel v. Abdo (Civil Appeal No. 93/25), in which the Court of Appeal held that defendant having first denied the signature of his ancestor he cannot later plead insanity, because in that case it was not until defendant failed on the denial of the signature that he brought forward the plea of insanity as an afterthought; but there is no contradiction when a party from the start states: my ancestor never signed the document; if he signed, he did it in a state of insanity.

I am of opinion that the judgment of the District Court must be set aside and the case remitted for the Court to hear evidence on the alleged insanity of the deceased, father of Appellant, at the time of the execution of the documents in claim, and if it decide against the Appellant on this point to hear evidence as to usurious interest and to give a fresh judgment.

Costs to follow the event.

JUDGMENT OF MR. JUSTICE KHALDI.

This is a case of opposition by an heir of the deceased against a judgment given against his father in an action lodged against one of his brothers under Article 1642 of the Mejelle. The Court found that the opposer impliedly submitted to the judgment passed against his father, whereby he was authorised to pay a certain sum out of the amount of the judgment-debtor to the judgment-creditor.

Nevertheless, the Court accepted his opposition, whereby he denied his father's signature and performed the process of comparison of the handwriting. They discovered that the signature was

that of the deceased. The Court, however, refused to consider the second ground of his opposition that when his father signed the promissory notes he was in a dying condition dispossessed of his senses. Being satisfied that the opposer's intention was simply to gain time, the Court rejected his opposition.

He now appeals against this judgment on several grounds set out in his statement of appeal, dated 1st March, 1931.

On consideration of both the said grounds and the Respondent's rejoinder, I am of opinion that the Appellant having been proved to have submitted to the judgment given against his brother, his opposition should be rejected. Nevertheless, the Court went beyond the limits of the law and referred the signature to experts for verification. Upon the experts' report the Court found the signature to be genuine as stated in its judgment appealed from.

The Appellant's objection to the Court's refusal to call the experts for cross-examination in Court in pursuance of the provisions of the amended article of the Civil Procedure Code regarding inspection is out of place inasmuch as the amendment does not apply to the handwriting and signature, and Article 63 of the Civil Procedure Code is repealed. Moreover, the verification was made under the supervision of a judge of the Court.

His other ground is that the Court refused his application to call the physicians to prove the insanity on the mere proof of the signature, and the discovery of the falsehood of the first objection, notwithstanding the fact that he is not precluded from making alternative pleas, so that if he fails in one there is nothing in the law to preclude him from making the other.

In my opinion the Court did not refuse to hear the second plea merely because his first plea failed, but there were other reasons relating to the same plea as stated in its judgment at length.

The main point which strikes the attention is the Court's belief that the plea is a fabrication. The Court expressly stated that had they called the doctors and heard them on oath they would not change the belief of the Court inasmuch as the medical certificates do not relate to the date of the promissory note.

It follows that the allegation that the Court was bound to hear the doctors is incorrect, as there is no authority compelling the Court to do so.

In my opinion the appeal must be dismissed and the judgment confirmed with costs.

Delivered the 24th day of August, 1931.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 7/32.

BEFORE:

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

IN THE CASE OF:

Ibrahim Khouri Farah,
Michael Shraga Harris APPELLANTS.

vs

Dr. Jacoub Nazha, in his capacity
as guardian for Hilaneh widow of
Yousef El Farran RESPONDENT.

Judgment by Land Court upsetting sale held not to have been contracted in good faith— Competence of Land Court to determine question of insanity — Matters of personal status within jurisdiction of Land Court—Articles 38, 42, 47 and 51, Palestine Order-in-Council, 1922— Gift by insane person — Incidental matters of personal status within jurisdiction of Land Court — "Insanity" defined—Arts. 945, 957, 978, Mejelle— Probability expressed by Court not to form basis for judgment.

Appeal from the judgment of the Land Court of Jerusalem, dated the 29th day of December, 1931.

JUDGMENT.

On the 29th December, 1931, the Land Court gave judgment annulling the gift made by Hilaneh Farran to the Appellant Ibrahim el Khouri and upsetting the sale by the latter to the second Appellant Michael Harris on the ground that the donor Hilaneh was insane and the sale was not contracted in good faith.

Counsel for the second Appellant argued:

1. That the Land Court was not competent to determine the question of insanity contending that insanity is a matter of personal status within the jurisdiction of the District Court. In support of this argument he cited Articles 38, 42, and 47 of the Palestine Order-in-Council, 1922.

2. That the evidence heard by the Court did not prove insanity, this being an apparent and patent state determinable by observation only in accordance with the Mejelle.

3. That the evidence on the sale proves that it was bona fide.

The first Appellant contended that at the date of the gift the donor was of sound mind and that the evidence heard by the

Court proved her state of mind merely at the date of the action. He further supported the arguments of the second Appellant.

Counsel for Respondent argued in reply—

1. That the proceedings were instituted for the purpose of upsetting a title deed and not to prove insanity and that the question of insanity was an incidental issue that could be dealt with by the Land Court. He added that on the 29th April, 1930 the District Court held that the donor was weak minded and that her state of mind in 1925 was similar to that in 1930.

2. That the evidence laid before the Court was sufficient to prove insanity and the absence of good faith on the part of the purchaser.

I am of opinion that the objection to the jurisdiction cannot be sustained inasmuch as the jurisdiction of the District Court in matters of personal status of this nature is limited to the appointment of a guardian as provided by Articles 47 and 51 of the Palestine Order-in-Council. In this case the question of insanity is an incidental issue calculated to upset a title deed, a matter within the competence of the Land Court as already decided in Civil Appeal No. 117/29.*

As regards the evidence as to insanity; it appears to us that the Land Court did not go into the question whether the evidence is compatible with provisions of the Mejelle and the dicta of the learned jurists as to the nature of insanity.

An insane is a person of minute understanding, incoherent in speech and who cannot manage his own affairs, but does neither do violence nor curses as a lunatic does, (See Majma' El-Anhur, Vol. 11, Page 564, Chapter on Interdiction). The Mejelle contains a similar definition in Article 945 which provides:—

> "Mat'uh is the person being so deranged in mind that his understanding is small, his speech confused and his plan of action bad."

It further places such a person on the same level with infants and lunatics who are under a natural inhibition (Article 957), while as regards his actions, such a person is similar to an infant incapable of transacting business (Article 978).

It may thus be concluded that an insane person (Ma'tuh) is a person seized of a kind of lunacy devoid of violence.

The Court remarked that it was highly probable that in the

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*ante, p. 946.

year 1925 the donor was insane. Such a probability cannot form a basis for judgment.

We are therefore of opinion that the judgment must be set aside and the case remitted for the Land Court to ascertain whether or not the said Hilaneh was insane at the date of the gift. As such a decision would affect the position of the second Appellant and the weight of the evidence regarding the sale, the part of the judgment affecting him must be quashed.

Costs to follow the event.

Delivered in July, 1932.

INSPECTION.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 2/24.

BEFORE:

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

IN THE CASE OF:

Ali ben Saad Hassan — APPELLANT.

vs

Mohamed ben Abd El Fattah and Others — RESPONDENTS.

Judgment of Land Court indefinite — Inspection held to be unsatisfactory—Commitee of inspection must ascertain location etc. of properties in dispute so that definite judgment can be given.

JUDGMENT.

In the Court of appeal the parties agree that Ali is entitled to the land registered as 53, and Mohamed to the land registered as 308. In form, therefore, the judgment is not objected to. Nevertheless it does not appear clear from the wording of the Kushans that 53 and 308 are conterminous, and the parties are not agreed as to what land is registered as 308. The inspection taken for the purpose of the Land Court judgment is not satisfactory. We think there should be another inspection and the location of the properties of the parties and their relation to one another ascertained.

For this purpose we set aside the existing judgment and leave the case to be determined anew by the Land Court.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 6/24.

BEFORE:

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

IN THE CASE OF:

Haj Mohamad Abdel Rahman Helal APPELLANT.

vs

Mohamad Mahmud Jabeh RESPONDENT.

Inspection made by Magistrate relied upon by Land Court—Land Court to make its own inspection—Claim against kushan for ownership of land not supported by written evidence—Irregularity of judgment not considered where no miscarriage of justice results.

JUDGMENT.

The Court finds that the Land Court was wrong in relying upon the inspection made by the Magistrate as the basis of its judgment. Since, however, the Appellant has not produced any document of title to the lands claimed which are included in the kushan of the Respondent, the Court holds that this contradiction in law does not cause a miscarriage of justice, and therefore it is decided to set aside the appeal.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 66/24.

BEFORE:

The Acting Senior British Judge (Seton, J.), Khaldi, J. and Khayat, J.

IN THE CASE OF:

Odeh el Barika APPELLANT.

vs

Ibrahim Ibn Mohamed Sultan RESPONDENT.

Inspection made by commission on instructions of Magistrate relied upon by Land Court—Stones placed by commission to mark boundaries—Inspection to be made by Land Court itself—Boundaries to be permanently marked to prevent future disputes—Plan of disputed land to be prepared by competent surveyor.

Appeal from a decision of the Land Court of Jerusalem dated 10th June, 1924, in Action No. 22 of 1923.

JUDGMENT.

The Court below has relied for its judgment upon the report of a commission which made an inspection of the property in dispute at the direction of the Magistrate of Beersheba in some previous proceedings between the parties. It appears that in the course of that inspection stones were placed by the commission to mark the boundary between the land of the Respondent and the land of the Appellant and the Court below has by its judgment confirmed this boundary and ordered the Appellant to respect it.

The decision of the Land Court is unsatisfactory in two respects. In the first place if the inspection of the land in dispute were necessary, and in this case it appears to have been, the inspection should have been made by the Court itself, and in the second, no permanent settlement of the dispute can be effected unless the boundary is marked in such a manner as to prevent as far as possible its position being disputed in the future.

For these reasons we set aside the judgment of the Court below and remit the case to them for an inspection of the land in dispute to be made by the Court, for a plan of it to be prepared by a competent surveyor and for the witnesses to be heard on the site of the land. The witnesses do not seem to be agreed as to whether there are any natural features to mark the boundary or not. Two of them say there is a path. In default of natural features we think that the Land Court would do well to order the erection of permanent boundary marks.

Costs to be costs in the cause.

Delivered in presence on the 22nd day of November, 1935.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 92/26.

BEFORE :

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

In the matter of a third party opposition :
Mohammad Ali of Safria

IN THE CASE OF :

Mousa Hussein Awad and Others APPELLANTS.

VS

Shukri Eff. el Taji and Others RESPONDENTS.

Demarcation of boundaries between Sarafend and Safrieh—Compulsory use by Air Force of village land—Compensation awarded by War Office—Art. 1645 Mejelle—Inspection by Court—Appointment by Court of experts as arbitrators—Third Party Opposition to judgment of Supreme Court—Old Kushans produced.

Opposition against the judgment of the Supreme Court sitting as a Court of Appeal dated 15th June, 1925, whereby the judgment of the Land Court of Jaffa dated 5th February, 1924, given in favour of the Respondents with regard to certain plots of a land was confirmed and the appeal of the Appellants dismissed with costs.

JUDGMENT.

The Appellant in this case is a certain Mohammad Ali of the village of Safria who asks us to admit him as a third party to oppose a judgment of the Court of Appeal affirming a judgment of the Land Court of Jaffa demarcating the boundaries of the villages of Sarafand and Safrieh. This was to be done for a practical purpose—the distribution of a sum of money as compensation awarded by the War Office to be divided between the two villages in such proportion as might be their due for the compulsory use of the village land for the purpose of the Air Force.

It was in the interests of both villages that the boundaries between their adjacent common lands should be ascertained in order that the money might be distributed, and this was no easy matter because in that flat country where there are no hedges or ditches it is not easy, when cultivation is intermittent or has been abandoned, to ascertain village boundaries even if such have ever been accurately known. This was particularly difficult in the present case because the Air Force had been in possession for some years and whatever evidence of boundaries of cultivation may have existed before that occupation they would be hard to re-discover. The land was of small value before the British Occupation but of considerable value when the action was brought, and the villagers would not agree.

The Mukhtars and certain notables of Sarafend as Plaintiffs and the Mukhtars and a notable of Safrieh, as representatives of both sides, joined in an action for the purpose of settling the dispute, and no objection was made at the time to this procedure, which was perhaps the best method practicable, and was adopted in reliance on Article 1645 of the Mejelle which allows such a course to be pursued in the case of matters of common interest relating to land common to both villages.

When the Court came to go into the evidence and visited the land with persons supposed to be experts in such matters they found it impossible to come to any conclusion owing to the absence of local indications and the conflicting testimony of the villagers. The Court therefore decided not to visit the land again in the vain attempt to get at the truth and appointed the experts as arbitrators to do the best they could. No objection was made at the time to that procedure. The arbitrators went on the land again and found that the common lands of the villages up to a certain distance on either side could be ascertained but that there remained a considerable area in the middle the division of which could not be accurately decided although they had witnesses and village Kushans which gave them small assistance. So they adopted a policy of despair and divided the remaining land in proportions that would correspond with the supposed relative amounts of the village holdings.

The decision was appealed by the party of Safrieh and it was objected that the manner of carrying out the action was not correct. The Court of Appeal was not disposed to send back the case for a new trial even if there was some ground for doubting the applicability of Article 1645, because both sides to the appeal had been content at the time to fight the action in that way. There was also objection made to the award, but if the manner of arriving at the award by the arbitrators was peculiar there was no likelihood of any better decision being obtained in any other manner as appeared from the history of the cases and the uncompromissing attitude of the parties. So the appeal was dismissed.

There was no question at that time of any privately owned land being in question, and the whole dispute was fought on the ground of a search for the boundary between the common lands of the villages.

Now the present Applicant complains that his rights have been ignored and that he ought to be allowed to raise this hopeless dispute again on the ground that he has privately owned property adversely affected by the decision of an action to which he was not a party. He has produced Kushans in which he appears as a part owner of undivided sixteenths in large areas of land. Those Kushans do not look to us like titles of private ownership. Looking at the date, the large areas, the manner of registration, and knowing the custom of registration of village common lands at the time when these were granted, they appear to be on the face of them less like registrations of private ownership than like registrations

of common lands made in the name of village representatives according to a common custom, the persons actually having rights of cultivation being a large number of villagers. However, we need not go into this enquiry because Mr. Samuel, who appears for the Appellant, claims to be admitted as a third party opposer on the ground that his client is the holder of private title, and not a person interested in the common lands, and if he is right in his contention there is nothing in the judgment of the Land Court or the Court of Appeal to prevent his client from the enjoyment of his property. It was never intended to interfere with private property, but for a practical purpose to find as fair a boundary as could be arrived at between the common lands of two villages about which the villagers could not agree, and which the Court could not discover accurately by hearing evidence. If it turns out that the boundary cuts through the private property of a landowner his right will not be affected by it, because such an issue has never been tried and the manner of conducting that case was clearly inapplicable to the decision of such a claim.

The application is refused.

Delivered in presence the 14th day of July, 1926.

In the High Court of Justice.

H.C. No. 84/27.

BEFORE:

The Chief Justice and Khayat, J.

IN THE APPLICATION OF:

Abdallah Ahmad Jaballi — PETITIONER.

vs

The Chief Execution Officer in the District Court of Jaffa
Solomon Jacobson for the Estate of Joseph Bey Moyal — RESPONDENTS.

Land ordered by Chief Execution Officer to be sold to be inspected—Analogy of Rule 4 of Rules of Court: Evidence taken out of Court of 3rd November, 1926—Report of proceedings to be drawn up by committee of inspection—Appointment of committee of inspection.

ORDER.

The Chief Execution Officer ordered, on the analogy of Section 4 of the Rules of Court on Evidence taken out of Court, approved by the High Commissioner on 3rd November, 1926, to cause an inspection to be made by three persons, one appointed by each party and one by the Chief Execution Officer, the last of whom shall draw up a report of their proceedings and of their opinion for the information of the Chief Execution Officer.

Delivered the 31st day of January, 1928.

In the High Court of Justice.

H.C. No. 70/29.

BEFORE:

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

IN THE APPLICATION OF:

Abdel Rahim Skairik, in his capacity as guardian of the minor children of the late Hassan Skairik — PETITIONER.

vs

The Chief Execution Officer, Haifa — RESPONDENT.

Land ordered sold by Chief Execution Officer to be inspected for the purpose of determining its value—Analogy of Rule 4 of Rules of Court, Evidence taken out of Court of 3rd November, 1926—Report of proceedings to be drawn up by committee of inspection—Appointment of committee of inspection—Application to Chief Execution Officer for extension of period of sale—Art. 108, Execution Law.

Application for an Order to issue to the Respondent, directing him to show cause why he should not stay the sale of the Petitioner's wards' property and allow its sale privately.

JUDGMENT.

By virtue of a decision of this Court, High Court No. 84 of 1927, dated 31st January, 1928, in the case of Abdallah Ahmed Jaballi vs the Chief Execution Officer, Jaffa, and Solomon Jacobson, it was ordered that upon the sale of land by an Execution Officer where there is a dispute as to the estimated value of the property offered for sale, an inspection must be made by three persons, one appointed by each party, i.e. the judgment Creditor and the judg-

ment Debtor, and one by the Chief Execution Officer, the last of whom shall draw up a report of their proceedings and of their opinion for the information of the Chief Execution Officer, on the analogy of Section 4 of the Rules of Court on Evidence taken out of Court, approved by the High Commissioner on 3rd November, 1926. Prior to the sale of the property, the subject matter of this application, no procedure as hereinbefore mentioned was followed. Subsequently, application was made to the Chief Execution Officer under Article 108, to extend the period of the auction, on the grounds that the highest bid was below the value of the property offered for sale. Therefore, the above mentioned procedure must now be carried out with regard to the valuation of the property. Subsequent to such valuation having been made if the present bid for the property appears to be much below the estimated value, the period of the auction may be extended at the discretion of the Chief Execution Officer by virtue of Article 108 of the Execution Law. If, however, in the opinion of the Execution Officer, the new valuation is not much above the present bid, the sale may proceed.

No costs.

Delivered in presence the 3rd day of February, 1930.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 24/30.

BEFORE:

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

IN THE CASE OF:

Mahmud and Abdel Ghani,
Sons of Khalil El-Akhras — APPELLANTS.

vs

Ahmad, Khadra and Halimeh,
Children of Muhammad Abu Taksireh
and Sa'Ada Muhammad Abu Hamra — RESPONDENTS.

Inspection of land—Experts held not to be essential—Court entitled itself to inspert.

JUDGMENT.

There is no rule of law requiring that inspection shall be carried out through experts. If the Court thinks fit, it is entitled itself to inspect the disputed land.

No other question of law is raised by this appeal, which is, therefore, dismissed with costs.

The Appellants will pay to the first Respondent £P.2.500 advocate's fees and expenses; and to each of the other three Respondents 500 mils expenses.

Delivered the 29th day of June, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 3/31.*

BEFORE:

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

IN THE CASE OF:

Eliyahou Zweig — APPELLANT.

vs

Dr. Sabri Izzidim
Hussein Karmin
Haj Ahmed Manaki — RESPONDENTS.

Goods purchased alleged not to be in accordance with contract—Inspection held to have been improperly conducted—Inspection of perishable goods.

Appeal from the judgment of the District Court of Haifa, dated 4th December, 1930.

JUDGMENT.

The main point in dispute in this case is the quantity of tobacco received by the Appellant which was in accordance with the terms of the contract and the amount which was not. It is contended that the inspection was improperly carried out in that (1) the expert appointed by the Appellant was not replaced on the ground of lack of confidence and
(2) the greater part of the inspection was not conducted under the control and supervision of the judge delegated by the Court. We are satisfied that the inspection other than that made on the first day was bad in law.

In view of the fact that it is now quite impossible to make a fresh and proper inspection owing to the length of time during which the tobacco has been lying in the stores, and has probably,

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* see ante, p. 851.

deteriorated and inasmuch as both parties agreed that the inspection carried out on the first day under the auspices of the Judge was properly done, we are therefore agreed in the absence of other evidence that the result of the first day's inspection must be taken as an estimate of the average quality of all the tobacco and the remaining bags being assumed to contain similars quantities of good and bad tobacco.

The judgment of the lower Court is set aside and the case remitted accordingly for the said Court to ascertain the result of the first day's inspection; the Court to satisfy themselves as to the number of bales inspected on that day and the amount of good and bad tobacco contained in each bale and then to take the average of the quantity of good and bad tobacco found in each bale and apply it to the remaining bales and give judgment for the price of the same in accordance with the contract.

Delivered the 25th day of February, 1932.

INSPECTION—

SEE ALSO CHIEF EXECUTION OFFICER, EXPERTS.

INSURANCE.

In the Privy Council sitting as a Court of Appeal from the Supreme Court of Palestine.

P.C. No. 18/30.

BEFORE:

Lord Blanesburgh, Lord Darling and Lord Russell of Kiilowen.

IN THE CASE OF:

Assicurazioni Generali — APPELLANTS.

vs

Selim Cotran — RESPONDENT.

Foreign currency—Rate of exchange to be applied to monies payable by insurance company on life insurance policy—Payment demanded in gold francs—Treaty of Peace with Turkey as part of municipal law of Palestine—Effect of international Treay on obligations in contract—Nationality of insurance company—Interpretation of provisions of Treaty of Lausanne.

JUDGMENT OF COURT OF APPEAL OF PALESTINE.

C.A. No. 104/28.

This case has been argued and decided in the District Court on the assumption that during the late War the parties were enemies between whom trading was impossible. The Appellant was an Ottoman subject, and it was assumed throughout that the Respondent Company was of Italian nationality.

The question of the present nationality of the Company is, however, immaterial. The Company has its head office at Trieste, which at the date when the insurance which gives rise to this case was effected, was Austrian territory. Moreover the policy itself makes it clear that the company was incorporated under Austrian Law. We have therefore, no doubt that the Company was, when the insurance was effected, and remained throughout the War, an Austrian Company. Hence, the provisions of the Annex to the Treaty of Lausanne relating to trading between enemies have no application and to ascertain the meaning of the policy of insurance, we have to apply the ordinary rules of interpretation.

The policy secures payment of a sum of 10,000 gold francs; that is to say, a sum to be ascertained by reference to the value in gold of a Napoleon.

On the face of the policy, therefore, the amount secured is to be calculated upon that basis.

On the 15th December, 1917, however, the terms of the policy were modified by an agreement annexed thereto of which the wording is as follows:—

> "Les paiements sur cette police seront de part et d'autre en Livres turques a raison de Frs. 23 la Livre".

On the face this was an agreement for payment of premiums and policy moneys in Turkish pounds at the rate thereby fixed.

The Respondent Company, however, contends that as the value of the Turkish pound was thereby fixed in "francs" and not in "gold francs", the annex also operated to convert the terms of the policy into an agreement to accept paper francs in lieu of gold francs.

We are unable to accept this contention,

We think the meaning of the annex is that one Turkish pound was to be taken as equivalent to 23 francs of the kind to which the policy relates, namely gold francs.

In support of this view, it may be noted that the rate of equivalence fixed was that for the value of a Turkish gold pound.

A further argument has been addressed to us based on the fact that, since the war premiums on the policy have been paid by cheque on Paris and not in gold; but we do not think that a variation of the terms of the policy can be inferred from this fact, especially as premiums were paid during the War at the rate for gold as fixed in the annex to the policy.

The appeal must be allowed, the judgment of the District Court set aside, and judgment entered for the Appellant for the amount of the policy moneys 10000 francs, less the last premium 257 francs, at the rate of exchange of gold francs, interest at 9% from the date of commencement of action until payment, with costs here and below and £P.15 advocate's fee.

Delivered the 3rd day of April, 1929.

LORD RUSSEL OF KILLOWEN:

The question raised on this Appeal is whether the moneys (10,000 francs) payable by the Appellant insurance company under a policy of life insurance are payable at the rate of exchange of gold currency or of paper francs.

The revelant facts are these:—

The policy was issued by the insurance company on December 11th, 1909, on the application of the Respondent, Selim Cotran, and his wife, Matilde Cotran, who were Ottoman subjects domiciled at Acre, Palestine. The liability of the insurance company, according to a certified translation of the policy, ran thus: "Undertakes to pay the amount of gold francs ten thousand immediately on the death of one of the assured to the survivor, or at the latest on December 15, 1929, to the assured themselves if they be still living."

The consideration for the insurance was the payment of a half-yearly premium of 257.66 francs. Mrs. Matilde Cotran died on July 7, 1925. At the date of her death the premium due on June 15, 1925, had not been paid, but a period of thirty days' grace, which was conceded by the policy, was still current.

All the earlier premiums had been paid and accepted by the insurance company, but owing to the difficulties and restrictions which arose after Turkey had entered into the war, the form of such payments varied at different times. Although at one time the insurance company relied upon this course of business between the parties in relation to the payments of premiums, in support

of their contentions before the Board, their Lordships at an early stage indicated their view that the circumstances in question could have no effect in altering the legal effect of the provisions of the policy as to the payment of the moneys thereby secured. Thereafter the point was no longer pressed and accordingly it becomes unnecessary to consider the form in which these premiums were respectively paid.

When Mrs. Cotran died, the insurance company proposed to pay to the Respondent in satisfaction of his claims under the policy the sum of 10,000 francs by cheque on Paris. The Respondent thereupon commenced these proceedings in the District Court of Jerusalem, claiming payment of the equivalent in Egyptian money of 10,000 francs gold.

The insurance company claimed that by virtue of the treaty of peace with Turkey, which as from August 6, 1924, operated as part of the municipal law of Palestine, there was no obligation on the insurance company to pay 10,000 francs gold.

The two judges who heard the case were divided in opinion. Judge Valero held that by virtue of the treaty the amount was not payable in francs gold. On the other hand, Judge Baraday was of opinion that the treaty, on its true interpretation, did not warrant a departure from the terms of the policy, which provided for payment in francs gold. The result of this division of opinion was that the claim of the plaintiff was dismissed. The operative part of the judgment dated March 6, 1928, is in the following terms: "Therefore, accordingly it is decided that the claim as regards judgment for payment in gold currency be dismissed and judgment entered in favour of the plaintiff in francs banknotes currency at the rate of exchange at the date of the death of Mrs. Cotran, July 7, 1925, together with legal interest as from the date of the action, May 19, 1926, untill full payment. Defendant to pay costs, expenses and £P.3 advocates' fees. Judgment open to appeal."

On appeal by the plaintiff to the Supreme Court of Appeal of Jerusalem, the judgment was set aside and judgment was entered for the plaintiff on April 3, 1929, "for the amount of the policy moneys, 10,000 francs, less the last premium 257 francs, at the rate of exchange for gold francs, with interest at 9 per cent from the date of commencement of action until payment, with costs here and below."

The grounds of this decision were (1) that the insurance company was an Austrian company at the time when the insurance

was effected and remained an Austrian company throughout the war; (2) that in those circumstances the relevant provisions of the treaty had no application; and (3) that accordingly the provisions of the policy for payment of the sum of 10,000 francs gold remained unaffected.

It is from this judgment that the insurance company appeals to His Majesty in Council.

As a result of close and careful argument before the Board, at which the Respondent was not represented, the grounds in support of the appeal were reduced to the single question whether the treaty operated to relieve the insurance company from the obligation to pay gold francs as provided by the policy. A consideration of this question speedily revealed the fact that it was essential for their Lordships to be supplied with proper evidence of the true meaning of the French terms used in the revelant parts of the treaty, which was signed in the French language only. It was the duty of the insurance company to have supplied this evidence in the first instance, but they had failed to do so. Their Lordships accordingly gave the insurance company the choice between two alternatives. The first was to have the appeal dismissed. The second was to adduce the necessary evidence upon the terms that the insurance company should in any event bear the costs of the appeal and should give notice to the Respondent, who had not appeared before the Board, so as to enable him to appear if he thought fit. The insurance company chose the second alternative and gave full notice to the Respondent, who nevertheless still abstained from appearing.

Equipped with the necessary translation, their Lordships now proceed to a consideration of the sole ground upon which it is alleged that this appeal should succeed.

In order to ascertain whether the Appellate Court was right in its view that the treaty had no application because the insurance company was an Austrian company at the date of the policy and throughout the war, it is necessary to consider the relevant provisions of the treaty.

The treaty of peace with Turkey was signed at Lausanne on July 24, 1923, by the allied powers, including Italy. It came into force on August 6, 1924. At that date Trieste (where the head office and control of the insurance company were situate) had become Italian territory by virtue of the Treaty of St. Germain, which became operative on July 10, 1920.

The revelant provisions of the Treaty of Lausanne—namely, para. 2 of the Annex to Section II—may (according to the evidence before this Board, be accurately rendered in English thus:

> "Paragraph 2.
>
> "It is agreed that life assurance policies contracted in currencies other than the Turkish pound, entered into before October 29, 1914, between companies possessing at this date the nationality of an allied power, and Turkish nationals, in respect of which premiums have been paid before and after November 18, 1915, or even only before that date shall be settled: First, by determining the rights of the assured, in accordance with the general conditions of the policy, for the period before November 18, 1915, in the currency stipulated in the policy, such as is legal tender in the country from which this currency originates (i.e., every amount stipulated in francs, in gold francs, or in actual francs shall be paid in French francs); secondly, for the period after November 18, 1915, in Turkish paper pounds—the Turkish pound being deemed to have pre-war par value.
>
> "If Turkish nationals whose policies were contracted in a currency other than Turkish currency show that they have continued, since November 18, 1915, to pay their premiums in the currency stipulated in the policies, the said policies shall be settled in the same currency, such as is legal tender in the country from which it originates, even for the period after November 18, 1915.
>
> "Turkish nationals whose policies contracted before October 29, 1914, in the currency other than Turkish currency with companies possessing at this date the nationality of an allied Power are, owing to payment of premiums, still in force, shall have the option within a period of three months after the coming into force of the present Treaty to restore their policies for the full amount insured in the currency stipulated in their policy, such as is legal tender in the country from which it originates. For this purpose they must pay in this currency the premiums which have accrued due since November 18, 1915. On the other hand, the premiums actually paid by them in Turkish paper pounds since the said date shall be repaid to them in the same currency."

The material provision is that contained in the first sentence of para. 2, in which the words "at this date" represent the word "actuellement" and refer to the date on which the treaty was signed.

From a perusal of this sentence it seems clear to their Lordships that this provision (whatever its contents may be) applies to all life assurance policies which satisfy in other respects the detailed description, provided that the issuing company possessed the nationality of an allied Power at the date of the signing of the treaty—namely, July 24, 1923. Whatever its previous nationality may have been, as to which no inquiry need be made, the insurance company in this case undoubtedly possessed Italian nationality on that date.

Once the true meaning of the French terms is made clear, the basis of the judgment of the Appellate Court crumbles away and the fact (if it be the fact) that the nationality of the insurance company was Austrian down to an earlier date is wholly immaterial.

Their Lordships are accordingly of opinion that the policy here in question became subject to and, on maturity, was governed by the Treaty of Lausanne.

That being so, it remains to consider what the first sentence of para. 2, provides in relation to this policy. The payment of the 10,000 francs is one of the rights of the assured which must be determined under this clause; and whether the payment falls under the provision "first" or the provision "secondly", it is, their Lordships think, manifest that the right to be paid francs gold has been taken away from the Respondent.

It is more advantageous to the Respondent that he should be paid in "French francs" rather than in Turkish paper pounds, and the insurance company is content that the former course be adopted.

Their Lordships are of opinion that the judgment of the Appellate Court was erroneous and should be discharged, with the result that the judgment of March 6, 1928, will be restored, with its liability on the insurance company to pay costs as therein mentioned. As to the costs in the Appellate Court, these should lie as they have fallen: that is to say, if the insurance company has not yet paid them, the liability to pay shall cease; if the insurance company has already paid them, there shall be no right of recoupment by set-off or otherwise. As to the costs of the appeal here, since the Respondent has not appeared, no order need be made in respect thereof.

The two supplemental records will be treated as incorporated with and forming part of the record before the Board.

Their Lordships will humbly advise His Majesty accordingly.

Delivered the 27th day of November, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 40/30.

BEFORE:

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

IN THE CASE OF:

Yomtov Amon as the Syndic of the bankruptcy of Eliahu Janashwili — APPELLANT.

vs

Union Geneva Insurance Co. — RESPONDENT.

Insurance policy assigned by owner of shop to purchaser—Goods destroyed by fire—Refusal of insurance company to pay insurance—Forfeiture of rights by laches under insurance policy—Effect of letter written "without prejudice"—Notarial notice as constituting "une demande en justice"—Condition of forfeiture in insurance policy held not void on ground of public policy—Contract made in Palestine held to be subject to Palestine law although made in foreign language.

Appeal from the judgment of the District Court of Jerusalem, dated the 21st March, 1930, C.D.C. Jm. No. 380/29.

JUDGMENT OF THE DISTRICT COURT.

The Plaintiff Janashwili is a merchant dealing in cotton, silk and woollen goods in the Old City. The Defendant is the Union Genèva, a Swiss Insurance Company registered and carrying on business in Palestine.

On the 8th May, 1928, Messrs Yomtow and A. Shrem, dealers in cotton and woollen goods in the Old City insured against loss by fire the goods in their shop in the Old City for LP.3,000 with the Defendant Company (Vide Exhibit F, Fire Insurance Policy No. 5076). The Plaintiff purchased the shop of Messrs. Yomtov and A. Shrem and the latter, with the Company's consent, assigned their rights under the Insurance Policy 5076 (Exhibit F), (Vide Exhibit G—Transfer of Policy 5076), to the Plaintiff.

On the night of 17-18 January, 1929, a fire broke out in

Plaintiff's shop and as a result the greater part of Plaintiff's goods were either burned or damaged.

On 20th January 1929, the Defendant Company, through its legal representative, by letter informed the Plaintiff that as the Plaintiff had not immediately informed the Company's agent—Mr. Fahri—of the fire, in compliance with Art. 11 of the Insurance Policy, the Company denied all liability under the Policy.

On the 23rd January, 1929, the Company, by letter in reply to a claim in writing dated 18th January, by Plaintiff, informed the Plaintiff that the Company emphatically rejected the Plaintiff's claim because the Plaintiff had broken the conditions of the Policy both before and after the fire. Further, the Company informed the Plaintiff that the goods saved from the fire were in the hands of one Mr. Cabelli and that the Plaintiff could obtain delivery of the goods at his will.

On 25th January, 1929, the Company by letter demanded of the Plaintiff certain information within 48 hours. Apparently, on the 27th January the Plaintiff sent a letter to the Company, for on 29th January the Company in a letter to the Plaintiff acknowledged the receipt of Plaintiff's letter of 27th January and wrote through its attorney (inter alia) —

> (A) "Vu les circonstances que l'incendie a eu lieu et les rumeurs qui circulent sur place à cet effet, la Compagnie a plein droit de vous suoupçonner et tant qu'une sentence ne sera pas donnée par un Tribunal compétent, elle ne pourra changer d'opinion.
>
> (C) .... et je vous répète encore une fois que les sousdites marchandises sont à votre disposition et que vous êtes responsable pour tous les frais que vous occasionerez de ce chef a la Compagnie."

It is to be noted that on 29th January, the Plaintiff had been charged with arson and was awaiting trial.

The Plaintiff alleges that he dispatched a statement of account to the Defendant by registered letter on 1st February, 1929. The Company's attorney admits receiving the registered letter on 5th February, 1929. The Company's attorney returned Plaintiff's registered letter by registered post because, as he alleges, the letter was received by him after the period of 15 days referred to in Condition 11 of the Policy.

It is worthy of note that no letter has been filed to prove that when he returned the registered letter to Plaintiff the Com-

pany's attorney informed the Plaintiff that the Company intended to rely on the terms of Clause 11 of the Policy.

On the 25th February, 1929, the Plaintiff filed a Notarial Notice which was served on Defendant by the Public Notary on 3rd March, 1929. In the Notice the Plaintiff refers to a statement of account he alleges he sent to Defendant Company on 1st February, 1929, and refers to his claim to be paid, LP.2872, and warns Defendant that if the claim of LP.2872 is not paid by 1st March, 1929, the Plaintiff will claim interest at 9% until full settlement and advocate's fees, etc.

On 8th March, 1929, the Defendant lodged in the Notary Public Office for service on Plaintiff a Notarial Notice which reads as follows:

"To Mr. Eliahou Janashwili
Bazar Street, Jerusalem
Through the Notary Public Jerusalem.

Sir:

Your notarial notice dated 25th February, 1929, sent me, in my capacity as the General Attorney of the Union Geneva Insurance Company through the Office of the Notary Public Jerusalem, was handed to me at 8:30 P.M. on the 3rd of March, 1929.

I have to reply:

(A) You have produced no report and documents required under Clause 11 of the Policy either to me or to the Company. You in fact sent a letter which was received by me only on the 5th February, 1929; this letter was returned to you by return registered letter because it was received after the expiration of time. You received it back as may be verified from the receipt in my possession.

(B) You disturbed the Company in the drawing up of the expertise of the goods saved from fire, contrary to the terms of the Policy; and the price of these goods fluctuate with you as speculation.

(C) In my capacity as General Attorney of the above Company I informed you in my letter of 23rd January, 1929, that the Company utterly refuted your demand and refused to pay the amount of insurance for the reasons therein stated. As is evident from the receipt in my possession, this letter was received by you on 24th January, 1929.

(D) There is no legal basis for your demand for interest even though the Company would have to pay any sum whatever at the order of any legal institution.

(E) You failed to comply with the conditions incumbent upon you and your actions were wholly contrary to the terms of the Policy; therefore you have no right of claim against the Company. Accordingly, I call upon you to desist from any sort of claims (demands), failing which the Company will hold you responsible for all damages and expenses which were or shall be incurred by it through your demands; and you shall further have to bear the advocate's fees which the Company will have to pay in this connection, especially the costs of the Notarial Notice.

Respectfully yours,
(Sgd) D. Aboulafia, Advocate
General Attorney
of the Union Geneva
Insurance Company."

The Plaintiff does not deny having received the Notice. No further correspondence seems to have passed between the parties until the 10th July.

On the 9th July, the Plaintiff was acquitted of the charge of arson. On the 10th July, by letter, the Plaintiff informed Defendant that Plaintiff had been acquitted and referred to Defendant's letter of 23rd January, in which Defendant had written:—

"La Compagnie repousse catégoriquement votre réclamation vu que vous êtes soupçonné d'avoir occasionné, etc."

Further (inter alia) the Plaintiff asked the Company to appoint an arbitrator to settle the dispute as to the amount of Plaintiff's claim, in accordance with Condition 18 of the Policy.

On the 28th July the Company's attorney replied to Plaintiff's letter of 10 July and (inter alia) informed the Plaintiff that as the Director General of the Company was absent from Palestine, he could not give a definite reply to Plaintiff's request for the appointment of an arbitrator pending the Director General's return.

It is to be noted that: (a) the last paragraph of the letter of the Company's attorney contains the following sentence:

"Cette lettre vous est addressée sans préjudice et sans aucun engagement pour la Société."

and (b) there is no mention that the Company considered that the Plaintiff had forfeited any rights he may have had under the Policy by not instituting legal proceedings within three months of Defendant's Notarial Notice of 4th March, 1929.

The Company's Attorney in his letter of 25 January asking for certain information inserted the words: "et sans aucun préjudice." The letter of 25 January was not objected to by the Defendant and he admitted the Defendant's letter of 10 July. On the 5 September, 1929, Defendant's Attorney replied definitely to Plaintiff's letter of 10 July and informed Plaintiff that the Defendant Company rejected finally Plaintiff's claim. Defendant's Attorney referred to his letter "Without prejudice" of 28 July without qualifying the letter again as being "Without prejudice." Further, in Defendant's letter of 5 September, no mention is made of all rights under the Policy having been forfeited.

On 24 October, 1929, the Plaintiff filed this action.

Defendant contends that no action lies because the Plaintiff has not complied with Clause 10 of the Proposal Form (Exhibit AL. 6.) and Conditions 8, 11, 13 of the Policy. With regard to the alleged breach of condition 8, the Company alleges that the Policy was issued on the warranty that Plaintiff was a wholesale dealer and that as a fact the Plaintift has sold goods by retail. The Plaintiff does not admit the allegation—the Court would have to hear the evidence of the parties before expressing an opinion on the point.

With regard to the alleged breach of Clause 10 of the proposal form, we rule against the Company. Affixed to the Policy is a printed slip in which we find the following:

> "L'assuré déclare sous peine de n'avoir droit à aucune indemnité en cas de sinistre que son risque n'est pas éclairé par des lampes à vapeur d'alcool, etc. etc."

The proposal form is not referred to in the Policy or made the basis of the Policy.

With regard to the alleged breach of Condition 11 of the Policy: The Condition is usually found in fire policies and we hold that unless waived by the Company, the condition is a condition precedent to the assured's right to recover on the Policy. Clearly by the letter of 25th January, the Company waived the question whether the Plaintiff had informed the Company immediately of the fire.

The Plaintiff alleges that he forwarded by registered post on

1st February, 1929, the statement of account etc., and thus complied with the terms of the condition within the fifteen days.

Incidentally prima facie it appears that the Company took possession of goods salved. Before ruling on this point we would have to hear the evidence of both parties.

With regard to the alleged breach of condition 13: The Plaintiff argues that:—

(a) A Notarial Notice constitutes "une demande en justice."

(b) The Company is a Swiss Company and Swiss Law must be applied and by Swiss Law unless the Company on rejecting a claim notified the insured that he must file an action within three months, the Company cannot plead that the action has been brought out of time.

(c) The Company finally rejected the Plaintiff's claim by letter dated 5th September; so this action is in time.

(d) The condition is void on the ground of public policy.

With regard to (a), after consulting certain French Law Books we hold that a Notarial Notice is not "une demande en justice".

With regard to (b) there is nothing in the policy which leads us to think that it was the intention of the parties that Swiss Law should be applied.

The fact that the language in which the Policy is expressed is French, does not in our mind, carry any weight. The contract was made in Palestine and in the absence of an expressed intention to the contrary, we hold that is was the intention of the parties that the interpretation and effect of the Policy should be governed by the law of Palestine. We do not know of any law in Palestine or in England which demands that notice should be given by the Defendant Company if it wishes to rely on the conditions in the Policy.

With regard to (c), from the terms of the Defendant Company's letter of 29th January, 1929, it is perhaps reasonable to infer that the Defendant Company would consider Plaintiff's claim if and when Plaintiff was acquitted by the Court of the charge of arson.

The Plaintiff, however was not satisfied with the view taken by the Defendant Company and by the Notarial Notice of 25th February, 1929, notified the Defendant Company that if the claim was not paid by 1st March, 1929, the Plaintiff would hold Defendant Company liable to pay interest at 9% on the claim from 1st March, 1929, until full settlement plus costs and advocate's fees.

By the Notarial Notice of 4th March, 1929, the Defendant Company categorically rejected Plaintiff's claim in toto and unconditionally.

In our judgment, the letter of 28th July, 1929, by Defendant Company's Attorney cannot be considered as reopening the negotiations. We therefore rule against the Plaintiff on this point.

There remains the question (d) as to whether the condition is void on the grounds of its being contrary to Public Policy. It is true that the heading of Condition 13 is "Déchance" which means "Forfeiture" and the Plaintiff consequently should have read the terms of the condition carefully. As a fact we would not normally expect to find the condition "Si la Compagnie a repoussé la réclamation dont elle était saisie et qu'une demande en justice n'ait pas été faite contre la Compagnie dans les trois mois qui suivront son refus etc.... l'assuré ou ses ayants-cause seront déchus etc....", following on conditions which deprived the Plaintiff of any rights under the Policy if he committed fraud, etc.

We hold that the Plaintiff was bound in law to read the conditions of the Policy.

Further, we do not think the delay of three months after the rejection of a claim is an unreasonable delay to give a claimant in which to file his action.

We therefore hold that the Plaintiff is bound by the terms of the condition and is debarred from bringing this action.

We give judgment for the Defendant Company with costs and advocate's fees assessed at LP.3.

Given the 21st day of March, 1930.

JUDGMENT OF THE COURT OF APPEAL.

The appeal is dismissed on the grounds stated in the judgment of the District Court.

Costs will be paid by the Appellant, including LP.2 advocate's fees.

Delivered the 7th day of January, 1933.

INTERDICTION—

SEE BANKRUPTCY.

INTEREST.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 165/23.

BEFORE :

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

IN THE CASE OF :

Jamili Khanoum Futyani,
on her behalf and as guardian of
her minor children, Osman,
Shehran and Zilfi, APPELLANT.

vs

Amer Ibn Mustafa Ali Mizfin RESPONDENT.

Copy of judgment not served on Appellant—Time for presentment of grounds of appeal—Meaning of Art. 22, Addendum to Civil Procedure Code—Promissory note made before passing of Usurious Loans (Evidence) Ordinance, 1922—Money borrowed on security of promissory note acknowledged before Notary Public—Usurious Loans (Evidence) Ordinance, 1922, held to be Law of Procedure and applicable to the case of loans made before its passing—Admissibility of oral evidence to prove inclusion of usurious interest—Right to administer oath.

INERLOCUTORY JUDGMENT.

We hold that the appeal is not out of time.

In this case the judgment under appeal was delivered in the presence of the parties, but a copy of it has been served upon the Respondent. It is argued by the Respondent that as grounds of appeal were not presented within thirty days of such notification the appeal is out of time. Article 22 of the Law amending the Civil Procedure Code provides that "The period for lodging appeals against judgments, by default or otherwise, issuing from a Court of First Instance, shall be thirty days from the date of service of the judgment on the person adjudged against, or at his place of residence."

It has been held by this Court that when a person, adjuged against, desires to appeal without waiting for a copy of the judgment to be served upon him, he can do so, provided that he serves a copy of the judgment on the other party.

It does not follow, however, that time begins to run against

him from the date of service of such copy, and the wording of Article 22 is clear.

JUDGMENT.

The Court hold that the Usurious Loans (Evidence) Ordinance, 1922, which is a law amending procedure, applies to transactions which took place before the Law was enacted, and that in virtue of that Law the Appellant is entitled to produce parol and written evidence in support of his claim that the amount for which he has given an acknowledgment includes interest in excess of the legal rate.

The judgment of the District Court is set aside and the case remitted for evidence of the parties to be produced.

In default of evidence the Appellant is entitled to administer an oath to the Respondent.

Any sum paid by the Appellant under the judgment, with regard to interest, of the Magistrate's Court dated 25th November, 1919, No. 1480, is to be taken on account of the total amount found to be due from her in respect of principal and interest.

Costs to be costs in the case.

Delivered in presence of both parties, the 29th January, 1924.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 8/24.

BEFORE:

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

IN THE CASE OF:

Mohamed Abdul Salam
Mussa Abdul Salam APPELLANTS.

vs

Mitry Salameh Atallah RESPONDENT.

Money borrowed on security of promissory note acknowledged before Notary Public—Usurious Loans (Evidence) Ordinance, 1922 held to be Law of Procedure and applicable to the case of loans made before its passing—Admissibility of oral evidence to prove inclusion of usurious interest—Right to administer oath.

JUDGMENT.

The Court holds:

1. That the Usurious Loans (Evidence) Ordinance, 1922, being a Law of Procedure applies in the case of loans made before

the passing of the Ordinance, where action was not commenced until the Ordinance was in force.

2. That the nature of the acknowledgment gives rise to the presumption that the sum made payable after a delay of six months included interest on the sum lent, and hence that the District Court should have admitted oral evidence to prove whether in fact the sum payable did or did not include interest at a rate in excess of the legal rate; and the fact that the acknowledgment was given before the Notary Public is immaterial.

3. In the event of the Appellants being unable to establish their claim by evidence, they are entitled to have an oath administered to the Respondent.

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

Delivered the 13th day of May, 1924.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 10/24.

BEFORE:

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

IN THE CASE OF:

Kamel Ed-Din Arafat — APPELLANT.

vs

Sheikha Ali Hussein
wife of 'Issa Abdul Hadi — RESPONDENT.

Extension of time requested by debtor in proceedings before President of the District Court under Transfer of Land Ordinance, No. 2 of 1921—Allegation that excessive interest included in sum claimed—Sec. 2, Usurious Loans (Evidence) Ordinance, 1922—Effect of failure to pay fees on counter-appeal.

JUDGMENT.

The Court holds that the fact that the Respondent, in proceedings before the President of the District Court under the Transfer of Land Ordinance No. 2 of 1921, applied for an extension

of time for payment of the amount due from her to the Appellant, does not estop her from alleging that the sum claimed includes interest at a rate in excess of the legal rate or from benefiting by the terms of the Usurious Loans (Evidence) Ordinance, 1922.

The District Court has held, on the evidence before it, that the Respondent's claim is good.

The Respondent has raised before this Court the question of the repayment of the amount paid by her in excess of the sum due for principal and interest. As however the Respondent has not thought fit to pay fees in respect of this counter-appeal this Court cannot take this question into consideration.

The appeal is dismissed with costs.

Delivered the 1st day of July, 1924.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 133/24.

BEFORE:

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

IN THE CASE OF:

J. & I. Salzman — APPELLANT.

vs

Palestine Land Development Company — RESPONDENT.

Appeal of party struck out for lack of appearance—Interest ordered paid as from date of commencement of action and not from date of service of notarial notice as requested.

JUDGMENT

In default of appearance by the Palestine Land Development Company their appeal is struck out.

On appeal of Messrs. J. & I. Salzman claiming interest from 31st January, 1924, the date of service of a public notary notice upon the Company, it is ordered that interest on the princi-

pal sum due be paid from the date of commencement of the action, as the public notary notice did not call upon the Company to repay the purchase money.

Subject to this modification, the judgment of the District Court is affirmed.

Judgment in absence of the Palestine Land Development Company subject to opposition.

Delivered the 10th day of February, 1925.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 41/28.

BEFORE :

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

IN THE CASE OF :

Samaan Jadoun Khalil — APPELLANT.

vs

Abdel Rahim Sqariq — RESPONDENT.

Judgment given by District Court for payment of amount due on promissory note—Interest not ordered to be paid—No discretion in Court to refuse interest—Interest at legal rate payable from commencement of action—Art. 112, Civil Procedure Code.

JUDGMENT.

Article 112 of the Code of Civil Procedure (Turkish text) prescribes that interest shall be paid without the creditor having to prove that he has suffered loss. It would, therefore, appear that the Court has no discretion with regards to awarding interest and that the award should follow the judgment. Accordingly, the appeal is allowed and the judgment of the Haifa District Court amended by the inclusion of an award of interest at the legal rate from the time of action until payment.

Respondent to pay the costs of this appeal.

Delivered the 5th day of November, 1928.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 71/28.

BEFORE:

Baker, J., Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Zipora Karwasarsky APPELLANT.

vs

Bezalel Kaminsky RESPONDENT.

Plea of usurious interest—Claim for reduction of interest to legal rate heard so long as accounts are outstanding between the parties—Art. 6, Ottoman Law of interest not overruled by Usurious Loans (Evidence) Ordinance, 1922—Claim disallowed on bill not yet matured.

JUDGMENT.

By virtue of Article 6 of the law concerning the rate of interest of 9th Rajab, 1304, it is prescribed "that claims for the reduction of interest to the legal rate may be heard as long as there is an account outstanding between the parties." This Article has not been over-ruled by the Usurious Loans (Evidence) Ordinance, 1922.

The case is therefore remitted for Plaintiff's claim to be heard and tried on its merits and if Plaintiff satisfies the Court that she has actually paid moneys in excess of 9 per cent then she will be entitled to a return of those moneys. The Court confirms the dicta of the lower Court that Appellant cannot claim on bills which have not yet become due.

Costs to follow the event.

Delivered the 7th day of February, 1929.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 125/28.

BEFORE:

Corrie, J., Baker, J, and Khayat, J.

IN THE CASE OF:

Tewfik Bey el Ghussein and Others APPELLANTS.

vs

The Jaffa Fruit Company RESPONDENT.

Plea of usurious interest set up against written admission of indebtedness—Allegation by person making admission that admission false—Person in whose favour admission made to swear oath that admission true—Oath administered to manager of Company.

JUDGMENT.

I hold that the Appellants are entitled to have the contract C and Exhibit B treated as part of the agreement.

Exhibit B contains an admission by the Appellants that they owe the Respondent Company LE.3106.800 and it is upon this figure that the contracts A, B and C were based.

Although Exhibit B was signed after all the Appellants had an opportunity of examining the documents and three of them had actually done so, I hold that nevertheless they are entitled to have Article 1589 of the Mejelle applied and to have their allegation of interest in excess of the legal rate examined. The Appellants have produced no evidence to support their claim that usurious interest has been charged, and all they can do now is to administer an oath to the Respondent's Manager.

The oath to be administered will be in the following form: "That I do not know the Appellant's admission in Exhibit B is false and that I do not know that in computing the amount to which that admission relates, interest has been reckoned at a rate exceeding that allowed by law."

In the event of the Respondent's manager refusing to take the oath in the prescribed form, the judgment of the District Court must be set aside and the case remitted for the accounts to be examined and a fresh judgment given.

Costs to follow the event.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 40/29.

BEFORE:

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

IN THE CASE OF:

Suleiman Baidas — APPELLANT.

vs

Hassan Bak El-Said — RESPONDENT.

Admission of evidence to establish interest on loan to be in excess of legal rate—Action for reduction of interest on document not included in Usurious Loans (Evidence) Ordinance, 1922—Question of oath not raised in grounds of appeal.

Appeal from the judgment of the District Court of Jaffa dated 27th day of January, 1929.

JUDGMENT.

The District Court of Jaffa was correct in refusing to apply the Usurious Loans (Evidence) Ordinance, 1922. The document, the subject matter of this action, is not one expressed to be subject to the said Ordinance. The question of the oath is a question which has not been raised as a ground of appeal and therefore it cannot be administered.

The appeal must be dismissed and the judgment of the Lower Court confirmed with costs and advocate's fees assessed at £P.1.

Delivered the 22nd day of July, 1929.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 54/29.

BEFORE:

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

IN THE CASE OF:

Adib El-Zabin
Asma Bakir — APPELLANTS.

vs

Meir Shlomo Altshuler — RESPONDENT.

Admission of evidence to establish interest on loan to be in excess of legal rate—Plea of usurious interest available only to Defen-

dant—Sec. 1. Usurious Loans (Evidence) Ordinance, 1922—Interpretation of statutes — Intention of unambiguous statute to be gathered from the words used—Art. 6, Ottoman Law of Interest—Claims for reduction of interest to the legal rate heard so long as accounts are outstanding between the parties.

JUDGMENT OF THE CHIEF JUSTICE.

I am of opinion that the Turkish Law concerning the rate of interest should not have been applied in this case. On the other hand, I cannot agree with my brother Khayat, whose judgment I have read, that the Court below erred in not allowing oral evidence on behalf of the Plaintiff under Section 1 of Ordinance No. 11 of 1922, the Usurious Loans (Evidence) Ordinance, 1922.

That section expressly provides that where the Defendant pleads usurious interest, written or parol evidence may be received to support or rebut such plea.

I cannot agree that, as my learned brother says, we must take it that "the intention of the Law is to give the right to every debtor claiming the existence of excessive interest to prove his claim by personal evidence."

When the meaning of a statute is unambiguous its intention must be gathered from the words used. In the present case the ordinary law is varied in cases where the Defendant pleads usurious interest; the Courts have no power to extend it also to cases in which the Plaintiff puts forward that plea.

The appeal is dismissed with £P.2 advocate's fees and costs.

JUDGMENT OF MR. JUSTICE CORRIE.

In my view the District Court misinterpreted the provisions of Article 6 of the Ottoman Law of Interest of 9th Rajab, 1304.

Action was commenced on the 16th January, 1929. On 2nd February, 1929, the President of the District Court ordered the Plaintiff to pay the balance of the amount claimed, to "be kept in the Execution Office pending the judgment in the case". No further order has been made by the President of the District Court.

Hence it is clear not only at the date of commencement of action, but also at the date of judgment, there was "an account still outstanding between the parties."

As regards the meaning of Section 1 of the Usurious Loans (Evidence) Ordinance, 1922, I concur in the judgment of the learned Chief Justice: and accordingly I hold that the appeal must be dismissed.

JUDGMENT OF MR. JUSTICE KHAYAT.

I am of opinion that in spite of the provisions of Section 1 of the Law dated May 20, 1922, in regard to the admissibility of personal evidence by a Defendant to prove the inclusion of excessive interest, there can be no practical instance where a Plaintiff should make such a claim. It is more so in sanads certified by the Notary Public which have the executory force of a judgment. Here the Execution Office cannot ask Plaintiff to prove his debt as submitted by the Counsel of Respondent in this case, because such a procedure would amount to a confirmation or proof of a judgment by another.

Assuming that the view urged is correct the Defendant in this case is considered as Plaintiff so far as the claim of excessive interest is concerned and the onus of proving it is on him. So if we apply the strict wording of the law he cannot do it. The intention of the law is, therefore, to give the right to every debtor claiming the existence of excessive interest to prove his claim by personal evidence.

The judgment of the Court below must be set aside on two grounds: (a) the relation between the parties was still continuing when the sum claimed was deposited with the execution office and (b) Appellant is entitled to prove the claim of excessive interest by personal evidence because Respondent in fact is the Plaintiff in the substantive claim under the mortgage deed and Plaintiff is the Defendant in this case.

The case is remitted to the District Court to hear the evidence and give judgment accordingly.

Delivered the 9th day of February, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 29/30.

BEFORE:

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

IN THE CASE OF:

Muhammad Sha'aban el Hindi
and his sons Mahmud & Ali — APPELLANTS.

vs

Ayesh Omar Ajjour on behalf of the
heirs of his father Omar Ajjour — RESPONDENT.

Usurious interest—Procedure for claiming reduction to legal rate—Taking of accounts referred to experts—Art. 6, Law Concerning Rate of Interest, 9th Rajab 1304—Plea of payments on account of judgment debt.

Appeal from the judgment of the District Court of Jaffa, dated the 6th February, 1930.

JUDGMENT.

This action was instituted by the Appellants claiming:—

1. That the amount of LP.240 for which judgment had been given against them included exorbitant interest.

2. That they had made payments on account of the judgment debt.

The District Court referred the documents to experts to report what sum was due from the Appellants to Respondent allowing interest at the legal rate and giving credit for any payments made on account.

The experts reported that the total amount due for capital and interest was LP.54.620.

On the report being submitted to the District Court, the Court dismissed the action, holding (a) that it was too late to raise the claim of exorbitant interest and (b) that the experts had reported that the amount adjudged did not include exorbitant interest, (c) the Court disregarded the Appellants claim that payments had been made on account of the judgment debt.

The Court holds:—

(1) That Appellants were entitled, in accordance with Article 6 of the Law concerning the Rate of Interest of 9th Rajab 1304, to claim reduction of interest to the legal rate.

(2) That it is not the fact that the experts reported that the judgment debt did not include exorbitant interest.

(3) That the Court was bound to take into consideration the claim that payments had been made on account of the judgment debt.

Accordingly, the Court is of opinion that the District Court should on the 6th February, 1930, have taken the experts' report into consideration, and any objections by the parties as to the manner in which the report had been drawn up, and should have given judgment accordingly.

The judgment of the District Court, dated the 6th February, 1930, is set aside and the case remitted for completion.

Costs to follow the event.

Delivered the 4th day of June, 1931.

In the High Court of Justice.

H.C. No. 51/30.

BEFORE:

Corrie, J., Baker, J. and Frumkin, J.

IN THE APPLICATION OF:

Shlomo Steinberg PETITIONER.

vs

The Chief Execution Officer, Jerusalem,
Shlomo Kaufman
Kaduri Meshiah RESPONDENTS.

Rights of successive mortgagees—Right of first mortgagee to receive interest out of proceeds of sale by Execution Office in priority to any payment to second mortgagee—Constructive notice to second mortgagee of interest due to first mortgagee.

ORDER:

The Respondent, Kaufman, is the owner of property which he has mortgaged to the Petitioner Steinberg as securiry for £P.500 by registered deeds of mortgage, the particulars of which are:—

Date	No.	Amount secured
15th August, 1922	672	£P.300
1st October, 1923	968	£P.100
1st June, 1925	804	£P.100

Subsequently the Respondent Kaufman mortgaged the property to the Respondent Meshiah.

The Petitioner has obtained an order for sale of the property in satisfaction of his mortgage debt, and the question has been raised whether he is entitled to have interest upon his loans paid out of the proceeds of sale in priority to the debt due to the second mortgagee.

The three deeds of mortgage in favour of the Petitioner all contain an agreement by the mortgagor to pay interest at the rate of 9 per cent, and the second mortgagee must be held to have notice of this agreement, whether he in fact inspected the register or not before the mortgage in his favour was executed.

In our view, therefore, the Petitioner is entitled to have interest on his loans paid out of the proceeds of sale before any payment is made to the Respondent Meshiah.

The order nisi will be made absolute.

Delivered the 30th day of April, 1931.

In the High Court of Justice.

H.C. No. 13/32.

BEFORE:

The Chief Justice and Baker, J.

IN THE APPLICATION OF:

Jacob Gesundheit PETITIONER.

vs

Chief Execution Officer,
in the District Court of Jerusalem
Shimon Hausman,
Bano Davidoff RESPONDENTS.

Rights of successive mortgagees—Right of first mortgagee to receive interest out of proceeds of sale by Execution Office in priority to any payment to second mortgagee—H.C. No. 51/30 followed.

Application for an Order to issue to the Chief Execution Officer in the District Court of Jerusalem directing him to show cause why his Order dated the 8th of February, 1932, disallowing interest on the first mortgage debt in Execution File No. 3775/31 should not be set aside.

JUDGMENT.

In view of the authority of High Court No. 51/30, there having been a stipulation as to payment of interest in this case, we make the Order absolute with costs to include LP.2.— advocate's fees.

Delivered the 7th day of April, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 73/32.

BEFORE:

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

IN THE CASE OF:

Muhammad Khalil Shehab Eddin
Abdel Raouf Khalil Shehab Eddin APPELLANTS.

vs

Ismael Shehab Eddin RESPONDENT.

Interest disallowed where no undertaking to pay interest—Interest allowed by Court as from date of commencement of action.

Appeal from the judgment of the District Court of Jaffa dated the 25th April, 1932.

JUDGMENT.

1. As regards the claim for £P.491.960 it is clear that the Appellants are liable, and the appeal is dismissed.

2. The claim for £P.109.280 has now been withdrawn with a view to its being made the subject of a separate action, and as regards that sum and the sum of £P.6.510 interest thereon the judgment of the District Court must be set aside.

3. There is no undertaking by the Appellants to pay interest, except (under Exhibit 'B') in so far as interest may have been paid by the Respondent on money borrowed for the benefit of the Estate. There is no evidence of any such borrowing.

Interest on the sum of £P.491.960 will therefore run from date of action to payment, and the judgment of the District Court for £P.66.410 is amended accordingly.

The costs of this appeal will be borne by the parties in equal shares.

Delivered the 9th day of January, 1933.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 78/32.

BEFORE :

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

IN THE CASE OF :

Ismail el Ghanameh APPELLANT.

vs

El Taybi RESPONDENT.

Action on promissory notes—Pleas of excessive interest and part payment allowed by Court.

JUDGMENT.

The present Respondent in the Court below set up as a defence to Appellant's claim on three promissory notes for £P.400 part payment by way of farm produce to the amount of £P.89

and as to a further amount that it was usurious interest. The trial Court heard evidence and was satisfied that there had in fact been a part payment of £P.89 and that usurious interest had been charged, and gave judgment for Appellant for the sum of £P.140.910. Against this judgment Appellant has appealed.

After hearing Counsel for Appellant we find no reason to interfere with the judgment of the Lower Court, which is hereby affirmed, and the appeal dismissed with costs and advocate's fees.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 163/32

BEFORE:

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

IN THE CASE OF:

Solomon Enoch Levy — APPELLANT.

vs

The Ottoman Bank — RESPONDENT.

Action for balance alleged to be due on current Bank account—Plea of limitation of actions—Payment of debt contracted in foreign currency—Method of converting foreign currency into Palestine currency—Rate of conversion—Interest claimed in excess of capital sum due—Arts. 4, 5, Ottoman Law of Interest of March 22, 1302—Art. 84, Treaty of Lausanne—Legal inference that Bank account opened in foreign currency must be kept throughout in that currency—Change of currency of Palestine not authority to Bank to convert money of customer into Palestine currency—Right of Bank to charge compound interest.

JUDGMENT.

This appeal arises out of an action brought by the Respondent, the Ottoman Bank, against the Appellant, Solomon Enoch Levy, claiming £P.361.250 mils alleged to be due on the 1st of January, 1930, on a current account.

The Appellant set up the defence that the action was barred by lapse of time. This defence, however, was not pressed and in view of the correspondence which has been filed, we do not think it can be supported.

The Appellant has also set up the following defences:

(a) that the account is made out upon a wrong basis, in that the amount due from him is shown as owing in gold francs

and has been converted into Palestine currency at that date instead of at the equivalent of paper francs ;

(b) that compound interest is charged ; and

(c) that interest has been claimed to an amount exceeding the capital sum due.

The account which has been filed in support of the claim opens on July 1, 1914, with a debit of 20617.45 gold francs.

On December 31, 1915, the amount due had increased to 21806.55 gold francs.

On that date the debit balance was converted into Turkish currency, in accordance with the law which then came into force, and the amount due is shown on January 1, 1916, as L.T.959.08 gold Turkish pounds and 20 paras.

On December 31, 1917, the debit balance amounted to L.T. 1102.87 gold.

On that date the balanee was converted into Egyptian currency. £P.96.776 was shown as owing and the account was kept in that currency until October 31, 1927, when there was a further conversion into Palestine currency and £P.294.573 was shown as due and owing; the account having since been kept in that currency.

The Appellant's argument is that the debt was contracted in francs and that, in the absence of any express agreement that the amount due was to be paid in francs bearing a specified ratio to gold, it can validly be discharged by payment of paper francs, or their equivalent in Palestine currency.

In support of his argument, the Appellant has cited Article 84 of the Treaty of Lausanne :—

> "The High Contracting Parties are in agreement in recognising that debts which were payable before the war or which became payable during the war under contracts entered into before the war, and which remained unpaid owing to the war, must be settled and paid, in accordance with the provisions of the contracts, in the currency agreed upon, at the rate current in its country of origin."

The Appellant also relies upon the judgment of this Court in Maxumoff v. Simhayoff, Civil Appeal No. 98/25 [1]) and that of Mr. Justice Russell (now Lord Russell of Killowen) in British Bank for Foreign Trade v. Russian Commercial and Industrial Bank, 38 T.L.R. 65, English and Empire Digest, Volume 35, Page 170, Section 17.

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[1]) Ante p. 650

Against this, the Respondent cites the judgments of this Court in Abdel Salam Awaida v. the Ottoman Bank, Civil Appeal No. 323/20, Yehuda Yusef v. Moshe Eliazarof, Civil Apeal No. 216/22; Saleh Muhammad Shibl v. As'ad Habib Hawa, Civil Appeal No. 129/22 [1]), and the judgment of the Judicial Committee at the Privy Council in Moyal v. Halawe, Privy Council Appeal No. 121 of 1926 [2]). He maintains that these judgments are based upon the principle that where a debt is contracted in a currency other than that now in circulation in Palestine the debt is to be paid at the rate of exchange prevailing when it was contracted.

This argument seems to us to overlook the fact that the claim is based upon a current account which remained open until January 1, 1930, when the action was commenced. Hence the debt which gives rise to the claim cannot be regarded as a debt contracted on the date when the account was opened.

For the same reason the debt which gives rise to the claim is not a debt which was payable before the war or which became payable during the war under a contract entered into before the war. Hence the provisions of the Treaty of Lausanne do not apply to it.

We are, however, of opinion that when a customer has opened an account with a Bank in a currency other than the legal currency of the country in which the Bank is carrying on business the inference is that the parties intend that the account shall be kept throughout in the currency in which it is opened; and the Bank is not entitled to keep the account in any other currency.

In the present case, it is true, the conversion into Turkish currency was made in compliance with a law enacted by the Turkish Government during the war and would thus be binding upon an Ottoman subject. The Appellant, however, claims and it has not been contested, that he is a British subject, and this conversion would not bind him, unless he accepted it.

No authority has been given for the subsequent conversions into Egyptian and Palestine currency, and in the absence of agreement by the customer, these conversions cannot be valid against him.

We hold, therefore, that the Appellant is entitled to have the whole account made out in francs, and to discharge his liability in francs. Further, in the absence of any agreement that the franc was to be treated as bearing a specified relation to gold, the Ap-

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[1]) Ante p. 170

[2]) Ante p. 652

pellant is entitled, in accordance with the rule laid down by this Court in Maxumoff v. Simhayoff, above cited, which has been followed in Mamluk v. Fakhury, Civil Appeal No. 25/30 [1]) and in Yehudayoff v. Yehudayoff, Civil Appeal No. 30/27 and accords with the judgment in British Bank for Foreign Trade v. Russian Commercial and Industrial Bank to discharge his debt in francs or their equivalent in Palestine currency at the date of the judgment of the District Court.

The next question raised by the Appellant is as to the Bank's right to charge compound interest.

In the absence of an agreement to that effect, the position is governed by Article 5 of the Law of Interest of March 22, 1302.

As payments on account have been made by the Appellant, and no evidence that he is a merchant is before us, we hold that the Article does not entitle the Bank to charge compound interest.

Finally there is the question of the amount of interest that may be recovered.

This is governed by Article 4 of the same law which provides that no Court shall give judgment for interest exceeding the principal amount.

The judgment of the District Court is varied accordingly.

Delivered the 26th day of April, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 76/33.

BEFORE:

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

IN THE CASE OF:

Raja Salim Rayes — APPELLANT.

vs

Khalid Bey Azem — RESPONDENT.

Claim for reduction of interest to legal rate—Land transferred as security for loan—Power of Court to issue declaratory judgment—Excessive interest — Civil procedure — Parties to action — Person against whom order is sought must be named as Defendant not third party—Confirmation of provisional seizure refused by Court.

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1) Ante p. 657

Appeal from a judgment of the District Court of Haifa dated the first day of December, 1932.

JUDGMENT.

The action which gives rise to this appeal was brought in the District Court, Haifa, by the Appellant, Raja Salim Rayes, against the Respondent, Khalid Bey Azem, the Sub-Accountant, the District Commissioner's Officers, Haifa, being cited as a third party.

The question at issue was the amount of interest due in respect of a loan made by the Respondent to the Appellant upon security of land in Haifa, and the Appellant's claim was that judgment be given:

(1) reducing the interest to the legal rate and declaring that the Defendant is not entitled to any sum in excess of the sum of £571.200 mils (being equal to L.T.476.03);

(2) ordering the Defendant to abstain from receiving any sum in excess of the said amount;

(3) confirming the seizure; and

(4) ordering the third party to repay the excess amounting to LP.1350.076 to the Appellant, being his share in the money payable by the Government of Palestine, with costs.

Having regard to the fact that the Appellant was asking for an order directed to the Sub-Accountant, and we are of opinion that the Sub-Accountant should have been named as a Defendant.

The Appellant's action was dismissed and he has lodged this appeal to which the Sub-Accountant is not cited as Respondent or third party. It follows that the only claims before us are the first three claims above specified.

With regard to the first claim, namely, for a declaration that the Respondent is not entitled to any sum in excess of LP.571.200 mils, we hold that the rule laid down by this Court in Hassan Shihab ed-Din v. Khaduri Suleiman Darwish, Civil Appeal No. 64/32, applies. In that case, the Appellant, who had mortgaged immovable property to the Respondent, brought an action in the District Court claiming a declaration that part of the sum expressed to be due from him under the mortgage was interest in excess of legal rate, and hence was to be deducted from the amount due from him under the mortgage. This Court held that the District Court should have dismissed the Appellant's action on the ground that it had no power to issue a declaratory judgment of the nature claimed by the Appellant. The second claim, namely, for an order to the Respondent to abstain from receiving any sum

in excess of LP.571.200 is clearly a claim ancillary to and dependent upon the relief claimed in the 1st paragraph, and hence falls with that claim.

We are left therefore, with the Appellant's claim for confirmation of seizure.

The seizure which the Appellant seeks to have confirmed was effected by the District Court upon his application by way of provisional attachment of LP. 1360.076 mils in the hands of the Sub-Accountant pending the hearing of this action. As the Appellant's claim for payment of that sum to him by the Sub-Accountant has been dismissed, and no appeal against the dismissal of the claim has been made, it is clear that the order of the District Court removing the provisional attachment must be confirmed.

On these grounds the appeal is dismissed with costs including advocate's fees and expenses of LP.2.500.

Delivered the 16th day, of April, 1934.

JUDGMENT.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 88/22.

BEFORE:

The Acting Chief Justice, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Kaiserman & Nassrallah Khoury — APPELLANTS.

vs

Anisse Khoury wife of Basil Jarid — RESPONDENT.

Judgment that there is no prescription is not a final judgment—Interlocutory judgment not subject to appeal separately—Arts. 66, 179, Civil Procedure Code.

Appeal from decision of the Land Court of Jaffa dated the 14th June, 1922, to the effect that there was no prescription in the action between the above parties.

JUDGMENT

The Court holds:

1. That a judgment that there is no prescription is not a final judgment.

2. That Article 179 of the Civil Procedure Code must be construed in view of the provisions of the last paragraph of the Amendment dated 6 Ramadan, 1314, to Article 66 of the Civil Procedure Code, and hence that such a judgment is not subject to appeal separately until final judgment has been given upon the other issues in the case.

3. The appeal is dismissed with costs.

The Appellant is at liberty to raise the question of prescription as a ground of appeal when the other issues in the case have been decided by the Land Court.

Delivered the 10th day of January, 1923.

In the High Court of Justice.

H.C. No. 21/26.

BEFORE:

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

IN THE APPLICATION OF:

Mohammed Tewfiq Dajani — PETITIONER.

vs

Chief Execution Officer, Jaffa,
Solomon Jacobson, Administrator of the Estate of Joseph Bey Moyal — RESPONDENTS.

Judgment by default invalid after six months—Failure to execute judgment by default obtained in 1913—Expired judgment by default not revived by payment on account—Art. 150, Code of Civil Procedure.

ORDER.

The Respondent obtained judgment against the Petitioner in December, 1913, for a sum of money.

In December, 1918, a Rule of Court was made amending Article 150 of the Code of Civil Procedure, which thenceforth read as follows:— "A judgment by default loses its validity and is cancelled after six months if no legal steps have been taken towards putting it into execution".

Up to that time no steps had been taken to put the judgment into execution.

In October, 1919, Respondent sent a copy of the judgment to Petitioner who made no objection. In July, 1920, the judgment was produced to the Execution Officer, who notified the Petitioner

requesting him to pay. The Petitioner endorsed on the document a note to the effect that judgment was invalid because of the expiration of six months from the date.

There is no question that when the Respondent first took legal steps to put the judgment into execution it had lost its validity and was cancelled.

Subsequently ineffectual proceedings took place in execution of the judgment from time to time and in April, 1921, an agreement was made between the parties and before the Execution Officer for payment of the judgment by instalments, iucluding costs and interest, and by the same agreement the Petitioner authorized an attachment to be issued against certain properties, should he fail to pay instalments.

This document was followed by others of different dates recognizing the debt and the right of Respondent to the judgment. The Petitioner now objects to any further proceedings in execution, and asks for an Order directing the Execution Officer accordingly.

It appears from the dates of the judgment in default, the publication of the Rules of 1918, and the service of the first application to the Execution Officer, that when proceedings in execution were commenced the judgment on which they were founded was already invalid and cancelled according to the terms of Article 150 as amended. That being so, it was not competent to the parties to revive it. What they could do was to make a new agreement for payment of the old debt and this they appear to have done. If that is the contract relied upon by the Respondent it can be sued upon by him as in the case of any other contract, but not executed by the Execution Officer, whose office it is to execute judgments not contracts.

An order will issue to the Execution Officer accordingly.

Delivered the 14th day of June, 1926.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 40/26.

BEFORE:

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

IN THE CASE OF:

Abdallah Josef Dajani — APPELLANT.

vs

Litwinsky Brothers — RESPONDENTS.

Judgment for value of goods not delivered—Contractual right to cut oranges from trees—Impossibility of performance of contract—Value of goods not delivered according to contract assessed by Court.

JUDGMENT.

The Court holds that although the Respondents allege that the date mentioned in the notice was stated by mistake, yet they were entitled to extend the time and the Appellant was entitled to benefit from it.

Therefore the judgment of the District Court on this point is good. The Court however, should have given the Appellant one day in which to cut as many oranges as he could, the oranges then being on the trees.

Whereas the Respondents have cut the oranges, it is now impossible for Appellant to gather oranges for the period of one day from the orchard. Therefore the value of the quantity of oranges which the Appellant could have cut in one day from the said grove in the condition it was on that date, should be assessed and judgment given for it.

The Appellant is entitled to sue for damages if he so wishes.

Delivered the 14th day of May, 1927.

In the High Court of Justice.

H.C. No. 43/27.

BEFORE:

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

IN THE APPLICATION OF:

Zwi Zivlin
Zeev Israelsky — PETITIONERS.

vs

The Chief Execution Officer of the District Court of Jaffa
L. Spiro — RESPONDENTS.

Second judgment based on promissory notes—Intention of Art. 123, Execution Law—Priority of execution creditors—Certain judgments prima facie evidence of collusion between debtor and creditor—Promissory note as written admission.

ORDER

Article 123 of the Execution Law is intended to safeguard the interests of a creditor, who has obtained judgment and effected

executory attachment on the property of the judgment—debtor, from fictitious actions brought against him with his assumed consent, by third persons, with the sole object of diminishing the source from which the judgment creditor can collect his debt.

Under the above-mentioned Article judgments of the following nature, although not always conclusive, are to serve the Chief Execution Officer as prima facie evidence of collusion entitling him to disallow their holders from participating in a previously effected attachment, viz:—

(1) Judgments based upon oral admission of the judgment-debtor;

(2) Judgments based upon his refusal to take the oath; and

(3) Judgments which, even if based upon written admission, are not officially proved to have arisen from the same date as the cause of action of the first judgment.

We need not deal with (1) and (2) but have only to see whether or not applicant's judgment comes under (3). It obviously does. It is based upon promissory notes signed by the judgment-debtor, which are of the nature of written admissions. Not only is it not officially proved that this admission was made about the date of Respondent's debt, but it is admitted they were made much later, even after applicant had effected attachment.

It is argued, that by the judgment the documents become officially proved, but the official proof required by Article 123 is not proof of the signature, since it is presumed that the signatory is a party to the collusion, but what is wanted is proof of the date of the making of the document. Once it is not proved that such documents have been made about the date of the cause of the action of the first judgment, and particularly when it is, as in this case, admitted that they have been made much later, their holder is not entitled to participate in a previously effected executory attachment even if on introducing his action he obtained an order for conservatory attachment.

Application is therefore dismissed with costs and £P.3 advocates' fees.

Delivered the 2nd day of December, 1927.

In the High Court of Justice.

H.C. No. 48/27.

BEFORE:

Corrie, J. and Frumkin, J.

IN THE CASE OF:

Liquidator of the Deutsche Palestina Bank PETITIONER.

vs

The Chief Execution Officer of Jaffa,
Omar El-Bitar,
Cesar Araktingy,
Taufiq Ayub RESPONDENTS.

Execution of judgment refused by Chief Execution Officer—Execution of judgment of Ottoman Commercial Court of First Instance—Judgment by default not presented for execution within six months from its date—Secs. 1. 3, 10, 11, Judgment by Default (District and Land Courts) Rules, 1926—Meaning of judgment by default—Arts. 139-150, Civil Procedure Code.

ORDER.

The Petitioner, the liquidator of the Deutsche Palestina Bank is seeking an Order for the execution of a judgment given on the 21st August, 1331, by the Commercial Court of First Instance of Jaffa in favour of the Bank against Omar El-Bitar, Cesar Araktingy and Taufiq Ayub.

Execution of the judgment was refused by the Chief Execution Officer of Jaffa in the following terms:

"In my opinion I am bound by the previous decisions of the High Court in other cases of a similar nature and the execution must therefore be stayed."

The judgment-debtors argue that under Section 11 of the Rules of Court published in Official Gazette No. 164 dated 1st June, 1926, page 286, the judgment of the Commercial Court is not capable of execution against them.

The Rule is as follows:—

"A judgment by default which has not been presented to the Execution Officer for execution within six months from its date shall be deemed to be null."

One of the judgment-debtors, Omar El-Bitar, did not appear in the proceedings before the Commercial Court. The other judgment-debtors appeared at the first hearing but were absent from the later proceedings, and the judgment of the Court is expressed to be "Judgment by default subject to opposition and appeal".

The Petitioner admits that the judgment was not presented to the Execution Office until seven months after delivery. There can thus be no doubt that in accordance with the decisions of this Court in the cases of Ragheb Othman El-Khawaja v. The Estate of Josef Bey Moyal (High Court No. 19/1926)* and Mohamed Tewfiq El-Dajani v. The Chief Execution Officer of Jaffa and the Estate of Joseph Bey Moyal (High Court No. 21/1926), Section 11 is operative as regards Omar El-Bitar, and the judgment cannot be executed against him.

With regard to the other judgment-debtors, however, the Petitioner argues that the term "judgment by default" in Section 11 must be given the same meaning as is given to it in Sections 1 to 10 published at the same time; and that under Section 3 the judgment is to be regarded as a judgment in a contested action. Section 3 provides as follows:

> "If a Defendant has appeared at the first hearing but fails to appear at any subsequent stage of the proceedings the action shall nevertheless be deemed to be contested throughout, and subject to appeal but not to opposition."

It must be noted, however, that Sections 1 to 10 headed "Judgment by Default" apply only to proceedings in the first instance before a District Court or a Land Court or on appeal from a District Court or a Land Court. These Sections, therefore, have no application to a judgment of an Ottoman Commercial Court of First Instance, and in determining whether such a judgment was a judgment by default or not, we have to apply the Section in force at the time of delivery of the judgment.

According to the Ottoman Code of Civil Procedure a judgment was given by default if the Defendant was not present at the delivery of the judgment although he had appeared in the earlier proceedings; and in such a case the judgment was, as stated in the judgment under consideration, "a judgment by default subject to opposition."

Section 11 must therefore be held to apply as regards all the judgment-debtors and the Petition must be dismissed.

Delivered the 1st day of September, 1927.

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* Ante p. 833

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 77/27.

BEFORE:

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

IN THE CASE OF:

Tzadok Hankin APPELLANT.

vs

Horace Farbstein in his capacity as Syndic of the Bankruptcy of Hirsh Wolf

Simon Holzman RESPONDENTS.

Judgment appealed from not produced by Appellant—Appellant unable to produce copy of judgment of Lower Court.

JUDGMENT.

The Appellant in this case has not been able to produce the judgment from which he appeals to this Court and now states that he is not in a position to do so, consequently there is no judgment whatever before this Court which the Court could consider.

For these reasons the appeal is dismissed. Appellant is to pay costs, together with advocates' fee £E.1, to each Respondent.

Delivered the 26th day of October, 1927.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 118/27.

BEFORE:

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

IN THE CASE OF:

Leah Trevich APPELLANT.

vs

Moshe Trevich RESPONDENT.

Order given by President, District Court under Succession Ordinance, 1923, Sec. 16—Judgment not subject to appeal—Jurisdiction of President, District Court in administration of estate.

JUDGMENT.

The Court holds that a direction under Section 16 of the Succession Ordinance is not a judgment subject to appeal and

therefore, on the Respondent's preliminary objection, dismisses the appeal with £P.2 advocates' fee and costs.

Delivered the 8th day of March, 1928.

In the High Court of Justice.

H.C. No. 22/28.

BEFORE:

Corrie, J. and Frumkin, J.

Application for stay of execution of judgment of District or Land Court—Procedure on refusal of application—Effect of amendment of Rule 12 (b), Judgment by Default (District and Land Courts) Rules, 1926—Arts. 171-200 Civil Procedure Code applicable to judgment in suit" which does not include orders made in execution proceedings — Art. 7, Execution Law, 1330 — Postponement of execution by Execution Officer—Grounds for grant of stay of execution.

JUDGMENT.

This is an application under Rule 3 of the Judgment by Default (District and Land Courts) (Amendment) Rules of Court, 1928, whereby Rule 12 (b) of the Judgment by Default (District and Land Courts) Rules, 1926, was revoked and replaced.

Rule 12 (b) was as follows: "Application for stay of execution of any judgment of a District Court or Land Court shall be made in the first instance to the Court which gave the judgment or any Judge thereof in Chambers, and on appeal to the Court of Appeal in Chambers."

The rule as amended in 1928 now runs:

> "Application for stay of execution of any judgment of a District Court or Land Court shall be made in the first instance, even if notice of appeal has been given, to the Court which gave the judgment or any Judge thereof in Chambers.
>
> From a refusal of such application an appeal shall lie to the Court of Appeal in Chambers."

It is argued by the Respondent that the effect of this amendment is to alter the procedure upon the refusal of an application by the Court of original jurisdiction.

The procedure under the 1926 Rule was by way of petition and an order was in general made thereon without the parties being called upon to appear.

The amended Rule however, says that "an appeal shall lie". It is contended that this means that on refusal of the petition to the Court of original jurisdiction the party seeking stay of execution must comply with the provisions as to appeals contained in the Code of Civil Procedure; that is to say, he must serve a copy of the judgment refusing stay of execution, must give security and must pay the prescribed appeal fees. The provisions of Chapter III of the Code of Civil Procedure however apply to a "Judgment in suit". This does not include orders made in execution proceedings which are governed by a separate law, the Law of Execution, 1330.

By Article 7 of that law "The Execution Officer cannot postpone execution without lawful cause but he may postpone execution for a reasonable period if there appear satisfactory ground for doing so".

The effect of the Rule of Court is to add the lodging of an appeal to the list of grounds for staying execution which the Execution Officer may regard as satisfactory.

The amendment to the Rule of Court therefore, does not involve an alteration of the established procedure.

Delivered the 18th day of March, 1929.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 81/28.

BEFORE:

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

IN THE CASE OF:

J. Wolfson
M. Sachs — APPELLANTS.

vs

Arie Gurevitch
S. Ginsberg — RESPONDENTS.

Company ordered by District Court to be wound up—Appeal by person not a party to original proceedings disallowed—Art. 180, Civil Procedure Code—Sec. 49, Companies (Winding Up) Ordinance, 1922.

JUDGMENT.

The Court holds that in the view of the terms of Section 49 of the Companies (Winding Up) Ordinance, 1922, and Article 180

of the Code of Civil Procedure, no appeal will lie against a judgment of the District Court made in proceedings under the Ordinance by a person who was not a party to such proceedings.

The appeal is therefore dismissed.

Delivered the 24th day of March, 1929.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 41/29.

BEFORE:

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

IN THE CASE OF:

Haj Salah Agha Abou Ramadan — APPELLANT.

vs

Hashem Hassan El-Kutt — RESPONDENT.

Judgment not served on party concerned held not to be final—Meaning of title deed under Art. 24, Ottoman Magistrates Law.

JUDGMENT.

A judgment not served on the party concerned is not final and can therefore not be considered a title deed within the meaning of Article 24 of the Ottoman Magistrates, Law.

The judgment of the Land Court must therefore be confirmed and the appeal dismissed with £P.1 travelling expenses and costs.

Delivered the 15th day of April 1930.

In the High Court of Justice.

H.C. No. 72/29.

BEFORE:

Baker, J., Tute, J. and Khayat, J.

IN THE APPLICATION OF:

Farideh, Widow of Najib Inkeiri — PETITIONER.

vs

Chief Execution Officer, Jerusalem,
Esther As'ad Khayat — RESPONDENTS.

Judgment by default not presented for execution within six months—Secs. 4, 9, 11, Judgment by Default (District and Land Courts)

Rules, 1926—Discretion of Court owing to absence of party to extend time of service and opposition.

JUDGMENT OF MR. JUSTICE TUTE & MR. JUSTICE KHAYAT.

Although the terms of Section 11 of the Rules of Court (District and Land Courts) Judgments by Default, 1926, are general, we are of opinion that it is intended to apply to judgments by default given in cases where both parties are in the same town and that it does not apply to those cases provided for in Sections 4 (a) and (b) and 9, where the Court uses its discretion of extending the time of service and of opposition.

We therefore hold that the Order of the Chief Execution Officer should be set aside and that the judgment was presented in due time, especially as the Petitioner in this case effected service in accordance with the law and the Order of the Court.

JUDGMENT OF MR. JUSTICE BAKER.

Petitioner, on the 20th May, 1928, obtained judgment by default against second Respondent for the sum of £P.800.

On the 12th August, 1928, the Court ordered substituted service of the said judgment on Respondent by way of advertisement in a newspaper, such advertisement to be published within intervals of a week and leave being granted for Respondent to oppose the said judgment within five months of the last publication.

The last publication of the said judgment was on the 23rd of October, 1928. No opposition was lodged within five months of the date as ordered. On the 20th June, 1929, the judgment was lodged in the Execution Office for execution. Respondent, however, opposed execution, pleading that six months had elapsed since the date of judgment and in accordance with Section 11 of Rules of Court (Judgments by Default) 1926, the judgment was null and void.

On the 6th November, 1929, the Chief Execution Officer cancelled execution proceedings, being of opinion that the terms of Section 11 of Rules of Court (Judgments by Default) 1926 should be applied strictly and the judgment be rendered unfit for execution. Petitioner now applies for this Order to be set aside.

Now, Section 11 of Rules of Court (Judgments by Default) 1926 reads as follows: "A judgment by default which has not been presented to the Execution Officer for execution within six months from its date shall be deemed to be null"; This section is perfectly clear and needs no interpretation, for it means what it says.

The judgment was not lodged for execution until thirteen months after judgment was signed. I am satisfied that the law provides no exception to the above-mentioned rule, and, therefore, in accordance with the said rule, the judgment, in my opinion, must be deemed to be null and the Order discharged.

Delivered the 11th day of September, 1930.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 102/29.

BEFORE:

Baker, J., Jarallah, J. and Daoudi, J.

IN THE CASE OF:

Yehudah Itin APPELLANT.

vs

Liquidator of the Russian Zionist Centre RESPONDENT.

Judgment given in default as if in presence—Counter claim disregarded by Court—Amendment of judgment by Court of Appeal.

JUDGMENT.

This is an appeal from a judgment given against Appellant in default as if in presence.

Appellant entered a counter-claim to the original action and states that the Court in their judgment make no mention of the counter-claim and alleges that if the Court had considered the counter-claim judgment would not have taken the same form it did.

Respondent alleges that the judgment should be amended by this Court adding to it that the counter-claim be struck out.

We are of opinion that it is quite impossible for us to form an opinion as to what the intentions of the Lower Court were, or to interpret their judgment by adding thereto the dismissal of a counter-claim of which we have no evidence as to whether it was presented to their notice or what they actually intended with regard to it. The judgment in its present state cannot stand. The judgment must be quashed and the case must be returned for the Lower Court to give a new judgment.

Costs to be costs in the cause.

Delivered the 4th day of February, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 26/30.

BEFORE:

Corrie, J., Baker, J. and Frumkin, J.

IN THE CASE OF:

S. Amzalak, in his capacity as one of the Heirs of the Estate of the late Yusef Bey Moyal APPELLANT.

vs

David Moyal RESPONDENT.

Application for review of judgment – Procedure applicable to Civil Courts not applicable to judgment of Sharia Court of Appeal — Art. 27, Addendum to Code of Civil Procedure.

JUDGMENT.

The Court after hearing Dr. Eliash for the Petitioner holds that it cannot apply to a judgment of the Shari'a Court of Appeal procedure laid down by the Code of Civil Procedure as applicable to Civil Courts.

The application is dismissed.

Delivered the 4th day of December, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 14/31.

BEFORE:

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

IN THE CASE OF:

David Mayer Tamches APPELLANT.

vs

Nahoum Spiegelman RESPONDENT.

Interpretation of statutes—Rule of procedure held to come into operation as soon as enacted and to have retrospective effect—Special preferred to general rule — Reciprocal Enforcement of Judgments (Egypt) Ordinance, 1929, applied.

Appeal from the judgment of the District Court of Haifa, dated 5th June, 1930.

JUDGMENT.

In our opinion the general principle is that a rule of procedure comes into operation as soon as it is enacted and has a retrospective

effect. Moreover, the special rule is given preference over the general rule. Hence, the District Court should have applied the provisions of the Reciprocal Enforcement of Judgments (Egypt) Ordinance, No. 16 of 1929, dated 30th April, 1929.

We are therefore of opinion that the judgment of the lower Court should be set aside and the case remitted for trial accordingly.

Costs to follow the event.

Delivered the 27th day of July, 1932.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 14/31.

BEFORE:

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

IN THE CASE OF:

Khalil Hanna Hababo APPELLANT.

vs

The Attorney-General RESPONDENT.

Failure to notify appeal to Respondent in appeal from Magistrate's Court to District Court — Provisions of civil procedure re appeal applicable to appeals from judgment of Magistrate.

JUDGMENT.

It is a general principle of the administration of justice in Palestine that no final judgment can be given in an appeal until the appeal has been communicated to the Respondent. In the present case the appeal to the District Court against the Magistrate's judgment was not notified to the Respondent (the present Appellant).

The judgment of the District Court is therefore set aside and the case remitted for the appeal by the Attorney-General to be notified to the present Appellant, Khalil Hanna Hababo, and the case to be completed.

No order is made as to costs.

Delivered the 14th day of July, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 92/31.

BEFORE:

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

IN THE CASE OF:

The Orthodox Patriarchate, Jerusalem APPELLANT.

vs

Mother Superior of Notre Dame de Sion, Jerusalem RESPONDENT.

Copy of judgment signed by Judge held to be conclusive evidence of judgment—Date of judgment disputed—Appeal not made within prescribed period.

Appeal from the judgment of the District Court of Jerusalem dated 18th June, 1931.

JUDGMENT.

The Court, after hearing Mr. Nasri Nicola Nasr on behalf of the Appellant and Mr. Moghannam on behalf of the Respondent, holds that it is bound by the date of the 18th June, 1931, on the judgment signed by the judges.

Appeal being out of time, it is dismissed with £2. advocate's fee and costs.

Delivered the 3rd day of February, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 132/31.

BEFORE:

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

IN THE CASE OF:

Gabriel Moshayoff APPELLANT.

vs

Bakhmal Moshayoff RESPONDENT.

Appeal not lodged within period prescribed by law—Service of copy of judgment—Art. 22, Appendix to Civil Procedure Code.

Appeal from the judgment of the District Court of Jerusalem, dated 23rd October, 1930.

JUDGMENT.

The appeal must be dismissed. The copy of the judgment appealed against was served on the 6th January, 1931, and appeal was not lodged until the 26th November, 1931. No costs.

In our judgment[1]) Respondent alleged he had not been served with a copy of the judgment and Appellant having agreed that such was the case, the appeal was accordingly dismissed.

Delivered the 29th day of February, 1932.

In the Supreme Court, Ierusalem.

(In Chambers)

C.A. No. 141/31.

BEFORE:

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

IN THE APPLICATION OF:

Adib el Hinnawi — APPELLANT.
for the estate of
Fatmeh bint Muhammad Hinnawi
vs
Ya'qoub Abul-Huda — RESPONDENT.

Application for revision of Order made by Court of Appeal—Amendment by Court of Appeal of its own judgment held ultra vires—Costs originally awarded against estate then altered to be against administrator personally.

Application for revision of the judgment of the majority of the Court dated 25th July, 1932, awarding costs against the Appellant personally.

ORDER.

We hold that the Court cannot amend its judgment dated 5th April, 1932[2]) awarding costs against the estate and that the decision of the majority of the Court dated 25th July, 1932, is ultra vires the Court and therefore inoperative.

Given the 23rd day of March, 1933.

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[1]) Reported ante p. 323.

[2]) Reported ante page 252.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 141/33 [1]).

BEFORE:

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

IN THE CASE OF:

Adib el Hinnawi APPELLANT.
for the estate of
Fatmeh bint Muhammad Hinnawi

vs

Ya'qoub Abul-Huda RESPONDENT.

Oppositition to Order made by Court of Appeal—Ex-parte order made by Court of Appeal for removal of ambiguity in judgment given by it—Grounds for issue of elucidatory order.

Opposition to an Order of the Court of Appeal made on July 25th, 1932, amending the judgment of the Court dated 5th April, 1932.

ORDER.

The Order of this Court made ex-parte in Chambers on the 25th July, 1932, appears to have been made by way of removal of an ambiguity in the judgment of this Court dated 5th April, 1932.

After hearing the parties, however, we are satisfied that there was no ambiguity in the judgment dated 5th April, 1932 [2]) and hence no ground for the issue of an elucidatory order, and accordingly the Order dated 25th July, 1932, is discharged.

Delivered the 3rd day of April, 1933.

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

C.A.D.C. Jm. No. 209/31.

BEFORE:

De Freitas, J., Abdel Hadi, J. and Valero, J.

IN THE CASE OF:

Yeheskel Ara'i APPELLANT.

vs

David Salman Zilha RESPONDENT.

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[1]) See previous judgment.

[2]) Reported ante page 252.

Appeal brought from preparatory (interlocutory) judgment dismissed—Only final judgment of Court subject to appeal—Art. 66, Civil Procedure Code.

Appeal from the judgment of the Magistrate's Court of Jerusalem, dated 12th July, 1931.

JUDGMENT.

After consideration, the Court finds that after giving his preparatory judgment, the Magistrate ought to carry it out and arrive at the final decision, instead of giving judgment at this stage at the request of the Appellant in order to enable him to bring an appeal against the preparatory judgment.

Therefore, the Court decides to set aside the Magistrate's decision and return to him the papers to complete the case after hearing all the arguments by both parties and give a fresh decision.

Judgment final.

Costs to be costs in the cause.

Given the 8th day of December, 1931.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 4/32.

BEFORE:

Baker, J., Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Vicar Philippus El-Makarius APPELLANT.

vs

Shukri Kattan and Others RESPONDENTS.

Failure of Appellant to serve judgment appealed from on Respondent—Attention of Appellant drawn to the omission to serve copy of judgment.

JUDGMENT.

In their rejoinder filed over two months ago, the Respondents drew the Appellant's attention to the fact that he had omitted to serve them with a copy of the judgment. The omission has, however, still not been made good.

Following previous judgments of this Court, the appeal is dismissed with costs and advocate's fees assessed at £P.1 each.

Delivered the 10th day of May, 1932.

In the Supreme Court sitting as a Court of Appeal.

A.A. No. 16/32.

BEFORE:

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

IN THE CASE OF:

Hamdan 'Uthman Mustafa El-Jibawi APPELLANT.

vs

The Attorney-General RESPONDENT.

Validity of judgment challenged on ground of improper composition of Court—Composition of Court of Criminal Assize—Judges of District and Land Court sitting in Court of Criminal Assize—Necessity of appointment of Judge in writing—Presumption of appointment of Judge.

JUDGMENT.

As regards Ali Eff. Hasna, he holds an instrument under the hand of the High Commissioner and the Public Seal of Palestine, dated 27th February, 1930, to be a Judge of a District Court in Palestine, and we hold that he was therefore properly a member of the Court of Assize under Section 9 of the Courts Ordinance, 1920.

As to Said Bey Toukan, he holds an instrument, dated 18th December, 1930, under the hand of the High Commissioner and the Public Seal of Palestine to be a Judge of a Land Court in Palestine.

This, we think eliminates Section 12 (3) of the Courts Ordinance as he is thereby clearly not a Magistrate and imports only Section 12 (2) of the Ordinance which, as the Government Advocate has pointed out, does not require an appointment in writing as do the four cases envisaged in Section 12 (1).

In practice, a written appointment by the Chief Justice has, as a rule, been given under Section 12 (2) and, for purposes of evidence that the appointment has been made, and delimitation of the scope of the appointment, such a written appointment is undoubtedly desirable, but when, as in the present case, the Judge whose capacity is questioned sits in a Court presided over by the Acting Chief Justice, who alone has power to appoint him to act in that capacity, we feel bound to say that we must, without further evidence, presume an appointment of the Judge of the Land Court in question to sit as a Judge of the District Court of the District in which the Court of Criminal Assize is sitting.

In Assize Appeals 5, 6 and 7 of 1930, in which Selim Eff. Shehadeh was held not to have been properly appointed, the Court was in no instance presided over by the Chief Justice or an Acting Chief Justice, and so no such appointment could be presumed from the presiding Judge sitting beside him upon the Bench.

In consequence, we adopt in this matter the able argument of Musa Eff. Alami, the Assistant Government Advocate, and hold that the Court was not improperly constituted.

Delivered the 28th day of September, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 64/32.

BEFORE:

Corrie, J., Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Hassan Shehab Ed-Din APPELLANT.

vs

Khadduri Suleiman Darwish RESPONDENT.

Property mortgaged as security for debt—Claim that part of amount due under mortgage is excessive interest—Application for declaratory judgment—Art. 36, Law of Execution restricted to three cases to which it relates—Excessive interest to be used as plea of Defendant.

JUDGMENT OF MR. JUSTICE CORRIE.

The Appellant who has mortgaged immovable property to the Respondent as security for a sum of £P.900, has brought an action in the District Court claiming a declaration that part of the sum expressed to be due from him under the mortgage, amounting to £P.318.775, is interest in excess of the legal rate and hence is to be deducted from the amount due from him under the mortgage.

The Judges of the District Court were unable to agree, and in consequence the Appellant's action was dismissed.

On appeal against this dismissal, the question has been raised whether or not the District Court could issue a declaratory judgment of the kind sought by the Appellant.

In this connection the provisions of Article 36 of the Law of Execution have been cited to us, and it has been argued that a

similar procedure may be adopted when the debtor alleges excessive interest.

I am not satisfied that such is the case. I hold that the procedure provided by Article 36 is to be restricted to the three cases to which it is expressed to relate; and that where a debtor alleges excessive interest his proper remedy is to set up this defence in an action by the creditor.

In the present case, it is stated that this course is not open to the Appellant, as the President of the District Court has ordered the sale of the mortgaged property, subject only to a delay to enable the Appellant to bring this action.

That, however, is not a question arising on this appeal. If the Appellant is aggrieved by the form of order made by the President of the District Court, that is a matter for which there is an appropriate remedy.

In my view the District Court should have dismissed the Appellant's action on the ground that it had no power to issue a declaratory judgment of the nature claimed by the Appellant.

KHALDI, J.: I concur.

JUDGMENT OF MR. JUSTICE FRUMKIN.

Having regard to the provisions of Article 36 of the Law of Execution, I hold that the District Court has jurisdiction to entertain an action by a Plaintiff who claims a declaration that the amount expressed to be payable by him under a mortgage, includes a sum representing interest at a rate in excess of the maximum rate prescribed by law. It follows that the action which gives rise to this appeal was within the District Court's jurisdiction.

Delivered the 24th day of July, 1933.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 113/32.

BEFORE:

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

IN THE CASE OF:

George Qa'war — APPELLANT.

vs

Anton Butros Matta — RESPONDENT.

Copy of judgment to be served on Respondent must be officially certified to be a correct copy—Art. 23, Appendix to Civil Procedure Code—Security for costs not duly certified—Art. 186, Civil Procedure Code—Cross-appeal to be made within period prescribed for lodging of appeal.

JUDGMENT.

The copy of the judgment to be served upon the Respondent, in accordance with Article 23 of the Law, dated 26th March, 1327, amending the Civil Procedure Code, must be officially certified to be a correct copy, hence service of a copy not so certified is not good service.

The Appellant's attention was called to this defect in the Respondent's rejoinder, dated 22nd August, 1932, but he has taken no step to make good the defect.

The same considerations apply to the security which is not duly certified.

In accordance with the judgments of this Court in Civil Appeal No. 108/31* and Civil Appeal No. 78/31, the appeal is dismissed.

The appeal by the Appellant, not having been duly presented, the cross-appeal by the Respondent, which was not made within the period prescribed for lodging an appeal, cannot be heard.

The Appellant Qa'war will pay the costs of this appeal, including £P.2 advocate's fees.

Delivered the 9th day of February, 1933.

In the High Court of Justice.

H.C. No. 41/33.

BEFORE:

The Senior Puisne Judge and Khayat, J.

IN THE APPLICATION OF:

Richard Hughes APPELLANT.

vs

The Chief Execution Officer, Jerusalem
Joseph Navon RESPONDENTS.

Limitation of actions—Prescription of judgment—Duty of Chief Execution Officer to determine whether judgment presented to him for

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* see ante, p. 327

execution is not prescribed—Arts. 144, 146, Execution Law—Procedure for establishing lawful excuse preventing prescription from running against judgment—Execution of judgment.

Application for an order to issue to the Chief Execution Officer, Jerusalem, to show cause why his order suspending execution of a judgment obtained in 1904 should not be set aside.

ORDER.

Under Article 144 of the Law of Execution, it was for the Chief Execution Officer to determine whether or not the period after which, in the absence of lawful excuse, the judgment would be prescribed, had expired.

The Chief Execution Officer having determined that such period had expired, the party who desires to establish a lawful excuse preventing prescription from running against him must apply under Article 146 to the competent Court for an order to that effect.

The Order of the Chief Execution Officer is modified accordingly.

No order is made as to costs.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 44/33.

BEFORE:

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

IN THE CASE OF:

Nasarallah Khoury — APPELLANT.

vs

The Syndic of the Bankruptcy of Nasarallah Khoury — RESPONDENT.

"Judgment" within meaning of Art. 43, Palestine Order-in-Council, 1922—Jurisdiction of Court of Appeal—Appeal disallowed from order of District Court made administratively—Bankrupt ordered to leave expensive house.

Appeal against a decision of the District Court of Haifa ordering the bankrupt to leave his house which the Court considered as being too expensive.

JUDGMENT.

The decision of the District Court given on June 16, 1932, is not a judgment within the meaning of the Palestine Order-in-Council, 1922, Article 43. It is an order made administratively giving effect to a report by the Juge Commissaire ; and in the absence of express provision to tnat effect, it is not capable of appeal to this Court.

There is thus no appeal before the Court and the application is dismissed.

In the High Court of Justice.

H.C. No. 50/33.

BEFORE:

The Senior Puisne Judge and Khaldi, J.

IN THE APPLICATION:

Ismail Muhammad Awad,
Salim Ibrahim El'Oufi,
Ali Muhammad El'Oufi and
Abdallah Abd En-Nabi El'Oufi PETITIONERS.

vs

The Chief Execution Officer, Nablus
Keren Kayemeth Le-Israel RESPONDENTS.

Application refused by High Court when order applied against already executed—Jurisdiction of High Court—Execution of order for eviction of Wadi Hawareth lands—Art. 43, Palestine Order-in-Council, 1922—Claim for recovery of possession of land—Sec. 6, Courts Ordinance, 1924—Jurisdiction of High Court to restrain registration of immovable property in name of purchaser at execution sale—H.C. No. 50/31 and H.C. No. 74/32 followed.

ORDER.

The Petitioners have been evicted from lands in the Wadi Hawareth by virtue of orders issued by the President of the District Court of Nablus on the 14th of August, 1930, and the 15th of May, 1933, and a letter of instructions given by the President of the District Court to the Execution Officer, Tulkarem, dated 3rd June, 1933.

Since their eviction, the Petitioners have made an application to the President of the District Court, which was refused by order dated 15th July, 1933.

The Respondents named in this Petition are the President of the District Court of Nablus and Keren Kayemeth Le Israel, at whose instance the orders of eviction were made.

Relief is sought by the Petitioners in the following terms:

> "It is prayed that the Respondents be summoned for trial, and after hearing the case that an order be given cancelling the said execution orders because they are contrary to the laws above-mentioned, and that our clients be allowed to return to the land with costs."

It is obvious that the first question arising out of this Petition is that of jurisdiction. The jurisdiction of this Court is defined in the second paragraph of Article 43 of the Palestine Order-in-Council, 1922, in the following terms:—

> "The Supreme Court, sitting as a High Court of Justice, shall have jurisdiction to hear and determine such matters as are not cases or trials, but petitions or applications not within the jurisdiction of any other Court and necessary to be decided for the administration of justice."

Now a claim to recover possession of land is one which can be made by action in the Magistrate's Court; such a claim, therefore, is not a matter upon which the Court has jurisdiction to make any order.

In the course of his pleading, the Petitioners' advocate argued that even if this Court could not make an order for possession, it could give a judgment declaring that the orders issued by the President of the District Court were illegal.

Now it is clear that if such orders had not been executed, it would have been within the competence of this Court to determine whether the orders were or were not validly made; and in the event of this Court being of opinion that such orders were invalid, to issue an order directing the President of the District Court to refrain from executing his orders.

The authority to issue such an order is expressly conferred upon this Court by Section 6 of the Courts Ordinance, 1924, which provides that:

> "The High Court of Justice shall have exclusive jurisdiction in the following matters:
>
> (2) Orders directed to public officers or public bodies in regard to the performance of their public duties and requiring them to do or refrain from doing certain acts."

Where, however, as in the present case, the order of the public officer has been carried into effect, the terms of this Section clearly do not apply; and we know of no provision which authorises this Court to pass upon an order made by a public officer and to declare such order illegal, in circumstances in which it is impossible for this Court to issue an order to the public officer concerned.

The same question arose in Ex-Parte Mrs. Rose Blum, High Court No. 50/31*.

In that case the Chief Execution Officer, Jaffa, had distrained upon the goods of the Petitioner for a sum of £P.43.510 mils in respect of a road improvement tax levied by the Local Council of Tel-Aviv.

After the amount had been levied, the Petitioner applied to this Court for an order setting aside the order for distraint made by the Chief Execution Officer.

This Court in dismissing the Petition said:—

> "The Petitioner has a remedy by way of action against the Local Council in the competent Court for recovery of the amount alleged to have been wrongfully levied: and this Court will not make an order which cannot be complied with, namely, for stay of execution proceedings which have already been completed".

A similar situation has arisen on more than one occasion in connection with orders made by a President of a District Court for the registration in the name of a purchaser, of immovable property sold by order of the President of the District Court in satisfaction of a judgment debt or in realization of the security for money lent upon mortgage.

The principle, which this Court has adopted in dealing with such applications, is that where the President of the District Court's order has not been carried out by actual registration of the purchaser in the Land Registry, the Court would entertain the Petition and, if necessary, issue an order directing the President of the District Court to refrain from execution of his order for registration.

Where, however, registration has actually been effected, the Court has held that it had no jurisdiction to issue any order. Ex-Parte Ahmad Mahmud Hejazi, High Court No. 74/32.

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* see ante, p. 287

The same principle must, in our view, govern the present case.

On behalf of the Petitioners it has been argued that, as the Court which has jurisdiction in questions of possession is the Magistrate's Court, it must treat the orders of the President of the District Court as binding upon it.

The same argument was put forward and rejected in Ex-Parte Mrs. Rose Blum, already cited.

The orders issued by the President of the District Court are not judgments of a Court and cannot bind the Magistrate's Court.

The Petition must be dismissed.

Delivered the 19th day of October, 1933.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 61/33.

BEFORE:

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

IN THE CASE OF:

Faris Khalil Haj Hamdan and Others — APPELLANTS.

vs

Osman Salim El Bushnak and 66 Others — RESPONDENTS.

Appeal from judgment of Settlement Officer decided by Land Court in Chambers—Civil Procedure — Commencement of period for appeal—Secs. 3, 57(2), Land Settlement Ordinance, 1928—"Notification of judgment" defined—Form of judgment—Rule 2, District Court Rules of Court, 1930—Signature of judgment in Chambers held not to be a delivery of judgment—Necessity of formal delivery of judgment—Art. 121, Civil Procedure Code and Art. 15 Appendix thereto.

JUDGMENT.

This is an appeal against a judgment dated the 21st of October, 1933, of the Land Court of Jaffa, on appeal from a decision of the Settlement Officer, Jaffa Area, given on the 17th of July, 1932.

The first question that arises is whether the period for appeal has commenced.

The appeal was decided by the Land Court in Chambers without hearing the parties. The parties were not summoned to hear judgment but on the 29th of October, 1933, the advocate of

the present Appellants, who were also appellants in the Land Court, received a notice from the Chief Clerk of the Court stating that the appeal was dismissed,

Now under Section 57 (2) of the Land Settlement Ordinance, 1928:

> "An appeal shall lie from the judgment of the Land Court to the Court of Appeal on a point of law. Notice of the appeal shall be lodged with the Court of Appeal within 30 days of the judgment if given in presence, or within 30 days of the notification of the judgment if it was given in absence."

Hence, as the judgment of the Land Court was not delivered in the presence of the Appellants or their representative, before they could appeal, the judgment must have been notified to them.

The term notification is not defined in the Ordinance. Under the Civil Procedure Code the only method of notification of a judgment to a party was by service upon him of an official copy of the judgment. This has been modified as regards judgments of the District Courts by Rule Two of the District Courts Rules of Court, 1930, which provides that

> "it shall be sufficient for such service if a judgment be drawn up in one of the forms set out in the Schedule thereto."

but no corresponding amendment has been made with regard to judgments of Land Courts.

In Land Appeal No. 36/31, Pinhas Goldberg and Others v. Khaya Rabinovitch and Others where the result of the appeal to the Land Court was communicated to the parties by the Settlement Officer himself, this Court held that such communication was not notification of the judgment as contemplated in Section 57 (2) of the Land Settlement Ordinance, 1929.

It follows that the informal notice sent to the Appellants by the Chief Clerk of the Court, which he was under no obligation to send and for which no authority exists in law, was certainly not notification as required by the subsection.

The period for appeal has therefore not begun. But the matter does not end there. The Appellants were unsuccessful plaintiffs; that is to say, the decision of the Settlement Officer rejects their claim; there is thus nothing in the judgment for the Respondents to execute other than an order for payment of costs.

If, therefore, signature in Chambers of the Land Court's judg-

ment operated as a valid delivery of the Judgment, it follows that the existing Rules of Procedure provide no means whereby the Appellants can bring an appeal against that judgment before this Court until the Respondents see fit to take steps to recover their costs. If such were the rule it would clearly inflict grave hardship upon a plaintiff who was an unsuccessful appellant.

Article 121 however of the Code of Civil Procedure contains the following provision :

> "The Court shall then deliberate and if it be possible to give a decision at once it shall forthwith return to the Court Room and the President shall inform the parties of the decision in open Court. If it be not possible to give a decision at once, a day shall be fixed for the delivery of judgment and the parties shall be informed accordingly and the Court shall deliberate in the interval and judgment shall be delivered on the date fixed."

Again, Article 15 of the Law of 26th Mart, 1327 (9th April, 1911) amending the Civil Procedure Code, contains the following provisions that:

> "The judgment will be read aloud by the President of the Court".

We know of no modification of these provisions which dispenses with the necessity for delivery of judgment even where, as in the present case, the appeal is decided in Chambers without hearing the parties.

It is true that Section 3 of the Land Settlement Amendment Ordinance, 1932, declares that:

> "any judgment given or order made by a Land Court in Chambers in any appeal prior to the commencement of this Ordinance shall be deemed to be and always to have been validly given or made."

But that section cannot be construed as conferring validity upon a judgment which never has been "given", and it is clear from the Articles cited that no judgment has been given until it has been delivered.

The judgment signed by the Land Court on 21st of October, 1933, has never been delivered and there is thus at present no judgment against which an appeal can lie.

When, after due summons to the parties, the judgment is delivered the Appellants will be in a position by attending to hear judgment to lodge an appeal within 30 days of its delivery.

Costs will follow the event.

Delivered the 15th day of January, 1935.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 86/33.

BEFORE :

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

IN THE CASE OF :

Shimon Jacob Shimon APPELLANT.

vs

Ezra Kokia RESPONDENT.

Power of District Court to issue declaratory judgment—Admissibility of oral evidence to contradict admission made before Land Registrar — Acknowledgement by both parties of false admission — Reduction of principal amount of mortgage.

Appeal from a judgment of the Disrict Court of Jerusalem dismissing the action of the Appellant for a declaratory judgment to reduce the amount claimed under a mortgage.

JUDGMENT.

On the authority of C.A. No. 64/32 we are of the opinion that the District Court should have dismissed the action on the ground that it had no power to issue a declaratory judgment of the nature claimed by the Appellant. We need not therefore stop to consider whether in the circumstances of the present case the District Court erred in applying C.A. No. 78/28* and refusing to allow oral evidence in contradiction of the admission made before the Land Registry in view of the fact that both parties in this case acknowledge that the admission was false.

The appeal is therefore dismissed with costs to include £P.2 advocate's fees.

Delivered the 14th day of June, 1934.

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* see ante, p. 61

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 101/33.

BEFORE:

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

IN THE CASE OF:

Hakmeh bint Saleh Jayousi and Others APPELLANTS.

vs

Muhammad Amin Salah RESPONDENT.

Judgment of District Court ordering erection of wall varied by Court of Appeal — Women's quarters overlooked by portions of newly constructed house — Article 1202, Mejelle.

Appeal from a judgment of the District Court of Nablus ordering the Appellants to erect a stone or brick wall of such a height as to prevent persons from looking into the women's quarters of the Respondent's house.

JUDGMENT.

The judgment of the District Court is varied by changing the order to the Appellant to put up a stone or brick wall, into one ordering him under Mejelle Article 1202 to screen any window and the staircase overlooking the Respondent's house in such a manner that a person of a man's normal height standing beside such screen is unable to look over them.

We make no order as to costs in this Court.

Delivered the 5th day of November, 1934.

KUSHAN.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 122/24.

Before:

Corrie, J., Jarallah, J. and Khaldi, J.

In the case of:

Yusef Abdul-Karim Abdul-Hadi — Appellant.

vs

Ismai'il Abdul-Rahman Khammash — Respondent.

Action against registered owner to establish ownership of land—Allegation of lost deeds of purchase—Proof of cultivation and leasing of land—Oral evidence not accepted against kushan unless overwhelmingly strong—Custom that land of heirs registered in name of one of them—Custom that land of village registered in name of its notables.

JUDGMENT.

This action was brought by the Respondent Isma'il Abdul-Rahman Khammash against the Appellant Yusef Abdul-Karim Abdul-Hadi whose father is registered as owner of the land in dispute, by purchase from Miriam Hindus.

The Respondent claims that his father bought by unregistered deed from Muhammad Abu Shurah, who bought by unregistered deed from Miriam Hindus. Neither of these deeds is forthcoming, the Respondent alleging that they are lost.

As regards the earlier purchase no witness who was present at the sale is produced. One witness gives evidence of the sale to the Respondent's father.

As regards possession, an attempt was made to prove that the Respondent and his predecessor had cultivated and leased the land. The only act of ownership, however, which was established to the satisfaction of the Land Court, was the digging of a cistern by the Respondent's father.

The Appellant alleges that, in fact, the alleged cistern is a hole from which earth is taken, and from the absence of evidence of user of water from the cistern this may be correct.

However that may be, the position is that the Respondent is bringing an action on title against the registered owner without producing any written evidence whatever. Such actions have been maintained in certain cases, as for example where the Court has

recognised the custom that the land of heirs is registered in the name one of them, or the land of a village in the names of a small number of notables.

Apart from such special circumstances, however, we know of no case in which the Court has accepted oral testimony against a kushan. If it is ever to do so, it must be in a case in which the evidence both as to title and possession is overwhelmingly strong.

In the present case, of the two sales alleged by the Respondent, one is unproved and one rests upon the evidence of a single witness claiming direct knowledge. The inference as to ownership from the fact that the land has been known as Hakuret Abdul-Rahman or Hakuret Khammash is not one which it would appear safe to regard as at all conclusive, as these names were not known to all the Respondent's witnesses.

Evidence of possession is limited to a single act—the digging of a cistern. I hold that this is not evidence of such a character that the Court should rely upon it against a registration, and accordingly, that the appeal should be allowed, the judgment of the Land Court set aside and the Respondent's action dismissed with costs.

Delivered the 2nd day of July, 1924.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 51/27.

BEFORE:

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

IN THE CASE OF:

Iskander Boulos Jada'
Labieh widow of Boulos Jada' APPELLANTS.

vs

The Palestine Land Development Co. Ltd. RESPONDENT.

Action against registered owner to establish ownership of land — Application for cancellation of kushan — Waste land revived — Rights of bona fide purchaser from registered owner — Estoppel of claimant by laches.

Appeal from the judgment of the Land Court of Haifa dated 28th February, 1927.

JUDGMENT OF THE LAND COURT
L. HA. No. 14/26.

In this case the Plaintiffs claim that a piece of land of 92 dunams in area, which lies to the south of their land should be declared to be theirs, and that the kushan for this land in the Defendant Company's name should be cancelled.

According to the Plaintiff's kushan the area of their land is 1000 dunams and is bounded to the south by waste land. The Plaintiffs are in possession of this 1000 dunams and can have an additional 178 dunams if and when they choose to pay bedl misl therefore.

But this is not enough for the Plaintiffs. They want to appropriate all land to the south until they get to what is now waste land,—and because the Defendant Company's land is in the way, they want that.

It appears that the 92 dunams now in dispute was itself once waste land and was revived by the vendor to the Defendant Company, who was granted a kushan therefor after Hilmi Eff. Husseini, an officer of the Palestine Government, had made an inspection thereof.

The Defendant Company was a bona fide purchaser of registered land. This Court has previously held that it will not allow such a purchaser to be defeated by persons who kept silent when the registration on faith of which it was purchased, was effected. There can be no doubt that they knew the vendor to the Defendant Company was obtaining registration but they kept silent.

We are of opinion that the Plaintiffs have entirely failed to establish their claim and we accordingly dismiss the claim with costs and advocate's fee £P.1.

Judgment in presence and appealable.

JUDGMENT.

Appellant is the registered owner of certain land the southern boundary of which is shown as waste land. He claims that the land in dispute, which is on his southern boundary is part of the land registered in his kushan, but he failed to prove his case in the Court below and the said Court found as a fact that the land in dispute was revived by the vendors to the Respondent.

The appeal must fail and the judgment of the Land Court affirmed with costs and £P.5 advocate's fees.

Delivered in presence the 16th day of January, 1929.

In the Land Court of Jaffa.

L.Ha. No. 5/27.

BEFORE:

Litt, J. and Strumza, J.

IN THE CASE OF:

Hassan el Taha and Others of
Arab el Ghawarni PLAINTIFFS.

vs

The Palestine Land Development
Co. Ltd. and Others DEFENDANTS

Application against registered owners of land for declaration of title — Registration in names of unspecified members of tribe refused — Action against kushan to be brought against all the registered owners.

JUDGMENT.

We have come to the conclusion that the Plaintiffs' case as at present framed must be dismissed.

They ask for a declaration of ownership, and registration in the names of the members of the tribe.

The Court cannot order registration in the names of the members of the tribe, when not only is it ignorant of their names, but in addition it is not even told the shares of the individual members.

As regards the alternative request now made that the action be allowed to proceed as regards the present Plaintiff's shares this cannot be acceded to as their shares are in no way specified.

Further, the case is not brought against all the registered owners as it should have been.

The Plaintiffs' case is accordingly dismissed without prejudice to a fresh action being brought when properly framed.

Costs, advocate's fee of LP. 2. Appealable.

Delivered the 17th day of June, 1927.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 58/27.

BEFORE:

Corrie, J., Jarallah, J. and Khaldi, J.

IN THE CASE OF:

Suliman Musa Mohammed Abu Hatab
Taha Ibn Ali Radwan APPELLANTS.

vs

Mohammed Ibn Ali Musa Abu Hatab
Ahmad Ibn Ali Musa Abu Hatab RESPONDENTS.

Action against registered owners of land to establish title — Allegation that lands of family registered in name of one of its members — Exception to general rule that oral evidence is not accepted against kushan.

JUDGMENT.

This is a case in which Appellants allege that the lands of the family were registered in the name of one member. That is a case in which, as an exception to the general rule, the evidence of witnesses can be heard against a kushan.

The Court decided to hear the evidence of three witnesses agreed upon by the parties. Of these witnesses, one was heard, but the other two were not.

We hold that the Court should have heard the other two witnesses, and we therefore set aside the judgment and remit the case for the witnesses named to be heard and a fresh judgment given.

Costs will follow the event.

Delivered the 12th day of October, 1927.

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

C.A.D.C. Jm. No. 146/30.

BEFORE:

De Freitas, J., Abdel Hadi, J. and Baradey, J.

IN THE CASE OF:

The Wakf Administration — APPELLANTS.

vs

Polish Consul, Jerusalem

Dr. J. Magnes — RESPONDENTS.

Wakfia held to be prima facia evidence of title — Necessity of actual kushan to be holder of title deed under Art. 24, Ottoman Magistrates' Law — Civil procedure — Parties to action — Art. 1637, Mejelle.

Appeal from the judgment of the Magistrate of Jerusalem, dated 1st May, 1930 (No. 2925/30).

JUDGMENT.

We consider that the Magistrate was wrong in considering that a "Waqfia" is not prima facie evidence of title and that a Kushan was necessary.

Again, Article 1637 Mejelle requires the presence of the lessor in this case.

The judgment is quashed and the case remitted to the Magistrate.

Costs to be costs in the cause.

Given the 15th day of July, 1930.

KUSHAN —

SEE ALSO LAND.

LAND.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 36/25.

BEFORE:

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

IN THE CASE OF:

The Palestine Land Development Co. Ltd. APPELLANT.

vs

J. & I. Salzman RESPONDENTS.

Validity of unregistered agreement for sale of land — Competence of District Court to decide incidental question of validity of agreement for sale of land — Sec. 11, Transfer of Land Ordinance, 1920.

JUDGMENT.

The Court holds that it was within the competence of the District Court when hearing an action for recovery of money paid in respect of an agreement between the parties do decide whether such agreement was valid or not and that in view of Section 11 of the Transfer of Land Ordinance, 1920, the Court was right in declaring the agreement invalid.

The opposition is dismissed and the judgment of the District Court as varied by the judgment of this Court deliverd on the 10th February, 1925, is affirmed with costs (including advocate's fees).

Delivered in presence the 16th day of April, 1925.

In the Supreme Court sitting as a Court of Appeal.

CR.A. No. 16/26.

IN THE CASE OF:

Talal Mohamad Khalil and Others APPELLANTS.

vs

The Attorney-General,
The Palestine Land Development Co. Ltd. RESPONDENTS.

Prosecution for trespass on land — Prosecution to establish that accused not legally entitled to possession of land — Criminal charge to be strictly proved — Right of person to exercise reasonable force to protect his property from interference by stranger — Art. 130,

Ottoman Penal Code — Claimants to land ordered to bring action in Land Court to establish their rights.

JUDGMENT.

In our opinion for the prosecution to succeed, it must establish the fact that the Defendants were not legally entitled to the possession of the land in question. We consider that it is not enough for the prosecution to prove, if it could or did, that the complainants are the owners of the land for there are many servitudes on land which might entitle Defendants to possession and a criminal charge must be strictly proved.

A man is entitled by law to protect by the exercise of reasonable force—as the case was here, his own property from interference by a stranger and if he does so, he is not liable under Article 130 of the Ottoman Penal Code.

As this case stands we cannot say that the Defendants were not within their rights of protecting land lawfully in their possesion.

This judgment must not be read as entitling persons to use any sort of force in protection of their own property and accordingly we again stress the point that such force must entirely be reasonable.

The judgment of the Civil Magistrate must be quashed and the papers remitted to him. This case must be re-heard by him when final judgment as to ownership and/or possession is given by the appropriate Court.

It is ordered that the accused persons do bring an action in the Land Court within 6 months from the date they receive information of this judgment.

Given the 17th day of April, 1926.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 35/27.

BEFORE:

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

IN THE CASE OF:

Kalthoum Bint Muhammad Banat Ghannameh APPELLANT.

vs

The Attorney-General RESPONDENT.

Application for registration of land in name of applicant — Mewat land planted without permission of Government — Acquisition of

ownership of waste land — Art. 1273, Mejelle — Right arising from enclosure of mewat land—Mahlul distinguished from mewat—Arts. 78, 103, Ottoman Land Code — Mewat Land Ordinance, 1921 — Trespass for unlawful cultivation — Right of squatter on land to apply for title deed.

JUDGMENT.

In this case the Appellant asked this Court to order that the whole of a certain piece of land, the subject-matter of this litigation, be registered in her name without payment.

The land in question which, as found by the Land Court, was admitted by the Appellant to be Mewat, had in fact been planted without the Government's permission by the Appellant, and the Land Court's decision directed the registration in the Appellant's name, upon payment of the equivalent value, of the area which she had planted, viz.: the plot marked on the plan as No. 5, and also a portion marked No. 3 on the plan which, albeit not revived as was No. 5, was situated in such proximity thereto as to be entitled to be associated therewith under Article 1273 of the Mejelle.

Inasmuch as the land concerned is admitted to be Mewat land, it is clear that it is Article 103 of the Land Code and not Article 78, as argued by the Appellant, that applies. The last-named Article applies to Miri and not Mewat land. The law relating to Mewat land as contained in Article 103 of the Land Code has been amended by the Mewat Land Ordinance, 1921. The concluding words of Article 103 run as follows:—

> "If anyone has opened and created into arable land any of this category of land (i.e. Mewat land) without permission, the Tapu value of the place opened up by him shall be taken from him and a Tapu Sanad shall be given on its being transferred to him."

These are the words which in the opinion of the Court must be what is in Section 2 of the Mewat Land Ordinance somewhat loosely described as "the last para. of Article 103 of the Ottoman Land Law". For this, by the same Section, there is substituted a provision making a person breaking up or cultivating Mewat land liable to prosecution for trespass, as well as being deprived at the same time of the right to a title deed for such land.

In the next Section of the same Ordinance the legislature provided a locus poenitentiae for a person who had already

cultivated such waste land, without obtaining an authorisation, by enacting that such a squatter "shall notify the Registrar of the Land Registry within two months of the publication of this Ordinance and apply for a title deed".

The Section says no more. It does not say if the squatter is to get a title deed or not, or if so, if he is to get it as of right or at the discretion of the Registrar, nor does it say if he is to get it gratis or on payment of the value.

It appears therefore that the Appellant was not entitled to judgment for any of the land involved. The Lands Department, however, ex gratia did not resist the claim to the part adjudged by the Land Court and we do not propose to interfere with that finding; but, for the rest, the appeal must be dismissed with costs.

Delivered the 30th day of June, 1927.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 82/29.

BEFORE:

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

IN THE CASE OF:

Fatmeh Bint Omar El Dajani — APPELLANT.

vs

Fatmeh El Dajani and Others
The Custodian International
di Terra Santa, Jerusalem — RESPONDENTS.

Sale by widow of land inherited from husband — Application to set aside registered sale on ground of excessive deception—Concealment by purchaser of value of property to be purchased—Allegation of misrepresentation — Position of bona fide purchaser for value.

Appeal from the judgment of the Land Court of Jerusalem, dated the 6th July, 1929.

JUDGMENT.

The Appellant Fatmeh is the widow of the late Haj Omar El Dajani, and the first five Respondents are his other heirs.

On the 30th July, 1927, the Appellant sold to the first five Respondents the shares inherited by her from her husband in 16 plots of land, and these shares were registered in their names in the Land Registry.

Subsequently the first five Respondents transferred the whole of two of the plots in question to the remaining Respondent the Custodia di Terra Santa, by registered sale for the sum of £.9000.

Upon learning of this transaction, the Appellant commenced an action in the Land Court in Jerusalem for a declaration that the sale of her shares in all the 16 plots was void on the ground of excessive deception.

The action was based upon the fact that the proportion of the purchase money paid by the Custodia was £P.1,125 whereas the amount paid to her by the other Respondents for her shares in all the 16 plots was only £P.44.

The Appellant did not in her statement of claim allege any actual misrepresentation upon the part of any of the Respondents, but merely a concealment of the terms agreed upon for the sale to the Custodia; and it appears from the judgment of the Land Court that it was only at the conclusion of the hearing that the Plaintiffs advocate alleged any positive misrepresentation, and the Court accordingly gave judgment upon the basis of the statement of claim.

The Land Court dismissed the Appellant's claim with regard to the two plots sold to the Custodia.

The Court further held that:—

> "As regards the other properties, no allegation of excessive injury and fraud is alleged, but as the Plaintiff considers the question as regards them of importance, the right is reserved to him to have the case continued on this point, if he so desires".

and thereupon dismissed the action.

In her appeal against this judgment the Appellant is alleging positive misrepresentation and desires to call evidence to prove that the Respondent Hassan Sidky Dajani informed her that it was impossible to obtain a better price for her shares than that which the Respondents were offering her, although in fact at that time the agreement for sale to the Custodia had already been concluded.

As regards the two plots of land sold to the Custodia, it is not suggested that the Custodia were parties to any alleged misrepresentation, and I hold that these plots having been transferred by registered sale to an innocent purchaser for value the Appellant's claim to have the sale set aside cannot be allowed,

even if fraudulent misrepresentation by one or more of the other Respondents were proved.

As regards the remaining plots of land no misrepresentation is alleged, and I am therefore unable to see any ground upon which the sale of the Appellant's shares therein can be set aside.

The appeal is dismissed with costs.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 25/32.

BEFORE :

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

IN THE CASE OF :

Mariam Bint Diab El-Awwad Da'ibes,
on behalf of her late Father's Estate — APPELLANT.

vs

Farah Elias Awwad Da'ibes
Yusef Elias Awwad Da'ibes — RESPONDENTS.

Claim of title by prescription on strength of ten years' possession — Art. 20, Ottoman Land Code valid only as defence.

Appeal from a judgment of the Land Court of Nablus dated the 10th February, 1932.

JUDGMENT.

On the authority of Land Appeal No. 76/25 we hold that the provisions of Article 20 of the Land Code are only valid as a defence.

The appeal is, therefore, dismissed with costs to include £P.3 advocate's fee.

Delivered the 9th day of November, 1932.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 57/32.

BEFORE:

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

IN THE CASE OF:

Amneh Bint Yusef Abu Ali — APPELLANT.

vs

Muhammad Mustapha Isa — RESPONDENT.

Possession of immovable property by force — Possession against will of person previously in possession — Meaning of Art. 24, Magistrates' Law.

JUDGMENT.

The question raised in this appeal was also raised in Land Appeal No. 52/30, Yusef Muhammad Ali Fahund v. Taufiq Bey Fahun, which was also an appeal from the Land Court of Nablus.

The judgment of this Court in that case clearly governs the present case, and in accordance therewith we hold that the term "takes possession by force" in Article 24 of the Magistrates' Law does not imply the actual use of violence, but applies to any case in which possession is taken against the will of the person previously in possession.

The appeal is therefore allowed, the judgments of the Land Court and of the Magistrate's Court are set aside, and the case remitted to the Magistrate's Court to hear and determine in accordance with this judgment.

Costs will follow the event.

Delivered the 12th day of April, 1933.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 64/32.

BEFORE:

Corrie, J., Baker J. and Frumkin, J.

IN THE CASE OF:

Michael Spectoroff — APPELLANT.

vs

Kupath Milveh Haklait Co-operative Society Ltd., Petach Tikvah — RESPONDENT.

Right of prior purchase of land — Right of zarurat between co-villagers — Arts. 41, 45, not applicable in cases of sale in execution proceedings — Safreh Hanim Mahmud v. Ratib Irikzade; 2 Cyprus L.R. p. 29, applied.

Appeal from the judgment of the Land Court of Jaffa dated the 20th day of July, 1932.

JUDGMENT

We see no distinction in principle, so far as the question now before us is concerned, between the right conferred by Article 45 of the Land Code and that conferred upon co-owners by Article 41.

With regard to the latter Article, the Supreme Court of Cyprus has held that Article 41 could not be invoked in the case of a sale in execution of a judgment. Safreh Hanim Mahmud v. Ratib Irikzade, 11 Cyprus L.R., p. 29.

Accordingly, and for the reasons stated in that judgment, we hold that Article 45 does not apply where land is sold in execution proceedings.

The appeal is dismissed with costs, including £P.2 advocate's fees.

Delivered the 27th day of January, 1933.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 90/32.

BEFORE:

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

IN THE CASE OF:

Sheikh Muhammad Haj Abdallah Takruri — APPELLANT.

vs

Muhammad Abd Er-Rahim Mur'ib — RESPONDENT.

Undertaking to plant land in consideration of receiving share in land — Disposition of land to which written consent of Government not obtained — Sec 11, Transfer of Land Ordinance, 1920 — Recovery of money paid under void disposition of land and money invested by purchaser in development of such land.

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 thereof being that Appellant at the end of eight years shall be the owner of half of the land. 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 para. of Article 11 clearly envisages not only the payment of 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 lands in accordance with the contract and to give a fresh judgment.

Costs costs in the cause.

Delivered the 16th day of October, 1933.

In the High Court of Justice.

H.C. No. 92/32.

BEFORE:

The Senior Puisne Judge and Baker, J.

IN THE APPLICATION OF:

The Haifa Bay Development Co.,
Keren Kayemeth Le-Israel Ltd.
Bayside Land Corporation Ltd. PETITIONERS.

vs

The District Commissioner, Northern District,
The Shamalni and Wasata Subsections
of the Ghawarni Tribe RESPONDENTS.

Order for possession made by Assistant District Commissioner under Land Disputes (Possession) Ordinance, 1932—Jurisdiction of High Court re possession of disputed lands — Nature of order for possession — Actions of District Commissioner as Magistrate — Interpretation of Statutes — Surplusage of Ordinance — Authority of High Court over District Commissioner acting in the proper exercise of legitimate judicial discretion — Duties of District Commissioner

under Land Disputes (Possession) Ordinance, 1932 — Order in favour of all members of tribe — Correction of clerical error in judicial order — Error in expressing manifest intention may be corrected — Order made in favour of persons not parties to proceedings — Proof of possession of land in dispute — Art. 43, Palestine Order-in-Council, 1922 — Secs. 1, 2, 3, Land Disputes (Possession) Ordinance, 1932.

PRELIMINARY JUDGMENT.

The Petitioners, the Haifa Bay Development Co., Keren Kayemeth Le-Israel Ltd., and the Bayside Land Corporation Ltd., are seeking to have set aside an order made on the 24th November, 1932, under the Land Disputes (Possession) Ordinance, 1932, by the Assistant District Commissioner of the Northern District with regard to certain lands known as the Jidru Lands in the Haifa and Acre Sub-Districts.

By that order the Assistant District Commissioner directed that the Petitioners should have possession of certain lands lying within boundaries defined in the order, and that the Shamalni and Wasata Subsections of the Ghawarni Arabs should have possession, until evicted therefrom in due course of law, of those portions of the Jidru Lands not specifically allotted to the Petitioners.

The Mukhtars of the Shamalni and Wasata Sub-Tribes have appeared as Respondents to this Petition and the Junior Government Advocate has appeared to represent the Assistant District Commissioner.

The Respondents have put forward the objection that this matter is not within the jurisdiction of this Court.

In the first place, it is argued that the Petitioners have an alternative tribunal and hence that, under Article 43 of the Palestine Order-in-Council, 1922, this Court has no jurisdiction.

The argument is that the Petitioners by applying to the Court, which has jurisdiction in questions of possession of land, namely, the Magistrate's Court, can obtain an order for possession of the disputed lands which will override the order made by the Assistant District Commissioner.

This argument is, in our view, fallacious. By the express terms of the Land Disputes (Possession) Ordinance, 1932, Section 2 (6), any order made thereunder in favour of any person to whom possession of any land is thereby given, is operative only until he is "evicted therefrom in due course of law." It follows that the order under consideration is purely temporary in character and that it is only the question of possession pending final determination

of the rights of the parties by the competent Court that we have to consider. It is, therefore, no answer to the Petitioners to say that, when the competent Court has given its judgment, the District Commissioner's order will become inoperative.

The Respondents also argue that the position of a District Commissioner under the Land Disputes (Possession) Ordinance, 1932, is similar to that of a District Commissioner under the Prevention of Crime Ordinances, 1920–1929: that is to say, that he is acting as a Magistrate from whose judgment there is no right of appeal; and that, under these circumstances, no order will issue from this Court. In support of this view, the Respondents rely upon the judgments of this Court given in Ex-parte El-Absieh Ibrahim, High Court No. 39/27; and Ex-Parte Subhi Khadrah, High Court No. 75/30 [1]) in both of which cases this Court dismissed a petition to set aside an order made under the Prevention of Crime Ordinance.

We hold, however, that in exercising the powers conferred upon him by the Land Disputes (Possession) Ordinance, 1932, the District Commissioner is not acting as a Magistrate; for if he were, the provisions of Section 2 (10), which declare that "Proceedings under this Ordinance shall be deemed to be proceedings before a Magistrate as regards taking evidence on oath, service of orders, summonses and other documents, enforcement of orders and other like matters," would clearly be surplusage.

Moreover, the procedure to be adopted by the District Commissioner as prescribed by Section 2 (4) of the Ordinance, differs from that of a Magistrate's Court.

Further in the second of the cases cited by the Respondents (High Court No. 75/30), the learned Chief Justice, in delivering the judgment of the Court, said:

> "We are asked to issue a rule calling upon the Deputy District Commissioner to show cause why he should not cancel an order given by him in the proper exercise of his legitimate judicial discretion. This we have no power to do".

Following this judgment, we hold that the principle to be applied in determining whether this Court has jurisdiction is that this Court can only hear this Petition if the order of the Assistant District Commissioner was not "an order given by him in the proper exercise of legitimate judicial discretion." We have, therefore, to examine the nature of the objections which the Petitioners have

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[1]) See ante, p. 713.

put forward against this order, and to ascertain whether in any of them it is maintained that the Assistant District Commissioner has exceeded the powers conferred upon him by the Ordinance.

Now in the first place, the Petitioners maintain that the Assistant District Commissioner has made an order in favour of persons who were not parties to the proceedings before him; and it is clear that if this objection is substantiated, the Assistant District Commissioner has exceeded the powers conferred upon him by the Ordinance.

Again, it is alleged that the Assistant District Commissioner has made an order in favour of persons with regard to whom there was not before him any evidence that they had ever been in possession of the disputed land. Now the Ordinance expressly relieves the District Commissioner from any necessity of enquiring into the merits of the dispute between the parties; its purpose being solely to prevent breaches of the peace; but we do not find in the Ordinance any provision which enables a District Commissioner to give beneficial possession of any part of the land in dispute to any person unless there is some evidence that such person has, at some time, enjoyed possession. On the contrary, Section 2 (4) directs that the District Commissioner "shall, if possible, decide whether any and which of the parties was, at the date of the order mentioned in Subsection 1, in actual possession of the subject of dispute.

Again, Section 3 (1) empowers the District Commissioner if he decides that none of the parties was, at the date of the order referred to in Section 2 (1), in actual possession of the subject of dispute or is unable to satisfy himself as to which of them was at such date in actual possession, to appoint a manager of the subject of dispute.

If, therefore, the Petitioners can establish their allegation, they will in this respect also have established that the Assistant District Commissioner has exceeded the powers conferred upon him by the Ordinance.

With the Petitioners' objection that a Sub-Tribe has no legal entity, we need not deal at any length, as it seems to us clear thot the order operates in favour of every member of the Sub-Tribe and of no other person: and the question whether an individual is or is not a member of a particular Sub-Tribe is a question of fact which it is easy to determine. Hence, the Assistant District Commissioner's order is not open to objection on this ground.

Again, the Petitioners' objection to the inspection made by

the Assistant District Commissioner is not one which would, in our opinion, entitle him to an order from this Court, as Section 2 (4) of the Ordinance empowers the District Commissioner to "make such inspection (if any) as he thinks necessary".

There is one other argument which has been put forward by the Respondents of which mention should be made; namely, that the reference to the Wasata and Shamalni Subsections of the Ghawarni Arabs in the order of the 14th November, 1932, is purely a clerical error, and that the order was intended to apply only to the specified families of those Subsections who were parties to the proceedings. It is argued that this clerical error may be corrected by the Assistant District Commissioner himself upon application by the Petitioners.

With regard to this, our view is that a correction can only be made in this manner where the error is an "error in expressing the manifest intention" of the authority by which it was issued. See Bright v. Sellar (1904), 1 K.B., p. 6.

As an example of the kind of error which may be corrected in this manner we may cite the passage in the third paragraph of the Assistant District Commissioner's order of the 12th September, 1932, in which he wrote "in virtue therefore of the powers conferred on me by Section 1 of the Land Disputes (Possession) Ordinance, 1932".

Now Section 1 of the Ordinance confers no powers upon the Assistant District Commissioner; its provisions are restricted to giving a short title to the Ordinance. Subsection (1) of Section 2, however, does confer upon the Assistant District Commissioner the power which he purported to exercise; and in our view, when the Assistant District Commissionor referred to Section 1 it was his manifest intention to refer to Subsection (1) of Section 2: and consequently the erroneous reference to Section 1 might be corrected in the manner suggested by the Respondents. But it is not clear that when the Assistant District Commissioner referred in his order of the 14th November, 1932, to the Shamalni and Wasata Subsections, it was his manifest intention to refer only to the specified families who were parties to the proceedings before him; and hence the order cannot now be corrected by the Assistant District Commissioner in the manner suggested.

We hold, therefore, that this Court has jurisdiction to issue the order prayed on the ground that it is maintained that the Assistant District Commissioner has exceeded the powers conferred upon him by the Ordinance, (a) by making an order in favour of

persons who were not parties to the proceedings before him; and (b) by making an order in favour of persons with regard to whom there was no evidence that they had, at any time, been in possession of any part of the disputed lands: there being in our opinion prima facie evidence to support these allegations.

Delivered the 23rd day of November, 1933.

JUDGMENT.

By its judgment of November 23rd, 1933, this Court held that it had jurisdiction to issue an Order on the ground that the Assistant District Commissioner, Haifa, had exceeded the powers conferred upon him by the Land Disputes (Possession) Ordinance, 1932,

(a) by making an order in favour of persons who were not parties to the proceedings before him; and

(b) by making an order in favour of persons with regard to whom there was no evidence that they had, at any time, been in possession of any part of the disputed lands.

We have now heard the arguments of the advocates of the Respondents, the Mukhtars of the Wasata and Shamalni Arabs, both of whom were parties to the proceedings before the Assistant District Commissioner on 12th September, 1932, and have also heard the Attorney-General's representative.

It is clear, and indeed it is not contested by the Respondents, that the order of November 14, 1932, was made in favour of persons who were not parties to the proceedings before the Assistant District Commissioner.

It follows that the Assistant District Commissioner's order must be set aside and the proceedings remitted to him to determine whether any and which of the parties thereto was on September 12, 1932, in actual psssession of the land in dispute or any part thereof.

It is thus unnecessary for this Court to give any judgment upon the other point raised by the Petitioners, namely, that an order for possession was made in favour of persons with regard to whom there was no evidence before the Assistant District Commissioner that they had at any time, been in possession of any part of the disputed land.

We think it desirable, however, to say that in our opinion, the provisions of the order must be strictly adhered to, and that no order can validly be made under the Ordinance in favour of any person unless there is before the Assistant District Commissioner evidence that the person in question was on September

12, 1932, in actual possession of the specific piece of land in respect of which the order is made, or had forcibly been dispossessed thereof within the two months immediately preceding that date.

Delivered the 12th day of February, 1934.

In the Supreme Court sitting as a Court of Appeal.

L.A. No, 29/33.

BEFORE:

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

IN THE CASE OF:

The Attorney-General — APPELLANT.

vs

Muhammad Tahir Salah
Fatmeh Bint Salah — RESPONDENTS.

Land expropriated by Government for making or road — No power in Court to alter its own decision — Function of Land Court under Sec. 8, Expropriation of Land Ordinance, 1926 — Right of promter to pay compensation money into Court — Claimant's title to expropriated land until judgment awarding him compensation.

JUDGMENT.

This is an appeal against an award given by the Land Court of Nablus on May 3, 1933, by which the Court ordered the payment of the sum of £P.418 to the Respondents in respect of compensation under the Expropriation Ordinance, 1926, for a plot of land expropriated by Government for the making of a road.

Immediately after the delivery of the judgment the Government's representative addressed the Court stating that he did not admit Respondents' title to the money as he was instructed they were only co-owners and under Section 15 of the Expropriation Ordinance he applied to pay the money into Court.

The Court in dismissing the application stated that "the ownership of applicants was never denied to the Court by the Respondents till after the award was made and given. We have no power now in our opinion to alter such award".

The appeal, it must be remembered, is against the judgment ordering the payment of the said £P.418 to Respondents and not against the said order refusing to retain the said amount in Court from which order there cannot be an appeal.

The Government advocate submits that the function of the Court under Section 8 of the Ordinance is to assess the amount of compensation payable, and no more, and after the Court has decided on the amount of compensation payable, it is open for the amount awarded to be paid into Court if for any of the reasons mentioned in Section 15 of the Ordinance he is unable to obtain a valid discharge from the claimant.

Now Section 15 of the Ordinance provides as follows: "At or after the expiration of three months from the time at which the compensation for any lands has heen agreed upon or otherwise assessed, the promoters may, if the person entitled thereto cannot be found, or if the persons claiming to be entitled shall fail to make out a title thereto, or, if for any like reason, the promoters shall be unable to obtain a valid discharge for the payment of such compensation or any part thereof, pay such compensation to the Court, such payment shall discharge the promoters from all liability in respect of the compensation awarded to the extent of the amount so paid."

During the hearing of the case the present Respondents' title to the land was never challenged or their right to give a valid discharge for the compensation awarded and it was not until after the judgment wherein a sum of money was ordered to be paid by the Appellant to the Respondents as compensation that any objection was ever raised as to Respondents' right to receive the said compensation.

I am satisfied that where a claimant's title to expropriated land has never been challenged until after judgment awarding such claimant compensation for the expropriated land it is then too late to invoke the assistance of Section 15 of the Expropriation Ordinance which presupposes that the title of land was and has always been in issue.

The appeal must therefore be dismissed and the judgment of the Lower Court affirmed with costs and advocate's fees assessed at £P.2.

Delivered the 11th day of July, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 29/33.

BEFORE:

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

IN THE CASE OF:

Abd er Rahim and Others — APPELLANTS.

vs

Muhammad Kheiri Mansur — RESPONDENT.

Contract not signed by one of several vendors — Action for return of purchase monies paid under invalid agreement — Validity of receipt in invalid contract.

JUDGMENT.

One of the constituent persons comprising the first party to the contract, the subject-matter of this action, not having signed the contract in question, it has no validity and we therefore quash the judgment of the District Court and give judgment for the Appellants with costs to include £P.2 advocate's fee, without prejudice to any right in the Respondent to sue upon the receipt for the return of the money paid.

Delivered the 6th day of June, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 82/33.

BEFORE:

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

IN THE CASE OF:

Michael Harris — APPELLANT.

vs

Daniel Duchner — RESPONDENT.

Contract for sale ot land — Deed of sale distinguished from agreement to sell — Rule for determining whether contract for sale of land is valid or not under Transfer of Land Ordinance, 1920.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem dated March 14, 1933, in an action brought by Daniel Duchner, the present Respondent, against Michael Harris, the present Appellant, claiming £E.400.

The action was based upon a contract dated October 16, 1924, with regard to the sale of certain land therein defined. The first two clauses of the contract read as follows:—

(1) The first party sells to the second party a plot of land, comprising an area of approximately 5 dunams, situate on the Mills Road, Jaffa, the boundaries whereof are shown in clause 3 hereunder, at a price of £E.163 for each dunam.

The second party buys from the first party the said plot of land at the said price.

Clause 5 of the contract provides that:—

(2) The second party pays to the first party at the signing of this contract the sum of £E.100 and undertakes to pay the balance to the first party on the day of the confirmation of the sale by the Land Registrar of Jaffa.

Clause 6 of the contract reads as follows:—

The first party undertakes to deliver to the second party a kushan for the said plot not later than three months from the date of this contract.

With regard to this contract, the District Court held:—

> "In our judgment, the document is a contract of sale and by virtue of Section 11 of the Land Transfer Ordinance, 1920, is invalid and it follows that all subsequent transactions in respect of the land are also invalid. It follows, therefore, that plaintiff succeeds in this action."

The Appellant is appealing on the ground that the contract, although expressed to be a sale is, in reality, an agreement for sale.

Now in determining whether a contract is valid or not under the Transfer of Land Ordinances, the intent and not the form of the contract is to be regarded; and where a contract relating to the sale of land is intended to be a preliminary to and not a substitute for a registered transfer of the land, this Court has held on more than one occasion that such a contract is an agreement for sale only, and not a deed of sale, even though the contract may be expressed in the form that one party sells and the other party purchases.

As examples of the application of this rule, the judgments of this Court in Civil Appeal No. 13/26, Etkin v. Shlosberg[1]), Civil Appeal No. 147/26, Meir Zeide v. Salomon Alcalay[2]), and Civil Appeal No. 136/31, Shapiro v. Frankel[3]), may be cited.

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1) see ante, p. 278.

2) see ante, p. 378.

3) see ante, p. 431.

The Respondent relies upon the decision of this Court in Civil Appeal No. 88/29, Behor v. The Anglo-Palestine Company Ltd.[1]), in which the contract was held to be a sale and therefore void by virtue of Section 11 of the Transfer of Land Ordinance, 1920.

That document, however, was an agreement of a very special character. While the purchase money was to be paid by monthly instalments over a period of 14 years, no date was fixed for completion of the registration. Indeed, the vendor bank admitted that it was not the registered owner of the property and not in a position to have the property registered in the name of the purchaser. Accordingly, it merely undertook to do so "when legally possible". In that case, therefore, the Court held that the transaction was intended to be an actual sale.

In the present case, it is clear, that the parties to the contract of October 16, 1924, intended that it should be completed by registration within three months from the date, and apart from the use of the term "Sells" and "Buys", the provisions of the contract are those of an ordinary agreement for sale.

We hold, therefore, that the contract is to be so construed, and it follows that the contract is not invalidated by Section 11 of the Transfer of Land Ordinance, 1920.

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

Costs will follow the event.

Delivered the 30th day of March, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 192/33.

BEFORE:

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

IN THE CASE OF:

Adib Salim Habayeb — **APPELLANT.**

vs

Shukri Yusef Saba — **RESPONDENT.**

Agreement of option to purchase land — Court action withdrawn in consideration of undertaking to preserve right of pre-emption— Discontinuance of legal proceedings good consideration for agreement — Art. 64. Civil Procedure Code — Agreement forbidden

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[1]) see ante, p. 188.

by Law or Ordinance — Unregistered disposition within meaning of Transfer of Land Ordinance, 1920 — Provisions of one clause in agreement enforced even though another clause held to be void.

JUDGMENT.

The Appellants are suing for a penalty for breach of Clause 2 of an agreement dated 14.7.33 made between Suleiman Daud Sabti and the Respondent of the one part and the Appellants' ancestor, Mikhail Bulos Habayeb of the other part, under which the latter was given an option to purchase certain land belonging to the parties of the first part in priority to any stranger.

The District Court has dismissed the action on the ground that the consideration for the agreement stated therein, namely the relinquishment by Habayeb of an action for pre-emption, was insufficient.

It is quite clear, however, that whatever may have been Habayeb's chances of succeeding in that action, its relinquishment was good consideration for the agreement by the parties of the first part.

The Appellants are relying upon the Amendment dated 21 Nissan, 1330 (4th May, 1914) to the Civil Procedure Code. They have thus to satisfy us that the agreement is not one which is "forbidden by Law or Ordinance".

The first clause of the agreement provides for a restriction upon user of part of the land of the parties of the first part, and it is arguable that such a restriction is an unregistered disposition of land and therefore void under the Transfer of Land Ordinance.

We have not, however, to determine this question, as we hold that the provisions of Clauses 1 and 2 of the agreement are distinct and separable, so that the provisions of Clause 2 may be enforced, even though Clause 1 is void.

Accordingly we hold that the District Court was wrong in holding that, as between the parties thereto, Clause 2 of the agreement dated 14.7.33 was not enforceable.

The question whether the right to enforce that Clause passed on the death of Habayeb to his heirs, is not before us.

The appeal must be allowed, the judgment of the District Court set aside and the case remitted for completion.

Costs will follow the event.

Delivered the 17th day of December, 1934.

LAND COURT.

In the Supreme Court sitting as a Court of Appeal

L.A. No. 14/23.

BEFORE:

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

IN THE CASE OF:

Aref Abdallah Mughli — APPELLANT.

vs

Fahmi Ibn Osman Qanadilo — RESPONDENT.

Action to amend registration of land — Nature of land planted with trees earlier than 1331 — Intervention by third party claiming that disputed land was waqf property — Judgment of Sharia Court as evidence of dedication of waqf — Jurisdiction of Land Court to decide whether land has been dedicated as waqf — Jurisdiction or Religious Courts to hear questions in respect of waqf — Conversion into mulk by planting of miri land.

JUDGMENT.

The Appellant's father Abdallah was part owner of land and trees the subject matter of this action and after his death his widow obtained registration for a half share as miri. The Appellant brought an action to amend the registration contending that the land having been planted with trees earlier than 1331 was mulk property and that consequently his father's widow, the Respondent, was entitled to be registered for an eighth share only. During the hearing a third party intervened claiming that the land in question was part of a waqf property of which he was mutawalli, and he produced a judgment of the Sharia Court of Nablus dated 1309 which was said to show that the land was waqf. The Land Court refused to exercise any jurisdiction so long as the Sharia judgment remained in vigour and directed the Respondent to take proceedings in the Sharia Court by way of third party opposition for the purpose of getting the Sharia Court judgment set aside.

There are two questions of fact which are of interest in this case: — (1) whether all or part of the land has been, earlier than 1331, so planted as to bear the character of mulk property and (2) whether the land has been as a fact dedicated as waqf and if so as to what kind of waqf.

The first question is obviously one within the competence of the Land Court to decide and in our opinion so is the second.

The Proclamation of 24th June, 1918, forebade any Court to hear any cases of ownership of land. The Land Courts Ordinance, 1921, gave to the Land Court jurisdiction to decide the question of ownership of land. (Neither the District Courts nor the Sharia Courts now have jurisdiction to decide the question of ownership of land. The Palestine Order-in-Council of 1922 has given a certain exclusive jurisdiction to the Religious Courts in respect of waqfs duly constituted before them, but no jurisdiction in respect of ownership is included. The Land Court was therefore competent to decide whether the judgment relied on by the third party concerned the land in dispute, whether dedication can be proved by such a judgment, and whether other questions may arise in the case.

The judgment of the Land Court withholding jurisdiction is set aside and the case sent back to be tried. Appeal allowed with costs to abide the event of the trial.

Delivered the 19th day of May, 1924.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 25/23.

BEFORE:

Baker, J., Khaldi, J. and Abdul Hadi, J.

Land Court improperly constituted — Rule 1, Rules of Court for the Land Courts, 15th May, 1921.

JUDGMENT.

Whereas it was proved on scrutinising the proceedings of the case that the Court in its session held on 7th December, 1921, was not composed in a manner corresponding to Rule 1 of the Rules of Court for the Land Courts published in the Official Gazette No. 43 of 15th May, 1921, which provides that the Court has to be composed of a British President and a Palestinian member, and whereas its composition was of two Palestinian members, and whereas its composition of two Palestinian members is in contradiction to the aforementioned Rule, therefore it was decided to set aside the appealed judgment and to return the documents in order to renew the hearing of the case in accordance with law.

Delivered the 23rd day of May, 1923.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 85/24.

BEFORE:

Seton, J., Frumkin, J. and Khayat, J.

IN THE CASE OF:

The Anglo-Palestine Co. Ltd., Jaffa APPELLANTS.

vs

Syndic of the Moldavsky Bankruptcy RESPONDENT.

House purchased by private document not registered in Land Registry — Mortgage given by purchaser under invalid agrreement of purchase — Validity of mortgage — Action for declaration of ownership of house — Jurisdiction of District Court in land disputes — Powers of Land Court — Sec. 2, Land Courts Ordinance, 1921.

JUDGMENT.

It appears from the proceedings in this case that a person named Moldavsky bought from the Haboneh Building Co. Ltd., a house in Tel-Aviv by a private document not registered in the Tabou. He paid part of the purchase money and gave to the vendor a mortgage on the house to secure payment of the balance.

This mortgage was transferred to the Appellants, the Anglo-Palestine Co. Ltd.

Moldavsky was adjudicated bankrupt and the Respondent, Mr. David Moyal was appointed his Syndic. It seems that the creditors in the bankruptcy were unwilling to admit the validity of the Appellants, mortgage since it was not registered in the Tabou. The Appellants therefore brought action in the District Court of Jaffa against the Respondent in his capacity as Syndic in which they petitioned the Court as follows :—

1. To recognise the Appellants' rights of mortgage on Moldavsky's house, or alternatively;

2. To declare that the said house is not the property of the Bankrupt.

The District Court dismissed the claim of the Appellants on the ground that it was not within their jurisdiction.

The Appellants appeal.

We have no doubt but that the decision of the District Court was right and that the claim of the Appellants should have been brought in the Land Court. Section 2 of the Land Courts Ordinance, 1921, enumerates the powers of the Land Court one

of which is to hear any dispute as to the ownership of land or any rights in or over the land.

The appeal is dismissed and the Appellants must pay the costs both here and in the Court below including the sum of £.3. fixed as the remuneration of the Syndic, Mr. Moyal in respect of this appeal.

Delivered the 28th day of November, 1924.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 69/25.

BEFORE:

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

IN THE CASE OF:

Fahmi Ibn Osman Qanadilo and Others APPELLANTS.

vs

Mootie Ibn Ibrahim Abdo and Others RESPONDENTS.

Jurisdiction of Courts to decide ownership of land claimed to be waqf — Jurisdiction of Civil and Religious Courts Ordinance, 1924— Judgment of Sharia Court as evidence of dedication of waqf — Grounds for retrial of action — Art. 1840, Mejelle.

Appeal from a judgment of the Land Court of Nablus dated 5th May, 1925, whereby it was decided to dismiss the case of the Appellants brought against Defendants, whereby they claimed to annul a transfer made to them by certain beneficiaries and ordering to refrain from interfering and rectification of the Tabou Registers on the ground that this was not within their jurisdiction.

JUDGMENT.

It was decided by the Court of Appeal in L.A. No. 14/23* before the Ordinance of 1925 about the Jurisdiction of Religious and Civil Courts, that the Land Court had jurisdiction to decide all cases of ownership of land whether or not there was a claim raised by either party that the land was waqf.

In this case the Land Court appears to have forgotten that decision and refused jurisdiction in the case. The judgment is set aside and appeal allowed. The case will be remitted to the Land Court to be tried on the merits.

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* see ante, p. 1112.

JUDGMENT OF MR. JUSTICE WEBB.

The Plaintiffs in this case are the two Mutawallis of the Waqf of Jala El Din, the one representing the interests of the Qanadilos and the other that of Shafia Family. They allege that the premises in dispute were declared to be holy waqf, and they rely on a judgment of the Sharia Court dated 2 Rageb, 1309. The Defendants deny that the premises in dispute are Waqf, but say that they are their property and registered in their names.

The judgment upon which Plaintiffs rely, is one pronounced in a case in which Abdul Rahman Mahmud Ismail Shafia was Plaintiff and claimed to be interested in a third of various premises, including those now in dispute. The Defendant, Ismail Mahmud Ismail, then Mutawalli of the Waqf successfully raised the defence that the premises were Waqf, and the Court apparently declared that 24 Karad (not only the interest claimed) were Waqf. It is argued that no predecessor in title of the present Defendants was a party to that suit and therefore I am clearly of opinion that judgment is not binding on the Defendants. If an authority is required for so obvious a principle of natural justice it is to be found in Mejelle, 1840. Whether the appropriate step to be taken would be for the Plaintiffs to take proceedings against the Defendants in the Sharia Court for a declaration of Waqf, or for the Defendants to proceed in the Sharia Court by way of Third Party opposition, is, in the view we take unnecessary to be decided, because we are of opinion that this Court has no jurisdiction to determine the question raised in this case, whether or not the lands are Waqf. Under Ottoman Laws such questions are within the competence of the Sharia Court as is shown by Article 4 of the Draft Jurisdiction of Civil and Religious Courts Ordinance, 1924 (O.G.114) by which it was proposed to confer jurisdiction in such cases on the Civil Courts.

We therefore dismiss the case with costs and £E.5 advocate's fees leaving the parties to take such proceedings in the Sharia Court as they may be advised.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 139/25.

BEFORE:

Baker, J., Frumkin, J. and Jarallah, J.

Dispute concerning right of irrigation — Jurisdiction of Land and Magistrates' Courts — Secs. 2 (c) (g), Land Courts Ordinance, 1921.

JUDGMENT.

The Court finds that the point on which the dispute is based is whether disputes concerning the rights of irrigation are within the jurisdiction of the Land Court or the Magistrate's Court. The Land Court of Nablus decided that a case concerning the said right is within the jurisdiction of the Magistrate's Court.

Section 2 (c) (g) of the Land Courts Ordinance, 1921, provides that the Land Courts shall have jurisdiction to hear disputed claims concerning the proprietorship or any rights in connection with lands, and this Court cannot imagine that the rights of irrigation differ from the said rights intended in the said Land Courts Ordinance, and it must also be mentioned that the Jurisdiction of Magistrates' Courts Ordinance, 1924 fixed the jurisdiction of the Courts.

It is therefore decided to return the documens, and that such claims are within the jurisdiction of the Land Courts.

Delivered the 8th day of April, 1924.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 87/26.

BEFORE:

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

IN THE CASE OF:

Yousef Moh'd Awadallah El-Hamzeh of Ain Karem
Suleiman & Khalil sons of Ismail Shakhas

(APPELLANTS & RESPONDENTS.)

vs

Suleiman Ismail Shakhas & his brother Khalil

and (APPELLANTS & RESPONDENTS.)

The Government of Palestine THIRD PARTY.

Jurisdiction of Land Court to determine character of land — Waqfieh and Sharia judgment as evidence before the Land Court— No power in Land Court to delegate its duties to Sharia Court— Action to determine whether land is waqf or miri — Right of Government to be entered as Third Party in questions of waqfs of Takhsisat category.

Appeal from the judgment of the Land Court of Jerusalem dated 12th April, 1926.

JUDGMENT.

The only Court competent to try the case is the Land Court and it was the duty of that Court to examine the Waqfieh and the Sharia judgment passed before the Occupation when the Courts had jurisdiction in such matters; and also to be satisfied whether the land in dispute was within the boundaries of the Waqf as ascertained by the Waqfieh and the Sharia judgment.

None of this has the Land Court done but delegated its authority to the Sharia Court which it has no right to do.

The Land Court does not seem to have heard evidence as to boundaries.

The main question in this case being whether the land the subject matter of the action is pure Waqf of the Takhsisat category or plain miri, the Government had an interest in the question entitling it to be entered as a Third Party. Although the judgment would in fact affect many properties the duty of the Court was confined to deciding the issues of fact regarding the actual land in dispute and there was no objection to making the Government a party.

The case is referred back to the Land Court to be tried on its merits with the Government as a Third Party.

Delivered in presence the 25th day of November, 1926.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 136/26.

BEFORE:

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

IN THE CASE OF:

Saleh Salah Hamdan and Others — APPELLANTS..

vs

Ma'mour Awkaf Nablus — RESPONDENT.

and

The Government of Palestine — THIRD PARTY.

Art. 23, Proclamation of June 24th, 1918 — Jurisdiction of Court to give judgment deciding the ownership of land — Jurisdiction of Land Courts re ownership of land — Cases pending before Sharia Court at date of Proclamation and prohibited from giving judgment.

Appeal from judgment of the Land Court of Nablus dated the 8th of July, 1926, whereby the Plaintiffs' case was dismissed on the ground that the Land Court had no jurisdiction and the Sharia Court still retains its jurisdiction in this case which has been pending before it since 1332.

JUDGMENT.

By the Proclamation of 1918 all jurisdiction over cases concerning ownership of land was taken from the Sharia Court and from the Courts of First Instance now called District Courts, and has never since been restored. Instead, a jurisdiction has been given to the Land Courts, by the Land Courts Ordinance, 1921. Whether or not a case was pending in the Sharia Courts at the date of the Proclamation the Courts were prohibited from giving any judgment deciding the ownership of land, and nothing has happened since 1918 to remove that prohibition.

The judgment of the Land Court must be set aside and the case heard.

Delivered in presence the 2nd day of September, 1926.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 28/30.

BEFORE:

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

IN THE CASE OF:

Mudallaleh Bint Darwish Yunes,
Uthman Ibn Abd er Rahman
Abu Shawarab and Others — APPELLANTS.

vs

Ahmad Abd el Aziz — RESPONDENT.

Jurisdiction of Land Court to hear successive claims for same land against different Defendants — Civil procedure — Estoppel.

Appeal from the judgment of the Land Court of Jaffa, dated 12th February, 1930.

JUDGMENT.

The Land Court dismissed the Appellants' claim on the ground that in a previous action brought by the Appellants against other Defendants with regard to the same land the Land Court gave judgment in favour of the Appellants for an area of 10 dunams. This judgment was confirmed on appeal, and the Land Court held that the Appellants are estopped from bringing a separate action upon the same title against the present Respondents claiming a larger area.

We hold that this view cannot be supported. The fact that the Appellants' rights against other Defendants were held by the Court to be limited to the land which the Court stated was of an area of 10 dunams, does not prevent him from claiming a larger area against the present Respondents.

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

Costs will follow the event.

Delivered in presence of the Appellants 'Uthman, Hamdan, Suleiman and Zarifeh, children of Abd er Rahman Abu Shawareb, and in absence of other parties, the 20th day of February, 1932.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 43/30.

BEFORE:

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

IN THE CASE OF:

Shakib El-Haj
Ibrahim Najib El-Haj — APPELLANTS.

vs

Rashid Abdel Fattah Mustafa — RESPONDENT.

Appeal from Land Settlement Officer to Land Court heard in Chambers in absence of parties — Sec. 56 (2), Land Settlement Ordinance, 1928 — Procedure on grant of leave to appeal — Necessity of presence of parties on appeal — Art. 43, Ottoman Magistrates Law, amended — Magistrates Courts Procedure Rules, 4th July, 1918.

JUDGMENT.

This is an appeal from the judgment of the Land Court, Jaffa, whereby the judgment of the Court of the Settlement Officer, Jaffa Area, was confirmed.

Counsel for Appellants, upon the hearing of the appeal, raised the question as to whether there was a proper judgment before the Court in view of the fact that the appeal from the Court of the Settlement Officer, Jaffa, was decided, not in open Court and in the presence of the parties but in Chambers, contrary to Sec. 56 (2) of the Land Settlement Ordinance, 1928.

The before-mentioned Section 56 (2) of the Land Settlement Ordinance, 1928, reads as follows:—

> "Where leave to appeal is granted it shall be heard by the Land Court."

(The Amending Oidinance of 1930 does not vary or alter this Section.)

The Magistrates' Courts Jurisdiction Ordinance of 1924, prescribing a similar right of appeal in Section 3, Subsection 5, does not specify whether the appeal shall be heard in open Court by the Appellate Court, merely stating, "leave to appeal may be granted in any case in which an appeal does not lie as of right".

The Magistrates' Courts Jurisdiction (Amendment) Ordinance of 1928 is equally silent with regard to the manner in which the appeal shall be taken. However, it is prescribed in the Magistrates' Courts Procedure Rules (Bentwich, Vol. II, p. 458) of the 4th July, 1918, amending Article 43 of the Ottoman Magistrates' Law of 1913 with regard to appeals from the Magistrates' Court to the District Court.

> "The parties will not be summoned to appear before the Appellate Court unless the Court decides that their presence is necessary in the interest of Justice."

This Rule of Court, however, has at no time been made applicable to appeals from the Settlement Officer to a Land Court and no exception to the ordinary hearing of appeals appears to apply thereto.

We are therefore of opinion that Section 56, in the absence of any similar rule can bear but one interpretation and that is that the word "heard" in its ordinary and popular sense means that the appeal must in fact be heard in open Court in the presence of the parties and not in Chambers in the absence of the parties.

Accordingly the appeal is allowed and the judgment of the Jaffa Land Court quashed, and the case returned for the parties to be heard in Court and a fresh judgment to be given.

No costs.

Delivered the 24th day of December, 1931.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 55/30.

BEFORE:

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

IN THE CASE OF:

Salim Jiryes Haddad — APPELLANT.

vs

Fuad Muhammad Said Tahbub — RESPONDENT.

Jurisdiction of Land Court — Action against heir for declaration of title to land purchased from deceased — Judgment of Land Court declaring title not executed by Registrar of Lands — Application for refund of money paid under invalid agreement not within jurisdiction of Land Court — Establishment of Land Courts— Land Courts Ordinance, 1921.

JUDGMENT.

This appeal gives rise to a question of jurisdiction.

The Appellant, Salim Jiryes Haddad, bought from Muhammad Said Tahbub, the father of the Respondent, by an unregistered sanad attested by the Notary Public of Konia executed on 8th September, 1334, 300 dunams out of a certain piece of land, registered in the Land Registry, of which the boundaries were specified in the sanad.

The heirs of the vendor failed to transfer; and in 1927 the Appellant brought an action in the Land Court, Jerusalem, against the Respondent for a declaration of title. Judgment was given in favour of the Appellant.

On presenting the judgment to the Land Registry for registration, the Appellant was informed that it could not be registered, as the piece of land, registered in the name of the Respondent's ancestor, contained an area of only 55 dunums.

The Appellant then brought action in the Land Court, Jerusalem, for a declaration that the sale was dissolved and for an order to the Respondent, on behalf of the heirs of the vendor, to refund the purchase money with costs.

This action was dismissed by the Land Court and against this judgment the Appellant is now appealing.

The existing Land Courts were established by Section 4 of the Establishment of Courts Order, 1924, in exercise of the power in that behalf conferred upon the High Commissioner by Article 42 of the Palestine Order-in-Council, 1922, "for the hearing of such questions concerning the title to immoveable property as may be prescribed."

No ordinance or order has been enacted since the date of the Palestine Order-in-Council, 1922, prescribing the jurisdiction of Land Courts; and it follows that their jurisdiction is that prescribed by the Land Courts Ordinance, 1921, the provisions of which are made applicable in Land Courts established under the Palestine Order-in-Council, 1922, by Article 46 of that Order.

Now the jurisdiction of Land Courts as prescribed by the Land Courts Ordinance, 1921, does not include power to hear an action for repayment of purchase money paid in respect of land.

The Land Court, when giving judgment on title to land, may make the order dependent upon the fulfilment by the succesful party of a condition; which may be the repayment of money received in respect of the land. And in Spiro Jirius Zakharia and Another v. Ali Haj Hasan el Matari and Others (Land Appeal No. 175/23*) this Court held that where the Land Court declared a sale to be invalid, the order for re-transfer of the land ought to be made conditional upon repayment of the purchase money.

But that is a totally different matter from a claim for repayment of purchase money made independently of any question of title.

Nor can the fact that the Land Court has already decided a question of title to the land confer upon it jurisdiction to hear a separate action in respect of the purchase money.

It follows that the Land Court had not jurisdiction to hear the Appellant's action, and upon that ground the appeal must be dismissed with costs.

Delivered the 31st day of October, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 129/30.

BEFORE:

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

IN THE CASE OF:

Mahmud Atallah Sururi — APPELLANT.

vs

Ahmad Mahmud Es-Saiyed — RESPONDENT.

Jurisdiction of District and Land Courts — Breach of undertaking as to user of land the title to which is not disputed within jurisdiction of Land Court — Sec. 2 (d), Land Courts Ordinance, 1921.

Appeal from the judgment of the District Court of Jerusalem, dated the 29th April, 1929.

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* see ante p. 376.

JUDGMENT.

The Appellant's action has been dismissed by the District Court on the ground of lack of jurisdiction, the Court holding that the points in dispute come within Section 2 (d) of the Land Courts Ordinance, 1921.

It does not appear, however, that the action involves "a dispute as to the ownership of the land or any rights in or over the land."

The Appellant alleges merely a breach of an undertaking by the Respondent as to user of land the title to which is not in dispute.

This Court, therefore, holds that the matter is within the jurisdiction of the District Court, and accordingly sets aside the judgment of that Court and remits the case for hearing.

Costs will be costs in the cause.

Delivered the 31st day of October, 1931.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 18/32.

BEFORE:

The Acting Senior Puisne Judge, Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Nazirah Hashem Shawa
Jamileh Hashem Shawa
Fauzieh Hashem Shawa — APPELLANTS.

vs

Jamil Muhammad Hashem Shawa and Others — RESPONDENTS.

Appeal from judgment of Land Settlement Officer to Land Court to be heard in open Court — Necessity of presence of parties — Sec. 56 (2), Land Settlement Ordinance, 1928.

Appeal from the judgment of the Land Court of Jaffa, dated the 28th November, 1931.

JUDGMENT.

The facts in this appeal are similar to those in Land Appeal

No. 43/30* in which it was decided that on an appeal from the Land Settlement Officer to the Land Court the appeal must be heard in open Court in the presence of the parties and not in Chambers.

Accordingly, the appeal is allowed, the judgment of the Jaffa Land Court quashed and the case returned for the parties to be heard in Court and a fresh judgment to be given.

Costs to be costs in the case.

Delivered the 14th day of June, 1932.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 37/32.

BEFORE:

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

IN THE CASE OF:

Ibrahim Yusuf Askar — APPELLANT.

vs

Miriam bint Yusuf Askar — RESPONDENT.

Powers of Land Court on appeal from Land Settlement Officer—Sec. 57 (1) (b), Land Settlement Ordinance, 1928. — Re-hearing the evidence or hearing fresh evidence on appeal.

Appeal from the judgment of the Land Court of Jaffa, dated the 8th June, 1931.

JUDGMENT.

By virtue of Section 57, Subsection (1) (b) of the Land Settlement Ordinance, 1928, the Land Court is empowered to rehear the evidence or hear fresh evidence and give judgment on appeal.

The appeal is accordingly dismissed and the judgment of the Lower Court affirmed with costs and advocate's fees assessed at £P.2.

Delivered the 6th day of February, 1933.

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* see ante p. 1121.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 41/32.

BEFORE:

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

IN THE CASE OF:

Mariam bint Shteiwi Mufleh. APPELLANT.

vs

Khazneh bint Ibrahim el Hasan RESPONDENT.

Discretion of Land Court not interfered with by Court of Appeal— Right of Court to hear party in opposition — Validity of Certificate of Inheritance of Sharia Court not to be questioned by Land Court.

Appeal from the judgment of the Land Court of Nablus, dated the 15th February, 1932.

JUDGMENT.

As to the right of the Court to hear the Respondent in opposition, this Court holds that the Land Court properly exercised a discretion with which this Court will not interfere.

The Court also holds that until the Certificate of Inheritance issued by the Sharia Court of Tiberias has been set aside by a competent Court, the claim of the Appellant must fail.

The appeal is dismissed with £P.4 advocate's fee and costs.

Delivered the 7th day of December, 1932.

In the High Court of Justice.

H.C. No. 74/32.

BEFORE:

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

IN THE APPLICATION OF:

Ahmad Mahmud Hedjazi PETITIONER.

vs

The Chief Execution Officer, Jaffa
Yousuf Alami
Muhammad El Qurm RESPONDENTS.

Order made by Chief Execution Officer for sale of debtor's house — Application to set aside registration of ownership in Land Registry— Jurisdiction of Land Court and High Court — Art. 43, Palestine Order-in-Council, 1922.

Application for an order to issue to the first Respondent directing him to show cause why his order for the sale of Petitioner's house should not be set aside.

JUDGMENT.

What the Petitioner is now seeking is an order setting aside a registration of ownership in the Land Registry.

This is a matter in which the Land Court has jurisdiction, and hence in accordance with Article 43 of the Palestine Order-in-Council, 1922, this Court has not jurisdiction.

The Petition is therefore dismissed with costs including £P.2 advocate's fees and expenses.

Delivered the 14th day of January, 1933.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 84/32.

BEFORE:

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

IN THE CASE OF:

Fatmeh bint Nimer Shuhaby
Shihadeh el Aref — APPELLANT.

vs

Syndic of Suleiman el Aref,
a bankrupt — RESPONDENT.

Jurisdiction of Land Court where title not disputed — Question of payment to be made in respect of land not within jurisdiction of Land Court.

JUDGMENT.

There is no dispute as to the Appellant's title to the land. The only question that has been raised is whether the Appellants are liable to make a payment to the Respondent or not in respect

of the land, and that is not a matter within the Land Court's jurisdiction.

Following the judgment of this Court in Miriam bint Anton Abdel Masieh vs Bishara Habib (L.A. No. 29/26) we dismiss the appeal with costs including £P.2 advocate's fees.

LAND REGISTERS.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 306/20.

BEFORE:

Kermack, J., Jarallah, J. and Khaldi, J.

IN THE CASE OF:

Khadijeh Ismail Abu Khadra APPELLANT.

vs

Amneh Khalil Abu Khadra RESPONDENT.

Validity of admission made by party before Land Registrar and later denied — Right of party to administer oath — Application of Art. 1589, Mejelle — Admissions in Official Department.

JUDGMENT.

In the case between the Appellant Khadijeh Ismail Abu Khadra (Khadijeh bint Abdul Latif Hadouteh) and the Respondent Amneh Khalil Abu Khadra, judgment was given against Khadijeh and her children for the sum of P.T.30860 plus interest at 9 per cent from February 30th, 1920, to date of payment and the costs of the action upon the assumption that the Defendants shall refuse to take the oath that the acknowledgment of Amneh made in the Tabu is not false.

This judgment was given in presence of Khadijeh and her children and in absence of Defendants.

The objections raised by the Appellant on appeal are that the Plaintiff's acknowledgment of the receipt of the money took place before an official body, viz., the Mubaya Commission, and therefore she cannot be asked to take the oath. The transaction, she says, was officially recorded. The admission made is one to which effect should be given.

The Court should have called upon the Respondent to take the Istizhar oath.

The Respondent states in her reply, that the Article of the Mejelle is applicable under all circumstances whether the admission is officially recorded or not and asks that the appeal be dismissed.

Having considered this point, this Court is of opinion that admissions that take place in an Official Department do not come within the wide meaning of Article 1589 of the Mejelle. The Court of Cassation in its judgment of June 13th, 1314, and November 6th, 1315, appears to have taken this view.

The admission in this case having taken place in an Official Department, viz., the Tabu Department, attention would not be paid therefore to the statement that it was false.

The Court below was wrong in accepting that statement and in calling upon the Defendant to take the oath.

The judgment consequently is reversed. The Plaintiff is ordered not to interfere with the rights of the heirs of her brother Hassan Eff. Abu Khadra in consequence of the said sale.

Respondent is ordered to pay the costs of this action.

Delivered the 18th day of August, 1920.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 19/28.

BEFORE:

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

IN THE CASE OF:

Esther Selim Yacum Khayat — APPELLANT.

vs

Mejib Khalil Mejdalani
Syndic of the Bankruptcy
of Jules Khayat — RESPONDENT.

Lodging of claims for correction of land registers — Correction of the Land Registers Ordinances, 1920-22 — Dispute between claimant to land and trustee thereof — Rights of party to invoke provisions of Land Courts Ordinance, 1921 — Section 15 (2), Transfer of Land Ordinance, 1920.

Appeal from the judgment of the Land Court of Haifa dated 23rd December, 1927.

JUDGMENT.

The Land Court has dismissed the Appellant's action on the ground that the right of action is barred by the Correction of Land Registers Amendment Ordinance, 1922, "which directs that all such claims as this must be lodged before the 10th of July, 1924". That Ordinance was an amendment to the Correction of the Land Registers Ordinance, 1920, as amended by the Correction of the Land Registers Amendment Ordinance, 1921, and the effect of the Ordinance of 1922 was to extend to the 10th of July, 1924, the period within which an application could be made under the 1920 Ordinance.

The judgment of the Land Court, however, seems to be based upon a misconception as to the facts of the case. The Correction of the Land Registers Ordinance, 1920, enabled a party who claimed that some other person was registered as the owner of immovable property as trustee for the claimant, to apply for correction of the register.

The Ordinance, in so far as it contemplated contested proceedings, contemplated only a dispute between the claimant and the alleged trustee, such however is not the position in the case before us. The Appellant, it is true, alleges that the Respondent Mejib Khalil Mejdalani was at one time registered as owner of the land claimed by the Respondent. On the contrary it is fully admitted and the question raised by the action is whether the transfer made by the Respondent Mejib Khalil Mejdalani to Jules Khayat, of whom the Respondent Levy is the Trustee in Bankruptcy, was or was not made with the authority of the Appellant; and if made without her authority, whether it was or was not invalid.

Thus the circumstances of the case are clearly such as that the Correction of the Land Registers Ordinance, 1920, has no application.

We hold, moreover, than even in case in which an application might have been brought under the Correction of the Land Registers Ordinance, 1920, failure to bring such an application does not disentitle a party from bringing proceedings under the Land Courts Ordinance, 1921.

When the Correction of the Land Registers Ordinance, 1920, was enacted, no Land Courts had been created and no means existed of establishing a title to land except in a special case by leave of the Legal Secretary under Section 15 (2) of the Transfer of Land Ordinance, 1920.

Section 3 of the Correction of the Land Registers Ordinance, 1920, provides as follows :—

> "Where any immovable property is registered in the name of a person who is alleged to hold on behalf of, or as the nominee of any other person or corporation, the person or corporation claiming to be the beneficial owner may within one year of the date of the issue of this Ordinance apply to the Court for an order stating that such person or corporation is entitled to be registered as owner in place of the person at present registered. The applicant must produce documentary evidence to prove that the registered owner holds the property in the capacity of trustee or nominee, and the Court after hearing both parties, if the registered owner does not oppose the application, shall order the register to be corrected on such terms as it thinks fit.
>
> "If the registered owner opposes the application, the Court shall hear the application in accordance with the foregoing articles and shall at its discretion order such entry to be made in the register as is thereby provided."

It is clear, therefore, that an applicant under the Ordinance could only be registered as owner of the property if the registered owner did not oppose the application. If the registered owner did oppose, all that a successful claimant could obtain was an entry in the Register. The nature of such entry is defined in Section 1:

> "Any person claiming any interest in registered land otherwise than as being the registered owner or mortgagee may apply to the Court for an order that an entry be made in the register relating to such land to the effect that the applicant claims an interest therein, and the Court after hearing all parties may at its discretion order such entry to be made. Such entry shall specify the nature of the interest claimed and shall include short particulars of the proof produced in support of such claims."

Thus the utmost that a successful applicant under the Correction of the Land Registers Ordinance, 1920, could obtain

if his application were contested was an entry in the register to the effect that he claimed title to the land and it was still necessary for him to bring an action under the Land Courts Ordinance, 1921, to obtain a declaration of his right to registration.

It may be suggested that under these circumstances no useful purpose was served in prolonging the period for applications to be made for the correction of the register. It is to be noted, however, that under Section 9 of the Correction of the Land Registers Ordinance, 1920, the fee payable was the same as that payable in a possessory action, that is only one fourth of the fee payable for ownership. Thus the Ordinance provided a cheap method by which a person whose claim was not contested by the registered owner could obtain registration of the property in his own name.

The appeal is allowed, the judgment of the Land Court set aside and the case remitted for rehearing.

Costs will follow the event.

Delivered the 15th day of May, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 129/32.

BEFORE:

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

IN THE CASE OF:

Mutawalli of Nagib Waqf — APPELLANT.

vs

Rasha Dajani and Others — RESPONDENTS.

Correction of Tabou registration made by Land Registry — Necessity of consent of both parties to correction — Inadvertent error in document of registration — Rectification of clerical error — Art. 3, Law of Disposition of Immovable Property of 5th April, 1329.

JUDGMENT.

We are satisfied that a correction of the Tabu Registration cannot be made by the Land Registry without obtaining the consent of both parties thereto.

If, however, there has been a previous registration and it has been ascertained that an error has crept into the registration

which contradicts unambiguous entries and that it is in fact an error then correction may be carried out, on the basis of previous registration, on the application of one of the parties after due notice has been given to any other party concerned.

Judgment of the Lower Court is accordingly set aside and the case is remitted for the Magistrate to ascertain if the correction was carried out in compliance with the above mentioned decision or not and to give judgment accordingly.

In the High Court of Justice.

H.C. No. 46/33.

BEFORE:

Baker, J. and Frumkin, J.

IN THE CASE OF:

The Board of Foreign Missions of the Methodist Episcopal Church PETITIONER.

vs

The Director of Lands, Jerusalem RESPONDENT.

Refusal by Director of Lands to register property of Church in name of trustee — Creation of charitable trust — Sec. 37, Charitable Trusts Ordinance, 1925 — Proper fee for registration of correction of Land Register — Fee for registration of charitable trust — Unreasonable act on part of Public Officer as subject of application to High Court.

JUDGMENT.

This is a return to a rule nisi calling upon the Director of Lands to show cause why he should not register, in accordance with an Order of the District Court of Jerusalem, certain properties which are at present registered in the name of Angeline Newman, in the name of the Board of Foreign Missions of the Methodist Church as trustee thereof. The said Court declared the properties, by virtue of Section 37 of the Charitable Trusts Ordinance, 1924-1925, to be held in trust for the purpose of the said Ordinance, and that the said properties be vested in the present Petitioners as trustees of the said trust and the registration of the said property in the Land Registry be corrected accordingly.

The before-mentioned Order of the Court, together with the necessary documents, were submitted to the Land Registry

of Jerusalem with an application for correction of the Register together with a fee of 250 mils, which sum is prescribed as the proper fee for the registration of a correction under Article 17 of the Land Registries Schedule of Fees. The Land Registrar refused to register the transaction as a correction of registration under the before mentioned Article 17, but considering the transaction to be one of a constitution of a Charitable Trust, ordered it to be treated as such and fees be paid similar to those prescribed upon the constitution of land as Waqf.

Subsequently, Petitioner applied to the Director of Lands for a final ruling as to the fees payable, and on the 1st June, 1933, the Director of Lands replied — "that fees were payable on the basis of the constitution of a Trust (Waqf) and not under a correction fee".

On the hearing of the return to the Order nisi, Mr. Olshan, who appeared for Petitioner, argued that the Director of Lands must treat the transaction as one for correction in which case a fee of 250 mils is prescribed, or, in the alternative, inasmuch as the Charitable Trusts Ordinance fails to prescribe a fee for the registration of property held in trust for charitable purposes, to treat the registration as one upon which no fees are payable.

Now, the Transfer of Land Ordinance, 1920-1921, lays down in Section 16 thereof that the High Commissioner may from time to time make rules as to the fees payable for or in connection with the registration of land, and in accordance therewith schedules of fees applicable in the Land Registries have been made and enacted and are still in force.

The said Schedule does not set out the fees to be paid upon the registration of property held upon trust for charitable purposes: neither does the Charitable Trusts Ordinance. The Schedule, however, under para "C", does enact that "any transaction in respect of which the fees are not covered by the following rules shall be referred to the Director of Lands for instruction" and we are of opinion that reference was properly made to the Director of Lands in this connection.

The Director of Lands has ruled that the transaction must be treated as one analogous to the constitution of a Waqf and similar fees paid to those prescribed for the registration of a Waqf.

It has not been shown to us that the Director of Lands when issuing his instructions under paragraph (c) acted unreasonably. Accordingly the order must be discharged.

LAND SETTLEMENT.

In the Land Court of Haifa.

L.S. Ha. No. 1/31.

BEFORE:

The President and Aziz Daoudi, J.

IN THE CASE OF:

Rifka Aronson and Others — APPELLANTS.

vs

Hassan Mustafa Abu Jbara and Others — RESPONDENTS.

and

Abdel Fattah Mar'i el Samara and Others — THIRD PARTIES.

Settlement of rights in land and registration thereof — Factors to be considered in fixing boundaries between villages — Territorial jurisdiction of Land Settlement Officer.

Appeal from the judgment of the Land Settlement Officer dated the 26th of June, 1931, in Case No. 92/30.

JUDGMENT.

On the 14th of May, 1929, the High Commissioner made an order under Section 3 of the Land Settlement Ordinance, 1928, (which took the place of an earlier Order of the same nature dated the 26th April, 1929) ordering that a settlement of the rights in land and registration thereof should be effected in the area included within the boundaries of the village of Hudeira and the area, if any, between that village and the sea in the Haifa Sub-District and of the lands of Wadi Hawareth, Atil and Zeita in the Tulkarem Sub-District and various other places therein specified.

Village Settlement Committees were appointed for Hudeira, Zeita and Attil under Section 13 of the Ordinance and on the 9th of November, 1929, the Settlement Officer gave notice to these committees that it was his intention to come on a certain day and inspect the boundaries between Hudeira and the neighbouring villages and warning anybody who had any interest in

the boundaries to attend since no change would be made after they had once been settled.

It has been stated by the Appellants that on the day appointed for the inspection of the boundaries the Village Settlement Committee of Attil attended and objected to a certain boundary and that this objection has not been settled yet but that the village Settlement Committee of Zeita did not attend although they informed the Settlement Officer (whether prior or subsequent to the inspection does not appear) that they had no objection to the boundaries. However this may be, it appears that the Settlement Officer did fix the boundaries and that when he did so, Khor el Wasa', the land in dispute, was within those boundaries, for on the 2nd of December, 1929, he gave notice under Section 8 of the Ordinance that three blocks in Khor el Wasa' were about to be settled and on the 8th September, 1930, he gave a similar notice in respect of Blocks 23-28 and 44, all of which form part of Khor el Wasa'.

When these notices were issued more than 80 persons of the village of Zeita came forward and claimed that Khor el Wasa' was part of the Musha' of their village and belonged to them.

We think that at this stage the best course to have taken would have been to have selected one of these claims as representative of all the others and settled it in the manner provided by Section 27 of the Ordinance, obtaining undertakings from the remaining claimants to abide by the result.

However, this course was not adopted. The fellaheen of Zeita were assigned the role of Plaintiffs, the colonists of Hudeira became Defendants, other fellaheen, some of Zeita and some of Attil, were added as third parties and an investigation was begun by the Settlement Officer with the object as is stated in the final decision of the 26th of June, 1931, of deciding whether Khor el Wasa' lay within the boundaries of Hudeira and in consequence was within the jurisdiction of the Settlement Officer.

With all due repect to the Settlement Officer we do not think that the trial was begun with that object at all. The boundaries had already been settled and what all the parties were seeking was an opportunity to prove their title to the land. In any case it is clear from the record of the proceedings that there was a good deal of uncertainty in the mind of the Settlement Officer as to what he was going to do, so much so that in his Interim Order made on the 25th of November, 1930, (page 47 of

the Record) we find him recording that he "is of opinion and decides that he has no powers to exclude land so registered (i.e the land in dispute) from the Village Settlement Area of Hudeira"; he qualifies this finding in his final judgment but the qualification appears to have been an afterthought since in his Interim Order of the 16th December, 1930, he quotes the previous Interim Order without any such qualification (page 60 of Record).

In the end, the Settlement Officer found that the land in dispute was not within the boundaries of Hudeira and that he had no power to deal with claims in respect of the same, since his jurisdiction was limited to Hudeira.

On the face of it, this seemed to be a decision which prejudiced nobody and we had considerable difficulty at first in convincing ourselves that any appeal lay from it. No indication is given in the Land Settlement Ordinance as to what are to be considered the boundaries of a village and so long as the rights of individuals are not affected it does not seem to us to matter very much how the Settlement Officer decides the question. If his decision is inconvenient, machinery exists by means of which it can be amended, administratively, after Land Settlement has been completed.

However, upon closer examination, it will be observed that the judgment of the Settlement Officer consists of two parts, firstly, a finding as to the boundaries of Hudeira made under Section 12 of the Land Settlement Ordinance, 1928, and, secondly, a decision that Khor el Wasa' does not lie within the boundaries of Hudeira as recorded in the original Kushans of Hudeira.

The latter decision seriously affects the rights of the Appellants, the more so since the Settlement Officer has ordered that the entries in respect of Khor el Wasa' in the Haifa Land Registry shall be separated from the Hudeira entries and an observation made in respect of the former that in accordance with the judgment of the Settlement Officer, Jaffa Area, in case No. 92/30, these lands were held to be situated within the musha' lands of Zeita and/or Attil.

With regard to the first decision, as has been mentioned before, the Land Settlement Ordinance nowhere lays down what the boundaries of a village are to be deemed to be nor does it say what factors should be taken into consideration in coming to a decision on the subject. In this case, the Settlement Officer has excluded Khor el Wasa' from Hudeira because, as he found, it

was not included in the original Kushans of Hudeira. We do not propose to overrule him on this point because his decision does not affect the right or title of any individual who is a party to this action; on the other hand, if we had had to make the decision ourselves, we think that we should have paid regard more to the present state of affairs rather than to that of many years ago. Today Khor el Wasa' is to all intents and purposes a part of Hudeira and is likely to remain so whatever may be the outcome of the dispute as to title; further, since the year 1925, it has been treated by the Government as being part of Hudeira and consequently within the Haifa Sub-District and not within the Sub-District of Tulkarem. For these reasons it seems to us that it would have been more convenient to have kept it within Hudeira for the purposes of Land Settlement, and so we should have decided, had the question any practical value for the parties to this action.

With regard to the second decision, namely that Khor el Wasa' does not lie within the boundaries recorded in the original Kushans of Hudeira, there is ample evidence in the careful and competent investigation made by the Settlement Officer to confirm this finding and we uphold the same accordingly.

The Appellants, on the question of title, have still another string to their bow because they have acquired the rights of the Government in Khor el Wasa' which the Government claims, was declared Mahlul during the Turkish regime. This question has still to be determined.

In the result, the appeal fails and is dismissed: no order is made as to costs.

Judgment delivered in the presence of the parties and subject to a right of appeal upon a point of law.

Dated the 18th day of July, 1932.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 1/31.

BEFORE:

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

IN THE CASE OF:

Khalil Mustafa Khalil El 'Isweid and Others — APPELLANTS.

vs

The Heirs of Haj Muhammad Ahmad el Dajani — RESPONDENTS.

Acquisition of ownership of land by long possession — Registration in Land Settlement of prescriptive title to land — Sec. 2, Registration of Land Ordinance, 1929 — Settlement Officer not bound to hear witnesses to establish prescriptive title.

Appeal from the judgment of the Land Court of Jaffa, dated the 29th October, 1930.

JUDGMENT.

The Registration of Land Ordinance, 1929, was not in force when the Settlement Officer heard this claim; therefore the Settlement Officer was not bound to hear witnesses whom deceased Respondent (who claimed by possession) desired to call, which Section 2 of the said Ordinance provides for. This principle has been clearly settled in Land Appeal No. 2/31*.

We hold, therefore, that the Settlement Officer was right in refusing to hear witnesses whom the deceased Respondent desired to call.

The appeal is allowed, the judgment of the lower Court is set aside, and the judgment of the Settlement Officer is affirmed.

The costs of this appeal, including £P.1 advocate's fees and expenses will be paid by the Respondents.

Delivered the 21st day of December, 1931.

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* see succeeding judgment.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 2/31.

BEFORE :

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

IN THE CASE OF :

Fatmeh Haj Muhammad Taha and Others — APPELLANTS.

vs

Muhammad Sa'adat el Dajani on behalf of the estate of his father — RESPONDENT.

Settlement Officer not bound to hear witnesses to establish prescriptive title — Title to land not set up against registered owner solely on ground of possession for period exceeding that of limitation of actions — Registration in Land Settlement of prescriptive title to land — Sec. 2, Registration of Land Ordinance, 1929.

Appeal from the judgment of the Land Court of Jaffa, dated the 29th October, 1930.

JUDGMENT.

Had the Registration of Land Ordinance, 1929, been in force at the date when the Settlement Officer heard this claim, he would have been bound under Section 2 of the Ordinance, to have heard the witnesses whom the party claiming by possession for twenty years desired to call.

The claim, however, was actually heard and the Settlement Officer's decision was given on the 18th July, 1929, while the Registration of Land Ordinance, 1929, was not enacted until the 1st August, 1929.

It is clear that as regards land in a settlement area prior to the passing of that Ordinance the rule which is in force outside a settlement area applied, namely, that title to land could not be set up against a registered owner solely on the ground of possession for a period exceeding that of limitation of actions.

We hold therefore that the Settlement Officer was right in refusing to hear the witnesses whom the Respondent desired to call.

The appeal is allowed, the judgment of the Land Court set aside, and the judgment of the Settlement Officer is affirmed.

The costs of this appeal, including £P.3 advocate's fees and expenses will be paid by the Respondents.

Delivered the 15th day of October, 1931.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 36/31.

BEFORE:

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

IN THE CASE OF:

Pinchas Goldberg,
Nachman Wolf Goldberg,
Shina Shalman — APPELLANTS.

vs

Khaya Rabinovitch,
Haim Rokach
Rachel Rokach — RESPONDENTS.

Appeal from judgment of Land Court on appeal from Settlement Officer — Procedure for notification of judgment of Land Court — Appeal held to be premature — Notification of judgment under Sec. 57 (2), Land Settlement Ordinance, 1928.

JUDGMENT.

The Court holds that the notification of the result of Appeal dated the 12th July, 1931, of the Settlement Officer of Ramle his not a notification of the judgment as contemplated in Section 57 (2) of the Land Settlement Ordinance, No. 9 of 1928.

The appeal is therefore premature and the application is therefore dismissed with costs to include £P.2 advocate's fee.

Delivered the 12th day of April, 1932.

In the Land Court Jaffa sitting as a Court of Appeal.

L.S. Ja No. 3/32.

BEFORE:

The President and Tukan, J.

IN THE CASE OF:

Esther D. Abrevayou — APPELLANT.

vs

Liquidation Commissaire of the bankruptcy of Zelig Rabinovitch,
Subhi Ayoubi,
M. Talisman,
Shimon Kaplan — RESPONDENTS.

Procedure on grant of leave to appeal from judgment of Settlement Officer — Deficiency in Land Settlement Ordinances, 1928-1930— Period for appeal after notification of leave to appeal — Jurisdiction of Settlement Officer to upset order given by Juge Commissaire.

JUDGMENT.

From examination it appears from the application dated 3rd March, 1932, attached to this case that leave to appeal was served on the Appellant on 3rd February, 1932, and the notice of appeal was submitted by her on 26th February, 1932.

Whereas there is no provision in the Land Settlement Ordinances, 1928-1930, nor in the Rules issued pursuant to those Ordinances referring to the period of submitting such appeals after leave to appeal has been granted, therefore it is necessary to follow the general Rules provided by Article 5 of the Magistrates' Courts Jurisdiction Ordinance, 1924, published in Official Gazette No. 109. Whereas this Article lays down that the period of appeal is 10 days from the date of the notification of leave to appeal, thus the appeal submitted by the Appellant would have been lodged after the expiration of the prescribed period.

But in any case we are of opinion that this appeal must fail. The Settlement Officer was correct in holding that he had no jurisdiction to hear the case. A Settlement Officer has no power to upset an order given by a Juge Commissaire. On this ground also the appeal must be dismissed with costs and expenses.

Given the 14th day of November, 1932.

In the Supreme Court sitting as a Court of Appeal.

P.C.L.A. No. 11/33.

BEFORE:

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

IN THE CASE OF:

Rifka Aronson and Others — APPLICANTS.

vs

Hassan Mustafa Abu Jbara and Others — RESPONDENTS.

Leave to appeal to the Privy Council refused — Decision of Settlement Officer that claims to land not within his jurisdiction held not subject to appeal — Art. 3 (a) (b), Palestine (Appeal to Privy Council) Order-in-Council, 1924 — Claim to be entered in Schedule of Claims — Right of appeal to Privy Council — Sec. 56, Land Settlement Ordinance, 1928.

JUDGMENT.

This is an application for leave to appeal against a judgment of this Court dated 12th January, 1933, whereby this Court held that a decision of the Settlement Officer, Hedera, that claims to land known as Khor-el-Wasa' were not within his jurisdiction, was not subject to appeal.

The Applicants maintain that their application falls within paragraph (a) of Article 3 of the Palestine (Appeal to Privy Council) Order-in-Council, 1924.

In considering this claim let us assume that, as the Applicants maintain, this Court was wrong in holding that the Settlement Officer's decision was not subject to appeal, and further that the Settlement Officer was wrong in holding that he had no jurisdiction with regard to land in Khor-el-Wasa' and in ordering that the register relating to that area be separated from the Hedera Registers.

The effect of reversing these two decisions would be that the Applicants' claim to be entered on the Schedule of Claims as owners of land in Khor-el-Wasa' would be put forward now for determination as part of the settlement of Hedera village, instead of being deferred until the Settlement Officer is dealing with the neighbouring villages, Zeita and Attil.

It is not and cannot be suggested that the delay in determining the Applicants' claim involves a case of over £P.500.

This however is not what the Applicants have in mind. The real ground of this application is that the Settlement Officer's decision was based upon a finding that "the whole area of Khor-el-Wasa' in dispute in this action is included in the boundaries of Zeita and/or Attil Musha lands". The Applicants say that this finding is prejudicial to their claim to be entered in the Schedule of Rights in respect of land in Khor-el-Wasa' admittedly worth much more than £P.500 and hence that their appeal involves indirectly a question respecting property of the value of £P.500.

It must, however, be observed that the judgment of this Court in respect of which this application is made, does not imply either directly or indirectly any approval of the finding of fact in question; and that such finding is of no pecuniary value whatever, unless and until a decision as to the Applicants' claim has been based thereon.

The Applicants' argument that their application falls within paragraph (a) of Article 3 of the Order-in-Council must therefore be rejected.

As regards their alternative application under paragraph (b); if it were clear that this is the only opportunity that the Applicants will have of attacking a finding which they regard as conclusive against their claims, I am of opinion that they should be granted leave to appeal.

Such, however, is not the case.

Even if it be assumed that when a Settlement Officer comes to deal with the Applicants' claim to Khor-el-Wasa' as part of the settlement of Zeita and Attil Lands, he will accept the finding of fact already made and will base thereon a decision unfavourable to the Applicants' claim; it will be open to the Applicants to apply under Section 56 of the Land Settlement Ordinance, 1928, for leave to appeal against the decision, on the ground that the Settlement Officer was wrong in holding that the lands in question are not within the village of Hedera.

That is to say, the applicants will be in precisely the same position as any other claimant to land whose claim has been dismissed, and will have the same remedies open to them.

It would, therefore, in my opinion, not be proper that leave to appeal should be granted under Article 3 (b) of the Order-in-Council.

Delivered the 6th day of July, 1933.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 21/33.

BEFORE:

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

IN THE CASE OF:

Shehadeh el Ali and Others APPELLANTS.

vs

Shehadeh el Ali and Others RESPONDENTS.

Period of appeal from Settlement Officer — Civil procedure — Deficiency of Land Settlement Ordinance, 1928, as to period for lodging appeal after leave to appeal has been granted — Sec. 5 (2) Magistrates' Courts Jurisdiction Ordinance, 1924 — Interpretation of Statutes — Unintended omission in Ordinance may be supplied in enactment construed beneficially.

JUDGMENT.

This is an appeal from the judgment of the Jaffa Land Cour sitting as an Appellate Court in an appeal from the Land Settlement Officer whereby the said Court decided that:

> "As there are no provisions in the Land Settlement Ordinance, 1928-1930, nor in the procedural rules made thereunder as to the period within which the appeal must be lodged after leave to appeal has been granted, it is necessary to have recourse to the general rule laid down in sub-section 2 of Section 5 of the Magistrates' Courts Jurisdiction Ordinance, 1924, which lays down that an appeal must be lodged within ten days: The appeal having been submitted after the lapse of ten days must, therefore, be dismissed."

Abu Ghazaleh who appeared for the Appellants submitted that, in the absence of any provision in the Ordinance, thirty days was the correct period allowed for an appeal to be lodged, and Mr. Abcarius for Respondents, appeared to support the District Court's judgment, arguing that by analogy the practice before the Magistrate must apply which by virtue of the Magistrates' Courts Jurisdiction Ordinance, 1924, Sub-Section 3 of Section 5, prescribes a period of ten days.

It is common ground that the Land Settlement Ordinance, 1928-1930, contains no provision as to the time within which an

appeal must be lodged after leave to appeal has been granted, and it is therefore a question for us to decide whether we can, by analogy, apply the practice prescribed by the Magistrates' Courts Jurisdiction Ordinance, which lays down a period of ten days.

Now it is a rule of law that an omission which the context shows with reasonable certainty to have been unintended, may be supplied, at least, in enactments which are construed beneficially as distinguished from strictly; but we do not consider that any omission exists in the enactment, for Sub-Section 2 of the said Ordinance prescribes that:

> "Where leave to appeal is granted, it shall be heard by the Land Court, and the Settlement Officer shall forward to the President of the Court all the documents relating to the case."

We therefore are of opinion, that the grounds set out in the application for leave to appeal, when forwarded to the Land Court by the Settlement Officer, were intended to form the grounds of appeal and to cause the Land Court to be seised with the appeal.

Should, however, the Appellant desire to lodge any additional grounds, there appears to be no reason why he may not do so, provided they are lodged with the Land Court prior to the hearing of the appeal.

The judgment of the Land Court must, therefore, be set aside and the case remitted for the said Court to give its judgment on the merits, considering the grounds stated in the application for lease together with the statement of appeal if such a statement had in fact been submitted before the appeal was heard.

In the High Court of Justice.

H.C. No. 77/33.

BEFORE:

Baker, J. and Frumkin, J.

IN THE APPLICATION OF:

Shalom Mordechai Simkin — PETITIONER.

vs

Chief Execution Officer, Jaffa,
Anglo-Palestine Bank, Ltd. — RESPONDENTS.

Amount of mortgage debt contested — Admission made before Land Settlement Officer of amount due under mortgage — Registration by Land Settlement Officer of mortgage amount of which is agreed by the parties — Question of res judicata — Act of Land Settlement Officer made in his administrative capacity — Binding effect of judgment of same Court.

JUDGMENT.

Since this case was adjourned for judgment another Chamber of this Court consisting of the learned Chief Justice and Khayat, J., in High Court No. 86/33, Zeev Lipkis v. Chief Execution Officer, Jaffa, and the Anglo-Palestine Bank Limited have dealt with a similar application by a mortgagor under an order of the Land Settlement Officer against the mortgagee who happens to be also the Second Respondent in the present case.

In the case cited the Court held that there was no question of res judicata, and on the authority of H.C. No. 90/32[1] and C.A. No. 64/32[2] made the order absolute.

The effect of the said judgment is that a mortgagor of a mortgage registered under an order of the Land Settlement Officer has similar remedies to those in a case of registration of a mortgage by the Land Registrar, and we are bound by this judgment. True, this case is distinguishable from High Court No. 86/33 in that, while in High Court No. 86/33 the amount of the mortgage was disputed, in the present case the registration was made upon the mutual consent of the parties. But this distinction is rather in favour of the Petitioner, because in case of consent the Land Settlement Officer has to exercise no judicial functions and he acted in a mere administrative capacity.

The order is therefore made absolute with costs and advocates' fees assessed at £P.2.

Delivered the 16th day of May, 1934.

LAND TRANSFER.

SEE LAND — TRANSFER OF LAND.

[1]) See ante p. 291.
[2]) See ante p. 1074.

LEASE.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 42/25.

BEFORE:

Corrie, J., Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Fahmi Qanadilo, Mutawalli of the Waqf of Jelal Ed-din Yunis (Nablus) APPELLANT.

vs

Rida Muhammad Hamed,
Ahmed Hassan Kitani,
Assad Ifraitikh,
Fayez Aj'aj RESPONDENTS.

Action for declaration invalidating lease — Recovery of leased property — Jurisdiction of Magistrate in possessory actions — Jurisdiction of Courts in actions for wrongful appropriation — Secs. 1 (b), 4, Magistrates' Courts Jurisdiction Ordinance, 1924 — Possessory action under Ottoman Magistrates' Law of 1913 distinguished from possessory action under Magistrates' Courts Jurisdiction Ordinance, 1924 — Question of ownership of land — Art. 24, Ottoman Magistrates' Law, 1913.

JUDGMENT.

This action was brought in the Magistrate's Court by the present Appellant as mutawalli of a waqf claiming a declaration that lease granted by the Respondent Rida to the other Respondents was invalid, and for recovery of the property leased.

The Respondents pleaded that the property was mulk. The Magistrate held that the matter was not within his jurisdiction on the ground that the value of the subject-matter exceeded £E.100.

On appeal to the District Court, the Court held that the action "was not brought in the form of a possessory action and that actions for wrongful appropriation do not fall within the jurisdiction of the Magistrates' Courts," and dismissed the appeal.

An appeal against this judgment has been brought to this Court by leave of the President of the District Court under Section 4 of the Magistrates' Courts Jurisdiction Ordinance, 1924.

We are unable to accept either of these grounds for holding that the matter was not within the Magistrate's competence.

Section 1 (b) of the Magistrates' Courts Jurisdiction Ordinance, 1924, gives the Magistrates' Courts jurisdiction in "Actions for recovery of possession of immovable property of any value."

We hold that this confers upon the Magistrates' Courts jurisdiction in any action to obtain possession of immovable property whatever may be the nature of the adverse claim, and that no such limitation is to be implied as was the case with regard to a possessory action under the Ottoman Magistrates' Law of 1913.

The only restriction upon the competence of the Magistrates Courts in this respect is contained in the final paragraph of Section 1: "No criminal or civil action or counter-claim which involves a decision as to the ownership of immovable property may be heard by a Magistrate."

In the present action the Appellant is claiming as mutawalli of a waqf, the Respondents claim that the property is the mulk of the Respondent Rida.

The action clearly raises a question of ownership.

The Appellant alleges that the question had been settled by a judgment of the Sharia Court of 1309 upon which the Magistrate was empowered to act. But the Respondents produced documents of title in support of their contention, and we cannot regard the question of ownership as one which had been finally decided.

It follows that the Magistrate has not jurisdiction to hear the action until the question of title has been decided. Upon this ground the appeal is dismissed.

Delivered the 15th day of October, 1925.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 5/27.

BEFORE:

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

IN THE CASE OF:

Abarbanel and Weiser — APPELLANTS.

vs

Township of Tel-Aviv — RESPONDENT.

Action for return of monies paid under lease agreement — Secs. 2, 11, Land Transfer Ordinance, 1920 — Recovery of monies paid under null and void disposition — Constitution of Land Courts — Jurisdiction of Land Courts defined — Proclamations Nos. 75 and 76 of 1918.

JUDGMENT.

The Appellants are claiming the return of moneys paid by them in respect of a lease for fifteen years which they allege to be void.

The District Court has held that it is incompetent to decide whether the lease is invalid or not, as that is a matter for the Land Court.

It is, however, to be observed that the Transfer of Land Ordinance, 1920, Section 2 of which defines a disposition of land to include a lease for more than three years, by Section 11 provides 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 Courts."

At that time, Land Courts had not been constituted, and the only Court in which a claim for recovery of a sum of more than £E.1000 could be made was the District Court.

Land Courts were constituted under the Land Courts Ordinance, 1921. Section 2 of that Ordinance defines the powers of the Courts. There is nothing in that Section to suggest that the jurisdiction as to repayment of money paid under an invalid disposition conferred upon District Courts by the Transfer of Land Ordinance, 1920, was removed from the District Court; though it would appear that if it were the lessor who sought a declaration that the lease was invalid, and that in consequence he was

entitled to the land free of all claims by the lessees, the action must be brought in the Land Court.

Further, a number of actions have been heard by District Courts in which repayment has been claimed of moneys in respect of sales of land which were void under proclamations Nos. 75 and 76 of 1918, and there would not appear to be any difference in principle in such an action and the present case.

We hold therefore that the District Court has jurisdiction.

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

Costs to follow the event.

Delivered the 29th day of April, 1927.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 21/27.

BEFORE:

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

IN THE CASE OF:

Michael Francis Rahil — APPELLANT.

vs

Neera widow of Abdel Rahman Shouki,
Hanna Rahil, in his own capacity
and as heir of Daoud, Hafeezeh and
Kareemeh sons of Michail Rahil.
Raful Daoud Rahil } as heirs of Daoud
Rauf Lawrence } Hafeezeh and Karemeh
sons of Michail
Rahil — RESPONDENTS.

Claim that transfer in form of sale was in reality mortgage transaction — Long possession by way of lease as evidence of title — Letters as constituting agreement — Possession under lease or mortgage held not to avail as against real owner — Genuineness of signature to be proved.

Appeal for the judgment of the Land Court of Jerusalem, dated December 6th, 1926.

JUDGMENT.

The facts of this case are as follows.

In May, 1931, (Financial) certain Meshaa shares in a plot of miri land in Ain Karim known as El-Janane, and certain shares in a house and garden in the same village, were transferred to Abdel Rahman Shawki Bey by Francis, Daoud, Hanna, Hafizah and Karimeh, children of Michael Rahil, and Rose Bint Jiryes Morcos in the form of a sale.

On Muharram 1,1315, Raphael Eff. Rahil, leased the share of Abdul Rahmen Shawki Bey in the house and garden for a term of one year at 5 Napoleons.

On February 4th, 1898, Francis Eff. Rahil leased from the said Abdel Rahman Eff. the plot of land known as El-Janane for one year at a rental of 2 Napoleons.

On Muharram 1,1320, Francis Eff. Rahil leased the said shares for a term of three years.

On August 19th, 1915, a letter was sent by Abdel Rahman Eff. from Tribisond to Francis Eff. Rahil in which he informs him of his arrival at the place to which he had been transferred from Jerusalem, where he had been Chief Accountant. In this letter there is the following passage: — "I beg you to take in hand the finishing of the debt of the house and gardens which were sold to me at Ain Karim. To get rid of this debt is better for you".

There is also a letter dated July 2nd, 1321, sent from Tripoli by the said Abdel Rahman Eff. to Theodore Eff., then an official of the Finance Department at Jerusalm, in which he states his regret at the death of Francis Eff. Rahil. In this letter there is the following passage: — "You know as regards the debt due to me in consideration for which he (Francis Eff.) and all his family, except Raphael Eff., had transferred to me their house at Ain Karim with El-Janane and I had let it to them; before that, I had let it to them through you. Whereas the term of the lease has expired, I wrote to Nejib Eff. Abou Souan to see you and take up the matter of selling these places. If anything is left over in excess my claim, the excess I give as a donation to the orphans of Francis Eff. If it is not possible to sell them, will you and Nejib Eff. let them out for two years on my behalf".

On the 24th February, 1925, an action was started in the Land Court, Jerusalem by Michael Eff., one of the heirs of

Francis Eff. Rahil, on behalf of the estate, against the heirs of Abdel Rahman Eff., to whom were passed the shares in the house and garden and El-Janane, and also against Hanna Daoud Rahil, Rafful Daoud Rahil and Raouf Lawrence on behalf of the estates of the deceased Daoud, Hafizah and Karimeh, children of Michail Rahil, and Rose Jiryes Morcos.

In this action he claimed an order to the Land Registry not to effect any transaction concerning the said shares, because in fact they were transferred to Abdul Rahman Eff. as a security for 400 Napoleons; he also claimed an order for registration in the names of the heirs of Francis Eff.

In support of his allegation of mortgage, he produced the said two letters and also relied on possession during all this period.

The Land Court left out of the action the second part of the Defendants, because the Plaintiff claims that they sold him their shares in the properties in dispute but did not produce anything in support of this, and it restricted the action to the rights which the heirs of Francis Eff. could claim by succession from their father.

In this case the Court only considered the passages in the said letters sent by Abdel Rahman Eff. to see whether or not they mean a mortgage or a final sale on the presumption that the letters are signed by Abdel Rahman Eff., because the Attorney of the Respondents denies the signatures.

The Court dismissed the action on the ground that the said two letters do not import a mortgage.

The judgment is appealed from on the ground that the Land Court was wrong in holding that the passages in the two letters do not point to a mortgage inasmuch as the statements are clear and leave no place for doubt.

We are of opinion that the Court was not wrong in discussing only this one of the several points raised by the Defendants such as prescription, occupation by Plaintiffs as tenants and payment of Werko after the purchase, because if the mortgage is proved prescription or long possession by way of lease are of no avail.

We also hold that the only point which should be considered is whether or not the two letters contain evidence that the transaction was in fact a mortgage.

We doubt whether the Court of Appeal is entitled to interfere

with the finding of the Land Court concerning the construction of the passages in the said two letters; but our doubts are put an end to when we find clear statements which expressly show that the transaction was made with a view to provide security, i.e. a mortgage. Sufficient in this respect is the following phrase:— "The debt of the house and El-Janane". But this is so only when the letters are proved to be signed by the ancestor of the Defendants inasmuch as their attorney denies the signature, and the Land Court based its finding on the presumption that the signatures are his.

We hold that the judgment of the Land Court should be set aside and the case remitted to it for the genuineness of the signature to be gone into.

Costs to follow the event.

Delivered in presence the 13th day of August, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 85/27.

BEFORE:

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

IN THE CASE OF:

Fuad El-Khaldi, Administrator of the Waqf of Mahbubeh El-Khaldi — APPELLANT.

vs

Muhammad Said Aweidah,
Isma'il Aweidah,
Abdel Ghani El-Khaldi, and
Mustafa Khalil El-Khaldi — RESPONDENTS.

Jurisdiction of Magistrate to hear action to declare lease void and for recovery of possession of property leased — Sec. 1 (b) Magistrates' Courts Jurisdiction Ordinance, 1924 — Jurisdiction of Civil and Religious Courts re validity of lease challenged by waqf — Matter of internal administration of waqf — Art. 441, Mejelle — Art. 52, Palestine Order-in-Conncil, 1922.

JUDGMENT.

The Appellant claims:

(a) a declaration that a certain lease granted by the Respondents

Abdel Ghani Eff. and Mustafa Eff. to the Respondents Muhammad Said and Ismail Aweidah is invalid;

(b) recovery of possession of the property included in such lease.

It is clear that the District Court has no jurisdiction in either of these matters, but it does not follow that they are matters for the Sharia Court.

Actions for recovery of possession of immoveable property of any value are by Section 1 (b) of the Magistrates' Courts Jurisdiction Ordinance, 1924, within the jurisdiction of the Magistrate's Court.

For the purpose of deciding such an action, it might be necessary to decide whether the lease was invalid owing to an inadequate rent having been reserved.

Primarily this is a question of Sharia Law, but in view of the terms of Article 441 of the Mejelle it is a question with which the Civil Courts would appear to be competent to deal without reference to the Sharia Court.

In any case an action involving a defendant who is not a mutawalli or beneficiary of a waqf would not appear to be a matter of the internal administration of a waqf, so as to be within the exclusive jurisdiction of a Moslem Religious Court under Article 52 of the Palestine Order-in-Council, 1922.

On these grounds the appeal is dismissed.

Delivered the 8th day of November, 1927.

In the High Court of Justice.

H.C. No. 13/28.

BEFORE:

The Senior Puisne Judge and Frumkin, J.

IN THE APPLICATION OF:

Rothstein and Label — PETITIONERS.

vs

The Chief Execution Officer
of Jerusalem
Joseph Weinberg — RESPONDENTS.

Order made by Chief Execution Officer to lessee to vacate leased premises — Mortgagee deemed to have notice of existing lease — Mortgagor held incapable to give lessee an interest greater than he himself has — Lease of mortgaged premises to terminate with interest of mortgagor (lessor) — Sec. 10, Provisional Law of Mortgage, 1331 — Sec. 2, Mortgage Law Amendment Ordinance, 1920.

JUDGMENT.

The provisions of Section 10 of the Provisional Law of Mortgage of 1331 and of Section 3 of that Law, as amended by the Mortgage Law Amendment Ordinance, 1920, Section 2, are applicable.

The mortgagor cannot give a lessee an interest greater than he himself has, and hence any lease granted after the creation of the mortgage is liable to be determined in the same manner and at the same time as the mortgagor's own interest.

The petition is dismissed with costs, including £P.2 advocate's fees.

Delivered the 31st day of May, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 5/29.

BEFORE:

Baker, J., Jarallah, J. and Aziz Daoudi, J.

IN THE CASE OF:

Shmuel H. Tajer — APPELLANT.

vs

Moshe Cohen — RESPONDENT.

Stipulation in lease for payment of penalty by lessor in the event of his failure to vacate at expiration of lease — Failure of lessee to vacate—Purchase by lessee of leased premises—Art. 442, Mejelle—Merger of lease on purchase by lessee.

JUDGMENT.

This is an appeal from the judgment of the Jaffa District Court.

The District Court dismissed Appellant's claim for £P.884 odd being rent alleged to be stipulated for in case Respondent did

not vacate Appellant's premises at the expiration of a lease entered into between the parties to the action.

In the year 1243 (Hejira)—1924-1925—a contract of lease was executed between a Mr. Shmuel Tajer and Mr. Moshe Cohen whereby Mr. Cohen, the present Respondent, agreed to take the premises, the subject of this appeal, for a period of one year at a rental of £P.120 payable by instalments.

The Respondent also agreed to vacate the premises upon the expiration of the said lease and to deliver the keys to the lessor, failing which he would pay 75 piastres Egyptian for every day he held over. The Respondent did not vacate the premises at the expiration of the said lease and the present claim is for rent at the aforesaid rental for the number of days Respondent has remained in possession since the expiration of the lease.

Respondent alleges that upon the 22nd of March, 1925, he concluded an agreement of sale with the owner of the premises whereby he undertook to purchase the leased premises for £P. 1,900, the greater portion of which he has paid, viz. : £P.1,000; also that it was a condition of the said contract that if the sale took place before the month of Moharrem, Respondent was under no obligation to pay rent and if later than Moharrem the Respondent agreed to pay interest on the balance of the purchase money £P.900,

The contract of sale was produced by Respondent who alleges that the contract of sale was intended to annul the lease and in fact did so by virtue of Article 442 of the Mejelle.

The District Court did not deal, in our opinion, with the main issue, i.e., whether the lease became merged immediately the contract for sale was entered into but dismissed Appellant's claim on the grounds that no demand had been made to the Respondent requesting him to vacate the premises.

There is no evidence that the contract has been annulled and we are satisfied that Article 442 of the Mejelle governs the case and that when the contract for sale was entered into and a part of the purchase price paid, all contractual relations under the lease subsequent to the date of the contract of sale ceased and the lease became null and void.

Accordingly the appeal must be dismissed. Appellant to pay costs and advocate's fees assessed at £P.2.

Delivered the 16th day of April, 1931.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 73/29.

BEFORE:

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

IN THE CASE OF:

Edwin Herman Brush — APPELLANT.

vs

Suliman Ahmad El Muwaqat — RESPONDENT.

Contract of lease for five years contained in two agreements — Evasion of registration of lease as a disposition — Sec. 11, Transfer of Land Ordinance, 1920 — Contract cannot be cancelled by one party — Recovery of money paid under void disposition — Eviction of lessee — Recovery by tenant of repairs made at request of landlord — Action for recovery of possession of immovable property.

Appeal from the judgment of the Land Court of Jerusalem dated the 5th June, 1929.

JUDGMENT OF THE LAND COURT.

(TRANSLATION)

The appeal has been filed within the prescribed time and therefore it is accepted as a matter of form.

Upon perusal the Court finds that the first point to be decided in this action is whether the contract of lease in dispute in this case for the period of five years contained in two agreements executed on the same day, the first for the period of three years and the second for a further period of two years, is valid, seeing that the lessee waived his rights under the second contract. The Court holds that the intention of the parties in executing two agreements of lease on the same date was really to conclude one contract of lease in respect of immovables for a period of five years and such contract has no valid effect.

The fact that the tenant waived his rights under the second agreement after making use of the first agreement is not to be permitted, because if the contract is void it is void as a whole and no part of it can be given effect to, especially as a contract signed by two parties cannot be effectively cancelled by one of them. Therefore, the fact remains that the contract in suit was

a contract for a period of five years made in two agreements and is invalid and cannot be pleaded in defence in an action for recovery of possession of immovables. This Court would be disposed to confirm the judgment of the Magistrate, if it were not for the fact that the Plaintiff (Respondent) has received from the Defendant a promissory note in respect of the rent of the said property for two years in advance in the amount of £P.140 and had discounted that promissory note with a bank and received the value thereof (less the discount). Therefore it would not be equitable under the circumstances that the tenant be ordered to evict the property before the return to him of the money paid by him in advance on account of rent.

The Court, therefore, confirms the judgment of the Magistrate subject to the condition that the landlord should repay in the Execution Office the amount of rent paid to him by the tenant in advance together with interest thereon from the date of payment until repayment in the Execution Office, and after deducting therefrom the proportionate amount of rent from the period of the commencement of the lease (1st November, 1928) until the premises are evacuated at the rate of £P.70 per annum, which is the agreed rent between the parties, the calculation to be made by the Execution Officer upon eviction.

This Court thinks it equitable that the tenant should be able to recover all amounts spent by him by way of repairs at the express order of the landlord and that he is entitled to retain the premises by remaining therein until he receives all amounts due to him in that respect, but as the orders for repairs given by the landlord are not included in the contract of lease executed by the parties and as the contract of lease further states that the premises were delivered in good and tenantable repair we leave the discussion of this point, and ascertainment of the amounts spent by the tenant at the landlord's orders to the competent court, viz:— the District Court, and the Appellant is entitled to proceed with the action already instituted by him in the District Court in the matter and all the rights of the Appellant will be duly safeguarded by the said Court.

No order is made as to costs.

Dated the 5th day of June, 1929.

JUDGMENT OF THE COURT OF APPEAL.

The Court after hearing Mr. Levanon for the Appellant, and Ibrahim Eff. Kemal for the Respondent, orders that the appeal be dismissed with £P.2 advocate's fees and costs.

Delivered the 31st day of March, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 115/29.

BEFORE:

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

IN THE CASE OF:

Boulous Boutrus Hallak — APPELLANT.

vs

Bernaba Dimiany — RESPONDENT

Use of property by unauthorized person — Payment of rent for property used — Liability of part-owner to pay rent — Arts. 472, 597, 1075 Mejelle.

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

JUDGMENT.

The general principle applicable to this case is laid down by Article 472 of the Mejelle: namely that where a person without contract or permission uses the property of another the equivalent rent must be paid, in the case of a thing prepared for hire, from the commencement of such user, and in the case of a thing not so prepared, from the date when rent is demanded.

As an exception to this general rule, Articles 597 and 1075 (last paragraph) of the Mejelle provide that a part-owner is not liable to pay rent for the user of the share of his co-owner: but there is no provision enabling a part-owner to use the joint property without payment of rent.

The Appellant is not a part-owner of the property and he therefore cannot claim the benefit of this exception to the general rule. He is therefore liable to pay to the Respondent a proportion of the equivalent rent. The appeal must be dismissed with costs, including £P.2 advocate's fees.

Delivered the 2nd day of November, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 6/30.

BEFORE:

Baker, J., Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Joseph Weinberg	APPELLANT.
vs	
Israel Leibel	RESPONDENT.

Use of property by unauthorized person — Payment of rent for property used — Rent payable from date of notice to vacate — Art. 596, Mejelle.

Appeal from the judgment of the District Court of Jerusalem dated the 24th day of May, 1929.

JUDGMENT.

The Magistrate's decision was wrong and contrary to Article 596 of the Mejelle. Accordingly, the appeal must be allowed and the judgment of the District Court confirming the Magistrate's decision set aside and the case remitted to the District Court for the said Court to direct the Magistrate to determine the equivalent rent payable by the Respondent for the period of occupation from the 7th December, 1927, when he was notified by the Execution Officer to vacate his premises, until the 20th January, 1928, the period covered by the action, and to give judgment accordingly.

Respondent to pay the costs here and below, and advocate's fees for this Court assessed at £P.2.

Delivered the 20th day of May, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 100/30.

BEFORE:

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

IN THE CASE OF:

Suliman Ahmed El Muwaqat	APPELLANT.
vs	
Edwin Herman Brash	RESPONDENT.

Repairs carried out by lessee under contract with lessor — Right of lessee to effect repairs — Notarial notice insufficient to rescind agreement — Binding effect of statement in Notarial Notice — Application of doctrine of estoppel.

Appeal from the judgment of the District Court of Jerusalem dated the 19th July, 1930.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jerusalem dated the 19th July, 1930, whereby the said Court adjudged Appellant Suliman Muwaqat to pay Respondent E. H. Brash the sum of £E. 688.779 being the assessed value of repairs carried out by Respondent to Appellant's house, in accordance with a contract dated the 16th August, 1927, together with interest on the said sum and costs.

The Respondent at the time of the earthquake of the 11th July, 1927, was occupying, as tenant, Appellant's house, and the house was considerably damaged by the said earthquake.

On the 16th August, 1927, Respondent paid Appellant £E.140. — being two years rent in advance for the said premises and at the same time Appellant entered into a contract with Respondent to repair the said premises, specifying therein the nature of the repairs which were to be effected and at the same time covenanting—

> "that if something of what has been agreed upon or required in the undertaking from Clause 1 to Clause 7 is lacking, the lessee is to carry it out at the expense of the landlord (The Appellant)".

On the 10th September, 1927, Appellant not having commenced to carry out the agreed repairs, Respondent, by Notarial Notice, called upon him "to carry out the terms of the contract not later than the 13th September, 1927, or he, Respondent, would be entitled to employ a mason to begin the work at once and to effect repairs to an amount of not less than £P.300."

On the 16th September, 1927, a plan delineating in red ink the agreed repairs to be effected to the premises was signed by the Appellant and a memorandum was endorsed thereon also signed by Appellant which reads as follows: —

> "Supplementary to the undertaking signed by me on the 16th August, 1927, I further undertake to carry out the

repairs shown on the map with red ink, under the supervision of the mason Abdul Chani el Bilbeisi, in accordance with the agreement in his possession, leaving nothing incomplete".

On the same date Appellant appears to have commenced the repairs to the premises and to have entered into a contract with one Abdel Chani el Bilbeisi, a mason, whereby the said el Bilbeisi agreed to effect the said repairs, and to do the work to the utmost satisfaction of the Respondent and in accordance with the articles contained in the contract of the 16th August, 1927.

On the 3rd October, 1927, Appellant served a notice on el Bilbeisi (his contractor) notifying him that he was not carrying out the repairs in accordance with their agreement, but doing additional work for which he would hold him liable.

On the same day Appellant issued a Notarial Notice to Respondent whereby he acknowledged the receipt of Respondent's notice of the 10th September calling upon him to commence carrying out the repairs to the house by a certain date failing which the Respondent would do so in his stead, and on his account. The notice then proceeds to state, inter alia "that Respondent had no authority to effect repairs in the house and that any repairs carried out by Respondent would be at Respondent's own expense".

El Bilbeisi stated in evidence that two days prior to the receipt of the Appellant's notice, he had ceased to carry out the repairs, having been stopped by Respondent's wife. The Respondent denied this and stated in evidence that Bilbeisi ceased working of his own accord despite a promise, that he, Respondent, would pay him if he would continue with the work.

Respondent on or about the 11th October engaged a contractor to carry on with the repairs and complete them, which the contractor did. The cost of such repairs are the subject matter of this action.

On the 25th of October, Respondent was again served with a Notarial Notice signed by the Appellant and dated the 20th October, 1927, wherein he refers to his previous notice of the 3rd October, and states that despite such notice Respondent had prevented his contractor, Bilbeisi, from carrying out the repairs to the house and that Respondent was then building rooms and corridors which had not been contracted for, that Appellant was still prepared to effect repairs to the house, but that he cancelled any authority

given to Respondent to carry out repairs and any repairs carried out by Respondent would be at Respondent's own expense.

These were the facts before the Jerusalem District Court.

The District Court heard evidence and was satisfied that the present Appellant stopped the work and consequently the Respondent was justified under the terms of his contract with the Appellant of the 16th August, 1927, to complete the work in accordance with the said contract as modified by the sketch plan dated the 16th September, 1927, and signed by Appellant. The Court then ordered both parties to appoint experts to decide:

1) Whether the house as completed is in accordance with the agreement entered into between the two parties and in accordance with the plan agreed upon.

2) The value of work done by Respondent in accordance with the agreement and plan.

3) Whether the house has in any way suffered by the fact that, as Appellant alleges, Respondent did not do the work specified in the contract and the plan.

The two experts appointed by the parties did not agree and a third expert was appointed by the parties. Subsequently the three experts gave evidence before the Court and were examined by both parties and the Court found that the repairs were in accordance with the agreement and plan and gave judgment for £E.688.779.

Against this judgment Suliman Eff. Muwaqat has appealed and Brash cross-appealed. The grounds of appeal are shortly:

1. The agreement to repair and the plan signed by Appellant were not binding undertakings and could be rescinded by Appellant which he in fact did by virtue of a Notarial Notice.

2. The agreement did not authorise Respondent to carry out the repairs in case Appellant failed to do so and in fact Appellant did not fail to carry out the repairs.

3. Respondent having said in the Notarial Notice that he would spend £E.300 on repairs is bound and cannot recover more than £E.300.

1) The agreement of the 16th August, 1927, must be considered in conjunction with the plan dated the 16th September, 1927, and we are satisfied that they constituted a binding contract

upon Appellant to repair the premises, and to effect the repairs in accordance with the terms of the contract and the plan, and that failure to do so enabled the Respondent to effect the repairs at the expense of the Appellant.

The agreement being binding could only be cancelled by mutual consent and could not be rescinded as Appellant alleges it was.

2) There was evidence before the Lower Court, — which they believed, that Appellant stopped the work and accordingly they found that by virtue of the contract Respondent was justified in completing the work.

3) The Respondent, in his Notarial Notice, stated that he would spend not less than £E.300 and therefore he cannot be restricted in his claim to a sum of £E.300. The Court subsequently having heard the evidence of experts found that the house had been repaired in accordance with the before-mentioned agreement and plan, and awarded judgment for Respondent for the sum of £E.688.779 being the assessed value of the repairs. Accordingly, we are of opinion that the appeal of Suliman Muwaqat must be dismissed.

The Respondent has cross-appealed with regards to the amount awarded to him under the judgment stating firstly that the sum credited to Appellant for work which the Appellant had carried out on the premises and for materials left there should be £E.100 and not £E.150.893. "The latter sum was the amount estimated by the experts". Cross-appellant however refers to Appellant's Notarial Notice to him of the 3rd October, 1927, in which he states that "he had entered into a contract for the necessary repairs and expended nearly £.100" and contends that Appellant is bound by this admission and estopped from claiming any sum other than £.100. With this contention we do not agree and we are satisfied that the Lower Court was right in relying upon the evidence of the experts which they, presumably, considered the best evidence rather than upon an indefinite and unreliable statement made by the original Appellant Muwaqat, and that under the circumstances the doctrine of estoppel does not apply. Secondly, the Respondent also appeals against the deduction of 10% from the valuation of the costs or repairs as contractor's profits. The District Court in making the deduction was complying with the statements in the evidence of experts who testified that in arriving at a proper estimate, it was customary to add such an amount and such an

amount had been added by them to the costs of the repairs. In the present case there was no contractor and we are of opinion that the District Court's decision was correct in deducting the 10%.

The District Court, however, in making their deduction of 10% contractor's fees calculated the amount of the sum total of the value of the work including contractor's fees. This is obviously wrong and the amount should have been calculated on the value of the work excluding 10% contractor's fees.

By doing so a sum of £P.82.523 is obtained. The judgment must accordingly be amended by the inclusion of this amount instead of £P.90.755. This alteration will increase judgment in Respondent's favour to the sum of £P.697,031, and we are of opinion that subject to this amendment the judgment of the District Court must be affirmed and Respondent's appeal dismissed.

We see no reason to interfere with the costs granted by the District Court in this case and the cross-appeal with regards thereto and also with regards to the assessed price of work done by Respondent must fail. Appellant to pay the costs of the original appeal and advocate's fees assessed at £P.4.

The costs of the cross-appeal to be paid by the original Respondent.

Delivered the 28th day of May, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 124/30.

BEFORE:

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

IN THE CASE OF:

Haj Hassan El Isawi — APPELLANT.

vs

Heirs of Badia Zarifeh — RESPONDENTS.

Contract of lease of orchard for period of two years — Signature of agreement held to be consent to contents thereof — Party to agreement estopped from denying authority of attorney although attorney in fact not authorized — Undertaking by party to agreement to remove all obstacles and impediments to the agreement— Right of recourse against party to agreement to be exercised forthwith on action by stranger — Joinder of reimbursing party.

Appeal from the judgment of the District Court of Jaffa, dated 17th February, 1931,

JUDGMENT.

This appeal arises out of an action brought by the Appellant Haj Hassan El Isawi against Taufiq Zarifeh for himself, and against Mrs. Badia Zarifeh for herself and as one of the heirs of her husband Saleem Zarifeh, and against Qadi Zarifeh and Farid Zarifeh, under an agreement dated 14th April, 1929, made between the Appellant of the first party, and "Taufiq Eff. Zarifeh and his brothers Wadi and Farid Zarifeh, and Taufiq Zarifeh in his capacity as attorney for the heirs of the late Saleem Zarifeh" of the second party.

By that agreement the parties of the second part leased to the Appellant the fruit of the orchard of "El-Khayriyeh" for the years of 1929 and 1930.

After the Appellant had gathered the fruit of the orchard a claim was made against him for 2000 cases of oranges by one Zuhdi El Jubun, who alleged that he had purchased these cases from Taufiq Zarifeh and his brothers. An action was brought by Zuhdi in the District Court against the Zarifeh Brothers, and the Appellant: the matter was referred to arbitration and Zuhdi was awarded the sum of £P.661. This sum was paid to him by the Appellant. Badia Zarifeh was not a party to the action or arbitration proceedings.

The Appellant, however, claimed this sum from Badia in reliance upon Clause 5 of the agreement of lease, which is to the following effect:—

> "The Parties of the second part are responsible for all that shall happen as regards obstacles and impediments of all kinds and are obliged to remove them jointly and severally".

The District Court gave judgment in favour of the Appellant against Taufiq, Wadi and Farid Zarifeh, and against the Syndic in the Bankruptcy of Messrs. Zarifeh, and dismissed the action as against Badia Zarifeh on the ground that "she did not sign the contract with the other signatories by joint and several liability".

The appeal is brought by the Appellant against the judgment as regards Badia Zarifeh. Since the appeal was lodged Badia Zarifeh has died, and her heirs have appeared to answer the appeal.

The Appellant maintains that as Taufiq Zarifeh was expressed to sign the contract as attorney for the heirs of the late Saleem Zarifeh whose names were mentioned in the contract and of whom Badia was one, she must be held to be one of the parties of the second part, and hence is liable under Clause 5. In reply, the Respondents allege that at the time of signing the agreement Taufiq had no power of attorney from Badia, and hence that the agreement does not bind her.

The contract was actually signed by Badia herself, but the Respondents argue that the reason for this is to be found in the wording of Clause 4 of the Agreement which defines that "all that has been mentioned in this contract has been carried out by the consent of Mrs. Badia, wife of the late Saleem Zarifeh, as guardian of her minor children whose names are mentioned above". They therefore argue that Badia's signature relates to this Clause only, and that she thereby consented to the agreement on behalf of her children only, and not on her own behalf.

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We hold that this view cannot be maintained. Badia has signed an agreement expressed to be signed on her behalf by her attorney and she and persons claiming under her are thus stopped from denying that the person signing as attorney had authority o do so.

We have therefore to consider the nature of the liability imposed upon the parties of the second part by Clause 5 of the Agreement. Under this clause they are jointly and severally obliged to remove all obstacles and impediments.

Under this Clause the Appellant was entitled when Zuhdi Abdel Jubun made his claim to call upon the parties of the second part to answer the claim and Taufiq and his brothers Wadi and Farid were parties to the action brought by Zuhdi and to the arbitration proceedings. Badia, however, was not made a party to the action or to the arbitration, that is to say she was not called upon to remove the obstacles and impediments arising out of Zuhdi's claim.

Under these circumstances we hold that Badia and her heirs cannot be made liable under the Clauses for the sum which the Appellant has been compelled to pay to Zuhdi, under the arbitration award.

Accordingly the appeal is dismissed with costs and advocate's fees assessed at £P.2.

Delivered in the presence of both parties the 21st day ot January, 1932.

In the District Court of Jerusalem.

C.D.C. Jm. No. 245/31.

BEFORE:

Sherwell, J. and Valero, J.

IN THE CASE OF:

Joseph Elyasher PLAINTIFF.

vs

Isa Mubarah El-Cattan DEFENDANT.

Contract of lease of house — Undertaking by landlord ;to give occupation of premises on first of Moharrem — Unreasonable delay in taking steps to fulfill obligations to effect repairs — Contract of lease cancelled by Court on account of breach and monies paid thereunder ordered returned.

JUDGMENT.

The Court is satisfied that there was in the agreement between the parties a term that the landlord (Defendant here) was to do certain repairs to the house, such as whitewashing it before delivery was to be made to the Plaintiff. It is clear from this that both parties knew and understood that the actual delivery could not be effected on the first day of Moharrem having regard to the fact that the landlord could not effect these repairs until after the other (late) tenant had given up his possession, that is to say until the first day of Moharrem had arrived. However, we think, there was a clear obligation on the part of the landlord to effect these repairs immediately the first day of Moharrem did arrive. This is borne out by oral evidence called which explains the implication contained in Defendant's letter to Plaintiff (see Exhibit P/1).

We are satisfied after hearing the evidence called by the parties that the landlord delayed unreasonably after the first day of Moharrem in taking the steps necessary to fulfill his obligation to effect the repairs. Such repairs in our opinion, he was bound to effect at once and he knew or ought to have known that this was the fact and that time was of great importance to the Plaintiff, namely the incoming tenant. The Defendant, however, does not appear to have taken any steps at all to effect these repairs during

the first four days of Moharrem or to see that the premises were vacated by his late tenant. In this we think he was negligent and thereby broke his contract with the Plaintiff. Had the Defendant started these repairs reasonably soon after Moharrem had arrived the matter would be different. But since we have come to these conclusions as regards the Defendant's negligence in not having taken all reasonable steps to effect delivery to the Plaintiff of even portion of the house duly repaired as soon as possible after the first of Moharrem and having regard to the special circumstances of this case and the principle underlying the decision of this Court in the case of David Rosman and Yehiel Morgenstern, No. 195/30, we think we are bound to cancel the contract between Plaintiff and Defendant as prayed by the Plaintiff. There will be an order accordingly, with costs and advocate's fees LP.2.

Judgment delivered in presence of both parties and subject to appeal, the 13th day of August, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 26/32.

BEFORE:

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

IN THE CASE OF:

Etil Popovsky — APPELLANT.

vs

Zeev Berson — RESPONDENT.

Lease held to be invalid on loss by lessor of leased premises — Mortgagor unable to grant to lessee an interest greater than he himself has — Principle in H.C. No. 13/28 applied.

Appeal from the judgment of the District Court of Jaffa dated the 28th February, 1931.

JUDGMENT.

The Court holds that the principle laid down in Ex parte Rothstein vs Lobel (High Court No. 13/28) that "the mortgagor cannot give the lessee an interest greater than he himeelf has" applies, and accordingly that the District Court was in error in holding that the lease produced by the Respondent was binding upon the Appellant.

The judgment of the District Court is set aside and the case remitted to the District Court to determine what amount, if any, is due to the Appellant in respect of her claim.

Costs will follow the event.
Delivered the 4th day of November, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 105/32.

BEFORE:

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

IN THE CASE OF:

Mrs. Fani Cornu — APPELLANT.

vs

Ali Ahmad Sheikh Ali,
Guardian of Fakhrieh,
and Others — RESPONDENTS.

Contract of mussaqaat and of lease — Submission to arbitration in invalid agreement held unenforceable — Decision on an application for removal of an arbitrator or umpire appealable only by leave, but decision on application to appoint an arbitrator or umpire appealable without leave — Sec. 15 (2), Arbitration Ordinance, 1926-28— Essentials of contract of mussaqaat — Contract of lease for three years which can be automatically renewed is disposition within Secs. 2, 11 (1) of the Transfer of Land Ordinance, 1920—Disposition by unregistered lease held null and void—Severability of contract— Cultivation of orange grove in consideration of revenue therefrom— Mussaqaat and Muzaraa partnership discussed — Arts. 478, 1431-1448, Mejelle — Contract for sale or pledge of growing crops— Art. 64, Civil Procedure Code as amended — Contract for sale of future goods valid.

JUDGMENT OF THE DISTRICT COURT.

On the 15th June, 1929, a contract was entered into between the Defendants on the one part and the Plaintiffs on the second part.

The contract was stated to be one of "Mussaqaat" and one of lease.

It was to come into operation as from the 15th April, 1932, the reason being that as from the 15th April, 1929, for a period

of 3 years the husband of the present Plaintiff had a practically similar contract with the Defendants.

In accordance with Clause 10 of the contract, the Plaintiff now asks that arbitrators should be appointed by this Court, the Defendants having refused to go to arbitration and differences having arisen between the parties.

Clause 1 of the contract which purports to be a contract of Mussaqaat states that the Defendants shall hand over to the Plaintiff the three groves and that the Plaintiff shall hand over to the Defendants 10 shares out of 1000 shares of the produce during the period of the contract. Delivery of the groves was to be made on the 15th April, 1932, i.e. three years after the date of signing the contract. By clause 2 of the contract the Defendants purported to lease to the Plaintiff the land of these three groves together with the buildings, wells, motors, pumps, for a period of three years as from the 15th April, 1932, the property to be used by the Plaintiff as she desires against a rent of £P.7000. £P.1000 was acknowledged to have been paid at the time of signing the contract and the balance of £P.6000 to be paid by the Plaintiff to the creditors of the Defendants.

Clause 3 of the contract, after dealing with certain matters regarding the proper cultivation and irrigation of the groves, contains a provision that the Plaintiff buys from the Defendants 10 cases out of every 1000 cases at five and a half shillings per case out of the contract of Mussaqaat.

Clauses 4, 5, 6, 7, and 8 of the contract are not very material to the present arguments.

Clause 9 states that if by reason of war, locusts, or force majeure, the Plaintiff is unable to enjoy the crop of the groves and the land and buildings thereon during the period of the contract, then the period shall automatically be prolonged to a period proportionate to the period during which the Plaintiff was unable to enjoy the crop, land and buildings.

Clause 10 is the arbitration clause and in it the names of certain arbitrators are mentioned.

The first point which we have to determine is this:—

Is this a valid contract of Mussaqaat or not?

Secondly, if not, is it a valid contract of lease or not?

Thirdly, if it is neither of these things, what is it?

According to the Mejelle the contract of Mussaqaat to be valid consists of a kind of partnership; one person, the owner of the property gives his trees, another person cultivates them and the proceeds from the fruit are divided between the persons in an agreed proportion. The contract of Mussaqaat to be valid must not contain anything else.

It must contain these three essential points and nothing more.

It had been argued at some length before us that the land is separate from the trees which are planted on it and that the contract of Mussaqaat does not include the lands which are so planted.

As already stated, in a contract of Mussaqaat one partner offers the trees and the other partner uses his labour for the cultivation of those trees.

Cultivation includes irrigation, it includes pruning. In an orange grove it includes pumping, watering the trees and use of manure. In other words, it includes the use of the land on which the trees are.

If the use of the land is not granted, it will be impossible to cultivate the trees and the other party will not be able to carry out his work.

We are therefore of opinion that the contract of Mussaqaat includes the use of the land in a way which is necessary for the proper cultivation and keeping in good condition the trees of the grove.

Regarding this contract as a contract of Mussaqaat we find that the trees were given to the Plaintiff to cultivate, and in addition the effect of the contract is that the Plaintiff undertakes to pay £P.7000, which is included ipso facto in the contract. In other words, in addition to the minute shares which the Defendants had to get they had to obtain £P.7000. This is contrary to the conditions of Mussaqaat and we are therefore of opinion that the contract as a contract of Mussaqaat is invalid.

Returning now to the second question: is this contract valid as a contract of lease.

According to Section 2 of the Transfer of Land Ordinance, 1921, as printed on page 62 of Bentwich Vol. 11, "disposition" of land is defined as ". . . a lease containing an option by virtue of which the term may exceed three years." Such a lease is invalid if it is not registered.

Now, Clause 9 of the contract states that in the event of the Plaintiff being unable to enjoy the produce of the groves for any period during the three years, the period of the contract shall automatically be prolonged for the period of non-enjoyment.

Does this provision come within "disposition" as defined in the Transfer of Land Ordinance? Perhaps it will be easier to answer if I give an example to this clause. Supposing after two years of enjoyment, in the third year the Plaintiff is unable to get any benefit from the groves, the period of the contract would extend for the fourth year in order to earn three years of actual enjoyment, but would the Defendants during the third year of the period have been able to lease the property to anyone else? The answer is no, and the reason is because the property was already leased to the Plaintiff. According to the contract the lease still subsisted, and was automatically extended for the fourth year. If an option to extend a three year lease for one year makes it necessary that that lease should be registered, how much more so is it necessary to register where there is an automatic extension under certain conditions.

Under Article 478 of the Mejelle, the Plaintiff, in the event of non-enjoyment, would have been able to claim an abatement of the rent by way of recompense for non-enjoyment, the parties, however, have chosen a different course of recompense. For this reason, we are of opinion that the contract, as a contract of lease, is void, because it is for a lease of more than three years and was not registered.

We are of opinion that the contract is neither Mussaqaat nor lease, and in either case it is void.

Clause 10 of the contract, therefore, cannot be enforced, in accordance with the judgment of the Court of Appeal in Civil Appeal No. 68/29, which clearly states that submission to arbitration is invalid if the contract is void.

Seeing the views which we have taken we think it unnecessary to discuss the other points in the case.

Judgment must be entered for the Defendants.

The Plaintiff is to pay the costs together with £P.5 advocates' fees to each of the two advocates for the Defendants.

Delivered the 23rd day of June, 1932.

INTERLOCUTORY JUDGMENT.

On the preliminary point we hold that while under Section 15 (2) of the Arbitration Ordinance, 1926-1928, the decision on an application for the removal of an arbitrator or umpire is appealable only by leave, the decision on an application to appoint an arbitrator or umpire is appealable without such leave.

The District Court did not grant the prayer in para. 8 of the statement of claim to appoint an arbitrator, to replace the resigning arbitrator and no leave to appeal from the decision is requisite.

The preliminary point therefore fails.

JUDGMENT OF MR. JUSTICE McDONNELL.

This is an appeal against a decision of the District Court of Jaffa refusing to appoint arbitrators under Clause 10 of a contract dated 15th June, 1929, entered into between the parties to the action. The District Court based its decision upon the point that the contract being void, the submission to arbitration contained therein was invalid.

By the first clause of the contract one party purports to create a Mussaqaat for three years from 15th April, 1932, in regard to the trees in three orange groves, the crop thereof being divided into specified shares.

By its second clause the contract creates between the same parties a lease for three years from the same date, viz., 15th April, 1932, of the land of the three orange groves, with the buildings, wells, motors and pumps thereupon.

By the ninth clause the contract provides that if the second party should during any year be unable to enjoy the crops of the groves or the lands or buildings thereon by reason of war, locusts or other act of God, then the contract shall be automatically prolonged for an equal period.

We have to decide first, whether this contract, which it is admitted was not registered and to which therefore in the words of Section 11 (1) of the Transfer of Land Ordinance, 1920, the written consent of the Government was not obtained, is or is not a disposition within the meaning of that Ordinance, and whether as a result it is or is not null and void.

When we turn to the definition—see Section 2 of that

Ordinance—we find that a disposition does not include a lease for a term not exceeding three years but does include a lease containing an option by virtue of which the term may exceed three years.

The present instrument is a lease primarily for three years, by which in certain eventualities, not by the exercise of an option, but by the operation of forces completely outside the volition of the parties, whether war, insect pests or act of God may automatically be extended.

I do not think that there can be the slightest doubt that this brings it outside the definition of a lease for a term not exceeding three years and that therefore it is a disposition and as such is null and void.

I now come to the point that the lease is severable from the Mussaqaat and that even if the former is void the latter is valid and can be enforced.

Seeing that the lease includes all the wells, motors and pumps upon the orange groves, all of which are essential for the cultivation of the trees, I cannot agree that the lease is severable from the Mussaqaat, and this being so I need not discuss the question whether Clause 1 constitutes a good Mussaqaat or not and the appeal must be dismissed with costs to include £P.12 advocate's fee.

JUDGMENT OF MR. JUSTICE FRUMKIN.

The parties to this appeal entered into contractual relations under a written agreement, the last clause of which provides for the submission to arbitration of any dispute which may arise between them. It is the enforceability of this arbitration clause which was the subject-matter of the action in the Court below, and this appeal also turns on this point only. But as the question of the validity of the arbitration clause depends entirely on the major question of the legality or illegality of the agreement as a whole, the entire agreement was discussed at great length both before the Court below and before this Court, and it is therefore necessary to analyse the agreement before we can arrive at any conclusion as to that clause of the agreement which forms the only basis of the present action.

The agreement is dated 15th June, 1929, and on the face of it embodies two contracts, the one which is dealt with in Clause 1

of the agreement and which the parties have chosen to insert with the name of Mussaqaat, provides in essence that in consideration of 990 shares out of a thousand in the crops of the Respondents' three orange groves, which the Respondents undertake to give to Appellant for the period of three years beginning 15th April, 1932, the Appellant on her part undertakes to cultivate the trees of the said orange groves for the like period.

The second contract which is contained in Clause 2 of the agreement appears to be a lease by Respondents to Appellant for the same period as above of the land of the said orange groves and all that is contained in the same land, apart from the trees, in the nature of buildings, wells, motors, pumps, etc., the rent for that lease being £P.7000 payable by Appellant to Respondents in a manner specified.

The other clauses of the agreement are not of much relevance to the issue and we can pass to Clause 9 which provides that "if the second party (Appellant) will not be able to enjoy from the crop of the said orange groves or the land and buildings thereon during any year of the period of the contract resulting from war or locusts or any other act of God (force majeure) then the period of this contract shall automatically be prolonged proportionately to the period during which the second party (Appellant) was not able to enjoy, etc."

The Court below held that as a contract of Mussaqaat the contract was invalid because it was not in conformity with the provision of the Mejelle as regards Mussaqaat and that as a contract of lease it is void because it was a lease with a possible extension over a period of more than three years, and was hence by analogy to a lease containing an option by virtue of which the terms might exceed three years, a disposition subject to registration, with a result that in accordance with the judgment of the Court of Appeal in Civil Appeal No. 68/29, where it was laid down that submission to arbitration is invalid if the contract is void, it dismissed Appellant's action for the enforcement of the arbitration clause in the agreement.

Against this judgment this appeal has been lodged.

I propose to deal first with the Mussaqaat, secondly with the lease, and then with the question of the severability between the two contracts.

Mussaqaat is a partnership based on the same principles as that of Muzaraa partnership. The Muzaraa is dealt with in the

Mejelle, Articles 1431-1440, while Articles 1441-1448 deal with Mussaqaat.

Both institutions were created for the benefit of landlords who cannot or do not wish to cultivate their land or their trees respectively themselves, and anxious to avoid dealing with hired labour, enter into partnership with a cultivator to do for them the cultivation of land or trees, as the case may be, in consideration of a proportional share in the proceeds of the land or trees so cultivated.

It is in both cases nothing else than a contract between an owner of a farm or grove on the one side and a workman or cultivator on the other side, the latter to work on the land not as a hired workman for a fixed daily or monthly pay, but as a partner in the proceeds at an agreed proportion.

There is apparently nothing to prevent the parties to a Mussaqaat partnership from requiring the cultivating partner to invest money of his own or materials or other matters required for the cultivation. Yet his principal function would remain that of work and cultivation.

Sale or pledge of things not in existence at the time of the contract being prohibited under the Mejelle, growers in this country as in other parts of the Ottoman Empire, to which Palestine then belonged, used very frequently to give their contract for the sale or pledge of their crops the form of Mussaqaat. The vendor or pledger assumes the role of the owner of the trees in the Mussaqaat partnership, and the "workman" is in fact the purchaser of the crops or the moneylender, as the case may be. A most striking example of a fictitious Mussaqaat we find in this case. I do not know whether the Respondents, the owners of the groves, could themselves look after their groves, but the lady Appellant, herself a town resident, is certainly the last person in the world to assume the function of the workman to do the cultivation of the trees: and the remuneration she gets for her work is nothing less than 99 per cent. The one per cent formally left to the owner in fact also remains with the "workman" for payment of taxes.

Whatever might have been the intention of the parties to hide under this fiction of Mussaqaat, it is clearly not a contract of Mussaqaat.

But if for the fact only that the contract is invalid as Mus-

saqaat, the arbitration clause would not become unenforceable. A contract may be invalid and yet not void in the sense that it is illegal. If the contract were before us on its merits we would most probably have had to interpret it in accordance with what was the intention of the parties and not according to the name they have chosen for it. If we read Clause 2 of the agreement embodying "Mussaqaat" together with the next clause in the form of lease, little doubt will be left that what was really intended was that Appellant purchased three years' crops of Respondents' orange groves in consideration of £P.7000 plus costs of cultivation of the groves for the same period. Under Article 64 of the Ottoman Code of Civil Procedure as amended on 21st April, 1913, future goods become permissible to be the subject-matter of a contract, so that as a contract for the sale of future goods it is therefore not illegal.

We have to turn now to the question whether the contract is a disposition and therefore void because not registered.

The question has arisen whether or not a Mussaqaat is a disposition. Having arrived at the conclusion that what is named in the agreement before us as a Mussaqaat is only a fiction of it, it is not necessary to decide that point.

Is the lease a Disposition?

Now the main object of the lease was to enable the tenant (Appellant) to enjoy the crops of the groves for the period of the contract. In a sense the lease therefore is also some other fictitious form to cover what was probably meant to be a sale of future goods. But apart from it, the lease is not entirely far from reality. In order to be able to cultivate the trees, which cultivation was part of the bargain, Appellant had to use the buildings, machinery and utensils fixed to the land on which the trees are planted. These she could only have obtained by lease from their real owners. Now this lease is for an original period of three years. A lease not exceeding three years is not a disposition. But as already mentioned, under certain circumstances the lease would automatically be extended to a larger period. Does that condition make the lease one exceeding a term of three years.?

The obvious object of imposing the duty of registration as regards a long termed lease is to protect the members of the public from possible surprises. A prospective purchaser, mortgagee, or even a tenant of immoveable property, in examining the official register of such property and finding no lease registered on it, could

rightly and safely presume that at least for a period exceeding three years there is no lease on the property. That is the reason why a lease with an option by virtue of which the term may exceed three years is subject to registration, although there is actually no lease for more than three years and the option might not be used. The landowner has vested another person with rights to extend the period, that person may use the right, so that the owner of the land is bound by it. It is the same thing in the present case. Nothing might happen during the three years and the term of the lease would extinguish at the expiry of that period. But if any of the events specified in clause 9 do arise, the term of the lease will exceed three years and the member of the public who, say in April, 1932, was sure that there could not be a lease exceeding April, 1935, will, to his surprise, find that there is still a lease going on for another year or two or even three.

I therefore uphold the view of the District Court that analogous to a lease with an option, a lease with a provision for automatic extension over a period exceeding three years is a disposition. This lease was never registered or in the words of the law (Transfer of Land Ordinance, 1920, Sec. 9) the consent of Government was never obtained to it, and it is therefore governed by Civil Appeal No. 68/29.

On behalf of the Respondents it has been argued that the lease by Respondents to Appellant was to succeed another lease granted on the same day by Respondents for the same property to Appellant's husband for three years, expiring just at the time when the present lease was to come into operation, and that in fact it was a lease for six years and it was only in order to avoid the law that is was made in two contracts of three years each, each one in the name of a different member of the family, the one coming into force immediately after the expiration of the former. If the object of registration is as held above, to protect the rights of the public, it would appear that change in the person of the lessee should not affect the position of the lessor who has agreed to part with the property for a period exceeding three years. But having decided that the contract, in itself, is for a term requiring registration, it is not necessary to consider this point any further.

We have now to deal with the argument of the Appellant that the Mussaqaat is severable from the lease, and that even if the lease is found to be null and void, the contract would still be good as a Mussaqaat and the arbitration clause therefore enforceable.

To decide that point we need not labour under the academic problem as to whether a lease is an essential part of the Mussaqaat or not, particularly since we hold that there is no Mussaqaat proper before us. The answer to the question is to be found in the object of the contract itself. It would be fatal for the Appellant if it were held that one can alienate the lease from the contract. Without the lease the Appellant would not be in a position to use the buildings and machinery necessary for irrigation and cultivation of the trees. The cultivation is part of the consideration given for the crops so that without it he would not be able to get the goods for which he has paid. Again, if the two contracts are split, we would reach that absurd position that the owner of the crops gets no consideration for 99 per cent of his crops with which he has to part under the agreement.

The contract must, therefore, be taken as a whole, and being a disposition, to which the consent of Government was not obtained, I hold that it is null and void and thus the arbitration clause is invalid.

Finally, I would like to take this opportunity to make the following remark which is of a somewhat wider aspect.

It has already been stated that it was the practice in olden times to shelter under the Mussaqaat when parties sought to obtain funds advanced on their future crops by way of sale or mortgage.

In absence of clear legislation to meet the point, the practice still continues. The present case is not the only example to show that this practice is not to be encouraged as being to the disadvantage not only of the parties to such fictitious contracts, but may often become prejudicial to the interests of non-contracting members of the public.

With the immense development of the citrus industry, which becomes more and more one of the principal resources of the wealth of this country, it will be of great assistance not only to orange growers and credit institutions, but to the public at large if legislation is passed to meet the demands of the trade, providing, on the one hand, for more adequate and up-to-date ways and conditions under which future crops may be sold or mortgaged and, on the other hand, for measures of control to safeguard public interests.

For the reasons stated above, I hold that the appeal must be

dismissed and the judgment of the District Court confirmed with costs and £P.12 advocate's fees.

DISSENTING JUDGMENT OF MR. JUSTICE KHAYAT.

According to Article 1441 of the Mejelle the contract of "Mussaqaat" is defined as a kind of partnership on the terms that trees are to be supplied by one partner and the cultivation by another and that the proceeds of the fruits to be shared between them. It is not the intention that the cultivator contemplated in this Article should not be able to hire labourers to do the work and that he should do the work personally. What is contemplated is the cultivation of the trees and the providing of the necessary funds therefor. That such is the case, is borne out by the long-existing custom.

This being so, I am of the opinion that this contract of "Mussaqaat" is a valid contract even without amalgamating it with the lease, since as in "Mussaqaat" one partner has to provide the trees it naturally implies a licence to enter upon the land to irrigate and otherwise look after the trees.

The lease embodied in the second paragraph of the agreement is valid and enforceable.

The extension of the term of the "Mussaqaat" and lease provided in paragraph 9 of Article 3 of the agreement in the case of a force majeure which totally renders the exploitation of the property and trees impossible, does not, in my opinion, render either contract invalid. This provision is nothing but a compensatory precaution. Instead of the lessee repudiating the lease which he is entitled to do under Article 478 of the Mejelle and claiming the refund of the rent for the period he was unable to benefit from the leased propeity, the parties chose to complement the three years by making this provision. Neither the wording of the agreement nor the intention of the parties was to confer on the lessee a right to enjoy the property for any length of time over and exceeding three years.

I am unable to hold that the cultivation of trees, and the providing of funds for the upkeep thereof in consideration of a share in the proceeds, is a disposition of immoveable property within the meaning of the law. Nor am I prepared to hold that a lease of three years, with a possible extension in the event of a happening of an unforeseen circumstance to complement the three years, is a lease for over three years and consequently a disposition.

I do not think there is any necessity to consider whether or not there are grounds to set aside the agreement or declare it void because this does not render this contract illegal. Vide Civil Appeal No. 88/29.*

The judgment of the Court below must be set aside and the case remitted to the District Court to apply the provisions of the Arbitration Ordinance.

Costs to follow the event.

Delivered the 4th day of May, 1933.

In the District Court of Jerusalem.

C.A.D.C. Jm. Nos. 325/32 and 326/32.

BEFORE :

The President and Valero, J.

IN THE CASE OF :

Mamur Awqaf PLAINTIFF.

vs

Syndic of Barsky's Bankruptcy DEFENDANT.

Claim for arrears of rent made by landlord against syndic of bankrupt lessee — Priority of creditors in bankruptcy — Rent as preferred debt — Claim by landlord of personal property on leased premises — Validity of unregistered lease for 15 years — Recovery of monies paid under void disposition — Sec. 11, Transfer of Land Ordinance, 1920-21 — Experts appointed to estimate fair rental.

INTERLOCUTORY JUDGMENT.

By an agreement dated 29th December, 1927, the Plaintiff leased for a term of 15 years the premises popularly known as the Palace Hotel.

In these actions instituted against the Syndic of the Bankruptcy, the Plaintiff is claiming in Action 325/32, (1) LP. 4891.232 arrears of rent for years 1930-1932, and the Plaintiff is seeking an order declaring that the said amounts shall be treated as preferred debts or alternatively that the furniture in the hotel was pledged to the Plaintiff as a security for the rent.

In action 326/32 the Plaintiff is seeking a declaration that 128 cupboards which were in the hotel and were seized by the

* see ante p. 188.

Syndic as being part of the bankruptcy property as a fact belong to the Plaintiff.

Now it is admitted that the lease was not registered in the Tabu. The Plaintiff, however, contends the lease is valid for the first three years. The Syndic has argued and to our mind correctly that the lease is null and void in toto.

Under the provisions of Section 11, of the Transfer of Land Ordinance, 1920-1921, 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.

The Syndic has not lodged a counterclaim but has stated in his defence that the Bankruptcy Committee believe that a fair rent for the period the Hotel was occupied by Mr. Barsky and the Bankruptcy Committee is much less than the amounts paid by Mr. Barsky and they reserve their right to counterclaim for the difference.

We hold that we are not called upon in the circumstances to consider the period for which no claim for rent is made but that we should assess the fair rental for the period for which arrears of rent is now claimed by the Plaintiff. Having assessed the fair rental the Defendant will be able to set off the amounts paid to the Plaintiff for the said period.

In the absence of agreement between the parties we order the Plaintiff and Defendant each to nominate an expert and the Court will nominate a third expert. The three experts will submit in writing to the Court their opinion as to fair rental for the Hotel during the period the Plaintiff claims that the rent was not wholly paid. The Plaintiff will deposit LP.5. in Court in respect of the fee which may finally be awarded to the Court expert. As the parties dispute the dates on which the hotel and shops were surrendered to the Plaintiff the parties will at the next sitting produce their evidence to enable us to give our decision on the point.

Further at the next sitting the Court will hear such further argument as the parties choose to submit on the question whether the rent if any owed by the Defendant should be treated as a preferred debt.

With regard to the claim in Action 326/32 for the 128 cupboards it is admitted that according to the provisions of the lease the Plaintiff had to supply cupboards built in but did not do so and that Mr. Barsky provided the cupboards and sold them

to the Plaintiff; the purchase price, LP.640, being treated as part of the rent. The Defendant contends that the cupboards represent part of the rent the subject matter of Action 325/32.

It is not clear to us whether the Defendant means that the cupboards represent part of the rent for the years 1930 or 1931 or 1932 or for the years prior to 1930.

At the next sitting we will consider the evidence the parties wish to lead on this issue as in our opinion if the price of the cupboards was placed against the rent due for the period prior to the period for which rent is claimed in Action 325/32 the cupboards are the property of the Plaintiff and must be handed over to the Plaintiff by the Syndic.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 15/33.

BEFORE:

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

IN THE CASE OF:

Keren Kayemeth Le-Israel Limited — APPELLANT.

vs

Dr. Zeev Beigel — RESPONDENT.

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49 year lease granted by Keren Kayemeth — Application for cancellation of lease — Alleged misrepresentation by lessee — Breach of contract of lease by failure to pay rent — Acknowledgment of receipt of rent made before Land Registrar held conclusive — Non-payment of Government and Municipal taxes not considered a breach of a substantial condition giving ground for the cancellation of the contract.

JUDGMENT.

On the 1st of March, 1927, the Respondent, Dr. Zeev Beigel, obtained a lease for 49 years on a plot of land of an area of 1906 square pics situated in Hadar Hacarmel. The plot was one of the many plots owned by the Appellant Company, Keren Kayemeth Le-Israel Ltd. The lease was registered in the Land Registry of Haifa under Deed No. 208/27, Vol. 8/23. In choosing the applicants for lease and generally in the matter of the allocation of the plots to applicants, the Hadar Hacarmel Society acted as agent of the Appellant Company. At the time of the registration of the lease

in favour of the Respondent the latter was the secretary of the Society.

The action which gives rise to the present appeal was brought by the Keren Kayemeth Le-Israel for the cancellation of the said lease, and was based partly on grounds originating in the period preceding the date of the registration of the lease and partly on grounds which occurred subsequent to the registration. The Court decided against the plaintiff company on all points, and judgment was entered for Defendant. Against this judgment this appeal has been lodged.

One of the grounds of the appeal is that the Appellant Company was induced to grant the lease by misrepresentation made by Dr. Beigel and by his taking advantage of his position as secretary of the Hadar Hacarmel Society. All the facts relating to this point were, however, brought before the Court of Trial, which also examined the correspondence between the parties, and the Court came to the conclusion that there was no foundation for such allegation, and with this finding of fact we cannot interfere.

Another ground of appeal is that the lessee has not paid rent as is required under Clause 5 of the agreement, nor did he pay the Government and Municipal taxes as required under Clause 17, and has thus committed a breach under Clause 10, which breach or breaches entitle Appellant to cancel the contract.

Now, as regards the non-payment of the rent, the contract which was registered in the Land Registry contains an admission by Appellant that the lessor has paid fifteen years' rent in advance, and although the Appellant Company now denies having received this payment, we hold that in view of its consenting to have the payment acknowledged before the Land Registrar, and because of the nature of the rent for the first 15 years being merely nominal, (ten piastres per annum), the Appellant Company cannot now claim the cancellation of the lease on that ground without prejudice to any claim they may have with regards to the amounts alleged not to have been received.

As regards the non-payment of Government and Municipal taxes by the Respondent, we hold that this cannot be considered a breach of a substantial condition giving ground for the cancellation of the contract. This lease is for a long term extending over a period of nearly half a century and it could not have been the intention of the parties to extend the provisions of Clause 10 to a

case where taxes for any one year were not paid as required in Clause 17 of the contract.

Both parties agree that notice was unnecessary for cancellation of the contract so that this point which Appellant raised we need not decide.

The appeal is dismissed with costs and advocate's fees assessed at £P.4.

Delivered the 16th day of April, 1934.

LICENCE.

In the High Court of Justice.

H.C. of 1925.

IN THE APPLICATION OF:

David Schlesinger	PETITIONER.
vs	
Director of Public Health	RESPONDENT.

Application for licence to practice as pharmacist refused by Director of Health — Requirements for grant of licence to exercise profession of pharmacist — Secs. 6, 7, Public Health Ordinance, 1921.

JUDGMENT.

The Petitioner, a person of foreign nationality, desires to be licensed to practise pharmacy in Palestine.

Section 6 of the Public Health Ordinance, 1921, says — "No person shall exercise the profession of pharmacist unless he holds the diploma in pharmacy of a school recognized by the Government and has been granted a license to practise pharmacy by the Government." Section 7 of the same Ordinance prescribes the manner in which the candidate is to proceed in order to obtain the license of the Palestine Government. That Article requires the applicant "to produce satisfactory evidence as to identity, good character, and suitability to practice pharmacy and as to being in possession of the diploma of a school recognised by the Government".

It appears that the Government of Palestine is in those matters relating to medicine and pharmacy represented by the Director of Public Health.

We see from a letter written to the Petitioner on the 18th February, 1925, by the Acting Director of Health, that he requires as satisfactory evidence of the applicant being in possession of a diploma, either the production of such diploma, or a duly certified copy thereof, or a certificate from the University authorities that he has graduated as pharmacist.

Instead of satisfying the Director of Health in either of the hree ways required, the applicant has produced a document purporting to be a certificate from the University of Moscow showing, not that he has received a diploma as pharmacist but that he has obtained a degree from another university and attended at Moscow certain lectures necessary for the examination for the degree of provisor. There is no evidence to show that the applicant is a provisor holding a diploma of the University of Moscow, or ever had such diploma.

There is among the documents produced one which purports to be a diploma of the University of Yuriev, and a certificate from the Moscow Department of Health to the effect that the applicant is privileged to be admitted to lectures leading to the degree of provisor. Apparently the same case mentioned in the certificate of the University. He also produced a military certificate and a passport in both of which he is described as a provisor, but even these do not say of what University he holds the diploma.

The other documents mentioned by Dr. Eliash do not carry him any further. We are asked to say that there is a prima facie case against the Director of Health of not having exercised his discretion reasonably in refusing to regard the documents produced by the applicant for a licence as satisfactory evidence of his being in possession of a diploma of the University of Moscow.

We do not see any prima facie case requiring us to call on the Director of Public Health to show cause, and we dismiss the petition.

In the High Court of Justice.

H.C. No. 69/25.

BEFORE :

The Chief Justice and Corrie, J.

IN THE APPLICATION OF :

Hayim Federman and Others PETITIONERS.

vs

Sir Ronald Storrs,
District Commisssioner, Jerusalem—
Southern District RESPONDENT.

Application to restrain intervention of District Commissioner—Right of persons not licensed by Rabbinical Council to slaughter animals for use as kosher meat — Right of police to interfere with liberty of persons without warrant — No rule entitling police to prevent illegal act — Grant of licence for ritual slaughter of animals — Order of Religious Authority is matter of religious discipline not matter for Civil Courts — Art. 74, Palestine Order-in-Council, 1922 — No jurisdiction in Jewish Religious Courts over foreign Jews — Process of law distinguished from executive action—Origin of Chief Rabbinate — Recognition by Government of Rabbinical Council and Beth Din as sole authorities in matters of Jewish Law—Right to issue of injunction to protect personal as well as property rights — Protection of right of property by injunction under Sec. 6 (2), Courts Ordinance, 1924.

JUDGMENT OF THE CHIEF JUSTICE.

This is an application by certain butchers of Jaffa for an Order forbidding the District Commissioner from interfering with their business. It appears that at the desire of the Rabbinical Authorities, the District Commissioner instructed his representative in Jaffa to prevent the slaughter of animals for use as kosher meat by persons not slaughterers licensed by the official Rabbis of Jaffa. This order was carried out, and the butchers complain that when their slaughterers were about to slaughter cattle at the usual slaughtering place on the Jaffa beach, they were forbidden to do so by a police officer acting under the directions of the Assistant District Commissioner, except on the condition of the butchers declaring that the meat would be sold as unclean meat,

that is to say, ordinary meat not killed, examined and declared to be kosher, by the proper Jewish religious authority.

Presumably these Petitioners had a right in common with others of their calling to exercise their trade without interference by the police, and if such interference is to be justified the burden lies upon the police to justify it.

It was argued by the Attorney-General, on behalf of the executive authority, that each local Rabbinate has the right to administer all matters of kosher, including the licensing of slaughterers and the taking of licensing fees, that persons not so licensed, found about to kill meat to be sold as kosher, are found on the point of doing an illegal act, and may be prevented from so doing by the action of the police.

Cases in which the police are entitled to interfere with the liberty of persons without the warrant of a Judge or Magistrate are to be found mostly in statutes dealing with the matters in question. There are other cases concerned with public discipline and security in which the police and sometimes even private citizens may and should interfere, although there may be no specific written law to that effect.

The present case cannot be shown to come within any of the statutory or customary powers. There is no such rule as has been urged by Mr. Sacher that, wherever it can be found that an act is illegal, it may be prevented by police action. It has been suggested that public security might be endangered by a strong feeling aroused by the sight of unlicensed slaughterers killing animals, but there is not the least reason to suppose that the action of the police offcer on the occasion in question was taken in consequence of an imminent breach of the peace.

The case has been argued at greath length but it does not seem necessary to go into any other of the many other points raised on behalf of the Respondent, because if the District Commissioner cannot show a right to employ the police for preventing the Petitioners from exercising their trade, for a purpose which has moreover to do with the religious affairs of the Jews and is not a matter of general concern, the Order ought to issue.

There are points raised by the Attorney-General whose determination may not be necessary, but to which importance has been attached, and which have been dealt with by my learned brother

at some length in his judgment. While agreeing with his conclusion, I think it may be as wellto add to this judgment a few words on the question as to whether there is any ground for holding that there exists in the official Rabbis of Jaffa, as urged by the Attorney-General, a civil right of some kind against persons slaughtering animals for sale as kosher meat without their licence.

So far as Jewish Courts are concerned, we do not find in the Order-in-Council, 1922, any provision conferred which would enable them to deal with such a matter as licensing of slaughterers, with such authority as would entitle them to the assistance of the civil power for the purpose of enforcing their decisions. A Jewish Religious Court could not give a judgment against a slaughterer which would be executed by the civil authority.

But it is said that the Chief Rabbis of Jaffa are a licensing authority, and that a Jewish slaughterer carrying on the trade of slayer of animals for kosher purposes without their licence is committing an illegal act, and that he can be punished by the Civil Courts and prevented by the police.

We have already dealt with the question of police preventive action for which there is no support at law.

A Religious Authority, recognised by a Community or a part of a Community, issuing orders about religious matters to its own followers, would not be interfered with by the Civil Courts unless by some action or conduct such persons offended against some rule of morals or public order established by law. So far as the faithful are concerned the orders would be obeyed or disobeyed according to the validity attached to them by the persons affected. That would be a matter for religious discipline, and not a matter for the Civil Courts, and certainly not for the police. For the purposes of the Respondent we should have to go further and find that the Rabbis had power not only to issue licences which would be regarded as valid and exclusive by the faithful, but which could be upheld by the Civil Courts exercising disciplinary powers against all persons carrying out the trade in question without the licence.

It is not pretended that the Rabbis are delegates of the Grand Rabbi of Constantinople, and, if not, they could not successfully claim the powers to be found in the Berat of his appointment whatever those may be.

The Attorney-General refers to a Public Notice issued before the Order-in-Council, 1922, but possibly confirmed by Article 74 of that Order by which a Jewish Religious Authority was declared by the Provisional Government of the British Occupation.

By that Public Notice issued by the Civil Secretary, the Government recognises as valid a Council composed of Rabbis chosen by an Assembly of whose constitution the Notice is silent. No Chief Rabbis are to be recognised except those chosen by the Assembly, who are in fact the two present Chief Rabbis and who do not seem to be given any particular authority, but we are informed by Mr. Sacher, who appeared with the Attorney-General, that they are the Chairmen of the Council.

The Notice goes on to say (1) that the Council and Beth Dins appointed by it are to be the sole authorities as to Jewish Law, (2) that the judgments of the Beth Dins of the Council and other Religious Courts sanctioned by it will be executed through the Civil Courts. This latter privilege has been curtailed by the Order-in-Council, 1922, by which it is clear that judgments of Jewish Religious Courts which will be executed by the Civil Authority are confined to specific subjects not including the one in question. The Order, moreover, gives no jurisdiction to Jewish Religious Courts over foreign Jews.

As to the authority to declare Jewish Law, that is of importance when some question arises in which Jewish Law becomes relevant, but the Civil Courts do not administer Jewish Law. It cannot be held that in a constitutionally governed country the police may be invoked to administer Laws made and published by religious bodies, and of which the Civil Courts have no knowledge, and use force to oblige persons who are not transgressing the ordinary Law, to obey orders issuing from persons who are not shown to have any jurisdiction to issue orders enforceable by the Civil Authority.

The Order will be made absolute.

Question of costs reserved.

JUDGMENT OF MR. JUSTICE CORRIE.

There is no dispute as to the facts which give rise to this Petition.

The Petitioners are Jewish butchers selling meat to Jewish consumers.

For this purpose they slaughter animals under the ritual supervision of a Rabbi, but the Petitioners and their slaughterers have no licence from the Jaffa representatives of the Rabbinical Council, and pay no licence fees to the Council.

In consequence they are in a position to sell meat more cheaply than is the case if a licence fee has to be paid.

It appears that a considerable body of customers are satisfied that the slaughtering is performed in such a manner as not to render the meat unclean by Jewish Law, and they therefore buy from the Petitioners in preference to paying a higher price for meat upon which licence fees have been paid to the Rabbinical Council.

There is no suggestion that the Petitioners have attempted to sell their meat as having been killed under licence from the Council; in fact it is clear that such is not the case.

The police of Jaffa, acting under the orders of the District Commissioner, have interfered with the Petitioners by refusing to allow them to slaughter at the public slaughtering place of Jaffa unless they would sign a certificate that the meat so killed was ritually unclean by Jewish Law. This certificate would imply that the meat was unfit for consumption by a Jew who observes the rules of his religion, and the Petitioners refused to sign: and they are now applying for an Order to restrain the District Commissioner and the police from interfering with them.

The ground upon which the issue of such an Order is resisted by the Attorney-General is that the action of the Petitioners constitutes an infringement of the rights and privileges assured by the Government to the Rabbinical Council.

It is claimed that the Council has been recognised by the Government as solely entitled to license ritual slaughtering and to collect fees in respect of the licences so granted: and hence that any slaughtering unauthorised by the Council that purports to be in accordance with Jewish Law is not only a violation of the Council's right to control the religious observances of the Jewish community in Palestine, but also an infringement of a monopoly, from the proceeds of which arises a considerable part of the funds required for the support of the religious and benevolent activities of the Council.

It was argued by the Attorney-General with great force and earnestness that the existence of a central authority able to supervise and co-ordinate the religious observances of the Jewish people in Palestine was of the utmost importance to the maintenance of their unity as a people : and that with this object in view the Government had given its support to the Rabbinical Council, and in pursuance of this policy had authorised the interference by the police with the Petitioners.

I see no ground upon which such action can be justified.

Assuming that it were proved beyond dispute that the Rabbinical Council have been entrusted with the control and licensing of ritual killing and that the Petitioners by selling meat as killed under the supervision of a Rabbi were infringing the rights of the Council, there could nevertheless be no possible ground for using the police to prevent the Petitioners from slaughtering in circumstances in which no breach of the peace was threatened.

Such rights as the Council may have are to be enforced by process of law and not by executive action.

And that decides the question.

So much, however, has been said in argument with regard to the position of the Rabbinical Council, that it may be well to examine the grounds upon which their rights are supported.

Briefly the argument is this.

Under the Turkish Government the Jewish subjects of the Ottoman Empire formed a "Nation" or Community having a constitution defined by a Law issued in 1864, and controlled by a Hakham Bashi or Chief Rabbi, at Constantinople, whose powers were prescribed in that Law and in his Berat of Appointment, and whose delegate in Palestine was an official of the Community known as the Chief Rabbi of Palestine.

In 1921 an Assembly of Rabbis and other Jewish inhabitants of Palestine was held which elected a Council of Rabbis.

This Council was recognised by the Government set up by the Occupying Power.

It is argued that the Chief Rabbi was formerly the sole authority in control of ritual killing, and that all his rights and powers—including that of licensing slaughterers and collecting licence fees—have devolved upon this Rabbinical Council.

Before attempting to decide the somewhat difficult question as to what were the powers of the Chief Rabbi of Constantinople in regard to ritual killing, it may be well to examine the claim that his rights are now vested in the Rabbinical Council.

The Council was elected by an Assembly which, though it may have been convened with the approval of the Government, was not an official body. The Council, therefore, has no official standing except in so far as this has been conferred upon it since its election.

The instrument which defines its position is a Public Notice issued by the Civil Secretary on the 18th March, 1921.

This Notice, after announcing the election of a Rabbinical Council consisting of two Chief Rabbis and six Rabbis, declared that—

> "The Government of Palestine will recognise the Council "and any Beth Din sanctioned by it as the sole authorities "in matters of Jewish Law."

It is further declared that:

> "The appointment of Hakham Bashi no longer exists in Palestine: and no person is recognised by the Government as a Chief Rabbi of Palestine except the Rabbis elected by the Assembly."

Upon these declarations rests the claim that the Rabbinical Council has succeeded to the position of the Hakham Bashi of Constantinople so far as Palestine is concerned.

The effect of this Public Notice was unquestionably to appoint the Council as an authority recognised by the Government as able to declare the rules of Jewish Law. A rule declared by the Council to be a rule of Jewish Law, is a rule of Jewish Law in the eyes of the Government of Palestine.

But the recognition thus conferred was limited. The Government, while announcing that it would execute judgments of the Beth Din sanctioned by the Council, did not express any intention of employing its powers to give effect to the decisions of the Council itself.

Between an authority to declare Jewish Law as to ritual killing, and an authority to license slaughterers and collect licence

fees there is a wide difference, and it is obvious that the former right does not imply the latter.

Indeed an authority to declare the Jewish Law as to ritual killing does not even imply a power to decide the question whether, from the point of view of the Law of Palestine, any meat is or is not ritually clean.

Undoubtedly such a question is in part a matter of Jewish Law. It is also in part a matter of fact. Hence if this Court were called upon to decide whether meat sold as ritually clean was so by the Law of Palestine, it would accept, in virtue of the Public Notice, the pronouncement of the Council as to the requirements of Jewish Law with regard to ritual killing ; but it would be for this Court itself to decide whether in the given case those requirements had been fulfilled.

It has, however, been argued by the Attorney-General that the wording of the Public Notice is not to be construed too strictly, and that the intention of the Government was to substitute the Rabbinical Council for the Hakham Bashi. Hence that the Council must be treated as having in the eyes of the Government and of the Courts the right to exercise the powers previously exercised by the Hakham Bashi, and in particular to control ritual killing.

It is difficult to see how we can be asked to hold that the Government intended something so widely different from what the wording of their Notice would imply. It is, moreover, clear that even if the Government did intend the Notice to invest the Council with functions other than that of declaring Jewish Law, the control of ritual killing was not one of them.

This is established by the fact that on the 9th May, 1922, a year after the issue of the Public Notice, the Government appointed a Commission to inquire into and report upon, among other matters,

" 1. What is the present system of licensing the killers "of animals according to the Jewish Ritual Law in Jerusalem "and other Jewish centres in Palestine ?

" 2. What fees are charged for the killing, and how are "such fees distributed ?

"3. What steps should be taken to regulate the licens-
"ing of killers by Jewish Communities and to secure for the
"Jewish Communities in Jerusalem and elsewhere the revenues
"derived from the slaughter of animals and from the fees
"for burial in the Jewish burial grounds, while providing
"for the vested rights of any persons now participating
"in those revenues?"

Had it been the case that the Government regarded the Public Notice as conferring upon the Council the control of ritual killing, the appointment of this Commission would have been an unnecessary and unwarrantable encroachment upon the sphere of the Council's authority.

Hence the claim that in the eyes of the Government the Public Notice constituted the Rabbinical Council an authority having entire control of ritual killing cannot be made good. And that is the basis upon which the alleged right of the Council is founded.

It follows that the right which the Petitioners are alleged to have infringed does not exist.

One further argument remains to be considered.

It is said that even if the employment of the police is illegal, an order to restrain the executive from employing them against the Petitioners cannot issue, as such an Order can only be made in a case in which an injunction would issue in English Law: and that an injunction will not be granted except in protection of a right of property.

This is, in my view, an unfortunate position for the Government to take up. Once it is established that the use of the police to interfere with the Petitioners is illegal, the only proper course for the Government is to consent to an Order being made against them, or to render the issue of an Order unnecessary by giving an undertaking that the illegal action shall not be repeated.

But even upon the purely legal ground, the position cannot be maintained.

It is questionable whether the issue of Orders under Section 6 (2) of the Courts Ordinance is to be governed by the rule of English Law which has been cited.

But assuming that such is the case, can it seriously be maintained that a right of property is not involved in the proceedings?

What is at stake, so far as the Petitioners are concerned, is their means of livelihood, and the proper method of safeguarding their rights would appear to be by petition for a restraining Order, rather than by action for damages.

In view of what has been said it is unnecessary for the purpose of this application to decide what were the powers of the Hakham Bashi of Constantinople.

As, however, those powers were dealt with at considerable length by both sides, some reference should perhaps be made to them.

Extracts were quoted from the Berat of Appointment of a Chief Rabbi of Constantinople, who, it is stated, held office at the time of the British Occupation of Palestine, which appeared to support the view that questions of ritual killing were under his control.

On referring, however, to the Law of 1864 regulating the Jewish Community, it will be found that the Law recognised, in addition to the Chief Rabbi, three other authorities, a General Council, a Spiritual Council, and a Lay Council.

The duties of the Chief Rabbi are defined in Chapter II. Article 5 provides that: —

> "The Chief Rabbi cannot act alone, or give any "decision whatever without a report from the competent "Council."

Chapter III is headed "Election and Duties of the General Council": but the four Articles of which it is composed, while regulating the manner of election, do not prescribe any duties.

Chapter IV relates to the Spiritual Council. Article 25 provides that matters of Tareif and Kosher shall be entrusted to three Rabbis, Members of the General Council, who are not for the time being acting as Members of the Spiritual Council.

Article 29 declares that all religious matters are within the sole competence of the Spiritual Council.

It would appear therefore that the Law intended that control of ritual killing should be in the hands not of the Chief Rabbi, but of three Members of the General Council under the supervision of the Spiritual Council.

To establish, therefore, that the Rabbinical Council have succeeded to the powers exercised by the Chief Rabbi under the Law of 1869 would not be sufficient to invest them with the control of ritual killing. For that purpose it would appear to be necessary that they should have succeeded also to the powers of the General Council and the Spiritual Council.

Whether the provisions of the Law of 1864 are to be regarded as superseded by the Berat, issued subsequently, is a matter which fortunately this Court is not called upon to decide.

Finally it must not be forgotten that both the Law of 1864 and the Berat of Appointment conferred authority only with regard to Jews who were Ottoman subjects, an authority very different from that now claimed on behalf of the Rabbinical Council.

The Order applied for by the Petitioners must be made absolute.

Question of costs reserved.

Delivered the 14th day of December, 1925.

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