COLLECTION OF JUDGMENTS

OF

THE COURTS OF PALESTINE

1919 — 1933

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

ARRANGED
ACCORDING TO SUBJECTS
IN ALPHABETICAL AND CHRONOLOGICAL ORDER

WITH
COMPREHENSIVE AND DETAILED INDEX

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PUBLISHER'S NOTE.

In undertaking the publication of this Collection of Judgments of the Courts of Palestine the Publisher has been met with innumerable difficulties inherent in such an undertaking. Hitherto, (with the exception of the very few reported in the Official Gazette) there have not been published any systematically arranged Law Reports, and consequently courts and advocates were obliged to resort to typewritten copies of the judgments available in the archives of advocates. The Publisher has spent some considerable time in collecting this large number of judgments, the publication of which will, he trusts, meet the numerous requests for a publication of this nature which have been made to him by the many subscribers to his edition of the Laws of Palestine, 1918—1933.

The plan and outline of this first edition is similar to that adopted in the Publisher's edition of the Laws of Palestine, 1918—1933. The material is arranged in alphabetical order according to subject matter, and then in chronological order. Each judgment is preceded by a brief summary of its contents. A comprehensive and detailed Index of the subject matter contained in these judgments will appear at the end of the publication, as well as a Table of Cases showing the page on which any judgment is reported.

All judgments published are taken from the private collections of advocates.

The Publisher will welcome all corrections of errors and suggestions for the improvement of the work.

January, 1935. L. M. ROTENBERG.

ACKNOWLEDGMENT OF ASSISTANCE.

The Publisher desires to express his thanks to Mr. Max D. Friedman, LL.B., Barrister and Solicitor, Advocate, of Tel-Aviv for contributing the synopses preceding the judgments and for assistance kindly rendered at all stages by notes, suggestions and advice.

The Publisher desires to thank Mr. Friedman also for the large collection of judgments which he has placed at his disposal, and generally, for assistance willingly given.

L. M. R.

ABBREVIATIONS.

A.—Criminal Assize.
A.A.—Assize Appeal.
C.A.—Civil Appeal.
C.A.D.C.Ha.—Civil Appeal in District Court Haifa.
C.A.D.C.Ja.—Civil Appeal in District Court Jaffa.
C.A.D.C.Jm.—Civil Appeal in District Court Jerusalem.
C.D.C.Ha.—Civil Case in District Court Haifa.
C.D.C.Ja.—Civil Case in District Court Jaffa.
C.D.C.Jm.—Civil Case in District Court Jerusalem.
C.D.C.Na.—Civil Case in District Court Nablus.
C.E.O.Ja.—Judgment of Chief Execution Officer Jaffa.
C.E.O.Jm.—Judgment of Chief Execution Officer Jerusalem.
C.L.A.C.A.—Civil Leave Application in Court of Appeal.
C.L.A.D.C.Ja.– Civil Leave Application in District Court Jaffa.
CR.A.—Criminal Appeal.
CR.A.D.C.Ha.—Criminal Appeal in District Court Haifa.
CR.A.D.C.Jm.—Criminal Appeal in District Court Jerusalem.
CR.C.D.C.Ha.—Criminal Case in District Court Haifa.
CR.C.D.C.Jm.—Criminal Case in District Court Jerusalem.
CR.C.D.C.Na.—Criminal Case in District Court Nablus.
CR.L.A.C.A.—Criminal Leave Application in Court of Appeal.
H.C.—High Court.
L.A.—Land Appeal.
L.A.D.C.Ja.—Land Appeal in District Court Jaffa.
L.A.D.C.Jm.—Land Appeal in District Court Jerusalem.
L.Ha.—Land Case Haifa.
L.Ja.—Land Case Jaffa.
L.Jm.—Land Case Jerusalem.
L.Na.—Land Case Nablus.
L.S.—Land Settlement.
L.S.Ha.—Land Settlement Haifa.
L.S.Ja.—Land Settlement Jaffa.
M.A.—Misdemeanour Appeal.
M.A.D.C.Ha.—Misdemeanour Appeal in District Court Haifa.
M.A.D.C.Jm.—Misdemeanour Appeal in District Court Jerusalem.
M.D.C.Jm.—Misdemeanour Case in District Court Jerusalem.
O.G.—Official Gazette.
P.C.—Privy Council.
P.C.L.A.—Privy Council Leave Application.
S.T.—Special Tribunal.
W.C.O.—Workmen's Compensation Ordinance.

ACCOUNT BOOKS.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 393/21.

BEFORE:

The Vice-President, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

The Armenian Patriarchate — APPELLANT.

vs

Mubarak Jabriye — RESPONDENT.

Admission in Document — Oath — Mejelle 1589 — Evidential value of letter from Legal Secretary — Books of Account as evidence — Illegal rate of interest — Art. 2, Civil Procedure Code.

Appeal from a judgment of the District Court, Jerusalem, dated 15.8.21, whereby Appellant was ordered to pay to Respondent a sum of 500 Napoleons, and legal interest at 9% from date of debt on November 22nd. 1917 and costs and £5 fees of Advocate.

JUDGMENT.

This appeal raises a question which has come before this Court upon several occasions under varying aspects.

The Respondent who is the Plaintiff is bringing an action upon a document containing a written admission by the Appellant of receipt of a certain sum of money. The Appellant alleges that the admission is untrue in that the amount received by him was less than that stated in the document.

It has repeatedly been held by this Court that where a Defendant in such a case was unable to produce documentary evidence in support of his allegation and such documentary evidence must necessarily be of a kind binding upon the other party, the only course open to the Defendant was to ask, in accordance with Article 1589 of the Mejelle, that the plaintiff should take the oath that the Defendant's admission in the document in question was not false.

There are some cases, as for example, where negotiability of negotiable instruments or the document containing the admission has been drawn up officially in the Land Registry, in which the Court has held that the Defendant is not entitled to have the Plaintiff put upon oath.

No such consideration arises in this case. Two special circumstances have however been brought to the notice of the Court on behalf of the Defendant. The first of these is a letter written by the Legal Secretary to the Appellant dated 15.12.1920 to the effect that in any future case on a bill the Court will have regard to any documentary evidence which the Patriarchate may produce to show the true nature of the transaction.

It has been urged upon the Court that this letter, copies of which were sent to the District Court and the Court of Appeal, must be treated as a Rule of Court made in exercise of the power conferred upon the Legal Secretary by Art. 28 of the Proclamation dated 24th June 1918, and that it effects on behalf of the Patriarchate a modification of the Rules of Evidence so as to enable the Patriarchate to put forward its own books of account as evidence against the other party.

With regard to this contention, it is enough to say that this point was decided by this Court in the case of the Armenian Patriarchate Vs. Haj Muhamed Taher, Civil Appeal No. 93/1921. It may be added however, that the Art. of the Proclamation in question does not confer upon the Legal Secretary power to alter the Law of Evidence and that it is unnecessary to construe the letter in question as suggesting that the Patriarchate would be entitled to put forward as evidence any document beyond the documentary evidence that would be available for any other Defendant.

The second point that has been put forward is that the document which is the subject of this action expressly reserves a rate of interest (15%) that is in excess of the legal rate; and it has been argued that such an illegality makes the whole document void. Art. 3 however of the Law of Interest of 22nd March, 1303 provides that in a deed of contract agreement to a rate of interest higher than the legal rate, whether this be explicit in the deed or whether the excess be included in the principal amount, the rate should be reduced to 9% per annum.

From this it is clear that the Ottoman Law does not regard the reservation of interest at an excessive rate a circumstance invalidating the whole document but merely provides that interest should be recoverable only at the legal rate.

Finally it has been argued that the true meaning of the second part of Article 2 of the Civil Procedure Code is that when a Plaintiff loses his action on a document, the Defendant can set up a claim against that document by producing his own books of account. The Court holds however that the word "Defendant" in that Article must be read as meaning the defendant to the claim set up against the document, that is, in this case the Respondent.

No appeal has been made in the grounds of appeal against the decision of the District Court on the question of the administration of an oath, and this point is therefore not before this Court.

The appeal is dismissed and judgment of the District Court confirmed with costs.

This 27th day of December, 1921.

In the Supreme Court sitting as a Court of Appeal.

C. A. of 1926.

IN THE CASE OF:

Tewfik Nasar El-Dawad — APPELLANT.

vs

Ibrahim Sahyoun — RESPONDENT.

Books of Plaintiff—Promissory Notes—Notes of Pres. District Court—Inaccuracy of Interpreter — Evidence of payment of money — Duty of Interpreter — Art. 9 Commercial Code.

JUDGMENT.

We have a certain difficulty in this case because there are no notes of the President of the District Court. Besides the Arabic Record, there is an obviously inaccurate note taken by the Interpreter whose duty is to interpret, not to take a note in the place of the Court.

It appears that the defendant claimed payment of certain sums as against his indebtedness under the two notes sued upon and a sum of £E. 200 was admitted by the Plaintiff as having been paid. As to the rest, the Defendant had no receipts or other written evidence of payment. At first he claimed to put the Plaintiff on his oath, but afterwards declined and asked to have the Plaintiff's books produced.

We are of opinion that the Court would have been better advised to require the production of the Plaintiff's books under Art. 9 of the Commercial Code and we remit the case for this to

be done, and for the production of any correspondence which may throw light on the transactions of which the giving of the promissory notes was a part.

Judgment set aside for this purpose.

Delivered in presence this 7th day of December, 1926.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 36/29.

BEFORE:

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

IN THE CASE OF:

Josephine Moyal — APPELLANT.

vs

Isaac Goldberg — RESPONDENT.

Books of accounts as evidence—Right to administer oath—Court of Appeal bound by records of case.

Appeal from the Judgment of the District Court of Jaffa dated 31.1.29.

JUDGMENT.

At the first hearing of this case by the Jaffa District Court the Court ordered that Goldberg be summoned as a witness to give evidence as to whether he has books or not and if so to produce them; that failing proof by other means Plaintiff is entitled to put Defendant on oath that he paid the money to Plaintiff or her duly authorised agent.

At the last hearing Goldberg appeared and produced his books. Plaintiff then asked for the oath which Defendant took. Appellant now alleges that he should have been allowed to cross-examine Goldberg on the books of account which request was refused by the Lower Court.

We are bound by the records of the case and the President's note and in neither is there any request to cross-examine Goldberg on his books, but immediately following the record of the production of the books is the request by Plaintiff for Defendant to take the oath.

The judgment of the Lower Court is confirmed and the appeal dismissed with costs and Advocates fees and travelling expenses assessed at LP.3.—

Delivered this 15th day of July, 1929.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 41/31.

BEFORE:

Mr. Justice Baker, Frumkin, J. and Khayat J.

IN THE CASE OF:

Dr. Jacob Nagourny — APPELLANT.

vs

Rabbi Benzion Uziel
Moise Valero
Joseph Salant
Joshua Abravaya
(executors of the estate of the late
Haim Aharon Valero) — RESPONDENTS.

Books of deceased as evidence—Minutes of executor—Documentary proof to upset Land Registry Registration.

Appeal from the judgment of the Land Court of Jerusalem, dated 15th Oct., 1931.

JUDGMENT.

Appellant when before the Land Court relied upon the books of the deceased and minutes of the executor to prove his case. Respondents were prepared to produce the said books, but not the minutes. Prior, however, to the Court's hearing Appellant's witnesses or making any order with regard to the production of the deceased's books or the executor's minutes, they dismissed Appellant's claim on the ground that "no documentary proof had been produced to upset a Tabu registration and that he apparently relied on finding an admission among the papers and accounts of the executors".

The Respondents having consented to the production of the books of the deceased, the Court should have allowed the production of same.

The judgment of the Land Court must, therefore, be set aside and the case remitted for the production of the said books of the deceased and such other lawful evidence as the parties may choose to tender, and judgment to be given accordingly.

Costs, costs in the cause.

Delivered this 15th day of April 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 146/31.

BEFORE:

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

IN THE CASE OF:

Muhammad Abd El Rahman El Dilbi APPELLANT.

vs

Ali Haj Abdallah
Samiyeh Mustafa Faddah,
on behalf of the Estate of
Mustafa Faddah RESPONDENTS.

Books of Defendant as evidence — Contradiction of antecedent statement—Art. 1647 Mejelle—Leave to appeal.

Appeal from the Judgment of the District Court of Haifa, dated 17th June 1930.

POINTS OF LAW.

1) Can a Defendant who has denied that a thing was delivered to him for safe custody, subsequently admit having received it and allege that he has returned the same or would such an allegation be a contradiction of an antecedent statement and as such "not heard" under the provisions of Art. 1647 of the Mejelle?

2) Are the entries in the books of a Defendant evidence on his behalf when such entries are in his favour.

JUDGMENT.

In respect of the first point of law on which leave to appeal is given the Court holds that the allegation in question is not a contradiction within Section 1647 of the Mejelle.

As to the second point, the books of the Defendant tendered by himself embody the only evidence against him and we hold that, insofar as they also embody evidence in his favour, the books have to be taken as a whole and therefore such evidence is inadmissible.

The appeal is therefore dismissed with costs.

Delivered this 11th day of April 1932.

ACCOUNTS.

In the District Court Haifa.

C. D. C. Ha. No. 43/23.

BEFORE:

Seton J. President, and Francis Khayat J.

IN THE CASE OF:

Yusef Selim Eff. Dajani — PLAINTIFF.

vs

Hafiz Eff. Mahdjoub — DEFENDANT.

Admission in sanad — Recovery of money expended — Art. 1817 Mejelle—Interest from date of Action—Insufficiency of stamp duty—Settlement of accounts.

JUDGMENT.

Having considered the proceedings in this case it is found as follows:—

In virtue of the two sanads produced and admitted by the Defendant, it is established that Defendant Hafiz Eff. Mahdjoub of Ramle, residing at Beit Dajan, owes the Plaintiff Yusef Eff. Salim Dajani of Beit Dajan, the sum of LE. 218 1/2, which the plaintiff had expended on the orange grove (locality Beit Dajan) of Defendant with his authority and during his absence.

Therefore, the Court under Art. 1817 Mejelle orders the aforesaid Defendant to pay to plaintiff the sum of LE. 218 1/2 with interest at 9% legal rate as from 5/12/21 date of institution of action up to the day of full payment provided that such interest does not exceed the capital and costs including the value of P.T.1100 paid by the plaintiff as fixed on the two Sanads for being short of the necessary revenue stamps. The Court as well dismisses the defence of the Defendant with regard to his request for a settlement of accounts in view of his dismission that the value of the two Sanads was the balance of the aforesaid expenditure.

Judgment in presence and appealable.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 46/23.

BEFORE:

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

IN THE CASE OF:

Ahmed Nasrat & Co. Contractors, Haifa APPELLANTS.

vs

Jaddallah El Mufdi of Baitjala RESPONDENT.

Accounts—Money due under contract for work done on railway—Privity of contract — Contractor and sub-Contractor — Engineer's certificate — Separate action to obtain production of document.

Appeal from a judgment of the District Court of Haifa dated 8th Nov., 1922, in action No. 178/22.

JUDGMENT.

This is a case in which work was done under a sub-contract between Plaintiff sub-contractor and Defendant the contractor, for work on a railway of such a nature that the railway engineer's certificate would be a basis of settlement. It was contemplated in our opinion that these certificates should enter into the accounts between the parties.

After the work had been done, the sub-contractor was unable to get the engineer's certificate from the contractor although they had been delivered by the railway and he could not get them from the railway because he had no contractual relation with it. He could bring an action against the sub-contractor for an account and payment of the amount due, but he preferred to bring an action for the production of the certificates only. Had he brought an action for account and payment this production of the certificates would have been ordered as a matter of course. Could it be obtained by a separate action?

The District Court would have been justified in its discretion in holding that this ought not to be brought as a separate action but as the Court gave an order which was obviously necessary to the Plaintiff in order to ascertain whether money was due to him under the contract, information which had been improperly withheld, we are not prepared to hold that such an order was irregular because the order did not go so far as to ask for an account generally, when as in this case it seemed probable that the production of the engineer's certificate would settle the question of what was due from the contractor to the sub-contractor.

The appeal is dismissed with costs and advocate's fees L.E.5.

Dated this 25th April, 1923.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 113/24.

IN THE CASE OF:

Elias Yacoub Abu Aun — APPELLANT.

VS

Khalil Odeh Abu Nahleh — RESPONDENT

Settlement of accounts re mortgage—Oral evidence against registered title—Proof of mortgage—Appeal on question of Law—Registration of judgment in Land Registry—Art. 8 Rules of Court Land Courts, 15th May, 1921.

JUDGMENT.

The issue in this action was whether the transaction by which the property in suit came to be registered in the name of the Respondent Khalil Odeh was a mortgage as alleged by the Appellant Elias Yacoub or a sale as alleged by the Respondent. This question has been decided by the Land Court in favour of the Appellant. The Respondent in a cross-appeal asks the Court to hold that the Land Court was wrong in that it accepted the testimony of witnesses against a registered title.

The practice of this Court has been to require some written evidence to prove that a registration as owner was in fact made in respect of a mortgage. In this case there is such evidence. Not only has the Appellant produced receipts for sums paid by him or his wife on account of his debt to the Respondent but the Respondent himself has produced a document which the person by whom it was written has sworn to be a settlement of accounts as between the parties in respect of the mortgage two years previously.

The cross-appeal therefore fails.

As regards the questions of accounts raised by the Appellant, these are questions of fact and not of law and therefore under Art. 8 of Rules of Court Land Courts of the 15th May, 1921, are not applicable.

As regards costs in the Land Court we see no ground for varying the order of the Land Court. The appeal and cross-appeal are dismissed.

Costs of the appeal are to be paid by the Appellant.

26th June, 1925.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 87/26.

IN THE CASE OF:

Iskander Kassab of Haifa — APPELLANT.

vs

Najib Nassar, Editor of "El-Carmel"
Issa Dwein — RESPONDENTS.

Accounts between partners—Mejelle silent on question of Accounts—Mudarabe partnership—Deposit of moneys—Oath in lieu of account—Arts. 1413 and 1774 Mejelle.

Appeal from the judgment of the District Court Nablus, dated 9.2.1925.

JUDGMENT.

The question in this case is whether the partners in a Mudarabe partnership who have received the capital of the partnership are bound to render an account of the manner in which they have dealt with it to the partner who supplied it or are entitled to refuse to submit an account and to rely on the provisions of Articles 1413 and 1774 of the Mejelle.

> Art. 1413. The manager is a depositary, that is, the capital remains in his hands as a deposit, but since he deals with the capital he is considered as an agent of the capitalist, and, if he makes profits, he shares them.
>
> Art. 1774. A depositary who maintains his irresponsibility by an oath is believed, as, for example, if the depository claim the return of the deposit, and the depositary maintain that he has already returned it, this last is believed after he has confirmed his statement by an oath, but if he claim, to produce witnesses, in order to be released from his oath, his witnesses are heard.

The Mejelle is silent on the question of accounts and Art. 1774 does not say at what stage of the proceedings the oath of the person who is entrusted is to be accepted.

We think it beyond dispute that in the case of "Mudarabe" partnership it is the universal custom for the partners to whom the capital for the partnership has been entrusted to render an account of their transactions to the partners who furnished it, and we hold that in the absence of a good and valid excuse they are obliged to do so.

If when the accounts have been submitted the other party disputes them, he cannot call upon the accounting party to prove that they are correct, but he must be given an opportunity to prove the contrary himself. If he fails to do so his only course is to demand the oath.

Cases may occur where for some reason or other it is a physical impossibility for the partners who received the capital to render an account and if the Court is satisfied after having heard the case and that it arises through no fault of the persons concerned, their oath must be accepted.

In the present case the Respondents allege, though somewhat late in the day, that they are unable to present an account because they kept no records themselves: they say that each transaction as it took place was reported to the Appellant who kept the account himself. This allegation is not consistent with a statement contained in an undated letter from the Respondents to the Appellant which has been produced in the Court of Appeal in which the former wrote "we now submit our accounts and invite you to a settlement of the same".

However this may be, we hold that the District Court before accepting the oath of the Respondents should have called upon them to furnish accounts and we set aside the judgment and remit the case in order that this may be done.

Costs to be costs in the cause.

8.11.1926.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 98/26.

BEFORE:

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

IN THE CASE OF:

Baruch Fledbrand
Meir Blumenfeld — APPELLANTS.

vs

Yehuda Rab — RESPONDENT.

Accounts re partnership trading arrangement—Oral evidence to prove meaning of agreement—Religious custom forbidding loans at interest—Oath to show intention of agreement — Non-appearance taken as refusal to take oath.

Appeal from the judgment of the District Court of Jaffa dated the 27th January, 1926.

JUDGMENT.

The meaning of the agreement between Nathan Richter (of whom the Appellants are Executors) and the Respondent, is on the face of it clear.

Richter provided 10,000 gold francs with which the Respondent was to trade for a period of three years, at the end of which Richter was to be repaid.

The Respondent was to be entitled to 1 ½% on this sum as remuneration, and subject to this deduction, any profits were to be divided between the parties, or losses borne by them in equal shares.

It was provided however that instead of giving Richter a half share of the profits, the Respondent could at his option pay interest on the capital found by Richter, at the rates specified in the agreement.

The Appellants allege that the transaction was in reality a loan at agreed rates of interest, and that the terms relating to profits of the business were inserted in accordance with a custom prevailing among religious Jews in order to observe the rule of their faith which forbids loans at interest. The existence of this custom the Appellants desire to prove by calling witnesses.

It may well be that such was the case; but we hold that the Appellants cannot call witnesses to prove that the meaning of the agreement was other than that which appears on the face of it.

If however the Appellants desire to do so, they can administer to the Respondent an oath:

> "That it is not the fact that the intention of the agreement dated 20th. October, 1922 between the late Mr. Nathan Richter and myself was that in any event I should pay to him interest on the sum of 10,000 francs received from him at the rates specified in the Agreement".

If the oath is administered and taken by the Respondent, or if the Appellants refuse to administer the oath, they are entitled either to an account of profit and loss, or to receipt of interest at the option of the Respondent.

If the oath is refused by the Respondent, interest at the rate of 9% from the date of the Agreement is payable by the Respondent.

Delivered the 30th November, 1926, in presence of both parties.

13th December, 1926.

Mr. Auster for Appellants.

No appearance for Respondent, either personally or by Advocate.

Mr. AUSTER: I ask that non-appearance may be taken as a refusal to take the oath.

JUDGMENT: Ordered accordingly. Interest at 9% is to be paid from the date of the Agreement—20.10.1912 (but not to exceed the principal sum) with costs here and below, and advocates' fees LE.8.— Delivered in absence of Respondent the 13th December, 1926.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 8/31.

BEFORE:

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

IN THE CASE OF:

Bishara Asilen — APPELLANT.

vs

Fuad Jobran Sa'ad — RESPONDENT.

Action for account—Judgment for amount found due.

Appeal from the Judgment of the District Court of Haifa dated the 12th December, 1930.

JUDGMENT.

It is clear that a Plaintiff can bring an action for an account and for judgment for the amount so found to be due to him—Civil Appeal No. 46/23 Ahmed Mosrat & Co. v. Jadallah el Mufdi.

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

The costs of this appeal will be costs in the cause.

Delivered this 7th day of October, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 89/32.

BEFORE:

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

IN THE CASE OF:

The Anglo Palestine Bank Ltd. APPELLANT.

VS

Leib Lipkis RESPONDENT.

Accounts—Oath as alternative to furnishing account—Bank manager's oath on behalf of Bank that claim is not for usurious interest — Failure to appear to take oath.

JUDGMENT.

It appears that in the District Court the Respondent asked that the Appellant Bank should furnish him with an account, and as alternative that an oath should be imposed upon the Appellants. Under the circumstances we hold that the Court should have ordered that the Appellants should render an account and should not have proceeded to tender an oath to the Appellants' representative.

The judgment of the District Court is, therefore, set aside and the case remitted to the District Court for completion in accordance with this judgment. Costs will follow the event.

ACCRETIONS TO LAND.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 32/22.

IN THE CASE OF:

Children of Ali Talbie APPELLANT.

VS

Ibrahim Abu Vianou RESPONDENT.

Accretions to Land — Interpretation of Art. 5 Provisional Law of Disposition of Immovable Property — Succession to plantation made after 1331.

JUDGMENT.

This action raises the question of the meaning of Art. 5 of the Provisional Law of Disposition of Immovable Property dated 5th Jumad-il-Awwal 1331 (30th March 1329).

It is not disputed that the deceased died after the date of the above quoted Law or that the plantation was made before that date. Under these circumstances the Land Court has held that Art. 5 applies, that the land and plantation is inheritable as Miri land, and has dismissed the Appellant's action.

On reference, however, to the Turkish text of the Law in question, it appears that the wording of the relevant passage of the Art. is:

> "Vines and trees planted, and buildings, together with the fixtures and additions, constructed on Miri or Waqf land will be the same as for the land itself".

Here it is clear that the Art. applies only to plantations made and buildings constructed after the date of the Law.

In the present case, therefore, the lands and plantations are transmissible according to the Law provisions in force, that is according to the Law of Mulk Land.

The judgment of the Land Court is set aside. The Appellants are entitled to be registered as joint owners of the Land in accordance with the Law of Succession of Mulk properties.

19.5.22.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 147/22.

Accretions to land — Provisional Law of Disposition of Immovable Property — Succession to plantation made before 1331 — Art 81 Land Code — Mulk Trees.

JUDGMENT.

The trees having been planted before the Law of 5 Jumad-il-Awwal 1331 (30th March, 1329) the trees are Mulk and the land will be regarded as of the same category. This rule of the Land Law (Clause 81) is not affected by the Provisional Law Relating to Inheritance of Miri or Waqf Land, 3rd Rabi Awal 1331 (27th February 1328). Our judgment is that the Mulk rules of inheritance apply. Judgment of District Court set aside and case sent back to be dealt with according to our above decision.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 71/26.

BEFORE:

Mr. Justice Seton (A.S.B.J.), Khayat J. and Mejid J.

IN THE CASE OF:

Joussef and Said Yikhyeh El-Tam — APPELLANTS.

vs

Khayim and Hanna El Kahy — RESPONDENTS.

Sale made in March 1918 held invalid — Accretions more valuable than Land — Effect of Proclamation No. 76 of November 1918 — Buildings erected in good faith — Right of builder to become owner.

Appeal from the judgment of the Land Court of Jerusalem dated 9th February, 1926.

JUDGMENT.

The sale in this case in March 1918 became invalid upon the publication of Proclamation No. 76 in November 1918.

Either party had the right to apply to the Courts within two months of the date of the Proclamation,—the purchaser for the return of the money he had paid, the vendor for the return of the property. Neither party took any such step, and the purchaser might well think when he began to build in 1919 that although the sale was invalid in the eyes of the law—the vendor was not preparing to take advantage of that fact but was prepared to stand by what he had done.

We hold, therefore, that when the Appellant (the purchaser) built in 1919 he did so in good faith and under an unfounded belief that he had legal justification and if the value of what he built was greater than the value of the land he is entitled to pay the value of the land and become the owner thereof.

The judgment of the Land Court is set aside and the case remitted in order that the respective values of the land and the new building may be ascertained as at the date of the building.

Costs to be costs in the cause.

Given in presence this 13th day of July 1926.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 72/28.

BEFORE:

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

IN THE APPEAL OF:

Samuel Blum	APPELLANT.
vs	
Mrs. Claire Calmy	
by Daoud Bey Moyal	RESPONDENT.
and	
1. Samuel Wilson	
2. Eliahu Levontin	
3. Land Department, Jerusalem	THIRD PARTY.

Interpretation of Art. 906 Mejelle — Claim to obtain ownership of land — Buildings erected in good faith by bona fide possessor more valuable than land — Right of builder to become owner — Art. 2 Land Courts Ordinance.

JUDGMENT OF LAND COURT.

After consideration of the claim brought by Plaintiff, Samuel Blum, against Defendants Claire Calmy and David Moyal and Third parties Samuel Wilson, Eliahu Levontin, Mrs. Heraklia Politis and Advocate Mr. Dukhan as attorney for the Government of Palestine including claim for judgment and confirmation of ownership over a plot of land measuring 1200 pics which is the north half of a plot of land measuring 2527 pics, with boundaries as follows: —

SOUTH:—plot marked 6A.

NORTH, WEST and EAST:—Road. Registered in the name of the first Defendant alleged to be nominee for the second Defendant who sold the land in question to Mr. Samuel Wilson as attorney for Plaintiff this being proved by document dated 13.11.1919 and marked No. 5.

Plaintiff built on this plot a house the value of which is more than double the value of the land and he claims, therefore, to apply Art. 906 of the Mejelle.

Defendant brought different pleas and the Court has selected one of them which is sufficient for a decision in this case and

this is non-acceptance of a claim in connection with a right granted by Art. 906 to a bona-fide possessor who built buildings on land the value of which is more than the value of the land after paying its value.

The Court finds that this right does not include a right to bring a claim in order to obtain ownership as it appears from the intention of Art. 906 of the Mejelle that this right is only given when the possessor is requested to vacate the land occupied.

The Court finds that in this case there is no question of eviction as Mr. David Moyal declared that he does not claim eviction and the right given by Art. 906 is not subjected only to the question of bona fides of the possessor but this right is also subjected to the question of eviction, and in the Appeal case No. 71/26 mentioned by attorney for Plaintiff we find no use because Appellant in this case was Defendant in the Land Court and Plaintiff claimed eviction of the property in question, and furthermore Art. 2 of the Land Courts Ordinance does not authorise the Land Court to find a new remedy such as requested by Plaintiff in this case.

Therefore, it is decided unanimously to dismiss Plaintiff's claim and to sentence him with costs and fees: judgment in presence of parties subject to appeal delivered and informed to parties as usual.

12.7.1928.

JUDGMENT OF COURT OF APPEAL.

We are of opinion that the interpretation of Art. 906 of the Mejelle laid down by the Land Court in this action and upon which the action was decided is a correct interpretation and accordingly we are of opinion that the appeal should be dismissed and the judgment of the Land Court confirmed with costs and advocate's fees, the fees and travelling expenses of the advocates concerned being assessed at LP. 2 each.

Delivered this 30th of May 1929.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 56/30.

BEFORE:

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

IN THE APPEAL OF:

Haj Ahmed Hassan Nasser — APPELLANT.

VS

The Syndic of the Bankruptcy of Youssef Dajani — RESPONDENT.

Sale of Land by unregistered deed after Transfer of Land Ord. 1920 — Accretions erected under void agreement — Right of builder to become owner — Art. 9 of Law of Disposition of Immovable Property of 1329 — Art. 906 Mejelle not applicable to miri land.

Appeal from the Judgment of the Land Court of Jaffa dated the 20th November, 1930.

JUDGMENT.

It is clear that the sale by unregistered sanad executed after the Transfer of Land Ordinance 1920 is null and void in accordance with sections 2 and 11 of the Ordinance and this conferred upon the Appellant no interest in the land whatever.

As regards the buildings created and the trees planted on the land by the Appellant the Court by a majority holds, for the reasons stated in the judgment of the Land Court, that Art. 9 of the Law of Disposition of Immovable Property of 1329 does not apply. Article 906 of the Mejelle has no application to miri land. The appeal is dismissed with costs including £P.4 advocate's fees.

Delivered this 29th day of September, 1931.

ACCRETIONS TO LAND—

SEE ALSO LAND.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 16/32

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

IN THE CASE OF:
Yousef Ibrahim el Asmar — APPELLANT.

vs

1. Hanna Yousuf Shami
2. Orelia Yousuf Shami
3. Labibeh Yousuf Shami
4. Anton Yousuf Shami
5. Alexandra Yousuf Shami
6. Execution Officer, Jaffa
7. Anton Boulos Meo
8. Beno Alonso
9. Execution Officer, Jerusalem
10. Yousef Abou Khalil
11. George Abd el Nour
12. Izzat el Haj
13. Nasib el Haj — RESPONDENTS.

Accretions to Land—Art 906 Mejelle not applicable to miri land—Buildings erected without consent—Requirements of Art. 9 of the Law Relating to the Disposal of Immovable Property of 1329.

Appeal from the judgment of the Land Court of Jaffa, dated the 15th February, 1932.

JUDGMENT.

Section 906 of the Mejelle is concerned with mulk and therefore does not apply to the present case where the land is miri. It is clear from the wording of the judgment in Land Appeal 71/26 which follows that of section 906 of the Mejelle that that case is concerned with mulk land and so is no authority in the present connection.

Land Appeal 130/25 on the other hand was a judgment under Sect. 9 of the Law relating to the Disposal of Immovable Property; but in that case there was building with the knowledge and consent of the vendor. Moreover, Sec. 9 requires the existence of a formal title deed in the hands of the owner of the land, a factor which is absent in the present case.

On these grounds the appeal is dismissed with costs to include LP. 2 advocate's fees to Respondents 5 and 8 respectively.

Delivered this 15th day of November 1932.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 23/32.

BEFORE :

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

IN THE CASE OF :

Ahmed Shalabi on behalf of himself and for his minor children, Abd el Rahim Fakhri and Aziz — APPELLANT.

vs

Haj Nimmer el Nabulsi — RESPONDENT.

Accretions to Land under colour of right — Art. 9 of the Law of Disposition of Immovable Property of 1329 — Application of Art. 906 Mejelle — Validity of acts of attorney after death of donor.

JUDGMENT.

The Power of Attorney loses its validity by the death of the donor.

Therefore, a sale made by the donee of the power is null and void. In consequence the question of good faith on the part of the purchaser does not arise.

The Appellant would therefore be entitled to the land were it not that the purchaser built on it and planted it after obtaining a title deed, and the land being miri land, Article 9 of the Ottoman Law relating to the Disposition of Immovable Property applies.

This Article unlike Article 906 of the Mejelle, which deals with mulk, is not concerned with the question whether the person planting and building has or has not an unfounded belief as to his legal justification for planting and building.

Article 9 of the Law of Disposition of Immovable Property is concerned only with the existence of a registered title in the name of that person, as is the case in the present action. We must, therefore, set aside the judgment and remit the case to the Land Court to estimate in accordance with Art. 9 of the Law Relating to Disposition of Immovable Property whether or not the value of the trees and the building is greater than the value of the land and for it to give judgment accordingly.

Costs to follow the event. Delivered this 7th November 1932.

ACTION.

SEE ALSO PROCEDURE.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 121/25.

IN THE CASE OF:

Leib Kabani — APPELLANT.

vs

Joseph Levy Hagis
Mordechai Hagis
Palotz (Third Party) — RESPONDENTS.

Art. 146 Civil Procedure Code – Procedure on default of appearance— Renewal of cancelled proceedings — Payment of fees within time for opposition.

JUDGMENT.

Article 146 Civil Procedure Code as revised by Rules of Court gives the Respondent an option, in the case where the Appellant, having appeared at the first hearing of the appeal does not appear subsequently, to demand that the Court shall either cancel the proceedings or give judgment on the pleadings previously put in.

If the Respondent adopts the latter alternative, the judgment of the Court is final and is not subject to opposition.

If however the Respondent applies for the proceedings to be cancelled, the effect of the judgment is merely to annul the proceedings in Court and in accordance with the judgment of this Court in L. A. 71/23, Nicola Ramadu and others vs Hanna El Khalil, it is open to the Appellant to renew his appeal on payment of the prescribed fee within the period allowed for opposition, without it being necessary for him to lodge a fresh appeal or fresh pleadings.

In the present case the latter course has been adopted and it is therefore open to the Appellant to renew within the time prescribed for opposition.

Delivered in presence, this 9th February, 1926.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 50/26.

IN THE CASE OF:

Eliezer Berger
Yekhiel Einbinder — APPELLANTS.

vs

Oriental Touring and Shipping Agency — RESPONDENT.

Action for refund of purchase monies paid — Variation during trial of nature of claim — Claim made by party refusing to complete contract.

Appeal from the judgment of the District Court of Jerusalem.

JUDGMENT.

This action was based on an alleged breach of contract. The District Court has held, in our view rightly, that no evidence of breach of contract was before them.

The Appellants now argue that nevertheless they are entitled to refuse to complete, and in that event, are entitled to payment of the purchase money they have paid. They do not deny that they may be subject to a claim for damages in respect of losses incurred by the Respondents owing to non-completion, but they argue that as no such claim is before the Court, judgment should be given in their favour for repayment for the purchase money without deduction.

In our opinion, however, it is not open to the Appellants to vary the nature of their claim in this manner. The action was based on breach of contract, and must be decided on that ground. The defence has been directed to the question whether or not a breach has been committed by the Respondents. It has not been concerned with the question what damages are payable by the Appellants in the event of their refusal without justification to complete.

If the Appellants desire to claim repayment of the purchase money on the ground of their own refusal to complete, they must commence an action based on this ground, when it will be open to the Respondents to make a counter claim.

The Appeal is dismissed with costs including £P. 3 advocate's fees. The attachment on the property of Bichara Habib is removed.

Delivered in presence this 3rd day of March 1927.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 101/26.

BEFORE:
The Chief Justice, the Senior British Judge and Jarallah, J.

IN THE CASE OF:
Messrs J. & P. Coats Ltd. APPELLANTS.
vs
Messrs Kirshenbaum & Blumenkranz RESPONDENTS.

Action for damages for tort under Common Law or Statute — Silence of Ottoman Law — No provisions for claim of general damages in Palestine.

Appeal from the Judgment of the District Court of Jaffa dated 29th October, 1925.

JUDGMENT.

There is no such general rule in Ottoman Law that when the infringement of a law creates damage to a person that person has a right to a civil action for damages against the infringer. We must, in every case where damages are sought, enquire whether a right to such civil remedy exists either under a rule of the Common Law or by Statute.

There is a general rule, that where damage is caused by an act which is also criminal, a claim for damages may be brought in conjunction with the criminal action or separately. That does not apply to this case because the action brought before the District Court was not framed so as to imply a criminal act. Now the Ordinance itself does not specifically give a right of action for damages when a criminal act is not alleged.

In the sections quoted where damages are spoken of we should assume that they refer only to cases where damages are recoverable under the above rule. Again, the claim for general damages was not admissible. Unless specially provided by Ordinance the Courts do not award any but proved damages.

Appeal dismissed, Respondent's costs—LP. 2.

Delivered this 29th day of November, 1926.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 83/30.

BEFORE:

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

IN THE CASE OF:

Shafiqah, widow of Nikola Aql, on behalf of the estate of her husband — APPELLANT.

vs

Mikhael Binia — RESPONDENT.

Death of party to action—Court must abide by its own decision to hear witnesses—Judgment for interest not to bear interest—Oath of Istizhar under Art. 1746 Mejelle — Appeal to be within prescribed period.

Appeal from the judgment of the District Court of Jerusalem dated the 26th June, 1930.

JUDGMENT.

The District Court having decided upon the 12th Oct. 1929 to hear the evidence of Yaqub Atallah and Yusuf Daoud, should not have given judgment without hearing these witnesses.

As regards the Appellant's claim that the Court has ordered payment of interest upon interest, the bill upon which Respondent's action is based states that it is for interest and hence the Court should not have ordered payment of interest on the judgment debt.

The sum admitted by the Respondents to have been paid by Nikola Aql was not admitted to be in respect of the LP. 216 which forms the subject of this action.

Though action was commenced during the lifetime of Nikola Aql, judgment was not given until after his death so that the provisions of Art. 1746 of the Mejelle with regard to administration of the oath of Istizhar are applicable.

As regards the heirs of Nikola 'Aql other than Shafiqah, the judgment is set aside and the case remitted for evidence to be heard in accordance with this judgment and a fresh judgment given.

As regards Shafiqah, the appeal, not having been made within the prescribed period, is dismissed.

Delivered this 31st day of July 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 108/30.

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

IN THE CASE OF:

Bishara Elias Menasseh — APPELLANT.

vs

Abdel Rahim Skeirek
Salim Matar — RESPONDENTS.

Period for commencement of action—Arts. 122 and 124 Commercial Code—Calculation of time — Sec. 24 (a) Interpretation Ordinance, 1929.

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

JUDGMENT.

The Court holds that action was commenced by the Appellant within the period prescribed by Arts. 122 and 124 of the Commercial Code, as the date on which protest was made is not to be taken into account. (See Sec. 24 (a) of the Interpretation Ordinance, 1929).

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

The Respondents will pay the costs of this appeal.

Delivered this 22nd day of July 1931.

In the Land Court Haifa.

L. Ha. No. 4/31.

IN THE CASE OF:

Bayside Land Development Co. Ltd — PLAINTIFFS.

vs

Raphael Cohen and Others — DEFENDANTS.

Necessity of separate actions against individual Defendants who are joint owners of property—Art. 15 Civil Procedure Code.

(TRANSLATION FROM ARABIC)

The Court finds that the Plaintiff has to prepare a plan on which the part belonging to every Defendant shall be shown, the

area kind of land and number of buildings on each plot, after which action to be brought against each Defendant, because of the difference in kind and in area, according to Article 15 of the Code of Civil Procedure, and that every Defendant who so wishes may appear and bring his witnesses to prove the value of the land, and then the replies will be considered.

(This was an action in which the company requested the Court to fix compensation for expropriated property. The several property owners were named jointly as Defendants, and the issue arose as to whether they were entitled to be heard individually in separate actions).

JUDGMENT.

Whereas the attorney for the Plaintiff refuses to file his action on every one of the Defendants separately, and whereas under Art. 15 of the Code of Civil Procedure, it is impossible to continue this action in its present form, it is therefore decided to dismiss the action with Court fees and costs of the Defendants, Mrs. Rachel Sothon and Hinda Khalif and £P 3 advocate's fees to their advocate Dr. Buxbaum.

Given in presence subject to appeal, this 12th August, 1932.

In the High Court of Justice.

H. C. No. 27/32.

BEFORE:

The Acting Senior Puisne Judge and Khayat, J.

IN THE CASE OF:

Ayesh Abu Mardieh — PETITIONER.

vs

The Chief Execution Officer, Jerusalem — RESPONDENT.

Action of ownership to be tried by a Civil Court—Jurisdiction of Chief Execution Officer—Art. 5, Civil Courts Jurisdiction Ord., 1925.

Application for an order to issue to the Respondent directing him to show cause why his order dated the 25th June, 1931, should not be set aside and execution proceeded with.

JUDGMENT.

The Application must be dismissed as Article 5 of the Civil Courts Jurisdiction Ordinance 1925, specifically says:—

"Every action or other proceeding concerning the ownership or possession of immovable property shall be decided by a Civil Court notwithstanding any claim by any party or person that the land is Waqf".

Delivered this 14th day of May, 1932.

In the District Court Jerusalem, sitting as a Court of Appeal.

C. A. D. C. Jm. No. 43/32.

BEFORE:

De Freitas, J., Mejid Bey, J. and Valero, J.

IN THE CASE OF:

Orphali	APPELLANT.
VS	
Yazidi	RESPONDENT.

Abandonment of excess to come within jurisdiction of Magistrate's Court—Promissory note—Magistrates' Court Jurisdiction Ordinance 1924.

Appeal from the judgment of the Magistrate's Court Jerusalem. Plaintiff sued the Defendant on a promissory note for £P. 102.500, claiming only £P. 100.— Defendant pleaded that the Magistrate had no jurisdiction.

JUDGMENT.

It is not specifically laid down in the Magistrate's Court Ordinance that a Plaintiff having cause of action for more than £P. 100, may abandon the excess, and thus sue in the Magistrate's Court for £P. 100 only.

The Defendant has denied having paid £P. 2.500 mils and there is no evidence on record to prove that Plaintiff did receive the £P. 2.500 mils.

In the circumstances we hold that the Magistrate had no jurisdiction to try the action.

We set aside the judgment of the Magistrate.

Plaintiff may institute an action in the District Court.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 45/32.

BEFORE:

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

IN THE CASE OF:

David Izmozik & Isaac Zisling — APPELLANTS.

vs

David Politch — RESPONDENT.

Once action is dismissed the Court is no longer seised of it — Application for release of attachment — Bank guarantee substituted for provisional attachment — Conservatory attachment — Release of guarantee.

JUDGMENT.

Originally the Respondent was allowed conservatory attachment on the property of Applicant. Before the trial of the action the parties agreed to the removal of the attachment, a bank guarantee being substituted therefor. The guarantee appeared to have been given guaranteeing the Respondent in this application until final judgment of the District Court.

The present Appellants won their action before the District Court, but subsequent to the said judgment the present Respondent obtained an Order from the District Court that the guarantee be released.

We are of opinion that the guarantee substituted for conservatory attachment at the request of present Respondent was released immediately the claim of present Respondent was dismissed, and that after judgment of dismissal the District Court was not seised of the action. The District Court purported to order the retention of the attachment by way of an order of execution. The action however, was dismissed and therefore there could be no question of execution.

We are of opinion that the Order of the District Court that the guarantee should remain was "ultra vires" the District Court and that the guarantee should be released.

Delivered this 13th day of May, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 97/32.

BEFORE:

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

IN THE CASE OF:

Sheikh Hussein Husni Khatib — APPELLANT.

VS

Darhalli — RESPONDENT.

Action for abatement of nuisance — Jurisdiction of Courts — Co-ownership of immovable property.

Appeal from a judgment of the District Court of Jaffa. The question was whether an action for the removal of pipes by a joint owner of premises involved ownership of land and was without the jurisdiction of the District Court. The two judges were divided in opinion and the action was dismissed by the District Court.

JUDGMENT.

It is clear that if the land of which the Appellant and Respondent are co-owners were entirely the property of the Appellant, the action could be one for abatement of nuisance and within the jurisdiction of the District Court.

It cannot affect the nature of the action or the Court's jurisdiction that the land in respect of which the action is brought is owned in common by the parties.

The appeal must be allowed, the judgment of the District Court set aside, and the case remitted.

Costs will follow the event.

In the High Court of Justice.

H. C. No. 49/33.

BEFORE:

The Acting Chief Justice and Khaldi, J.

IN THE APPLICATION OF:

Lea Goldsmith — PETITIONER.

vs

Chief Execution Officer, Jaffa
Jacob David Tobiash
Haya Rachel Tobiash — RESPONDENTS.

Action on mortgage deed — Application for order to the Chief Execution Officer—Jurisdiction of High Court.

Application for an Order to issue to the first Respondent directing him to show cause why his order dated the 24th February 1933, in Execution File No. 5472/32, should not be set aside.

ORDER.

The question at issue is what is the amount due on the mortgage deed.

This is a question to be decided by action in the competent Court, and this Court has no jurisdiction.

The Petition is dismissed.

Delivered this 12th day of September, 1933.

ADJOURNMENT.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 65/24.

IN THE CASE OF:

Mayor of Haifa (Abdel Rahman Eff. Haj) — APPELLANT.

vs

Moein Eff. Madi
Jamil Eff. Madi — RESPONDENTS.

An appearance to request an adjournmen tis a "hearing"—Opposition to judgment—Divisicn of opinion of Court.

JUDGMENT.

The Judges of the Court of Appeal being consulted it appears that three out of the six are of opinion that a mere application

and granting an adjournment is not a hearing, but something further must take place. The remaining three Judges are of opinion that any appearance of both parties before the Court for any purpose of the case is a hearing within the meaning of the rule.

So this case has to be decided by a majority of opinion.

Held by majority, Ali Eff. dissenting, that the Respondent was present at a hearing in the Court of Appeal and its judgment was regarded as contested.

His opposition is now dismissed.

Delivered the 27th October, 1925.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 49/30.

BEFORE:

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

IN THE CASE OF:

Shim'on Yaqub Shim'on — APPELLANT.

vs

Barclays Bank, Jerusalem — RESPONDENT.

Adjournment on account of sickness—Dismissal for non-appearance—Opposition to judgment by default — Medical certificate — Sec. 8, Judgment by Default Rules 1926.

Appeal from the judgment of the District Court of Jerusalem, dated the 4th April, 1930.

JUDGMENT.

It appears that when giving its judgment dismissing Appellant's opposition on the ground of his non-appearance, the District Court had not before it the Appellant's application for an adjournment on the ground of his sickness which was supported by a medical certificate.

If such application and certificate had been brought to the notice of the District Court, it would have been its duty to take them into consideration and either in the exercise of its inherent

discretion to adjourn the case, or to apply Section 8 of the Judgment by Default Rules, 1926.

We see no reason why the Court should have departed from the usual practice of allowing an adjournment upon proof of sickness of a party.

The Court, therefore, by a majority allows the appeal and sets aside the judgment of the District Court and remits the case for hearing of the opposition.

The costs of this appeal will be costs in the case.

Delivered this 3rd day of July, 1931.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 50/30.

BEFORE:

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

IN THE CASE OF:

Saleh el Ghalayini — APPELLANT.

vs

Freih Abou Middain — RESPONDENT.

Adjournment on ground of ill-health of party — Failure to file Grounds of Appeal.

Appeal from the judgment of the Land Court of Jerusalem, dated the 15th July, 1930.

JUDGMENT.

There being no Grounds of Appeal filed, the judgment being dated the 15th July, 1930, the appeal is dismissed with costs.

Any adjournment on the ground of Appellant's ill-health would only increase the costs he would have to pay, as the appeal would on his appearance have to be dismissed on the grounds stated above.

Delivered this 11th day of July, 1932.

ADMINISTRATION OF ESTATES.

In the District Court Jaffa.

C. D. C. Ja. No. 21/28.

IN THE CASE OF:

Moshe Moyal — PLAINTIFF.

vs

Salomon Jacobson — DEFENDANT.

Salary of Administrator—Jurisdiction of District Court in succession matters to prohibit Religious Court from dealing with estate—Secs. 7, 16, Succession Ordinance, 1923—Estate accounts—Jurisdiction to review order made by District Court under Succession Ordinance, 1923.

JUDGMENT.

This action is brought to obtain the refund of £. 2700 which the Plaintiff alleges has been overpaid to the Defendant in respect of his salary as administrator of the estate of the late Joseph Bey Moyal.

The Defendant was appointed administrator by the Kadi of Jaffa on the 9th of January, 1919, at a salary of £E. 100 per annum which was increased on the 10th March, 1919, to £E. 200 per annum. On the 31st of May, 1923, upon an application of Massouda, a daughter of the late Joseph Moyal, the President of the District Court, Jaffa, made an order under section 7 of the Succession Ordinance, 1923, transferring the administration of the estate within the jurisdiction of the District Court and prohibiting the Moslem Religious Court and the Jewish Religious Court or any of them dealing further with the succession of the said Joseph Moyal. This last order is still in force and since its date the administration of the estate has been carried on by the Defendant under the supervision of this Court.

On the 9th of October, 1928, the estate accounts were formally passed and approved by the District Court and in those accounts the administrator's salary for the whole period since his appointment was charged at the rate of £E. 400 per annum. This rate having been authorised by the President of the District Court.

These are the facts and the Plaintiff, asserting that he was not a party to the previous proceeding, applies to quash the order

of transfer of the 31st of May, 1923, on the ground that there was no power to transfer a succession from a Moslem Religious Court.

We are of opinion that we have no jurisriction to hear such an application. The order of transfer was made by the President of the District Court under section 7 of the Succession Ordinance and cannot be reviewed by the District Court itself. If objected to, the proper remedy is to appeal against it to the Supreme Court. The District Court is not a Court of Appeal or review from an order made under this section and this Court is bound by this order and must consider it as having full force and effect until it is reversed by a higher Court.

We have, therefore, to deal with the action on the footing that the order of transfer was a valid order. Under section 16 of the Succession Ordinance, a judge has the power to give such directions as may from time to time be required for the administration of an estate and the Supreme Court has held in the case of Treivish vs Treivish that an order made under this section is not subject to appeal; neither is it subject to revision by the District Court.

One further point. In a judgment dated the 9th October, 1923, given by Mr. Justice Seton it is recited that the accounts of the estate up to September, 1922, had been agreed to by all persons entitled with the exception of one, namely Abraham Moyal. The Plaintiff is bound by the judgment; and the accounts up to this date at any rate cannot be re-opened. From this date up till the present the rate of remuneration of the administrator is in the discretion of the Court or Judge and has been dealt with by the President acting under Section 16.

For these reasons we are of opinion that this action must fail and it is therefore dismissed with costs.

Dated the 16th day of April, 1928.

In the District Court Jerusalem.

C. D. C. Jm. 249/28

IN THE CASE OF:

Heir of Butros el Turk — PLAINTIFF.

vs

Mother Superior,
The White Franciscan Nuns — DEFENDANT.

Sec. 9, Succession Ordinance—Distribution of Estate under order of Ecclesiastical Court—Jurisdiction of Religious Court — Art. 54 (b), Palestine Order-in-Council 1922 — Concurrent jurisdiction of Religious Court.

JUDGMENT.

The facts, which are not in dispute, are as follows:

The late Butros el Turk was a monk of the Maronite Community and a Palestinian Citizen.

The Defendant is the Mother Superior of the White Franciscan Nuns.

On the 20th July, 1927, the Defendant gave the late monk Butros El Turk a promissory note for £E. 3047.580 payable on the 20th July 1928.

The monk Butros El Turk died and on 25th July 1928. The Maronite Ecclesiastical Court decreed (1) that the succession of the late monk's estate devolved on the Antonite Friary, (2) that the Antonite Friary of the Order of Saint Maron is the sole and exclusive heir to the late monk; further, the Court authorised the Reverend Yousef El Khoury El Armoni, Abbot of the said Friary, to take over the estate of the late Monk and handed over to the said Abbot all the late Monk's property including the promissory note given by the Defendant.

On 5.6.28 the President of the Ecclesiastical Court gave the Defendant a document in which the Court declared that the Defendant had handed over to the Court all she owes to the late Monk.

Certified copies of the proceedings in the Maronite Ecclesiastical Court have been filed by the Defendant.

The Plaintiff suing as one of the heirs of the late Monk claims the sum of £E. 3047.580 from the Defendant on the said Promissory Note.

The Plaintiff cited Bishop Francis Mubarak, President of the Maronite Ecclesiastical Court, as Third Party, but subsequently withdrew as against the Bishop.

At the first hearing on 9.2.1929, Counsel for Defendant contended that the Estate of the late Monk had already been distributed under the Order of the Maronite Ecclesiastical Court and therefore this Court had no jurisdiction to try the claim. He cited Section 9 of the Succession Ordinance, 1923 (Bentwich Vol. I, p. 353) in support of his contention. Per contra counsel for the Plaintiff argued that the Maronite Ecclesiastical Court had no jurisdiction to deal with the estate of the late Monk, because all the parties interested, including the Plaintiff, had not consended to the said Court's jurisdiction. In support of his contention, he referred to Art. 54 (b) of the Palestine Order-in-Council, 1922 and the judgment of the Court of Appeal in the recent case, Ibrahim El Khoury Farah v. Elias Mitri Eskuf. Further, he contended (inter alia) that if the Ecclesiastical Court had jurisdiction, the estate has not yet been distributed and so this Court has jurisdiction. (Vide Section 9 of the Succession Ordinance, 1923 to which reference was made by counsel for the Defendant).

The Court reserved its decision on the question whether the Maronite Ecclesiastical Court had jurisdiction *ab initio* and if we held that the Maronite Ecclesiastical Court had jurisdiction whether we were justified in law in entering into the merits of the claim.

On 21.2.29, the Court struck out the case under the misapprehension that both parties had applied for the case to be struck off the list, whereas in fact the Plaintiff had applied.

On 4.3.29, on the application of the Defendant, the case was re-instated and the Court heard Plaintiff's application to have the case struck out and adjourned pending a decision in a fresh action Plaintiff had filed, in which action Plaintiff seeks a declaration that he is the heir of the late Monk Butros El Turk. Defendant opposed Plaintiff's application and pressed for a decision on the question of jurisdiction in particular and asked for judgment on the case generally.

Now, assuming that this Court has jurisdiction, the Plaintiff must fail in this action, as he is not in a position to prove that he is an heir to the estate of the late Monk.

We reject Plaintiff's application and at Defendant's request have decided to give our decision on the very important questions raised.

There is no need to recapitulate the arguments of counsel because counsel for Plaintiff has kindly submitted in writing his arguments in extenso and counsel for Defendant bases his case on the terms of the Succession Ordinance.

The first question to be decided is whether the Maronite Ecclesiastical Court has jurisdiction in non-contentious matters of succession *ab intestato?* We hold that the question is governed by the Succession Ordinance of 1923 and that the Maronite Ecclesiastical Court had jurisdiction in the matter of the estate of the late Monk Butros El Turk.

It is worthy of note that Secs. 9, 10 and 25 (2) and (3) of the Ordinance provide a safety valve in non-contentious matters.

The second question is whether a District Court has jurisdiction to hear a claim by a person claiming to be an heir to an estate which has already been distributed by an Order of an Ecclesiastical Court.

In this case, although it is possible that the late Monk's estate has been distributed, that fact has not been proved to our complete satisfaction. The point is immaterial, however, as Plaintiff is not asking the Court to prohibit the Maronite Ecclesiastical Court from dealing further with the estate of the late Monk.

This question, like the first, has not, we believe, been previously decided by a Court in Palestine.

After carefully considering the history of the Religious Courts and the fact that the Civil Courts have concurrent jurisdiction in questions of succession ab intestato in certain circumstances, we have formed the opinion that a person who claims an interest in an estate which has been distributed by a Religious Court and who did not consent to the jurisdiction of the Religious Court, may bring an action in the appropriate District Court claiming his rights from the person or persons in possession thereof.

As has been stated above, the Plaintiff must fail in this action because he was not in a position to prove he is an heir.

The judgment of the Court is, therefore, for the Defendant, with costs and costs to the Third Party who had to come to Jerusalem from Haifa for the first hearing.

Given in presence this day of April, 1929, subject to appeal.

In the District Court Jaffa.

C. D. C. No. 265/28.

IN THE MATTER OF THE ESTATE OF MILAKEN HASNA BINT EL MUNAYER, Deceased.

Administration of Estates — Transfer from Ecclesiastical to District Court — Husband as guardian of minor wife — Religious degree of consanguinity — Change of Religious Communities Ordinance, 1927 — Solemnization of Marriage — Intestate succession to estate — Art. 6, Law of Inheritance of Immovable Property, 1331.

JUDGMENT.

The Administration of the estate was transferred on 19th July 1928, from the jurisdiction of the Greek Orthodox Ecclesiastical Court into the District Court of Jaffa on an application by the husband of the deceased to that effect.

The husband was originally the guardian of the deceased appointed by the Greek Orthodox Court when she was a minor. Owing to the fact that he and the deceased were cousins, and therefore within the prohibited degree of relationship as laid down in the Greek Orthodox Canon Law, they were unable to be married according to the rites of the Greek Orthodox Church. He therefore registered his appointment as guardian and married the woman in the Coptic Church. After the marriage both parties would seem to have resumed communion with the Greek Orthodox Church and shortly afterwards the woman died. All these events occured before the coming into force of the Change of Religious Communities Ordinance, 1927. The Greek Orthodox Ecclesiastical Court commenced with the Administration of the estate of the deceased until prohibited from doing so by the above mentioned order of this Court.

The present application is on a summons taken by the Administrator Mr. Chacron asking for directions as to the distribution of the estate. The heirs of the deceased according to a Certificate of Succession given by the Greek Orthodox Ecclesiastical Court are the grandmother Maryam bint Jiryes Halabi, the husband Bandali Mikhail Risk el Munayer, who was considered as a cousin only by that Court, and a large number of other cousins. The point to be decided by me is whether under the rule of distribution enforced by this Court the husband, Bandali Mikhail Risk el Munayer, should

not take a share as a husband or only a proportionate share with the other cousins, as a cousin only.

The marriage was solemnised by the Coptic Church and I have no power to say that it is not a valid marriage. In these circumstances I must hold that Bandali Mikhail Risk el Munayer is to take a share in the estate of the deceased as a husband.

The deceased having died intestate, her estate must be distributed in accordance with the provisions of Section 8(1) and 9(IV) of the Succession Ordinance, 1923.

According to article 6 of the Law of Inheritance of Immovable Property dated 1331, the husband Bandali Mikhail el Munayer will take, in any event, one half of the estate. With regards to the remaining half of the estate the grandmother Myriam bint Jiryes Halabi will in any event take one half of the remaining half, i. e. one quarter of the whole estate if the grandfather of the deceased, who is himself now deceased, left no heirs then the grandmother will take the remaining quarter, in accordance with Article 4 of the said Law. If, however, the deceased grandfather left heirs surviving him then in accordance with Article 6 of the said Law the husband will take this last quarter of the estate.

Costs of all parties in this application to come out of the estate together with £P. 2 advocate's fees to Fayes Eff. Kanafani.

Dated this 5th day of January, 1930.

In the High Court of Justice.

H. C. No. 39/30.

BEFORE:

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

IN THE APPLICATION OF:

Abed Shaker El Nabulsi — PETITIONER.

vs

Chief Execution Officer, Jaffa — RESPONDENT.

Claim of debt by administrator of estate—Payment by joint debtor of his share of debt — Attachment of Waqf — Jurisdiction of Chief Execution Officer — Opposition to judgment of High Court — Arts. 34, 36, Law of Execution — Rule 12, Judgments by Default Rules of Court — Appointment of Mutawalli and Deputy Mutawalli of Waqf — Right of beneficiary to sue on behalf of Waqf — Negligence of Sharia Court.

Application for an order to issue to the Respondent directing him to show cause why his order dated the 1st May, 1930, whereby

he refused the Petitioner's application to order the Moyal Estate and Ali Nabulsi to repay to the Petitioner all sums received by Ali Nabulsi on account of the Waqf, should not be set aside.

JUDGMENT.

The administrator of the Estate of Moyal claims a debt from the estate of Tewfik and Shaker Nabulsi. Attachment was laid on the Waqf of Haj Ismail Shaker el Nabulsi and on property belonging to Ashed Nabulsi personally. After this attachment there was paid through the Execution Office to the administrator from the income of the Waqf, and from Ashed personally a sum equal to £P. 400.840.

Ashed Effendi applied to the High Court to have the order of attachment set aside on the ground that the Waqf may not be attached and that his share should not be attached, as he had paid his share of the debt. On the 16th February, 1930, he obtained an order for the removal of the attachment.

This order was produced to the Chief Execution Officer who decided on the 28th February, 1930, to postpone any decision on it until the opposition lodged against it in the High Court by the administrator of the estate was decided.

Later the administrator of the estate produced a receipt signed by Ali Eff. acknowledging receipt of £P.125 of the Waqf money. Thereupon Ashed Eff. applied to the Chief Execution Officer and objected to the handing of that sum to Ali Effendi on the ground that he had no authority to receive money due to the Waqf and applied that that sum be recovered from Ali Eff., in accordance with the provisions of Art. 34 of the Law of Execution.

On the 1st May, 1930, the Chief Execution Officer decided that the receipt of the sum by Ali Eff. was in order and that Ashed was at liberty if he desired to sue him for the sum.

After this Ashed Effendi applied to this Court for an order setting aside the order of the Chief Execution Officer dated the 28th February, 1930, whereby he ordered postponment of execution until the question of the opposition was decided, on the ground that such order was contrary to Rule 12 of the Judgments by Default, Rules of Court, 1926, and also setting aside the order of the Chief Execution Officer dated 1st May, 1930, refusing to order recovery of the said sum, on the ground that it was contrary to Art. 36 of the Law of Execution.

It is clear from the endorsement of the Execution Officer that a sum was paid to the administrator after the attachment which was later on cancelled. This sum may be recovered after the removal of the attachment. It seems that only a sum of £P. 125 which is the subject matter of the present application, was paid back by the administrator to Ali Effendi in his capacity of Mutawalli of the Waqf. This payment was approved by the Chief Execution Officer. The approval by the Chief Execution Officer of the payment to Ali Eff. was based on a letter from the Sharia Court dated the 15th February, 1930, to the Execution Officer in which it was stated that up to date it had not been established that there was any Mutawalli other than the said Ali Eff. El Shaker.

On the 25th February, 1930, however, a letter was sent by the Sharia Court to the Execution Office stating that the judgment appointing Ali Eff. as Mutawalli of the Waqf had been set aside by the Sharia Court of Appeal on the 31st May 1920, and that the income of the Waqf should therefore be kept in the Execution Office until it be lawfully proved who is going to be in charge of the Waqf.

Later on a further letter was sent by the Sharia Court stating that Ashed was still Deputy Mutawalli (Kaim Makam) Mutawalli of the Waqf.

It is alleged that the £P. 125 was in fact paid on the 24th February, 1930, after the letter of the Sharia Court saying that there was no Mutawalli other than Ali Effendi.

It is not easy to attribute a fault to the Chief Execution Officer in approving the payment, although his statement that the High Court recognised Ashed as a beneficiary is not correct because a beneficiary of a Waqf is not entitled to sue on behalf of the Waqf except on authorisation by the Kadi. The Court recognised him as a party in the case only because he was a Deputy Mutawalli. It is the practice that a Deputy Mutawalli is appointed only when there is no Mutawalli. If the Chief Execution Officer had looked at the matter from this point he would have had no necessity to enquire from the Sharia Court about the Mutawalli.

His enquiry can only be regarded as being prompted by a desire to avoid ambiguity or error. It is very strange that the Sharia Court should admit that the judgment appointing Ali Eff.

as Mutawalli was set aside in 1920 and that it did not realise this except in 1930, i.e. 10 years later and that it should fail to state that Ashed Eff. was appointed Deputy Mutawalli and that he still functions in that capacity. We cannot therefore attribute the negligence or complications of the Sharia Court to the Chief Execution Officer.

The position of the attorney of the administrator of the estate differs inasmuch as he knew the truth and knew very well that Ali Eff. had no authority to effect transactions or dispositions on behalf of the Waqf. His reliance on the letter of the Sharia Court does not prove his good faith in what he did and does not incline the Court to approve his conduct, especially as the cheque given for £P. 125 was given after the receipt of the letter of the Sharia Court stating that the judgment appointing Ali Eff. as Mutawalli had not been confirmed.

All this creates a doubt as to the validity of the receipt dated 24th February, 1930, for £P.125, and as to whether it had in fact been paid on that date and supports the statements of Ashed Eff. that the payment was collusive between the administrator of the estate and Ali Effendi who it is established was no longer Mutawalli, and compels the Court to suspect that the conduct of the attorney of the estate in this case was not satisfactory.

In any case and in spite of all that has happened, we are of opinion that the approval by the Chief Execution Officer of the payment of £P.125 was not unjustified; but we cannot agree that Ashed Eff. should start a separate action to recover the sum from the administrator of the estate. Article 36 of the Law of Execution is clear. It is now evident that Ali Eff. is the Deputy Mutawalli. The Execution Officer should under the said Article recover the sum without retrial.

The question to whom the sum should be paid on recovery is a matter for the Chief Execution Officer.

The application is therefore granted and the rule nisi mad e absolute with £P.6 advocate's fees and costs.

Delivered this 11th day of December, 1930.

In the High Court of Justice.

H. C. No 47/30.

BEFORE:

The Chief Justice and Khayat, J.

IN THE CASE OF:

Jean Mubadda Khbeis — PETITIONER.

vs

President District Court Haifa

Evangel Matta — RESPONDENTS.

Procedure on appointment of administrator of estate — Jurisdiction of High Court — Sec. 13 (1), Succession Ordinance, 1923 — In succession matters District Court sits in judicial and not in administrative capacity.

Application for an order to issue to the President District Court, Haifa, directing him to show cause why the order given by him should not be set aside.

JUDGMENT.

This is an application for an Order to issue from the High Court to the President of the District Court, Haifa, directing him to show cause as to why he should not set aside his Order appointing Evangel Matta administrator of the estate of the Petitioner's father.

A preliminary point has been taken that there is no right of access to the High Court because this is an Order in regard to which there is an appeal from the District Court to the Supreme Court.

The appointment was made in virtue of Section 13(1) (Sec. 15 (1) in B. Vol. 1, p. 355) of the Succession Ordinance, 1923, which empowers a District Court or any Judge thereof to appoint an administrator to administer the estate of any deceased person of which the administration and distribution is within the jurisdiction of the Civil Court.

It does not appear that an application to dismiss the administrator was heard by the President of the District Court as an ordinary civil case in accordance with the Rules of Procedure in such cases,—i. e: in open court with a record of proceedings being kept and judgment given.

The case will, therefore, have to be remitted to the District Court for an application to be heard in accordance with the

procedure referred to above, the parties being informed that the Court or President thereof is sitting in a judicial and not in an administrative capacity, and if the application for the removal of the administrator is dismissed, the Applicant will have a right to appeal to the Supreme Court after taking out a copy of the judgment for service or after being served with a copy of the judgment. The stay of execution of 26.6.30 will therefore fall. £P. 4 advocate's fees and costs.

Delivered this 13th day of October, 1932.

It the Supreme Court sitting as a Court of Appeal.

C. A. No. 122/31.

BEFORE:

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

IN THE CASE OF:

Helen, widow of Lazarus Dimitriadis APPELLANT.

vs

Atanas Dimitriadis RESPONDENT.

Resignation of administrator — New administrators appointed by District Court— Appeal made against question not decided by trial Court.

Appeal from the judgment of the District Court of Jerusalem, dated 11th June, 1931.

JUDGMENT.

The Appellant is appealing against a judgment given by the District Court on 11th June, 1931, whereby two persons were appointed administrators of the estate of Lazarus Dimitriades, deceased, in the place of Dr. Nazha, who had been appointed administrator by a judgment of the District Court dated 1st April, 1931, but had subsequently resigned.

The appeal submitted relates solely to the question of jurisdiction. That question, however, was decided by the District Court in its judgment dated 1st April, 1931, against which no appeal has been made and consequently the Appellant cannot now be heard to argue that question.

The appeal is dismissed with costs.

Delivered this 30th day of March, 1932.

In the Supreme Court sitting as a Court of Appeal.

L. A. No 55/32.

BEFORE:

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

IN THE CASE OF:

Heirs of Sara Vijansky — APPELLANTS.

vs

Abraham Khojainoft and nine others — RESPONDENTS.

Administration of estates is not a matter of personal status—Jurisdiction of Rabbinical Court to appoint administrator of estate of miri property — Arts. 51, 57, of the Palestine Order-in-Council, 1922—Secs. 6, 19, Succession Ordinance, 1923—Law of Inheritance of Immovable Property 1908—Law of Community does not apply to miri land — Hearing adjourned for notice to be sent to proper parties.

JUDGMENT.

The question is raised whether a Rabbinical Court has power to appoint an administrator of miri land.

Under the Palestine Order-in-Council, 1922, the administration of an estate of a dead person is not one of the matters of personal status as defined by Art. 51 of the Order in which Religious Courts are given jurisdiction.

Art. 57, however, confers upon the High Commissioner power to vary the "constitution and jurisdiction" of Religious Courts by Ordinance or order.

In exercise of such power there has been enacted the Succession Ordinance 1923. Sec. 6 (1) of that Ordinance declares that:

"The Courts of each of the specified Religious Communities shall have jurisdiction in matters relating to the intestate succession upon death to persons who at the date of their death were members of the Community."

Sec. 6 (2) provides that:

"Subject to the provisions of Sec. 19, the estates of such persons shall be administered and distributed in accordance with the law of the Community."

Sec. 19 therein referred to declares that the provisions of the Ottoman Law of Inheritance of Immovable Property of February 27, 1908, shall be observed with regard to miri land.

It follows that whatever power a Religious Court may have to appoint an administrator to administer and distribute the

immovable and mulk property of an intestate "in accordance with the law of the Community", a matter upon which we express no opinion, there can be no such power as regards miri land for the administration of miri land is not a matter to which the law of the Community can apply.

It follows that we have not before the Court the proper parties.

The hearing must be adjourned for notice of the appeal to be given to the heirs of Sara Vijansky as set out in the Rabbinical Court's certificate, or to the guardian of any heir who may be a minor.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 55/32.

BEFORE:

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

IN THE CASE OF:

Heirs of Sara Vijansky — APPELLANTS.

vs

Abraham Khojainoff and nine others — RESPONDENTS.

Jurisdiction of Rabbinical Court to appoint administrators of estate of miri property—Failure to register in Land Registry—Registration in unofficial land books of Hedera Colony as proof of title—Time for payment of fees of appeal under Land Settlement Ordinance—Deed of gift of land made in 1905.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Haifa setting aside a decision by the Settlement Officer, Hedera.

The first point raised by the Appellants is that as fees for the appeal to the Land Court were not paid within the prescribed period, there was no appeal properly before the Land Court. The Land Settlement Ordinances, however, do not fix any limit of time within which appeal fees must be paid in a case where leave to appeal has been granted under the Land Settlement Ordinance, 1928, Section 56 as amended, and this ground of appeal, therefore, fails.

With regard to the merits of the case, the Appellants argue that the Land Court was wrong in accepting an entry in the unofficial land book of Hedera Settlement as a proof of the Respondents' title.

The entry in the land book records with regard to the land of Shabatai London, reads:

"His son has received a deed of gift of the whole land, 28th Heshvan, 665".

On the strength of this entry, his son Aharon London, who was made a third party to the proceedings in the Land Court, sold about two dunams of land some 25 years ago to the Respondent Yousef Abutbul, and in 1924 sold the rest of the land to the remaining Respondents and other persons who in turn resold to those Respondents.

These transactions were carried out by entries in the land book of Hedera Settlement. No entries were made in the Land Registry and the land remains registered in the name of Shabatai London.

On behalf of the Appellants, who are the heirs of Sara Vijansky, the daughter of the late Shabatai London, it is pointed out that the entry in the land book does not record that the deed of gift was produced on the date on which it was executed. It is further argued that as Shabatai London had two sons, the entry is insufficient to prove that Aharon was the son to whom the gift was made.

These arguments are, in our view, well founded, and we hold that entry in the Hedera land book cannot be accepted as evidence in favour of the Respondents as against the heirs of the registered owner, Shabatai London.

The judgment of the Land Court, is, therefore, set aside. The heirs of Sara Vijansky are entitled to be entered in the Schedule of Rights as owners of one out of three shares of the miri land included in this action other than the two dunams comprised within Parcel 20/162 sold to the Respondent, Yousef Abutbul.

With regard to these two dunams, the Settlement Officer had not made a finding as to possession, and the case must be remitted to him to determine whether, upon the evidence heard by him and such further evidence, if any, as may be submitted, the Respondent Abutbul had, at the time of the commencement of this action, been in undisturbed possession for a period of ten years. In such case the Respondent Abutbul is entitled to be entered in the Schedule of Rights as owner, under Section 2 of the Registration of Land Ordinance, 1929. If, however, the Settlement Officer shall find to the contrary, the Appellants are to be entered as owners of one out of three shares in the two dunams in question.

As regards Parcel 20/98 to which the Settlement Officer had held that the mulk law of inheritance applies, the Appellants are entitled, as held by the Settlement Officer, to one share out of five, and the supplementary order by the Settlement Officer the 9th June, 1931, is referred back to him to be amended in accordance with this finding.

As between the Appellants and the Respondents other than Abutbul, the costs of this appeal will be paid by the Respondents. As between the Appellants and the Respondent Abutbul, costs will follow the event.

In the High Court of Justice.

H.C. No. 15/33.

BEFORE:

The Senior Puisne Judge, and Frumkin J.

IN THE CASE OF:

The District Commissioner, Jerusalem, in his capacity as Administrator of the Properties of the Palestine Orthodox Society.

District Commissioner as administrator of the properties of the Palestine Orthodox Society — Duties of administrator — Injunction against administrator—Secs 3-4, Administration of Russian Properties Ordinance, 1926.

An order nisi was issued to the Respondent directing him to show cause why the following orders should not be made against him:

(a) For the payment out of moneys necessary to pay advocate's fees in connection with an action in Beirut for the recovery of property belonging to the Petitioners.

(b) For the payment out of moneys paid by Petitioners to Respondent, their banking account which is under the control of Respondent being proceeds of personalty realized by the Petitioners.

(c) For restraining the Respondent from paying over Petitioners' moneys by way of loan or otherwise to the credit of the Russian Ecclesiastical Mission.

(d) For payment out of £P. 50 allowance for the travelling expenses of a bookkeeper.

(e) For restraining the Respondent from executing a lease made between him as administrator of the properties of the Mission and Petitioners of the one part and Issa Hasboun of the second part.

(f) For restraining the Respondent from making allowances out of the revenues of Petitioners' properties for payment of tuition fees at non-Orthodox schools in respect of children of Orthodox Russian Immigrants.

[Ed. Note: Orders (a) (b) (d) (f) were made absolute by order of Oct. 13,1933. The judgment reported deals with (c) & (e).]

JUDGMENT.

With regard to Petitioner's application for an order restraining the Respondent from transferring or paying over any moneys forming part of the revenue of the properties of the Petitioner in the hands of the Respondent to the Russian Ecclesiastical Mission we hold that the true construction of Section 4 of the Administration of Russian Properties Ordinance 1926 is that the administrator may apply any part of the revenue received by him under Section 3 of the Ordinance for any of the purposes specified in Section 4 without regard to the source from which such revenues arise.

Moreover Section 4 expressly directs that such revenues shall be applied

> "in particular for (inter alia) the maintenance of Russian Orthodox Churches and Institutions".

and the latter term in our opinion, includes the Russian Ecclesiastical Mission. On this point, therefore, the Petitioner fails.

The Petitioner is also taking objection to the term of the lease which the administrator has agreed to grant of property the ownership of which is in dispute between the Petitioners and the Russian Mission.

We do not appreciate the force of this objection.

The administrator is not in a position to state the exact share of the land to which each of the Societies is respectively entitled, nor is there any reason why he had to do so.

Still less is there reason for him to recite in the lease granted by him, the fact that such shares are in dispute. He has done all that is necessary as regards notice to the tenant by declaring in the building agreement (Exhibit 13) that the grant of permission to the tenant to enter upon the land is without prejudice to the respective claims to the ownership of the land of the two societies.

Upon the points argued before us to day, therefore, the Petitioner fails.

Upon the other points raised in the petition an order absolute will issue.

ADMISSION.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 71/25.

BEFORE:

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

IN THE CASE OF:

El Haj Muhammad Abu Mustafa — APPELLANT & RESPONDENT.

vs

Government of Palestine — APPELLANT & RESPONDENT.

Admission of possession of land without right — Registration of ownership — payment of bedl-el-misl under Art. 78 Land Code claimed by the Government.

Appeal from the Judgment of the Land Court of Jaffa dated 27.3.25 whereby El Haj Muhamad Mustafa Abu Jabara was declared to be entitled to be registered as owner of 78 dunams and 123 pics of the land near Karakra at El-Massoudiah upon payment of bedl-el-misl of the said land according to its value at the time when he first took possession of it, that is, ten years ago, and his claim as to the rest dismissed.

JUDGMENT.

The Court upon hearing both parties holds that judgment should be entered in favour of Appellant Haj Muhammad Mustafa Abu Jibara for 78 dunams and 123 pics, without payment of bedl-el-misl under Art. 78 of the Land Code, as it was not shown that he made any admission of having taken possession without right.

The Appellant's appeal as to bedl-el-misl is allowed, and the Government's appeal as to bedl-el-misl is dismissed. His appeal as to the rest of the land is dismissed.

No order is made as to costs.

Delivered in presence of both parties this 30th day of December, 1925.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 93/25.

BEFORE:

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

IN THE CASE OF:

Yusef Jirius El-Nafel — APPELLANT.

VS

Miriam Eisa Abdo, in her capacity as guardian of her minor daughter Rasmia — RESPONDENT.

Written admission by deceased person — Denial of signature and seal of document — Allegation of false admission — Request to hear evidence of witnesses to deed — Where no written evidence oath may be tendered to establish admission is false.

Appeal from the judgment of the District Court of Jerusalem dated April 28th, 1925.

JUDGMENT.

The Respondent's claim is based upon an admission signed and sealed by her late husband Aisa Jirius Nafel.

The Appellant at first denied the authenticity of the signature and seal. When this was proved, he set up the further defence that the admission was false, and asked that the witnesses to the deed should be heard. He also claimed that the admission was made in mortal sickness, and was thus invalid. The rule however in such a case is clear. A party who has denied the authenticity of a document cannot when the document is proved to be genuine, call witnesses to prove that the contents of the document are false.

In default of written evidence, the person alleging that an admission is false can only ask for an oath to be administered to the other party.

The oath has not been demanded, and hence the appeal must fail.

Costs of this appeal are to be paid by the Appellant.

Delivered in presence this 29th day of March 1926.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 60/27.

BEFORE:

The Chief Justice, the Senior British Judge and Frumkin, J.

IN THE CASE OF:

Maim Abyad — APPELLANT.

vs

Heirs of Fritz Keller — RESPONDENTS.

Written acknowledgment against interest as evidence — Sufficiency of document to obtain registration of land as owner — Effect of direction in will to fulfill moral obligation — Lapse of legacy by predecease of testator.

Appeal from the judgment of the District Court of Haifa dated 3rd Jan., 1927.

JUDGMENT.

The acknowledgement of 1895 by F. Keller that subject to payment of half of the purchase money, G. Abyad was entitled to half of Roges land, was not a document of such a nature that Abyad could have successfully maintained an action upon it in the Land Court for registration as owner of half of the land. It follows that he could not on that document alone succeed in a claim for half of the purchase money.

Thus when F. Keller made his will in 1910, there was, so far as the evidence before us goes, no legal obligation upon him towards Abyad in respect of the land.

Hence the direction contained in his will to his sons "to fulfill the promise of which they knew that I gave to Mr. George Abyad concerning the half share of the net profit" can only be regarded as a direction to futfill a moral and not a legal obligation. That is to say the position must be regarded as a legacy to Abyad, which in consequence of his having predeceased his testator, has lapsed.

The appeal must be dismissed with costs.

Delivered in presence this 30th day of November, 1927.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 117/27.

BEFORE:

The Chief Justice, Khaldi J. and Khayat J.

IN THE CASE OF:

Hassan Suleiman and others — APPELLANTS.

vs

Muhammad Hassan Mustafa Hassan — RESPONDENT.

Admission in Power of Attorney of receipt of money—Party called as witness—Refusal by Court to administer oath to witness of party requesting.

Appeal from the judgment of District Court of Jerusalem dated 3rd May, 1927.

JUDGMENT OF THE DISTRICT COURT.

Upon consideration of the case brought by George Eff. Salah on behalf of the Plaintiff Moh'd Hassan Moustafa Hassan claiming £E. 266.660 from the Defendants Hassan Souleiman, Houssein Souleiman, Ayista Souleiman, Hassan Zaghloul, Fatimeh Zaghloul, all of Beit Iksa village by virtue of a deed of Power of Attorney dated 18/1/23 by which Defendants admit having received the said sum etc. as shown in his statement of claim of 20.1.27 the Court holds that:

1. Whereas the claim of the Plaintiff is based upon a deed dated 18.1.23;

2. Whereas Defendants' advocate denied that his clients have received the sum in claim and asked to hear the Plaintiff as witness in the case;

3. Whereas the Court heard the Plaintiff as a witness who stated in his evidence on oath that he paid the sum to the Defendants and that their admission made in the deed in question is not false;

4. Whereas Defendants' advocate was not satisfied with the evidence given by the Plaintiff and asked to administer an oath to him to the effect that his clients were not false in their admission in the said deed and to postpone execution but the Court refused his request as regards the administration of the oath being inadmissible.

Therefore the Court decides to give judgment against the Defendants for the sum of £E. 266.660 to be paid to the Plaintiff Mohamad Hassan Loutfi in proportion to their shares in this

sum with legal interest thereon from the date of the action plus costs and expenses of £E. 2 advocate's fees dismissing his application as regards his postponment of the execution. Judgment in presence.

This 3rd May, 1927.

JUDGMENT.

The Court sees no reason for interfering with the judgment of the Court below which is therefore affirmed. The appeal is dismissed with £P. 2 advocate's fees and costs.

Delivered this 3rd day of April 1928.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 78/28.

BEFORE:

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

IN THE CASE OF:

Jamillah Bint Mohamad Surhan — APPELLANT.

vs

Ibrahim Mohamad Haj El Husseini — RESPONDENT.

Allegation of false admission — Admission made before the Land Registry in a land transaction cannot be proved false by administering oath to other party.

Appeal from the judgment of the District Court Jaffa, dated May 8th, 1928.

JUDGMENT.

The question raised in this appeal is whether after having made an admission before the Land Registry in a land transaction, the person making the admission can subsequently set up the defence that such an admission was a false admission and request the oath to be taken by the person in whose favour the admission was made.

The question has been decided by the decision in Civil Appeal No. 306/20, the Court giving the judgment holding:—

> "that an allegation of a false admission cannot be heard as against the admissions made before the Land Registry".

Accordingly as the claim cannot be heard, the oath cannot be put by the Appellant and the appeal must, therefore, fail and the judgment of the lower Court be confirmed.

Delivered this 18th day of September, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 100/29.

BEFORE:

Puisne Judge Baker, J., Jarallah, J. and Khaldi, J.

IN THE CASE OF:

Salah el Hamdan — APPELLANT.

vs

Ragheb el Sukhon — RESPONDENT.

Verbal admission of payment—Plea of part payment of promissory notes—Notarial Deed of Settlement—Books of account as evidence—Art. 69 Civil Procedure Code—Art. 12, Law of Evidence Amendment Ordinance, 1924—Party may be called as witness by the other party—Lower Court to state grounds on which it rejects evidence of admission before witnesses.

Appeal from the judgment of the District Court of Nablus dated June 2nd, 1929.

JUDGMENT.

This is an appeal against the judgment of the Nablus District Court whereby the said Court adjudged Appellant to pay Respondent the sum of £P. 473.179 with interest, costs, etc.

The action was brought on eight promissory notes drawn in Respondent's favour. Appellant alleged that part of the sum total had been settled and the balance had been embodied in a notarial deed drawn up before the Notary Public of Tulkarem on the 16th May, 1928, in Respondent's favour for the sum of £P. 650. Appellant also alleged that at the time the notarial deed was drawn, Respondent admitted in the presence of witnesses that Appellant owed him nothing but the sum embodied in the said notarial deed for £P. 650.

The Lower Court caused the Respondent to produce his books and presumably in view of their judgment and the oath the Respondent took they were satisfied with the books and that the books produced were the only books.

Appellant requested the Lower Court, by virtue of Art. 69 of the Civil Procedure Code, to hear these witnesses arguing that there was good reason to believe that Respondent's admission was true. Appellant also requested that by virtue of Art. 12 of the

Law of Evidence Amendment Ordinance, 1924, the Respondent be called by the Lower Court to give evidence of the amount due to him. The Court refused both these requests and it is against such refusal that the appeal is made.

With regards to the first ground of appeal i. e. the refusal to hear oral evidence relating to an alleged admission made by Plaintiff, Art. 69 of the Code of Civil Procedure provides, inter alia:

> "it shall not be lawful to prove by the statements of witnesses the admission of any party made otherwise than before a Court, unless there be good reason to believe that such admission was true."

The Lower Court have stated no reasons for their refusal to hear such evidence and we are of opinion that where there is evidence of the nature hereinbefore mentioned the Lower Court should state the grounds upon which their rejection is based.

With regards to the second ground of appeal, the refusal of the Court to allow Appellant to call as witness the original Plaintiff, we are of opinion that the last paragraph of Art. 12 of the Law of Evidence Amendment Ordinance enables the Appellant to call Respondent as a witness.

Accordingly the case must be returned for the Lower Court to set out its reasons for rejecting the evidence of Respondent's alleged admission and also to enable Appellant to call Respondent as a witness in the case and to give a fresh judgment.

With regard to the cross-appeal relating to an alleged mathematical mistake in the conversion of Egyptian currency into Palestine currency, the Lower Court must consider this and give a decision theron at the same time:

Costs in the cause.

Delivered this 16th day of April, 1931.

In the Supreme Court sitting as a Court of Appeal

L. A. No. 9/30.

BEFORE:

Puisne Judge Baker, J., Jarallah, J. and Frumkin, J.

IN THE CASE OF:

As'ad Dib el As'ad
Said Dib el As'ad — APPELLANTS.

vs

Dawud Bdeir — RESPONDENT.

Admission made in another case as evidence—Relevancy of admission in contract—Refusal by Court to call witnesses to disprove an entry in the Land Registry — In cases of Musha'a oral evidence is admissible to prove customary law of village.

Appeal from the judgment of the Land Court of Nablus dated the 18th February, 1930.

JUDGMENT.

The Appellants, the original Plaintiffs in this case, in their statement of claim and before the Land Court relied on an admission made in a previous case by Defendant which was alleged to be contained in a contract of sale between Appellants and Respondent.

The Land Court found as a fact that the said admission did not relate to the land, the subject matter of the present appeal, and could not therefore be relevant to the case. Appellant then requested the Court to hear witnesses to disprove an entry in the Tabu. This the Land Court quite properly refused to do and dismissed Plaintiff's claim.

Appellants in their appeal now request that the Lower Court should be ordered to hear evidence to prove that land registered in the name of a certain person does not in fact belong to such registered person but that he holds a portion thereof as nominee of others.

This Court has held that in cases where land is held in common for the whole of a village, oral evidence may be submitted to prove the customary law of the village. There is, however, no question of the customary law of a village involved in the present case. Accordingly the appeal must be dismissed with costs and advocate's fees and travelling expenses assessed at £P. 3.500 mils.

Delivered this 25th day of November 1931, in presence of the Respondent and absence of Appellants.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 104/31.

BEFORE:

The Chief Justice, Khaldi J. and Khayat J.

IN THE CASE OF:

Joseph Yomtov Danon — APPELLANT.

vs

Etty A. Haim (Mrs. Danon) — RESPONDENT.

Admission made in favour of a third person — Renunciation of ownership — Contradictory claims.

Appeal from the judgment of the District Court of Jerusalem, dated 3rd August, 1931.

JUDGMENT.

The facts herein are that Plaintiff claimed ownership of the property for himself in a notice addressed to a Third Party and that he then in this case claimed that half of the property belonged to his wife.

We hold that the two claims are not contradictory because Plaintiff's present case consists of a renunciation of ownership and an admission in favour of a Third Party of half of what he claimed in the notice.

We therefore set aside the judgment and remit the case to the District Court to enter into the merits of the case and give judgment accordingly.

Costs to follow the event.

Delivered this 19th day of February, 1932.

ADMISSION—

SEE ALSO: CRIMINAL PROCEDURE, EVIDENCE, LAND REGISTRY.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 14/32.

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

IN THE CASE OF:

Anishe Bint Hassan Hamideh — APPELLANT.

vs

Shehade As'as Khouri — RESPONDENT.

Admission made before the Land Registry — Admissibility of parol evidence.

Appeal from the judgment of the Land Court of Haifa, dated 8th December, 1931.

JUDGMENT.

In accordance with the principle laid down by this Court that no parol evidence is admissible to disprove an admission made before the Land Registry, the appeal must be dismissed and the judgment of the Lower Court confirmed with costs and advocate's fees, assessed at £P. 2. |

Delivered this 9th day of June, 1932.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 20/32.

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

IN THE CASE OF:

Ibrahim Abu Habib — APPELLANT.

vs

Said Mahmoud Yasin — RESPONDENT.

Messrs White & Son
Philip Batty — THIRD PARTIES.

Admissions made before the Land Registry in land transaction — Plea by party making admission that his admission is false—Request for oath to prove falsity of admission.

Appeal from the judgment of the Land Court Jaffa dated the 15th February, 1932.

JUDGMENT.

Following the judgment in Civil Appeal No. 78/28, Civil Appeal No. 306/20 and Land Appeal No. 137/20, wherein it was decided that a person once having made an admission before the Land Registry in a land transaction, the person making the admission cannot subsequently set up the defence that such an admission was a false admission and request the oath to be taken by the person in whose favour the admission was made, neither can an allegation of a false admissison be heard as against admissions made before the Land Registry.

Accordingly the appeal must be dismissed and the judgment of the Land Court affirmed with costs and advocate's fees assessed at LP. 3 each.

Delivered this 7th day of June, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 110/32.

BEFORE:

Mr. Justice Baker, Frumkin, J., and Khayat, J.

IN THE CASE OF:

Haj Saleh Agha Abu Ramadan — APPELLANT.

vs.

Haj Muhammad Nimer Nabulsi — RESPONDENT.

Denial of admission before the Land Registry by person making the same—Claim that mortgage deed registered in Land Registry contained usurious interest—Plaintiff's own evidence to establish claim of usurious interest — Availability to Plaintiff of Usurious Loans Evidence Ordinance, 1922—Art. 80 Civil Procedure Code—Absence of party due to illness.

Appeal from a judgment of the District Court of Jaffa, dated July 17th, 1932,

JUDGMENT
of
MR. JUSTICE BAKER.

This is an appeal from a Judgment of the Jaffa District Court dated July 17, 1932, whereby a claim by the present Appellant that a mortgage deed registered in the Land Registry contained usurious interest was dismissed.

The Lower Court heard the evidence of the Defendant (the present Respondent) who denied usurious interest and the Court was satisfied therefrom that it would be futile to hear the Plaintiff in the case (the present Appellant), in view of fact that his evidence would remain uncorroborated and would be evidence contradicting an admission made by him before the Land Registry, and accordingly dismissed Plaintiff's claim.

This Court has already decided in Civil Appeal No. 78/28 following a decision in Civil Appeal No. 306/20 that where a person makes an admission before the Land Registry, the person making such an admission cannot subsequently set up the defence that such an admission was false. In this appeal there is only the evidence of Respondent in which he substantiates the document, and I am of opinion that by virtue of the before mentioned decisions and by virtue of Article 80 of the Civil Procedure Code as amended, any evidence Appellant might give against the document would be inadmissible and that the Lower Court quite properly excluded it. This is further supported by the decision in Civil Appeal No. 54/32 (following Civil Appeal No. 54/29) whereby it was decided that a Plaintiff cannot avail himself of the provisions of the Usurious Loans Evidence Ordinance, 1922, which is restricted to the case of a plea by a Defendant.

Accordingly the judgment of the Lower Court must be affirmed and the appeal dismissed with costs and £P. 2.— advocate's fees.

JUDGMENT
of
MR. JUSTICE FRUMKIN AND MR. JUSTICE KHAYAT.

The Plaintiff in this case wanted to prove by parol evidence (of himself) that a mortgage debt included usurious interest. The Court, after having heard Defendant, and having found some difficulty in hearing the evidence of Plaintiff owing to his sickness, gave judgment against Plaintiff, there being no evidence to prove his case.

It has already been held by this Court (in Civil Appeal No. 54/29) that a Plaintiff cannot avail himself of the provisions of the Usurious Loans Evidence Ordinance 1922 to establish usurious interest by oral evidence. For this reason alone, the appeal must be dismissed with costs.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 77/33.

BEFORE:

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

IN THE CASE OF:

Bishara Assileh — APPELLANT.

vs

Fuad Saad — RESPONDENT.

Admission made in Land Registry is restricted to property in respect of which it was made — Transfer of land at Haifa — Sale without consideration — Correction of Land Registry — Settlement of accounts containing full release — Acts as admissions of ownership — Discharge of debt.

JUDGMENT.

This appeal arises out of an action brought in the District Court of Haifa by the Appellant, Bishara Assileh, who claimed from the Respondent, Fuad Jubran Saad, the sum of £P. 5747.385 the price of 18,652 square dra's of land at Haifa, sold by the Respondent to Mr. Yehuda Ittin.

The relevant facts are as follows:

In December, 1319, a plot of land containing 60,000 square pics registered in the name of Khatoum Saad (the Respondent's sister) was divided into two plots containing 35,000 and 25,000 square pics respectively.

During the same month, the larger of these plots was sold to the Appellant by registered transfer.

In November, 1329, this plot was transferred by the Appellant to the Respondent, the transaction being registered as a sale for no consideration.

On the 9th of November, 1923, the Respondent obtained a correction of the Land Registry with regard to this plot, the corrected area being recorded as 23 dunams 265 pics, that is 37,065 square pics.

At the same time the plot was divided into two portions with a road separating them. The area of the North-East portion, plot (b) on Exhibit X, was recorded as 11 dunams and 718 square pics, that is, 17,918 square pics, and the area of South-West portion, plot (a) on Exhibit X, was recorded as 10 dunams and 1,279 square pics; the balance being the area of the road separating plots (a) and (b).

On the 21st February 1925 the Respondent filed in the Land Registry an application for a further correction of the Register. In this application the Respondent stated that the correction of area previously made was erroneous, the Southern portion having been omitted.

The application was approved and on the 18/19 May, 1925 the registration as regards plot (a) was amended so as to include the plot adjoining it to the South-West, plot (c) on Exhibit X, and the road running between (a) and (c).

The areas of plots (a) and (c) were recorded as 17.317 square pics and 18,652 square pics respectively and the total area including the road as 37,301 square pics.

This correction of areas was followed by the registration on the same date of a transfer upon sale of plot (c) to Yehuda Ittin. It is the purchase money received in respect of this sale which is the subject matter of this action.

On the 27th of May, 1925, there was a settlement of accounts between the Appellant and the Respondent. This settlement arose from the fact that the Respondent, who admitted that plots (b) and (a) had been transferred by him as security for a debt due from the Appellant to Archbishop Hajjar, had sold the plots and had applied the purchase moneys in settlement of the Appellant's liability to the Archbishop. Upon the occasion of the settlement the Appellant signed the following statement.:

"I have no claim whatsoever against Mr. Fuad Saad". The settlement contained no mention of plot (c).

In 1929 the Appellant brought an action against the Respondent claiming an account as regards the purchase money of plots (a) and (b). This action which contained no reference to plot (c) was eventually dismissed.

On the 31st of January, 1932, the Appellant commenced the present action. His case is that the Respondent has admitted that the transfer to him registered in November, 1329 was not an absolute sale but was a transfer by way of security only; that when the Respondent applied in February 1925 for a correction of the Register so as to include plot (c) as part of the property registered in his name under the transfer from the Appellant, the Respondent made an admission that plot (c) was part of the land so transferred to him; that it follows that the Respondent has admitted that he was registered as owner of plot (c) by way of security only; and that as the debt secured by the transfer of the

Respondent has now been fully discharged, the Respondent is trustee for the Appellant of plot (c) or its proceeds of sale.

The Respondent's explanation of his application in 1925 which resulted in plot (c) being included in the land registered in the Respondent's name by virtue of the transfer to him from the Appellant is that he bought plot (c) by unregistered purchase from Khatoum Saad and that in order to avoid the trouble and expense of getting plot (c) registered in Khatoum Saad's name and transferred to the Respondent, the official who at that time was Land Registrar of Haifa advised him to add it to the adjoining property registered in his name by the method of correction of area, which accordingly he did.

The District Court has given judgment in the following form :—

> "Unfortunately for the Plaintiff, however, it seems to us that his own conduct precludes him from succeeding in this action. He admits that he erected a wall around his property in the year 1329 and that plot (c) was not included within it and he admits, likewise, that he instructed a surveyor in the year 1924 to make a plan of the property and draw up a parcellation scheme and that again plot (c) was excluded.
>
> It seems to us in the absence of any adequate explanation that each of these two acts of the Plaintiff constituted a clear and unequivocal admission on his part that plot (c) did not belong to him and that in bringing this action he is not so much seeking to enforce a right which he genuinely believes to be his, as attempting to turn to his own advantage certain proceedings in the Land Registry which were undoubtedly irregular.
>
> "Judgment will be entered for the Defendant with costs to include advocate's fees which are fixed at £P. 5."

In appealing against this judgment the Appellant argues that neither the erection of a wall around plots (a) and (b) nor the preparation of a parcellation scheme for those two plots excluding in each case plot (c) was,

> "a clear and unequivocal admission on his part that plot (c) did not belong to him."

He further argues that even if either of such acts does constitute an admission on his part the effect of such admission is nullified by the subsequent admission to the contrary on the part of the

Respondent in applying to have plot (c) registered as part of the land transferred to him by the Appellant.

The Appellant further argues that the Respondent's admission having been made in proceedings in the Land Registry the Respondent cannot be heard to allege that the admission is false. In support of this argument the Appellant cites the decision of the Court of Appeal established under O.E.T.A. (S) in Civil Appeal No. 306/20, Khadijeh Ismail Abu Khadra v. Ammeh Khalil Abu Khadra; and the judgments of this Court in Civil Appeal No. 78/28, Jamile bint Mohamed Sarban v. Ibrahim Mohammed Faraj El Hussein, and Land Appeal No. 20/32, Ibrahim Abu Habib v. Said Mohammed Yasin.

Thus the Appellant's case is that whatever he himself may have done or omitted to do the Respondent is bound by his own irrebuttable admission that plot (c) was included in the land transferred to him by the Appellant and by his admission that the transfer to him by Appellant is by way of security only; and that the latter admission, though it may be rebutted, can only be rebutted by the administration of an oath to the Appellant under Article 1589 of the Mejelle.

With regard to this argument we hold that the Appellant is right in his view that neither the erection of a wall around plots (a) and (b) nor the preparation of a parcellation scheme for those two plots omitting plot (c) is a clear and unequivocal admission by the owner of those two plots that he does not own the adjoining plot. These are, however, facts from which the District Court was entitled to draw an inference and in the absence of a satisfactory explanation by the Appellant they undoubtedly go to show that he did not at that time regard himself as the owner of plot (c).

The fact (not mentioned in the District Court's judgment) that in 1929 the Appellant brought an action against the Respondent with regard to the proceeds of sale of plots (a) and (b) and in that action omitted all references to plot (c) the sale of which took place about 10 days before the commencement of action seems to us an even stronger indication that the Appellant claimed no right with respect to plot (c). To claim an account of the proceeds of sale of mortgaged property and to omit from that claim all reference to the proceeds of sale of one-third of the security is a proceeding for which we can find no reasonable explanation. The Appellant says that his object in bringing the action was that he hoped to obtain an admission with regard to plot (c). This explanation is quite unacceptable. The Appellant already

had the one admission that he could hope for, namely, that plot (c) was part of the land transferred to the Respondent by the Appellant.

The Appellant however contends that the Respondent is bound by the admissions that he has made and therefore cannot prove either the erection of the wall, the parcellation or the action brought in 1929 to rebut his own admissions.

In dealing with this argument we will consider first the latter of the two admissions, namely, that made by the Respondent when he applied to have plot (c) included in his registered land.

The rule that an admission made in a formal document in the Land Registry cannot be rebutted by whom it was made, however inconvenient that rule may be, appears to us to be established by the cases cited by the Appellant. It follows that the Respondent cannot now bring evidence to prove that plot (c) was not transferred to him by the Appellant.

When however we turn to consider the admission by the Respondent that the land transferred to him by the Appellant was transferred by way of security it seems to us that the Appellant's argument breaks down.

We have not before us evidence as to the precise terms of that admission nor do we know when it was made but it is clear that the admission was made in proceedings which in no way relate to plot (c). The binding force of this admission must be restricted to the property with respect to which it was made, that is to say, to plots (a) and (b). As regards plot (c) the Respondent has never made such an admission. The Appellant can of course ask the Court to infer from the fact that plots (a) and (b) were transferred to the Respondent by way of security that plot (c) was transferred upon the same terms. But that is a very different matter from relying upon a binding admission by the Respondent and the Respondent is free to bring evidence to disprove the inference which the Appellant is asking the Court to make. Accordingly, the evidence as to the erection of the wall by the Appellant, the parcellation and the action in 1929 is admissible. With this evidence before us we see no ground for setting aside the judgment of the District Court and the appeal is dismissed, with costs and advocate's fees assessed at £P. 5.

Delivered this 23rd day of February, 1934.

ADVOCATES

In the High Court of Justice.

H. C. of 1925

IN THE CASE OF:

Omar Eff. El Salah — PETITIONER.

vs.

Supreme Moslem Council — RESPONDENT.

Appearance of advocate before Sharia Court—Jurisdiction of Supreme Moslem Council—License to practice as advocate is granted only by Chief Justice—Arts. 3, 4 and 5, Advocates Ordinance, 1922—Legislative acts of Provisional Government.

JUDGMENT.

This is an application by an advocate, licensed by the Chief Justice under Secs. 5 and 7 of the Advocate's Ordinance, 1922 to appear in Moslen Religious Courts, for an order forbidding the President and members of the Supreme Moslem Council to interfere with the Qadi of Jerusalem by directing him to refuse audience to advocates licensed by the Chief Justice and not by the Moslem Supreme Council. It appears from a copy of the proceedings before the Sharia Court of Jerusalem of the 14th of July 1925, that the advocate appeared before the Court on that date and was refused audience on the authority of two communications received from the Supreme Moslem Council. The first referred to an interview held in June 1924 with the Chief Justice and contains an extract from a letter subsequently written by the Council to the Chief Justice in which occurs the following passage:—

> "The Advocate's Ordinance in question appeared after the constitution of the Supreme Moslem Council which Council was given charge of all Sharia affairs. Any provision in the said Ordinance which is in conflict with any of the admitted rights cannot be maintained. The Council had already been desirous to consult Your Honour with a view to amending the Advocate's Ordinance so as to render it just and equitable. More than a year ago, a committee delegated by the Supreme Moslem Council had interviewed Your Honour and you promised to send your observations on the subject, and the Council is so far expecting the fulfilment of your promise in order to be able to settle the question. But be-

fore this has been done the Council cannot issue an order recognising licenses to practise before the Sharia Courts which are not granted by it".

The second is a letter from the Supreme Moslem Council to the Qadi dated 24th Feb., 1925 which runs as follws :—

"It has come to our knowledge that an ambiguity arose as to the understanding of the above letter. Some of the Courts considered it to mean to include all advocates who have previously been licensed. This however, is not so. The letter meant only those new advocates who were licensed by His Honour the Chief Justice, but not licensed by the Council. This is due to the absence of any agreement or arrangement between His Honour and the Supreme Moslem Council. Advocates who were previously licensed are not included by the letter".

After referring to the above communications from the Supreme Moslem Council the note of the proceeding before the Qadi concludes thus: —

"Inasmuch as the Sharia Courts are related to and conected with the Council it is regretted that advocates who were licensed by His Honour after the establishment of the Supreme Moslem Council cannot be admitted unless an order to the contrary is issued. The above was made clear to Omar Eff. El Salah".

Fahmi Eff. Husseini, who appeared for the Supreme Moslem Council when the case came to be argued, did not pretend that the Council had a right to issue orders to the Sharia Courts, but he argued that there was no order issued in this case. We have no doubt that the sending of these communications to the Qadi was intended to operate as an order and was moreover, obeyed as such.

The Supreme Moslem Council was established in Dec., 1921, by a Regulation of the Provisional Government set up during the latter part of the Military Occupation. The Regulation was made by Order published in the Official Gazette but was not given the title of Ordinance. It has the appearance of a temporary expedient and would in the ordinary course have become inoperative when the Military Occupation passed into a constitutional government and the King assumed authority under the Mandate by the Palestine

Order-in-Council 1922, and by the same Order set forth the general form of a constitution under which this country was to be governed. However, Art. 74 of that same Order validated and maintained legislative acts including Orders made on and after the 1st July, 1920, and by virtue of that Article the order remains law to this day.

It is not easy to make out exactly what was the authority intended to be given to the Council in relation to the Sharia Courts. Fahmi Eff. argued that the Regulations gave the Supreme Moslem Council a general control of those Courts. Let us see what it actually does give. It gives authority to the Council to nominate for the approval of the Government and after such approval to appoint judges of Moslem Religious Courts (Art. 8 (b)) and we are informed by Fahmi Eff. that it claims also authority to dismiss judges, of which claim we find no sufficient ground in the Regulations. That the Council has power to appoint and dismiss minor officials is clear.

Art. 7 of the Regulations contains a passage which may appear to contemplate that the Council should exercise some further authority in relation to the Courts because it says:—

> "The Rais El Ulema and members of the Council shall receive salaries from the Government in consideration for their services in connection with the affairs of the Sharia Courts".

It is hardly tenable that a general power of control over the proceedings and discipline of the Courts can be legally claimed on this slender ground or that it confers on the Council the right to license advocates to practise in the Religious Courts.

However that may be, the whole question of the licensing of advocates to practise in the Sharia and other courts was subsequently regulated by a law called the Advocate's Ordinance, 1922, which came into force on the lst July in that year. That also was enacted before the Order-in-Council, 1922 but was validated and retained by virtue of the same order. It was called an Ordinance, a term which implies the highest form of legal legislative action, and is still law. By Section 2 of that Ordinance it is enacted that:—

> "No person shall hold himself out to be an advocate or practise as such in Palestine unless he is the holder of a

licence granted by the Chief Justice under this Ordinance"., and by Section 3 that:—

"No person who is not the holder of a valid licence to practise as an advocate in Palestine shall have the right to be heard on behalf of any other person at any hearing before a Court or in any other judicial proceeding in Palestine".

In dealing with this issue of licences to practise before the Moslem Religious Courts a special provision was inserted (Sec. 5 (iii)) as follows:—

"An applicant for a licence to practise before the Moslem Religious Courts must satisfy the Legal Board

(a) that he is adequately qualified by examination as to his knowdedge of Moslem Law to practise before the Moslem Religious Courts and is of good character, or

(b) that he is certified by the Supreme Sharia Council to be a person qualified to practise by his knowledge of Moslem Law and by his good character".

The Ordinance clearly disposes by Arts. 2 and 3 of any claim of right to license advocates in any person or body except in the Chief Justice, and further forbids any person not licensed by him to practise in any court or in any other judicial proceeding. So long as this Ordinance remains in force as it now stands this rule must he observed. Section 5 (iii) makes it clear that a certificate by the Council as to the knowledge and character of an applicant for a licence is only one of two alternative ways in which the Legal Board may satisfy itself that the applicant can be recommended to the Chief Justice for the grant of a licence. The granting of that certificate to the satisfaction of the Legal Board is the extent of the authority of the Council in this matter, and its direction to the Qadi that a further authority to practise is necessary is altogether unwarranted and illegal.

The attention of the Council should be drawn to the fact that any person practising as an advocate purporting to be licensed by the Council and not licensed by the Chief Justice will be liable to a heavy fine under Sec. 24 of the Advocate's Ordinance.

The Order will be issued as prayed for by the Petitioner.

In the High Court of Justice.

H. C. No. 50/26.

BEFORE:

The Chief Justice and Seton, J.

IN THE CASE OF:

Mark Gorodissky — PETITIONER.

vs

Council of Tel-Aviv Township — RESPONDENT.

Calling of an advocate described as a business — Interpretation of words by rule of noscitur ab sociis — Meaning of "Business" — Levy of taxes on commercial premises by Tel-Aviv Council — Sec. 5 (1) (f), Township of Tel-Aviv Order, 1921.

Application for an Order to issue against the Council of the Township of Tel-Aviv forbidding it to levy certain taxes mentioned in the amended petition on grounds therein stated.

JUDGMENT.

The Court upon hearing both parties including Mr. Kermack the Government Advocate on behalf of the Attorney General holds as follows:—

There are two points to be decided in this case. The first is whether a lawyer's office can be classed as business premises so as to be taxable under Section 5 (1) (f) of the Township of Tel-Aviv Order 1921. Sub-Section (1) (f) runs as follows:

"A tax on all shops, hotels and business premises within the Township according to the tariff to be fixed by the Council and approved by the District Governor".

We are of opinion that a lawyer's calling may be described as a business and are accustomed to the expression "the business of a solicitor". But Mr. Samuel says that the word "business" must, in its particular meaning in the sub-section, be controlled by the preceding words "shops and hotels". Now shops and hotels are not business premises of the same class except that they are both commercial. If it was not intended to confine the sub-section to commercial premises, why were the words used at all?. It would have been simpler to say "all business premises". But when the sub-section opens with the words "shops and hotels" it does seem to indicate that commercial premises were intended and

not all premises used for profit making such as private schools, doctors, surgeries, academies of music, and so on.

There is another question which we are not bound to decide but about which we nevertheless express an opinion and it is this:— Whether the Township can tax under sub-section 5 (i) (f) classes of persons and incomes. It appears that there is no such power. Premises should be taxed as premises and with some regard to their value not with regard to the classes of persons using them or the amount of their incomes.

Costs £P. 5 — Order accordingly.

Delivered in presence this 22nd day of June, 1926.

In the Supreme Court sitting as a Court of Appeal.

C. R. A. No. 96/27.

BEFORE:

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

IN THE CASE OF:

Said Abdallah Suleiman Abu Linda — APPELLANT.

vs

The Attorney General — RESPONDENT.

Case continued in absence of accused's advocate in another Court—Accused may be prejudiced by conducting own defence—Remission of case for new evidence to be heard—Criminal Law—Attempt to rape—Evidence of dumb person—Enmity between Complainant and Accused—Fabrication of evidence.

JUDGMENT.

The circumstances of this case are somewhat unusual. The Accused was charged with an attempt to rape the Complainant. Evidence in support of the charge was given by the Complainant, who is dumb, through her husband, who interpreted to the Court the meaning of her signs, and by two other witnesses, and evidence was also called for the defence to prove enmity between the parties with a view to establishing the malicious nature of the Complainant.

The question for the Court, as it realised, was purely one of credibility and the Court has by a majority accepted the evidence for the prosecution.

This would in general conclude the matter.

But in the present case the majority of the Court has arrived at its finding, not on account of the demeanour of the witnesses, but on the ground which it states as follows:—

> "The members of the Court find it impossible to believe that a man would fabricate a charge of such a nature involving his own wife".

Now it is unfortunately the fact that false charges of this nature are not unknown in other countries and we are unable to take the view that such a thing is beyond the bounds of possibility in Palestine. We therefore hold that this is not a ground upon which the conviction can be based.

The Court also refers in its judgment to the incident alleged by the Appellant as the cause of enmity between him and the Complainant's husband and remarks that "no other witness mentions this incident, though it would seem that two of them, Abdul Karim Muhammed Ali and Hussein Ali might have been present".

This is true but it must be noted that owing to the fact that the Appellant's advocate was engaged in another Court, the Appellant was left to conduct his own defence. The question whether or not the case should be heard in the absence of the advocate was clearly one for the Court. In these circumstances, however, it may have to some extent prejudiced the Appellant that he had no one to conduct his case for him, especially in the cross-examination of the witnesses for the prosecution.

On these grounds we hold that the judgment should be set aside and the case remitted for evidence to be reheard and such further evidence (if any) as may be tendered to be heard, and a fresh judgment given.

Delivered in presence this 20th day of December 1927.

In the High Court of Justice.

H. C. No. 16/29.

BEFORE:

The Chief Justice and Baker, J.

IN THE CASE OF:

Nassib Bey Abcarius
George Eff. Salah — PETITIONERS.

vs

Examining Magistrate of Bethlehem — RESPONDENT.

Rights of audience of advocates at preliminary enquiry — Sec. 14, Trial Upon Information Ordinance, 1924—Discretion of Magistrate in maintaining order in the Court-Room.

Application for an order to issue to the Respondent to show cause why advocates should not be allowed to attend the preliminary enquiry and to speak with their clients.

JUDGMENT.

This is an application on behalf of two advocates for an order to issue to the Examining Magistrate at Ramallah to show cause why they should not be allowed to attend the preliminary enquiry before the Magistrate in a charge triable upon information and to speak with their clients.

Section 14 of the Trial Upon Information Ordinance states that the accused person shall be at liberty to cross examine personally each witness called in support of the charge. It appears clear that the intention of the legislature in inserting the word "personally" was to exclude the right of audience of advocates in these preliminary enquiries. That this is a correct interpretation of the intention of the legislature in inserting that word is borne out by the provisions of Section 2 of the Civil Trial of Members of the Forces Amendment Ordinance No. 15 of 1928, which provides that notwithstanding anything in the Trial Upon Information Ordinance, No. 22 of 1924, in the preliminary investigation of a charge against a member of the Forces, an advocate appearing for the accused before the Magistrate shall be entitled to examine and cross-examine witnesses, or, in other words, the position resolves itself into this that Fighting Members of His Majesty's Forces may be represented by an advocate in these preliminary enquiries, but no other persons have this right.

If advocates then have no right of audience in these enquiries they appear to me to have no rights differing from those of the

general public in the Courts in which such enquiries are conducted.

These Courts are not open Courts and the Magistrates have a discretion to take such steps as they think fit to maintain order and quiet in the Courts including the stopping of talking and whispering whether it takes place between members of the public in general, or any member of the public whether an advocate or not, who chooses to address the accused.

In saying that the Magistrate has complete discretion to stop such conversation I feel that each case must be judged upon its merits, and so long as order is not disturbed the Magistrate may well, if he thinks fit, allow more latitude when an advocate is speaking to his client than when a conversation takes place between members of the public.

The order must be discharged with £P. 2 advocate's fees and costs.

Delivered this 26th day of April, 1929.

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

H. C. No. 100/30.

BEFORE:

The Senior Puisne Judge and Frumkin, J.

IN THE CASE OF:

Abraham Shama — PETITIONER.

vs

Chief Execution Officer, Jerusalem,
J. Mizrachi & Sons. — RESPONDENTS.

Execution of award under Workman's Compensation Ordinance, 1927, — Order directing CEO to execute — Necessity of Notarial power of attorney by advocate — Sec. 18 (1) Advocates Ordinance, 1922 — Art. 63 Notary Public Law — Art. 41 Civil Procedure Code — Power of attorney to execute arbitration award need not be attested by Notary Public but attracts stamp duty of 500 mils — Item 31 Stamp Duty Ordinance, 1927 — Fees payable on execution of award — Registration of award with Superintendant of Courts — Rule 4 Arbitration Rules, 1928 — Duly certified copy of award to be lodged in Execution Office.

Application for an order to issue to the Chief Execution Officer in the District Court of Jerusalem to show cause why his order in Execution File No. 1617/30 refusing to enforce an award of an arbitration under the Arbitration Ordinance, 1927, should not be set aside.

JUDGMENT.

The Petitioner, Abraham Shama, is a workman in whose favour an award has been made against the Respondent firm, Mizrachi & Sons, under the Workmen's Compensation Ordinance, 1927.

The award has been registered with the Superintendent of Courts in accordance with the Ordinance.

Upon failure by the Respondent to comply with the terms of the award, the Appellant's advocate, Mr. Krongold, applied to the Chief Execution Officer to order execution of the award.

This has been refused by the Chief Execution Officer upon four grounds, and the Petitioner is now asking for an order directing the Chief Execution Officer to execute the award.

As questions affecting Revenue are involved, the Attorney-General has been cited as a party to these proceedings.

The first ground upon which the Execution Officer relied is that the power of attorney held by Mr. Krongold, should be certified by a Notary Public.

In support of this ruling it has been argued on behalf of the Attorney General, that the proceedings before the arbitrator do not constitute a "specific suit" within the meaning of section 18 (1) of the Advocates Ordinance, 1922. That subsection provides as follows:

> "Art. 63 of the Law of the Notary Public dated 28th Oct. 1913, shall not apply to powers of attorney for advocates to act in any specific suit. Such powers may be drawn up privately but the advocate acting thereunder shall in all cases be personally responsible for the authenticity of the principal's signature".

The reference in the subsection to Art. 63 of the Notary Public Law would appear to be somewhat misleading, as the effect of that article is to render it obligatory upon a Notary Public to draw up and attest any of the documents enumerated in the article if called upon to do so. The article places an obligation upon the Notary Public — it places no obligation upon a member of the public.

The requirement that a power of attorney for use in legal proceedings shall be attested by the Notary Public does not arise under the Notary Public Law, but is contained in Art. 41 of the Civil Procedure Code which provides:

> "The Plaintiff and Defendant shall appear before the Court, in person, or by an attorney holding a power of attorney attested by a Court or by a Notary Public, or shall bring to the Court the person whom they wish to appoint as attorney and shall there register his power of attorney".

Thus Section 18 (1) of the Advocates Ordinance, 1922, though it refers to Art. 63 of the Notary Public Law, is actually an amendment of Art. 41 of the Civil Procedure Code, and relates only to powers of attorney to appear before a Court.

We are not aware of any rule of law requiring that a power of attorney to appear in arbitration proceedings shall be attested by a Notary Public, and it is therefore for the arbitrator himself to decide whether or not a power of attorney not so attested is to be accepted. The arbitrator in this case has not insisted upon the attestation by a Notary Public and that concludes the matter.

The second ground upon which the Chief Execution Officer has refused execution is that the power of attorney is not duly stamped and that "a stamp of 500 mils should be affixed thereon" under Item 31 (4) of the Schedule to the Stamp Duty Ordinance, 1927.

The Petitioner maintains that the power of attorney comes within the terms of Item 31 (1) (e) as enacted by Section 10 (d) of the Stamp Duty Ordinance, 1929:—

> "The following paragraph shall be added to Item 31 (1) in the Schedule as paragraph (e): —
>
> > "Where a power of attorney authorising an advocate to appear in any proceedings includes a power of bringing an appeal in the same proceedings, or of appearing before the Execution Officer therein and receiving any amount awarded by the Court on behalf of his client, no stamp duty shall be required in addition to that payable on the power of attorney in the original proceedings".

It must be noted however that in the provision, so far as it relates to powers of attorney for the receipt of money, the exemption is restricted to powers authorising the receipt from the Execution Office of "any amount awarded by the Courts" and that a power of attorney authorising receipt of moneys payable otherwise than under an order of the Court does not come within the exemption.

Now an award under the Workmen's Compensation Ordinance, 1927, although upon registration it has the force of a judgment, is not an order of the Court. It follows that a power of attorney for the receipt of money under such an award does not come within the meaning of Item 31 (1) (e) and a stamp of 500 mils is to be affixed thereon.

The third ground stated by the Chief Execution Officer for refusing execution is that the Petitioner paid no fees in respect of the judgment after its delivery.

The exemption from fees granted by Section 8 of the Third Schedule to the Workmen's Compensation Ordinance is restricted to proceedings prior to the award.

Under Section 6 of the Third Schedule a memorandum of the terms of the award must be sent to the Superintendent of Courts to be recorded; "and thereupon the memorandum shall for all purposes be enforceable as a judgment".

It thus is necessary for the person seeking to enforce the award to obtain a certified copy of the memorandum for the Superintendent and to lodge it in the Execution Office.

Para. 3 of Section 2 of the Third Schedule provides that;

> "Subject to the provisions hereof, the Arbitration Ordidinance, 1926, shall apply to proceedings under this Ordinance".

It follows that the fee payable in respect of the certified copy of the memorandum must be the fee prescribed in Rule 4 of the Arbitration Rules, 1928. In addition to this the usual execution fees are payable.

The fourth point raised by the Chief Execution Officer, namely, that the original award should have been produced, is covered by what has already been laid down. What has to be lodged in the Execution Office is not the original award, but a duly certified copy.

The Petitoner having failed upon the second and third points raised, the order nisi is discharged.

Delivered in presence of Petitioner and in absence of the Respondents, this 8th of May, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 104/30.

BEFORE:

The Chief Justice, the Senior Puisne Judge, and Khayat, J.

IN THE CASE OF:

Isaac Savil Daniels — APPELLANT.

vs

Sidney Owen Richardson — RESPONDENT.

Advocate and client — Fee for normal foreclosure action — Letters constituting an agreement of mortgage.

Appeal from the judgment of the District Court of Jaffa, dated 18th June, 1930.

JUDGMENT.

At the outset we wish to record our dissent from the passage in the judgment of the District Court in which it is stated that in the opinion of that Court the fee for a normal foreclosure action is the sum of £P. 60. In our opinion one quarter of that sum would be more properly described as the customary fee.

As regards the second mortgage, we hold that the letters of 3rd September, 1926, and 27th September, 1926, followed up as they were, by the transfer by Appellant's order to Respondent's account of £P. 60. by the bank constitute a completed agreement between the parties.

The Respondent was dealing with a resident abroad who asked what would be the total charges for the whole case. Although the Respondent informed Appellant in his letter of 27th September, 1926, that "there is no necessity for an actual case", he at no time informed the Respondent that litigation in the High Court and in the District Court was involved, and did not inform him that in consequence a higher fee would be required.

As regards the first mortgage, there was no agreement between the parties and the costs thereof must be taxed.

As regards the bidding for four and subsequently purchasing of three of the properties, this was clearly not contemplated in the agreement for payment of £P. 60. and the costs herein also must be taxed.

As regards interest, the Appellant is entitled to any interest which was actually earned by the sum of £P. 1100. while it lay to the credit of Respondent's account.

On the question of car fares, we do not consider that the Appellant has made out his case.

As to the private enquiry agent, in the absence of authority from the client to go to this additional and unusual expense we hold that the Appellant has made out his case.

As to costs in the District Court, the tender by Defendant to Plaintiff was not unconditional; the District Court was therefore wrong in not ordering the Defendant to pay costs to Plaintiff.

The case must therefore be remitted to the District Court, to proceed as laid down in this judgment and to give judgment accordingly.

The Appellant to have the costs of this appeal with £P. 3. advocate's fees and expenses.

Delivered this 11th day of December, 1931.

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

C. A. D. C. Jm. No. 186/30.

BEFORE:

Plunkett, J., Abdul Hadi, J. and Valero J.

IN THE CASE OF:

Solomon Horowitz — APPELLANT.

vs

Sai'd Awad — RESPONDENT.

Advocate and client—Settlement effected by client—Sufficient work done by advocate to earn fee—Agreed fees.

Appeal from the judgment of the Magistrate's Court of Jerusalem, in case No. 4085/30, dated 25th June, 1930.

JUDGMENT.

On consideration we find that the Appellant has done a sufficient amount of work which renders him entitled to the fees provided in Section 1, Sub-section (a) of the agreement. The fact that the Respondent has settled the matter subsequent to the steps of the Appellant cannot deprive the latter from the fees agreed upon.

We therefore set aside the Magistrate's decision and order that Respondent shall pay to the Appellant £P. 25. with costs and £P. 3. advocate's fees.

Judgment final.

Delivered this 16th day of June, 1931.

In the High Court of Justice.

H. C. No. 28/31.

BEFORE:

The Acting Chief Justice and Khaldi, J.

IN THE CASE OF:

Esther As'ad Khayat — PETITIONER.

vs

The Chief Execution Officer, Jaffa — RESPONDENTS.

Ankiri

Appearance by advocate in execution proceedings — Sufficiency of notarial copy of power of attorney — Service of documents on advocate — Chief Execution Officer — Application for substituted service.

Application for an Order to issue to Respondent (1) directing him to show cause why his Order dated the 28th March, 1931 should not be set aside.

JUDGMENT.

It is clear that Mr. Turtledove had appeared in the execution proceedings on behalf of Petitioner, submitting a notarial copy of power of attorney.

Prima facie that would appear to be sufficient authority to Mr. Turtledove to represent the Petitioner, and consequently service at his office of documents issued in the course of the execution proceedings would be good service. But if, for some reason, the copy of the power of attorney were held insufficient authority to Mr. Turtledove to appear, the fact that he tendered such power of attorney and attempted to appear on the Petitioner's behalf, suggested the inference that he was in communication with the Petitioner, and the Respondent was not justified in applying for substituted service without having made enquiry from Mr. Turtledove as to the address of the Petitioner.

The order will issue as prayed, with costs and £P. 2. advocate's fees.

Delivered this 18th day of June, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 107/31.

BEFORE:

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

IN THE CASE OF:

Abd El Latif Musa Abu Hantash APPELLANT.

vs

Rushadie, widow of Mustafa Kabbani RESPONDENT.

Admission by advocate in court proceedings—Limitation of actions re bill of exchange — Renewal of debt by payment on account — Rejection of letter as evidence —Administration of oath—Claim of interest from date of action.

Appeal from the judgment of the District Court of Nablus, dated the 29th June, 1930.

JUDGMENT.

The Appellant Abd El Latif Musa Abu Hantash, has not placed before this Court any facts upon which it can hold that the finding of the District Court that the bill was not barred by lapse of time was erroneous.

The admission alleged to have been made by the Respondent's advocate in proceedings in the Land Court was a statement made by him at a time when he was not representing either the present Respondent or her ancestor Mustafa Kabbani; moreover, the Appellant has made payments in respect of the debt.

With regard to the Appellant's claim that a letter rejected by the District Court should be admitted in evidence, it appears that upon the Court's refusal to admit the letter the Appellant asked that an oath should be administered to the Respondent. He cannot now plead that the letter was improperly rejected.

The appeal of the Appellant Abd El Latif Musa Abu Hantash must be dismissed.

The Respondent Rushadieh bint Suleh Arnaout has lodged a cross appeal claiming interest on the amount due from the date of action. To this she is clearly entitled and the judgment of the District Court must be amended accordingly.

Costs will be paid by the Appellant, including £P. 2.500 advocate's fees and expenses.

Delivered this 25th day of January, 1933.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 115/31.

BEFORE :

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

IN THE CASE OF :

Alfred Levy — APPELLANT.

VS

Yusef Abdel Fattah Salum — RESPONDENT.

Advocate must have express power of attorney to appeal — Appeal from Magistrate to District Court — Art. 42 Civil Procedure Code.

Appeal from the judgment of the District Court of Haifa dated 10th March, 1931.

JUDGMENT.

Inasmuch as the advocate who purported to represent Respondent before the District Court had no express power of attorney authorising him to prosecute the appeal in accordance with Article 42 of the Civil Procedure Code, there was no appeal before the District Court. The judgment of the latter is set aside and the judgment of the Magistrate's Court is re-instated with costs including £P. 3. advocate's fees.

Delivered this 18th day of February, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 30/32.

BEFORE :

The Acting Chief Justice, The Acting Senior Puisne Judge and Khaldi, J.

IN THE CASE OF :

Hanna Bishara — APPELLANT.

VS

Suleiman Tannous — RESPONDENT.

Absence of advocate — Appeal struck out — Medical certificate of inability of advocate to appear — Arts. 31, 33, 34 Civil Procedure Code—Adequacy of notice for hearing—Ground for adjournment—Endorsement by advocate on summons.

JUDGMENT.

Neither of the advocates for the Appellant has appeared. As regards one of them, a medical certificate of inability to appear

has been filed. The other advocate, Mr. Abcarius, was only notified of the hearing yesterday. Article 31 of the Code of Civil Procedure directs that except in urgent cases, three days' notice of the hearing shall be given.

It does not follow, however, that a summons giving shorter notice of hearing is null and void. The effect of the rule is that an advocate to whom less than three days' notice has been given may, on satisfying the Court that the matter is not an urgent one to which article 33 or 34 applies, obtain an adjournment on the ground that owing to lack of due notice he is not in a position adequately to present his client's case. The endorsement on the summons by Mr. Abcarius does not allege that he is not in a position to argue this appeal.

Accordingly we see no ground for ordering an adjournment.

The appeal is struck out with costs including £P. 2. advocates's fees.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 135/32.

BEFORE:

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

IN THE CASE OF:

Zaki El Osta — APPELLANT.

vs

Mohamad Salah — RESPONDENT.

Advocate's fee paid in advance—Case handled by other advocate—Quantum meruit for legal services — Arts. 572, 1466, Mejelle — Court acting of its motion — Ground omitted from leave to appeal.

Appellant was an advocate who had taken an advance of £P. 25. in respect of legal services which he undertook to render to the Respondent. Appellant become a magistrate and transferred his work to another advocate without his client's consent, whereupon the Respondent claimed a refund of the fees paid in advance.

JUDGMENT.

On the first point, we hold that Art. 1466 and not Art. 572 of the Mejelle is applicable. On the second point we hold that the District Court committed an error in law in making an allowance

to the Appellant in respect of work done without having a claim by the Appellant before it.

As, however, no leave to appeal against the judgment of the District Court on this ground has been obtained by the Respondent, we cannot amend the judgment in this respect.

Appeal dismissed with costs.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 33/33.

BEFORE:

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

IN THE CASE OF:

Salha Mahmud Awad — APPELLANT.

VS

Shareef Mahmud esh-Shanti — RESPONDENT.

Civil Procedure—Defective delegation by one advocate to another—Adjournment of action for party to be summoned in person.

Appeal from the judgment of the District Court of Jaffa dated the 13th June, 1932.

JUDGMENT.

We are of opinion that the lower Court when they ascertained that the delegation to the advocate Mohamad Eff. Cana'an was defective, the case should have been adjourned for the Defendant in person to be summoned.

The judgment of the lower Court is accordingly quashed and the case remitted for the present Appellant to be summoned and the Court to enter into the merits of the case and to give a fresh judgment.

Costs in the cause.

Delivered this 27th day of November, 1932.

It the Supreme Court sitting as a Court of Appeal.

C. A. No. 36/33.

BEFORE:

The Chief Justice, the Senior Puisne Judge and Khayat, J.

IN THE CASE OF:

Isaac Savil Daniels — APPELLANT.

vs

Sidney Owen Richardson — RESPONDENT.

Advocate's scale of fees — No agreement as to costs — Taxation of costs — Interest on advocate's trust account — Authority given by principal exceeded — Secs 21, 23, Advocates Ordinance, 1922 — Art. 4 Law Amending Code of Civil Procedure 25th March 1327— English scale of charges not applicable — Judge not to rely on personal recollections—Appointment of Taxing Master.

Appeal from the judgment of the District Court of Jaffa, dated the 20th December, 1932, C. D. C. Ja. No. 174/32.

JUDGMENT OF THE DISTRICT COURT.

This is an action brought by Mr. Daniels against Mr. Richardson for recovery of certain fees, which he alleges, were heavily overcharged by Mr. Richardson.

These costs were charged in respect of various transactions, the principal transactions being the sale of certain properties in Jaffa, which were the subject of two mortgages for £P. 10.000. The transactions were very complicated and something like four or five High Court cases arose in the course of them.

The Defendant put in a bill of costs charging, in addition to other pocket expenses, £P. 300. as profit costs. That included not only the work done in realization of the two mortgages, but various other legal matters in which the Defendant had acted for the Plaintiff.

This Court originally heard this claim, and decided that in the circumstances, in view of the large amount of work done the bill was not excessive and gave judgment accordingly.

The case went up to the Court of Appeal*, which reversed the judgment and said that at any rate, as regards one of the mortgages there was an agreement between the parties for a fixed amount to be paid by the Plaintiff. They set aside the judgment with regard to the other amounts and allowed a set-off against the bill being interest on certain amounts which the Defendant

* See report on page 86, ante.

had held for four months. The Court of Appeal remitted the case to this Court with instructions to tax for the remaining costs.

Now, of course there are no taxation rules in this country, though the Courts Ordinance has been in operation for several years and the question therefore arises on what basis we should proceed to tax. Quite apart from other considerations, I would mention here that questions of taxation are usually decided by one Judge or a Master and not a full Court.

The Plaintiff says that in the absence of Rules, we should call upon our imaginations to tax accordingly. The Defendant says that in the absence of Rules, the Court should apply the English taxing rules.

In the absence of any directions from the Supreme Court, we have to decide ourselves what is the method that we should adopt.

Of course, it is quite obvious that taxing costs cannot depend upon imagination. It must be based on some scale, and I know of no other scale except the English scale, and we feel that in the absence of any direction to the contrary, we must take into consideration what the costs on the English scale of taxation will be.

As a matter of fact, the costs under the English scale would come to £P. 134 more than the amount claimed by the Defendant. That being the case we cannot see that the Defendant's charges are unreasonable, especially when we consider the amount of work done.

In my own knowledge, no week had passed during these proceedings without application being put in by the mortgagors in connection with these mortgages. There were numberless hearings in chambers, taking some hours to hear, on various points with regard to these same mortgages.

We therefore, find that the bill is not excessive in view of all the circumstances, and give judgment accordingly.

We allow a set-off of £P. 19.42, mils in respect of interest in accordance with the judgment of the Court of Appeal.

The result of this judgment is that the Defendant should pay to the Plaintiff the sum of £P. 19.42, mils.

Costs to be divided.

Dated this 20th day of December, 1932.

JUDGMENT.

The action which gives rise to this appeal was brought by the Appellant, Isaac Savil Daniels, against the Respondent, Sidney

Owen Richardson, claiming a sum of £P. 449.307 mils, the balance alleged to have been received by the Respondent on behalf of the Appellant in respect of transactions in Palestine in which the Respondent acted as the Appellant's advocate, with legal interest and costs.

The Respondent admitted holding a sum of £P. 153.313 mils at the disposal of the Appellant and tendered payment of this sum which was, however, refused.

On the 18th June, 1930, the District Court of Jaffa gave judgment ordering the Respondent to pay to the Appellant the said sum of £P. 153.313 mils without costs.

An appeal was lodged to this Court, which on the 11th December, 1931, gave judgment* whereby it remitted the case to the District Court and ordered *inter alia* as follows:

> "As regards the first mortgage, there was no agreement between the parties and the costs thereof must be taxed.
>
> As regards the bidding for four and subsequently purchasing of three of the properties, this was clearly not contemplated in the agreement for payment of £P. 60. and the costs herein also must be taxed.
>
> As regards interest, the Appellant is entitled to any interest which was actually earned by the sum of £P. 1100. while it lay to the credit of Respondent's account.
>
> On the question of car fares, we do not consider that the Appellant has made out his case.
>
> As to the private enquiry agent, in the absence of authority from the client to go to this additional and unusual expense, we hold that the Appellant has made out his case.
>
> As to costs in the District Court, the tender by Defendant to Plaintiff was not unconditional; the District Court was therefore wrong in not ordering the Defendant to pay costs to Plaintiff.
>
> The case must therefore be remitted to the District Court to proceed as laid down in this judgment and to give judgment accordingly.
>
> The Appellant to have costs of this appeal with £P. 3. advocate's fees and expenses".

Upon the rehearing of the case, the District Court, on the 20th December, 1932, gave a fresh judgment, of which the concluding sentence runs as follows:

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* See report on page 86, ante.

"The result of this judgment is that the Defendant should pay to Plaintiff the sum of £P. 19.421 mils. Costs to be divided".

In terms, therefore, the judgment reduces the Defendant's liability from the sum of £P. 153.313 mils ordered to be paid under the judgment of the District Court of the 18th June, 1930, now set aside, to £P. 19.421 mils. As, however, the Court had previously stated, "We, therefore, find that the bill is not excessive in view of all the circumstances, and give judgment accordingly", it would appear to be intended that the sum of £P. 19.421 mils is to be paid by the Respondent in addition to, and not in substitution for, the sum of £P. 153.313 mils ordered to be paid by him under the original judgment of the District Court. Against this judgment this appeal is now lodged.

In giving effect to the directions of this Court, the District Court, while observing in its judgment that "questions of taxation are usually decided by one Judge or a Master and not a full Court", appears to have taken the view that it was bound, itself, to deal with the question of taxation.

We think that the District Court has misapprehended the meaning of the judgment of this Court.

Under the third paragraph of section 23 of the Advocates Ordinance, 1922:—

"The President of the Court or in case of a Magistrate's Court, the Magistrate, may appoint any fit person to act as Taxing Master in any case".

There is nothing in the judgment of this Court which would interfere with the exercise of this power. It is clearly for the President of the District Court to decide whether the work of taxation is to be done by the Court or by a Taxing Master; but whichever course is taken, the procedure to be adopted is the same.

The scale of charges authorised under the English Solicitors' Remuneration Act. 1881, are not applicable in Palestine, nor is there any equivalent in this territory to the *ad valorem* scale prescribed by Part 1 of Schedule 1 to the General Order of 1883 made under that Act.

It follows that, in accordance with the second paragraph of Section 23 of the Advocates Ordinance 1922, the party claiming payment must "lodge at the office of the Court a bill of costs for taxation setting forth in detail the items of the fees claimed".

While it is not expressly provided that a copy of the bill must be delivered to the party to be charged, it follows from Article 4 of the Law amending the Code of Civil Procedure dated 25th March, 1327, (9th April, 1911), that this must be done and tha the party to be charged must file his objections to the bill.

Until these steps have been taken neither Court nor Taxing Master is in a position to say whether the charges are proper.

The scale of charges authorised by Rule 18 of the Rules of Court, Advocates, issued by the Senior Judicial Officer, Major Orme Clarke, which came into force on the 1st of October, 1918 (published in the Palestine News Gazette No. 10 on 7th November, 1918) has never been replaced, hence by virtue of Section 21 (i) of the Advocates Ordinance, 1922, the scale is still in force, and for any item to which that scale applies, only the charge prescribed by that scale can be allowed.

Where that scale is not applicable, we hold that such charge is to be allowed as is, in the opinion of the taxing authority, fair and reasonable.

When, however, we turn to the proceedings of the District Court, we find a totally different procedure was adopted.

No detailed bill of costs was ever submitted by the Respondent.

It is true that he filed a copy of his diary and letter entries, (Exhibit 3) but no charge has been inserted against any item, and without this being done the exhibit is useless.

In addition, the Respondent filed a certificate (Exhibit A) as to the conveyancing charges which he claimed would be allowed in England, files of correspondence with regard to four specific matters in which he had acted for the Appellant (Exhibits D, E, F and G), and an Exhibit (Exhibit C) showing the amount claimed by the Respondent in respect of each of the matters in which he acted.

With this material before it, the District Court proceeded to determine what, in its opinion, would be the amount recoverable by the Respondent if the English scale of charges were applied; and being satisfied that such amount would be considerably larger than the sum claimed by the Respondent, it held that his claim was not excessive.

Objection has been taken on behalf of the Appellant to the validity of the certificate as to the conveyancing charges (Exhibit A). The matter, however, is of no importance so far as this appeal is concerned, as the amount allowable under the scale prescribed under the Solicitors Remuneration Act, 1881, can readily be ascertained by reference to the Annual Practice.

Moreover, in view of the procedure adopted in the District Court, it follows that whether the certificate is valid or not, the judgment cannot stand.

It may be added that even if the procedure adopted by the District Court of reference to the English scale of charges were applicable, the judgment is open to serious objection.

In the first place, the charges for the purchase of three properties, as prescribed by Rule 1 (D) and items 1 and 4 of the Schedule to the Solicitors' Remuneration (Registered Land) Order 1923, would amount to £P. 55.833 mils only, as against the sum of £P. 115.333 mils shown in Exhibit A and carried into Exhibit C, which the Court appears to have adopted.

Again, Exhibit C includes, and the Court has not disallowed, *ad valorem* charges by the intending purchaser's solicitor for bidding at an auction, whether the property was purchased or not. The fees allowed under this head, moreover, in respect of the three properties purchased, amount to £P. 117.500 mils, whereas the charges that would have been allowable for negotiating the purchases, had the sale been by private treaty, would have amounted only to £P. 78.416 mils.

We know of no authority for these charges.

Further, the matter to which Exhibits D, E, F and G relate, in respect of which charges are made in Exhibit C amounting to a total of £P. 50, are matters for which in England a detailed bill would have to be delivered.

Even, therefore, if the method upon which the District Court has proceeded were correct, it would be impossible, on the material before it, to determine whether the Respondent's charges were allowable or not.

Apart, however, from the question of applying the English scale, the District Court appears to have been misled through reliance upon its own recollections of matters they have had come before it.

The passage in the judgment of the Court to which reference is made reads as follows:—

> "In my own knowledge, no week had passed during these proceedings without application being put in by the mortgagors in connection with these mortgages. There were numberless hearings in chambers taking some hours to hear, on various points with regard to these same mortgages.
>
> "We, therefore, find that the bill is not excessive in view of all the circumstances and give judgment accordingly".

So far, however, as the mortgages were concerned, the charge to be allowed had already been determined, as regards the second mortgage, by the judgment of this Court, and as regards the first mortgage, by agreement between the parties.

Hence the number and length of the hearings connected with the mortgages had no relevance to the question which the attention of the Court was directed, namely, whether the Respondent's bill was excessive or not.

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

As the present position has arisen primarily from the Respondent's failure to deliver a detailed bill, the Appellant is entitled to the costs of the appeal including £P. 5 advocate's fees.

Costs in the lower Court will follow the event.

Delivered this 22nd day of January, 1934.

AGENTS.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 6/22.

BEFORE:

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

IN THE CASE OF:

Wahbeh Tamari
Iskander Ikdeis — APPELLANTS.

vs

Jabra Araman — RESPONDENT.

Claim for return of possession of land — Security for debt to bank — Fictitious registration of orange grove in name of agent for bank — Ism Musta'ar pleaded — Expulsion of party during War — Sale by mortgagee in satisfaction of debt — Rights of ownership not affected if purchaser has knowledge that vendor is not real owner.

JUDGMENT.

On consideration of the case we find that the facts may be stated as follows:—

Respondent Jabra Araman purchased the orange grove in claim. He registered his purchase in the name of Wilhelm Faber, the manager of the German Bank in Jaffa, as security for a debt to the said Bank because registration in the name of the Bank

itself was illegal. When Respondent was expelled from Jaffa during the war Faber sold the grove to the Appellants, on their paying the debt due from Jabra to the Bank. We compelled them to give him a sanad whereby return of the grove was secured to Jabra, the true owner, after recovering from him a specified sum within four years. On his return the Appellants refused to restore the grove. He then sued them and the manager of the Bank.

The Land Court gave judgment for registration in his name, and held that the rights claimable by the Appellants lay within the jurisdiction of the District Court.

Against this judgment Appellants appealed. They state that they have obtained possession in course of law. They allege:

(1) that the pleading of "Ism Musta'ar" cannot be entertained because the period fixed for hearing of cases of this kind has elapsed and because the transaction has been registered in the Tabu.

(2) After the seller has admitted that the sale was final he could not plead collusion.

(3) Faber's admission that his name was "Musta'ar" does not affect them (Appellants).

(4) The sanad signed by them is valid as against the manager but not against Jabra.

Other grounds are also given.

Respondent asks that the judgment of the Lower Court be confirmed. He bases his case on the admission of the manager of the Bank, and the agreement entered was really a contract of lease entitling Appellants to benefit by their work in the grove.

We find that the following issues must be dealt with:

(1) Is the claim as to "Ism Musta'ar" admissible.

(2) Was the transfer by Faber to Appellants made by permission and consent of Respondent.

As to (1). The period fixed for bringing an action based on "Ism Musta'ar" as provided in Art. 5 of the Ordinance of Transfer of Immovable Property was extended by several Ordinances after the Occupation. This action was brought in time and can be heard.

As to (2). Though Faber said that he had received permission from Respondent he based this on the word of the witness Aborli. This witness, however, denied the alleged statement. There is thus no proof of consent by the Respondent and he was right in bringing the suit.

Since both parties, the manager of the Bank, and the Appellants, were aware at the time of registration in the name of the latter that the real owner was the Respondent, it follows that the transaction which took place between them does not affect the latter's rights. Faber had no right to sell and Appellants knew that they were not taking from the real owner.

This Court upholds the judgment of the Lower Court as being consistent with the law.

As the Respondent did not deny the loan for which the grove was hypothecated, the Court confirms the judgment of the Lower Court on condition that Respondent pays to Appellants his debt to the Bank.

Costs against Appellants.

In the Supreme Court sitting as a Court of Appeal

L. A. No. 62/23.

BEFORE:

The Chief Justice, the Senior British Judge and Frumkin, J.

IN THE CASE OF:

Selim Bitar
Father Aurelio Marotta — APPELLANTS.

vs

The Consul of Spain in Jerusalem — RESPONDENT.

and

The Custodia di Terra Santa — THIRD PARTY.

Purchase of property by Franciscan Convent Jaffa, in name of agent—Corporation not permitted under Ottoman Law to register property in its own name—Action in Land Court on behalf of King of Spain for title by registration—Sufficiency of evidence before Land Court—Rights of Procurator of Custodia di Terra Santa—Spanish Consul authorized to deal with property belonging to Franciscan Convent—Presumption by Court of Appeal that if real evidence were available it would have been produced—Civil Procedure—Admission of Third Party on appeal—Defence conducted in wrong name as ground for setting aside judgment—Trustee of purchase monies.

Appeal from the judgment of the Land Court of Jaffa.

JUDGMENT OF THE CHIEF JUSTICE.

During the years 1910 to 1913 Selim Bitar, who was dragoman to the Franciscan Convent in Jaffa, purchased property which is

the subject matter of this action, situated in the vicinity of the Convent, and registered it in his own name. The purchase money was paid to Selim by Father Llaneza, who was at that time Procurator of the Terra Santa, or, in his absence, by his representative, Father Pardoa. It has never been pretended by Selim that he claimed any right in the property, but the registration was effected in his name because it was not permitted by Ottoman Law to a corporation other than a waqf constituted under Moslem Law to register property in its own name. Selim asserted at the trial that he had no instructions from Father Llaneza or from Father Pardoa as to the person or institution on whose behalf the purchases were to be made.

On the 2nd September, 1921, Selim received instructions from Father Marotta, Guardian of Terra Santa, who had discovered the existence of the purchased properties to have them registered in the name of the Terra Santa, which proceeding had been at that time rendered lawful by an enactment of the Government of Occupation. Selim, on being assured that if he carried out the above instructions he would be indemnified, if necessary, by the Terra Santa, consented. When the proceedings came to be carried out in the Land Registry Office in 1921, the properties in dispute were registered, not in the name of the Terra Santa, but apparently by error, in the name of Father Marotta. After some abortive procedings in the District Court, an action was brought on behalf of the King of Spain in January, 1922, in the Land Court against Selim Bitar and Father Marotta, claiming that the properties were bought with his money and should be registered in his name. One of them, however, appears to have been bought on behalf of a Spanish gentleman, and no question arises as to that transaction, because the Father Guardian Marotta claims no interest in it. The present Guardian of the Terra Santa applied to be made a party in the Land Court but that application was refused. In the Court of Appeal the Custodia of the Terra Santa has been admitted as an interested party.

During the period when the properties were registered in the name of Selim, he, according to his evidence, administered them on behalf of the Terra Santa through the Superior of the Convent in Jaffa. That Convent is part of the Terra Santa administration, but, according to regulations, a Spanish monk is always appointed Superior. In 1914 Father Llaneza retired from Palestine without leaving, so far as the evidence goes, any directions as to what was to be done with the properties. Father Hebrero

who was the Superior of the Convent in Jaffa, gave evidence that he leased the houses and received rents which were entered in the books of the Convent up to 1913, when he was removed to a similar office in the Convent in Bethlehem, and that he had been informed by the Procurator that the purchase money came from the Obra Pia, of which we shall speak later. In February 1913 while he was still Superior in Jaffa, and while Father Llaneza was still Procurator of the Terra Santa, Father Hebrero, in a letter written to the Spanish Consul Cavares, speaking of Selim Bitar's services in purchasing the property in the Sanctuary of St. Peter at Jaffa, says at the close of that letter: "Please take good note of all this for the guidance of the Consulate and note also that the money is from the Obra Pia, but truly destined to the Terra Santa". This is interesting as a letter written by one Spaniard to another about a matter of common interest and before any dispute between the Terra Santa and the Spanish Government had ever dawned.

On 6th October 1918 a letter was written to Selim by Father Diotallevy, then Guardian of the Terra Santa, informing him that he had discovered a document showing that he and others had acquired buildings in Jaffa which he concluded had been bought with monies of the Terra Santa and requiring particulars. That appears to have been the first time when the Authorities of the Terra Santa became aware of the transactions which are the subject matter of this action.

Twenty days after, on the 26th Ocober, 1918, Father Pardoa, then Procurator of Terra Santa, wrote a declaration, of which this is a translation:—

IN THE NAME OF GOD.

AMEN.

"At the request of the Most Reverend Father Guardian, I, the undersigned, hereby declare, that in the exercise of my Office as Vice-Procurator in the absence of the Reverend Father Aquilino Llaneza I received from the "Obra Pia" of Madrid the sum of 25.321 francs, which sum, by order of the said Father Aquilino, and at the request of Father Mateo Hebrero, President of the Hospice of Jaffa, I handed over to Mr. Selim Bitar for the purchase of houses for Terra Santa".

In witness whereof, etc.

Jerusalem, October 26th, 1918.

Father Emmanuel Garcia Pardea,
Proc. Gen. di Terra Santa.

It was not until 1921 that, as above mentioned, the properties were registered in the name of Father Marotta, the Guardian of Terra Santa.

Having gone so far in the history of the case we may consider what is the Obra Pia and what is its relation to the Custodia of Terra Santa. We gather from the evidence of Father Montero, Procurator of the Terra Santa, and Father Castello, a Spanish Franciscan and member of the Discretorium, the Executive Committee of the Terra Santa, during the period when the properties were bought, as follows:— The Obra Pia is said to be a Department of the Spanish Foreign Office and collects moneys from pious persons for pious uses. It is particularly interested in the Holy Land, and a sum of 20,000 pesetas is sent every three months through the Secretary of State to the Spanish Consul and handed over to the Terra Santa through the Procurator. The Procurator is a Spanish Franciscan, and together with the Guardian and the Vicar, is one of the three chief officials of the Terra Santa. These officials of whom the Guardian is President, together with four other Franciscan monks, form the Council and Discretorium of the Terra Santa. According to Father Montoro, the Procurator received other monies from the Obra Pia either through the Spanish Consul or direct, to be spent according to instructions from Spain. Such monies are not entered in the books of the Discretorium, but in a special book. The money which was paid over to Selim for the purchase of the properties in dispute was not received from or entered in the books of the Discretorium nor was it entered in any special book, that has been produced to us. Father Castello says that he, with Father Pardoa, counted out the money handed over to Selim Bitar, and that the money did not come from the Discretorium. Father Montoro testified that he, as Procurator represented the Secretary of State in the Custodia, and was allowed to spend monies sent from Spain without asking permission of the Guardian. He kept books showing monies received from the Obra Pia, but his predecessor handed over no books to him. Not only were no entries made in the books of the Discretorium nor in any special book presented to the Court, nor says Father Hebrero is there any record of the purchase in the books of the Convent at Jaffa.

The evidence before the Land Court appears to show that the properties were bought through monies which came from the hands of Father Llaneza the Procurator of the Terra Santa and provided by the Obra Pia. We have not before us any special instructions or any record to show for whose ownership the pur-

chases were made, but there is sufficient ground to assume that they were bought for the particular benefit of the Convent at Jaffa and came under its administration.

There is no evidence on the record that either the King of Spain or the Obra Pia held any properties in Palestine for pious uses in their names or in any name, nor was there evidence produced by the Spanish Consul to show that he had a special account with the Procurator to purchase properties which were to be in the ownership of the King of Spain or the Obra Pia and not in that of the Terra Santa. Moreover if it was seriously intended that the properties should be bought for the King of Spain and kept separate from the properties of the Terra Santa as the Plaintiff alleges, why was it bought through the Procurator of he Terra Santa and not through a broker employed by the Spanish Consul? The apparent fact is that the property was bought for the Spanish Convent, that the reason why it was bought through the Procurator is that the Procurator was a Spaniard and understood Spanish religious interests and as it was desired to benefit the Spanish Franciscans, Father Llaneza was entrusted with money which he spent in the interest of one of the Spanish Convents. There had been for some time before talk about buying properties adjacent to the Jaffa Convent by the Terra Santa but the prices demanded were high and proposed purchases were abandoned. Father Llaneza took up that line of usefulness, bought the properties in question, and left them in the hands of the Jaffa Convent.

The Procurator was in the habit of receiving from the King of Spain or from the Obra Pia, which is the same thing, monies of which he paid 20,000 pesetas regularly into the coffers of the Terra Santa and forwarded the receipt to the Spanish Government. As for the rest of the money that he received either from the Obra Pia or from any other source, it appears from reading the rules of the Terra Santa that it was not intended that the Procurator or any other member of the Franciscan body in the Holy Land shall carry on any private transactions with money intended for pious uses without making full account to the Father Guardian.

If the property was purchased for the Jaffa Convent it was purchased for the Terra Santa because the Franciscan property is common to the Order, and the Custodia of the Terra Santa is the Franciscan Order in Palestine.

The above describes in my opinion the apparent state of things at the time when Father Narotta took over the Convent Jaffa properties on behalf of the Terra Santa.

Father Llaneza who for some years had been absent and had not at any time asserted the right of the Obra Pia or the King of Spain to be the owners of the property, made a declaration which has come into the file, but does not appear to be addressed to any body in particular. It states that Father Llaneza had received monies from the Obra Pia for the purchase of houses and property in Jaffa, that these sums had been handed over to Selim Bitar to effect the purchases and that the list of these properties was to be found in the Spanish Consulate in Jerusalem. He requests that Selim Bitar be compelled to register the properties in the name of the Obra Pia.

The action brought in the Land Court on behalf of the King of Spain against Selim Bitar and Father Marotta was for a declaration that the properties belonged to the King of Spain and should be registered in his name.

The Guardian of the Terra Santa applied to be made a party to the suit, but for some reason not explained, that request was not complied with.

Judgment was given for the Plaintiff on the evidence and from that judgment the Defendants appealed. In the Court of Appeal the Custodia of the Terra Santa obtained leave to enter as an interested party.

We have to consider whether the evidence relied on by the Land Court was sufficient to sustain the judgment. It is unfortunate that we have not the evidence of Father Llaneza. Although we may read his declarations for the purpose of seeing what was the claim he made on behalf of the Obra Pia at the beginning of the dispute, yet it is not evidence of any fact. It was right and necessary that the Father should be present to prove transactions which, if really made as he claims, required explanation. The Franciscans travel freely all over the world and Spain was not so distant a country that distance could be pleaded as a reason for not producing evidence so necessary to the case of the King of Spain. Again no books were produced from the Spanish Consulate to show that these properties or any others bought by the Procurator from monies of the Obra Pia were held, not for the Terra Santa but for the particular account of the King of Spain or for the Obra Pia.

The Rules of the Custodia, 36 to 55, deal with the duties of the Procurator and it appears from them that he is not authorised to do any important business transactions without the consent of the Guardian and Council. All alms brought to the Holy Land are

to be kept in one safe with three keys of which the Custodian, the Vicar and the Procurator keep one each. In a Papal brief dated 18th August, 1846 and signed by Cardinal Lambruschini, a practice of the Spanish Franciscans to keep a separate chest is strongly condemned and forbidden. As regards the Custodia of the Terra Santa it was the duty of its Procurator Father Llaneza to account to the Guardian on all monies received for pious uses, and if he received monies from the Obra Pia he should have refused to hold such in a separate account. In practice the rules do not appear to have been observed. According to Father Montoro it is common for the Procurator, who is a Spaniard and who is said to hold a special authority from the King of Spain, to receive monies from the Obra Pia to be spent according to instructions received from the Spanish Government and without consulting the Guardian. This appears altogether contrary to the spirit of the Franciscan regimentum but according to the argument put forward on behalf of the King of Spain, this is what happened in the case of the purchase in question and it is supported by the evidence of Fathers Montoro and Castello. The transaction was intended to confer special benefit on the Jaffa Convent which was particularly Spanish by purchasing the properties direct instead of paying the money into the coffer of the Custodia with the risk of its being used for some other purposes of that institution. The Father Guardian was not informed by Father Llaneza because the latter was committing a breach of the rules of his Order and his duty as Procurator for the Terra Santa. If the purchases were intended for the Jafla Convent then the King of Spain has no claim to have them registered in his name; the money was admittedly intended for pious purposes in the Holy Land and was so spent. The Procurator knows well that anything he purchased for the Jaffa Convent was purchased for the Terra Santa although he may not have desired to inform the Guardian so long as he was Procurator.

The above appears to me to be the natural explanation of what took place. Now after a considerable interval of time the Spanish Government set up a case which amounts to a denial that the money supplied by the Obra Pia was spent for pious uses, that it was intended to be the property of the Spanish Government.

The burden of proof is on the Plaintiff to show that the properties were bought for the ownership of the King of Spain.

In my opinion the fact that the monies provided by Father Llaneza were not monies of the Custodia but monies sent by the Obra Pia does not carry the Plaintiff any further. It seems improbable

that monies sent from the Obra Pia were intended for any other purpose than the benefit of pious institutions.

Documents emanating from the Spanish Foreign Office and to which the Land Court has attached importance state that monies were sent to Father Llaneza from time to time to be spent, according to instructions, for the repair and betterment of the Sanctuaries, Convents and Hospices which are Spanish property and managed by Spanish Monks.

No instructions actually sent have been produced, and the documents themselves are not evidence for the Plaintiff. But so far as they go they show that the monies were intended for the betterment of the Spanish Convents. They specifically mention the Spanish Convent at Ramleh for which an adjacent plot of land was bought. Franciscan Convents at Jaffa and Ramleh are regarded as in a sense Spanish Convents. The judgment of the Land Court refers to a judgment of the Sheri Court of 1201 by which the Spanish Consul was authorised to alter and improve the property belonging to the Jaffa Convent, and another of the following year authorising the Spanish Consul to fly his flag over the building. The judgments are no judgments obtained against the Custodia and they may have been, and probably were, convenient to the Franciscans at the time, and there would have been no point in disputing them. But I do not see how it can be seriously maintained, in contradiction to the Constitution of the Custodia, that any of its Convents are the property of any European Government.

In the rules above referred to issued in the form of a brief of Benedict XIV in 1746 and confirmed by a brief of Pious IX in Rules 68 under Cap. VI "De partinentibus ad Custodiam" it is declared that all Convents and Hospices shall be common to all the friars of whatever nationality. It is further laid down that the Superior of the Jafla Hospice, among certain others, should be taken from amongst the Spanish friars, if fit persons are to be found of that nationality, leaving the Discretorium free to appoint others of any other nationality if suitable Spaniards cannot be found in the Custodia. The rule apparently allows a certain Spanish nationality to be assumed by certain Convents and Hospices including that of Jaffa, while affirming that all belong to the Custodia. That this state of community applies not only to the persons but also to the buildings appears from Rule 72 of the same chapter which forbids new buildings to be erected or old ones to be repaired without the consent of the Disrectorium.

In my opinion such evidence as we have shows that the properties in question were bought by Father Llaneza for the betterment of the Franciscan Convent at Jaffa, which may commonly be regarded as a Spanish Convent but which is a part of the Universitas rearum of the Custodia and that the King of Spain cannot now successfully claim that they were bought as properties of the Spanish Government and that they ought to be registered in his name.

It is not necessary for the purpose of this case that the judgment should decide that relationship between the Jaffa Convent and the Custodia. But a view of the constitution of the Custodia and the Convents help us to understand what was the matter with which Father Llaneza was dealing when he bought the properties. He was Procurator of the Terra Santa and knew the rules, and if he intended the properties to be and remain in the ownership of the King of Spain and had instructions to that effect he should have made it clear what was the exact nature of the transaction at the time when it took place. But no instructions have been produced and Father Llaneza has not appeared as a witness, and in my opinion the Court should presume that if there was any real evidence to be given on behalf of the King of Spain it would have been produced and that in its absence the transaction should be regarded as what it appears to be namely a purchase for the betterment of the Franciscan Convent at Jaffa, and that the claim of the King of Spain to be registered in respect of it must fail.

JUDGMENT OF THE SENIOR BRITISH JUDGE.

This action was brought by the Consul of Spain in Jerusalem acting under a power of attorney from the Minister of State of Spain as representing the Obra Pia of the Holy Places of Jerusalem, against Selim Bitar and the Reverend Father Aurelio Marotta.

In the course of argument, both sides have made use of expressions which might be interpreted to mean that the action was based on a claim by the King of Spain that the houses in dispute formed part of his civil property; but the terms of the power of attorney make it clear that such is not the case, that the King of Spain is not a party to the action, and that the action is brought on behalf of a pious foundation, the Obra Pia.

The subject matter of the action was 26 houses at Jaffa, adjacent to the Franciscan Convent there, and another house at Jaffa known as the house of Simon the Tanner or the House of the Vision of St. Peter.

All these houses were purchased during the years 1910-1913 by Selim Bitar, who was then the dragoman of the Franciscan Convent, and were registered in his name.

The purchases were made by Bitar upon the instructions of the Reverand Father Aquilino Llaneza who was at that time the Procurator of the Custodia di Terra Santa; and the purchase money was paid to Bitar by Father Llaneza or his deputy Father Emmanuel Garcia Pardoa.

The Custodia di Terra Santa is the branch of the Franciscan Order of Monks in Palestine and the adjacent countries. Its constitution is contained in the Status et Decreta of which a copy has been filed.

The governing body of the Custodia is a Council known as the Discretorium, which consists of the Father Guardian or Custos, the Vicar, the Procurator and four other monks.

Administrative routine is performed by the Procurator, but no business of importance may be transacted by him, or by the Custos except under directions from the Discretorium.

The Procurator is invariably a Spanish monk and the Statutes also provide that the Superiors of certain Convents including that at Jaffa shall always be Spaniards, if suitable monks of that nationality are available.

The Procurator, and all other Franciscan monks in the Province are subordinate to the Custos, whose duties in his absence are performed by a President Custodial chosen by the Discretorium.

Of the nature of the Obra Pia and its relation to the Minister of State of Spain all that need be said is that a declaration has been submitted purporting to be made by the Under Secretary of State, dated the 10th October, 1922, to the effect that the Obra Pia is an ancient institution in Spain for the maintenance of worship in the Holy Places and now by Royal Decree under the control of the Ministry of State.

It is common ground between the parties that out of the funds at the disposal of the Obra Pia a sum of 80,000 pesetas a year is paid quarterly to the Custodia di Terra Santa through the Minister of State. The instalments are received by the Procurator and entered by him in the books of Terra Santa, and receipts are signed by the Discretorium the sums so paid are used by the

Discretorium for the general purposes of the Terra Santa and are not allocated to any specified object.

It is part of the Respondent's case that in addition to these fixed periodical payments, other payments were from time to time made by the Obra Pia to the Procurator for specific purposes, in respect of which he received instructions from Spain; and that the purchase money for the houses in dispute (other than the House of the Vision) was so furnished by the Obra Pia to Father Llaneza when Procurator.

As regards the House of the Vision, the Respondent has alleged that the purchase money was paid to Father Llaneza, not by the Obra Pia, but by a Spanish gentleman named Urquijo. And the Respondent's claim to this house is based upon a declaration in writing by Urquijo, dated 27th October, 1919, directing that the house shall be registered in the name of the Obra Pia.

As regards this house Don Urquijo obtained a written acknowledgment of his title from Bitar, which has been produced and the Defendants have admitted the Respondent's claim with regard to this house and have consented to registration in his name.

As regards the other houses in dispute, it appears that from their respective dates of purchase, they were administered by the Superior of the Franciscan Convent at Jaffa; and that though no accounts mentioning these properties have been submitted, any rents that were obtained were accounted for by him with other rents to the Discretorium.

It nevertheless appears to be the case that the Discretorium did not realise the fact that these houses had been purchased until 1918, when a correspondence with regard to them took place between the Custos and the Superior of the Jaffa Convent, Father Hebrero, and Bitar.

In 1921, when legislation by the Occupying Power had rendered it possible for immovable property in Palestine to be registered in the name of foreign corporations, the then Custos called upon Bitar to transfer the houses into the name of the Terra Santa. Application was made to the Land Registry, signed in the absence of the Custos, by the President Custodial, the Defendant, Father Marotta.

By what appears to have been an error on the part of the Land Registry, the transfer was made in the name not of the Terra Santa but of Father Marotta.

The Respondent having become aware of this transaction, commenced these proceedings in the Land Court against Selim

Bitar and Father Marotta and obtained judgment. Against this the Defendants are appealing.

The first question that presented itself to this Court was one of procedure. In the Land Court a Petition was presented on behalf of the Custos by one of the advocates representing the Defendants, praying to be admitted as a Third Party to the action; and this petition having been rejected, the Custos entered an appeal against the judgment of the Land Court.

Before this Court, however, objection was taken that under the Statutes of the Terra Santa the Custos had no power to take proceedings on behalf of the Terra Santa without the authority of the Discretorium, which had not been obtained; and accordingly that the Custos had no interest in dispute.

This objection was allowed; whereupon the Discretorium applied to be admitted as a Third Party in this Court as representing the Terra Santa and their application was granted.

It was then moved on behalf of the Terra Santa that the judgment of the Land Court be set aside, on the formal ground that it had been given in the absence of the Terra Santa on a matter with regard to which this Court had held that the Terra Santa was entitled to be heard. It was not however suggested that there was any conflict of interests between the Terra Santa and the Defendant Marotta, or that the interests of the former had been in any way prejudiced by the fact that in the lower Court the defence had been conducted in the name of Marotta and not in that of the Terra Santa. It was therefore held that no ground had been disclosed for setting aside the judgment, and the Court proceeded to hear argument on the merits.

The main objection to the judgment was that proof had not been furnished by the Respondent that the money for the purchase of the houses in question had been supplied to Llaneza by the Obra Pia.

It was pointed out that Llaneza, who was in Spain, had not been called to give evidence, nor had his evidence been taken on commission; and that no accounts were forthcoming to establish the alleged payments by the Obra Pia.

As the defence did not produce any evidence that the purchase money had been furnished by the Terra Santa the argument in this respect reduced itself to the proposition that, as the Rules of his Order forbade Llaneza to have in his hands any moneys other than those of the Order, the purchase money which passed through Llaneza's hands, must have been the money of the Terra Santa.

From documents before the Court, however, it is clear that whatever may be the Rule of the Order in this respect, sums of money were from time to time sent by the Obra Pia to the Procurator for specific purposes, and that such sums were expended by the Procurator as agent for the Obra Pia in accordance with instructions from them. It is further to be remembered that the Terra Santa itself keeps accounts, and that any extraordinary expenditure of this nature requires the authority of a resolution of the Discretorium. No such resolution is forthcoming nor any accounts relating to the purchases, though from the correspondence between Father Hebrero, the Superior of the Jaffa Convent, and the Custos, it is clear that the question of the purchase of these houses by the Terra Santa was under consideration in 1910. Father Llaneza was admittedly a trustee of the purchase money; clearly he did not receive it from the Terra Santa; and no source from which it could arise other than the Obra Pia has been suggested.

There does not appear therefore to be any reason for refusing to accept as relating to the houses in dispute, the declaration made by Father Llaneza on the 15th March, 1922, that he received from the Obra Pia sums of money for the purchase of houses in Jaffa, which sums of money he handed over to Selim Bitar to effect the purchase; though the further statement in the declaration that the list of the properties so purchased is kept in the Spanish Consulate in Jerusalem, proves to be incorrect.

I therefore am of opinion that the Land Court was right in holding that the money with which the houses were purchased was provided by the Obra Pia.

Accepting this view of the facts, there would nevertheless be ground for rejecting the Respondent's claim if the Court were satisfied that it is to be inferred from the circumstances of the purchases, that the money so expended or the houses so acquired, were a gift from the Obra Pia to the Terra Santa; but the burden of proof in this respect is upon the Terra Santa.

The circumstances leave no doubt in my mind that the object of the purchases was to benefit the Jaffa Convent.

Jaffa is one of the Convents to which, as already mentioned, the Statutes of the Terra Santa assign by preference a Spanish Superior. These Convents seem to be regarded in Spain as having a distinctly Spanish character, and efforts were made to benefit such Convents to the exclusion of other Franciscan houses, contrary to the Rule of the Order.

That the Jaffa Convent was one in which Spain took a special interest is shown by the fact that the Spanish Consul so long ago as the year 1202 (A. H.) obtained a Biraat authorising the flying of the Spanish flag on the Convent. This is the more remarkable when it is recollected that the Terra Santa has its own flag which it is entitled to fly on the high seas (Young, Corps de Droit Ottoman).

If these purchases were made by way of gift to the Jaffa Convent, and the Jaffa Convent is not a legal entity but a part of the Terra Santa, it may be held that the effect of the transactions was to vest the ownership of the houses in the Terra Santa.

While considering the question of intention, however, I must infer from the circumstances, in addition to the desire to benefit the Jaffa Convent, a clearly marked intention to keep the houses out of the hands of the Terra Santa. Had this been the intention, there can have been no reason for making the purchases in the way in which they were made, instead of paying the money to the Discretorium in the way that the quarterly subvention was paid; nor would there have been any reason for leaving the Discretorium in ignorance of the transaction—an ignorance so complete that it would appear to have lasted for at least eight years.

If therefore intent is a factor in determining the legal position, I cannot hold that the purchases were made by way of gift to the Terra Santa. Looked at from this point of view the transaction appears to be one more attempt made regardless of Papal Briefs, upon the part of those interested in the Spanish Convents, to benefit them to the exclusion of the remainder of the Terra Santa.

In my view, however, the intention with which the purchases were made is, in the eyes of the Ottoman Law, immaterial. The governing consideration is, not what was intended, but what was actually done.

The Obra Pia through Father Llaneza, who for this purpose was their agent and not that of the Terra Santa, bought certain houses and as in accordance with Ottoman Law at that time, registration in the name of a foreign corporation was impossible, they adopted the expedient common at the time and had the houses registered in the name of an Ottoman Subject, Bitar, in whom they had confidence and whom they could control through the two Spanish monks, the Procurator and the Superior of the Jaffa Convent.

Bitar has stated on oath his belief that the purchase was made for the Terra Santa, but the value of his testimony is shaken, if not destroyed, by the fact that when called upon by the then Custos to register the property in the name of the Terra Santa, he agreed to do so only upon receiving an indemnity. I am satisfied therefore that he did not receive instructions from Father Llaneza to hold the property as a nominee for the Terra Santa; and Father Llaneza, from whom he received the purchase money, was the only person who could give him any instructions on this point.

The natural inference is that houses purchased with the money of the Obra Pia became and remained the property of the Obra Pia and I see nothing to rebut that inference either in the circumstances of the transaction or in the fact that the Obra Pia have left the management and enjoyment of the houses entirely to the Spanish Superior of the Jaffa Convent.

In my view the appeal of Selim Bitar and Father Marotta and the intervention of the Custodia di Terra Santa should be dismissed, and the judgment of the Land Court affirmed with costs.

One further point remains, namely as to the name in which the Respondent's ownership should be registered. In my view, registration should be effected in the name not of the Consul of Spain, who is merely an attorney, but of his principal, the Minister of State of Spain as representing the Obra Pia, or in such other name as the Minister, as such representative, shall direct.

JUDGMENT OF MR. JUSTICE FRUMKIN.

I need not go into the history of the case and set out all facts, both being fully dealt with in the judgment of my learned brothers. I want only to underline the relevant facts that Selim Bitar in purchasing the houses in dispute acted upon the instruction of Father Llaneza and for this purpose used monies provided by the latter or on his behalf; that no entry of the books of the Terra Santa has been produced to prove that the monies used for the purchase of the houses passed through the channels of the Terra Santa; that it is not contested that such monies were obtained from the Obra Pia outside the quarterly subventions provided by the latter to the Terra Santa; and finally, that Father Llaneza signed a declaration stating that these houses were purchased with

the monies of the Obra Pia which should therefore be registered as the rightful owner. This declaration is not an excellent piece of evidence, but it is not alleged to be a forged document.

The general rule is that when A. authorises B. to purchase property and to keep it in his name as a nominee until further instructions and then comes to ask him to effect registration in the name he has chosen, say C. or C. armed with a declaration of A. asks to be registered, B. has no right to oppose nothwithstanding any dispute which there may be between A. and C. on one side and somebody else on the other side.

In this case Selim Bitar acted on behalf of Father Llaneza, Llaneza declares that the property belongs to the Obra Pia, the Obra Pia demands registration; Selim Bitar has to obey, and it is not for him to consider the conflicts between Llaneza and the Obra Pia on one side and the Terra Santa on the other side.

The fact that at the time of the purchase Father Llaneza had not declared his intention that he was purchasing the property for the Obra Pia is to my mind not very material.

The strongest argument in favour of the Terra Santa is that Father Llaneza as a Franciscan brother and in his capacity as Procurator General of the Terra Santa could not have engaged himself in any transaction outside his function as Procurator General. I do not think that it is for this Court to deal with a breach of order which might have been committed by Llaneza, and I certainly cannot draw the conclusion that when a person occupying an office which forbids him from acquiring properties for himself or others than his employer, nevertheless acquires properties, such properties should belong to the employer because he has committed a breach of office.

For these reasons I concur in the judgment of the learned Senior British Judge.

Delivered the 2nd day of October, 1924.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 1/24.

BEFORE:

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

Acts of agent limited to powers granted in power of attorney—Ultra vires act of agent—Discharge of agent.

JUDGMENT

The Court finds that the power of attorney contains the transfer at the Land Registry only, and does not comprise the sale out of the said office. Therefore the regular sale made out of the Land Registry by the representative has no legal merit, but the representative was not discharged and still could arrange the transfer unless the Defendants paid the amount which was paid to them together with the debt they owe, and have discharged him from being representative, and if they have not done that, the provisions of the power of attorney are still in force and can be executed. Therefore it is decided to amend the judgment in the said manner.

Delivered this 24th day of April, 1924.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 114/26.

BEFORE:

Baker, J., Jarallah, J. and Frumkin, J.

IN THE CASE OF:

The Municipality of Tel-Aviv — APPELLANT.

VS

Marcoleth Company — RESPONDENT.

Delegation to agent of act which principal is required by statute to do in his own proper person — Delimitation of boundaries between Jaffa and Tel-Aviv—Submission of proposals of boundaries to District Governor—Township of Tel Aviv Order, 1921.

Appeal from the judgment of the District Court of Jaffa dated 15th December, 1925.

JUDGMENT.

By virtue of Article 9 of the Township of Tel Aviv Order of 11th May 1921, it is enacted that "the boundaries between the Township of Tel-Aviv and the rest of the Municipal area of Jaffa shall be delimited by a Commission composed of representatives of the Council of Tel-Aviv and the Municipality of Jaffa whose proposals shall be submitted to the District Governor for his approval".

Such proposals were submitted and in a notice dated 11th May, 1923, purporting to define the boundaries of the Municipal area of Jaffa and of the Township of Tel Aviv it is written: "Under the power conferred upon me by the terms of the Township of Tel Aviv Order dated 11th May, 1921, I declare that the respective boundaries etc, (sgd) J. E. F. Campbell, Assistant District Governor of Jaffa District."

Now, at the date of the said notice, Mr. Storrs was the Governor of Jerusalem and Jaffa Districts, Jaffa having been merged into Jerusalem and Mr. Storrs having been appointed Governor of the combined District by virtue of a Government notice dated 1st July 1922. Could, therefore, Mr. Campbell act for and on behalf of Mr. Storrs? There is no evidence that Mr. Storrs delegated his powers, and we are of opinion that if such was the case it could not legally be upheld. See Re Stables 33 L. J. Ch. 422, wherein it was held that "an agent may not be appointed for the purpose of doing an act, which the principal is required by, or pursuant to, any statute to do in his own proper person".

It was a condition precedent that before any quarter or area could be comprised in the Township of Tel-Aviv proposals of boundaries should be submitted to the District Governor, and this area therefore cannot be considered within the boundaries of Tel-Aviv and liable to taxation by the Tel-Aviv Township.

Accordingly the appeal must be dismissed with costs.

Given this 6th day of December, 1927.

Delivered in presence this 27th day of March 1928.

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

H. C. No. 40/28.

BEFORE:

The Senior British Judge and Khayat J.

IN THE CASE OF:

Mahmud Abdallah Samara
Aref Abdallah Samara
Abdallah Ibrahim Samara — PETITIONERS.

vs

The Registrar of Lands
Joshua Hankin — RESPONDENTS.

Agency—Remuneration and discharge of agent—Power of attorney limiting rights of agent.

Application for an Order to issue to the Director of Lands, Jerusalem, to show cause why an order should not issue directing him to refrain from transferring the lands of Petitioners to the Keren Kayemeth Le-Israel Co. Ltd., by virtue of the power of attorney of 17th Rabi's Thani, 1332, given to Mr. Joshua Hankin by Petitioners.

JUDGMENT.

It is not disputed that the Respondent Hankin is bound to account to his principals for any excess over 3800 Napoleons for which he might sell the property.

It follows that his rights under the power of attorney are restricted to the right to receive 1000 Napoleons out of the purchase money.

His principals having placed this amount to his credit, were entitled to discharge him, which they have done.

An order must issue as prayed.

The costs of this application are to be paid by the Respondent Hankin. Advocate's fees £P. 2.

Delivered this 17th day of July, 1928.

In the Supreme Court sitting a as Court of Appeal.

C. A. No. 94/28.

BEFORE:

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

IN THE CASE OF:

Yacoub Moussa Jouani — APPELLANT.

vs

Daoud Mohd. Abdu — RESPONDENT.

Action for brokerage fee for arranging mortgage — Fee payable equally by both contracting parties — Brokers' fee payable for mortgage not defined by law — Usage of trade.

JUDGMENT OF THE DISTRICT COURT.

The Plaintiff Daoud Abu-Abdu, an orange broker of Jaffa, claimed that in his capacity as broker he arranged for a mortgage of Defendant Yacoub el Jouani's two houses and orange grove to Mr. Jacobson, for £E. 2.000, that the said Defendant undertook to supply him with 25000 orange cases at the rate of 6/- per case, that the contract was accordingly entered into between them and that he (Plaintiff) was entitled to a brokerage fee of 1 penny per case which fee amounted to £E. 10.415. He claimed payment of this sum together with costs.

In Court Defendant denied the claim and the particulars given in connection with it. He also pleaded that the Plaintiff had sued him for the said sum in the Magistrate's Court, Jaffa, in which case Plaintiff claimed brokerage fees for the mortgage, but that the said Court dismissed his case on the ground that the alleged transaction was not entered in the Plaintiff's books. But the Plaintiff produced his books and the transaction was found entered in them.

The Court is satisfied with the evidence heard as well as with the entries of the books that Plaintiff acted as a broker between Mr. Jacobson and the Defendant in respect of the contract entered into between them. But whereas the fee due for brokerage is not defined, and the law does not provide the exact fee due as brokerage for similar cases, and whereas the witness Weirkh Vany said that he used to pay 1d. per case as fee;

Therefore the Plaintiff is entitled to a fee of 1d. per case which fee is payable equally by both contracting parties. Whereas a sum of £P. 60 is due by the Defendant at the rate of 1d. per

case, therefore the Court decides unanimously to order the Defendant to pay this sum to the Plaintiff with costs and £P. 5 advocate's fees.

Appeal from the judgment of the District Court of Jaffa dated the 13th May, 1928, C. D. C. Ja. No. 5/28.

JUDGMENT OF THE COURT OF APPEAL.

The judgment of the lower Court must be confirmed and the appeal dismissed with costs and advocate's fees.

Delivered this 23rd day of April, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 1/29.

BEFORE:

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

IN THE CASE OF:

Avieh Ratner — APPELLANT.

vs

Turkenits & Perlstein — RESPONDENTS.

Broker's fee—Sec. 8, Brokers' Ordinance, 1919—Brokerage fee for land transaction becomes payable on signing of agreement of sale—Meaning of "completed transaction".

Appeal from the judgment of the District Court of Jaffa, dated 9th November, 1928.

JUDGMENT.

This appeal is against the decision of the Jaffa District Court whereby they interpreted Section 8 of the Brokers' Licence Ordinance to mean that the brokerage fee could only be charged for, and when, the land is actually transferred in the Land Registry, and that Appellant was not entitled to this brokerage on the ground that a contract for sale had been completed between the parties.

Section 8 reads as follows:—

> "A broker may charge a brokerage fee according to the tariff annexed for each transaction carried through by his agency. The fee is chargeable only if the transaction is completed".

The question we have to decide is, what is a completed transaction, and we are of the opinion that the transaction for the sale of land is a completed transaction so far as a broker is concerned, when a privity of contract has been effected between the buyer and the seller, i.e. when a legal contract has been signed by both parties. Accordingly, the judgment of the lower Court must be quashed, and judgment entered up for the Appellant for the equivalent in Palestine currency of £E. 240 less £E. 30 already collected together with costs and advocate's fees here and in the Court below, assessed at £P. 5. The Cross Appeal automatically fails.

Delivered this 6th day of May, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 61/29.

BEFORE:

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

IN THE CASE OF:

Jacob Governik — APPELLANT.

vs

Faivel Lukatsky — RESPONDENT.

Employment of commission agent to buy cows — Action by unlicensed broker for payment of commission—Brokerage fees distinguished from remuneration for services rendered—Brokers' Ordinance, 1919 — Commission evidence taken abroad — Equitable rights to remuneration—2% as commission fee.

JUDGMENT OF THE DISTRICT COURT.

Plaintiff, Faivel Lukatsky contends that Defendant, Jacob Governik (both Plaintiff and Defendant being of Tel-Aviv) employed him as a commission agent with a view to the purchase of cows, which were ultimately purchased by Defendant through the intermediance of Plaintiff for the sum of LP. 9300.— and that Defendant is unwilling to pay to Plaintiff the commission to which he is entitled as well as expenses incurred by Plaintiff and incidental to the said purchase and amounting to £P. 236.897 as more particularly indicated in the list marked "L".

Defendant alleges that the Plaintiff's claim is a claim for brokerage fees, and that as Plaintiff is not a licensed broker he is not entitled to a fee.

The Court, however, in its decision of the 12th June, 1928, held that Plaintiff's claim is not a claim for brokerage fees, within the meaning of the Brokers' Ordinance, but a claim for remuneration for services rendered.

Thereupon the Defendant denied that he employed the Plaintiff, and denied that he purchased the cows through the intermediance of Plaintiff, and denied that he authorized Plaintiff to make any expenses.

It has been proved to the Court by the production of correspondence and cables, and by the evidence of witnesses heard before the Alexandria Mixed Court by way of commission that Defendant purchased cows from one Damianoi Hajioghlou for the amount of £P. 3200. It is true that in the evidence of the said Damianoi it is not expressly stated that this purchase was effected wholly by the efforts of the Plaintiff, but the correspondence and the cables show quite definitely that the Defendant instructed the Plaintiff to do certain acts with a view to the purchase of cows. Further, Damianoi gave evidence that the Plaintiff is the person who introduced him to the Defendant in the first instance. The Court is therefore satisfied that the purchase of the cows from Damianoi was effected as a result of the endeavours of the Plaintiff and it is not equitable that the Plaintiff should be deprived of remuneration for his services and we find that he is entitled to receive 2% of the said amount. As to the remaining amount, there is not sufficient evidence in support of the claim and at the request of Plaintiff, Defendant took the oath in the form required and the Court therefore unanimously decides to order the Defendant to pay to the Plaintiff the sum of £P. 64 being 2% of the said sum of £P. 3200 after conversion into Palestine currency, and to dismiss Plaintiff's claim as to the other items. Defendant to pay costs in the proportion of the sum adjudged in favour of Plaintiff to the sum claimed by him, and £P. 8 paid by Plaintiff for the expenses of attendance of witnesses.

Each party to bear its own advocate's costs.

Judgment given in presence, subject to appeal.

Delivered publicly on the 6th day of March, 1929.

JUDGMENT OF THE COURT OF APPEAL.

The Court upon hearing Mr. Zeiger for the Appellant and Mr. Gorodissky for the Respondent orders, and it is hereby ordered, that the appeal be dismissed with £P. 2 advocate's fees and costs.

Given this 9th day of April, 1930.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 7/32.

IN THE CASE OF:

Hashem Shawish — APPELLANT.

vs

Wilhelm Aberle — RESPONDENT.

Brokerage fees — Admission by Defendant that Plaintiff acted as broker—No interest payable for delay in payment of money under verbal contract — Application of Article 112, Civil Procedure Code.

Appeal from the judgment of the District Court of Jaffa, C. D. C. Ja. No. 416/31.

JUDGMENT.

The Court holds that as the Respondent admitted that the Appellant acted as a broker, the latter is entitled to brokerage.

We set aside the judgment of the District Court and substitute for it a judgment for the Appellant for £P. 57.167. As there was no contract the case does not come under Article 112 of the Civil Procedure Code, and we therefore do not order interest.

Each party to bear his own costs.

Delivered this 18th day of July, 1932.

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

C. A. D. C. Jm. No. 197/32.

BEFORE:

De Freitas, J., Plunkett, J. and Abdul Hadi, J.

IN THE CASE OF:

Hershkoff — APPELLANT.

vs

Cohen — RESPONDENT.

Brokerage fees—Claim of fees by unlicensed broker—Commission payable if transaction is isolated act — Broker's Ordinance, 1919 — Case remitted to Magistrate for re-hearing.

Appeal from the judgment of the Magistrate's Court of Jerusalem dismissing a claim for brokerage fees on the ground that only a person holding a licence from the Government may carry on the business of broker.

JUDGMENT

On consideration this case is remitted to the Magistrate to find as a fact whether at the time of the transaction sued on, the Appellant's business was that of a broker, or whether the subject of the claim was an isolated act.

If the Magistrate finds as a fact that the Appellant was not a broker at the time of the transaction he should hear the case and give a fresh judgment.

Costs to be costs in the case.

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

C. A. D. C. Ja. No. 406/32.

IN THE CASE OF:

Penhas Dvourin — APPELLANT.

vs

Abraham Fernikoff — RESPONDENT.

Brokerage fees — Claim by unlicensed broker for agreed remuneration — Commission payable if transaction is casual or isolated act— Judgment of Magistrate set aside.

Appeal from the judgment of the Magistrate's Court of Tel-Aviv dated 26th July, 1932, whereby the Appellant's action for the sum of £P. 100 was dismissed with costs.

JUDGMENT.

In our opinion, though the act done by Appellant is one of brokerage, yet he is entitled to the agreed remuneration if he does not carry on the business of a broker and if his act is a casual and isolated one.

The judgment of the Court below is, therefore, set aside and the case remitted for re-hearing.

Judgment given this 16th day of December, 1932.

AGENTS—

SEE ALSO POWER OF ATTORNEY.

AGREEMENT—

SEE CONTRACT.

ALIMONY AND MAINTENANCE.

In the Special Tribunal.

S. T. No. 1/28.

BEFORE:

The Chief Justice, The Senior British Judge and Chief Rabbi Jacob Meir.

IN THE CASE OF:

Hayeh Sarah Alpert	PETITIONER.
vs	
Chief Execution Officer Jerusalem	RESPONDENT.
and	
Moshe Leib Alpert	
Shimon Leib Alpert	THIRD PARTIES.

Claim for maintenance by Jewish widow out of estate of husband—Exclusive jurisdiction of Rabbinical Court in matters of marriage—Ketuba payable under Jewish Law is a matter of marriage — Art. 53 (a), Palestine Order-in-Council—"Alimony" interpreted according to English Law — Duty of Chief Execution Officer re judgment of Rabbinical Court.

Application for an order to issue to the Chief Execution Officer Jerusalem, to show cause why questions of alimony should not be within the exclusive jurisdiction of the Rabbinical Court although such alimony is claimed from the estate of the husband and that questions of alimony remain matters of personal status even after the death of the husband.

JUDGMENT.

This is an application "for an Order to issue to the Chief Execution Officer, Jerusalem to show cause why questions of alimony should not be within the exclusive jurisdiction of the Rabbinical Court although such alimony is claimed from the estate of the husband, and that questions of alimony remain matters of personal status even after the death of the husband".

The judgment of the Rabbinical Court, which it is desired to execute, contained the following passage:—

"The estate is ordered to pay the Ketuba of the widow Chaya Sarah Alpert in a sum of £P. 25.630. As regards the claim for alimony, after considering the position, the estate is ordered to pay a monthly sum of £P. 3 (apart from the room occupied by the woman). The continuance of the obligation for the payment of alimony is extended up to Muharram of this year, when, according to Defendant's words, they will be liable to pay her the largest sum due to her. The total of the Ketuba and alimony amounts to £.P. 60 (after deduction of a sum of £P. 4 which she had already received). This amount she will receive out of the rent of the house which is now rented to Mr. Zachs and the room which she now occupies and which will be let by the heirs. The remainder shall be paid by the Defendants Rabbi Moshe and Shimon Leib Alpert, up to the end of six months from Muharram of this year, i. e. up to the month of Teveth, 5689. The costs of this action amounting to £P. 1.400 are to be paid by both parties equally".

The Petitioner's claim is that the Courts had jurisdiction in view of the terms of Art. 53 (a) of the Palestine Order in Council which runs as follows:—

"53. The Rabbinical Courts of the Jewish Community shall have: —(a) Exclusive jurisdiction in matters of marriage and divorce, alimony and confirmation of wills of members of their community other than foreigners as defined in Art. 59".

The Chief Execution Officer's order on the application for execution runs as follows:—

"The subject matter of the action not being within the jurisdiction of the Rabbinical Court, judgment cannot be executed.

20.7.23. (sgd) Francis H. Baker".

The word "Ketuba", it appears, bears two meanings: it may mean in the first place a Jewish contract of marriage and in the second place the sum of money, which must not be less than 100 Zus, which, it must be provided in the marriage contract, shall be payable by the husband to the wife on her divorce, or out of the husband's estate, on his death. It is in this sense that I propose to use the word "Ketuba" in this judgment leaving the word marriage contract for the instrument.

Now in addition to the lump sum, named Ketuba, to which the wife is entitled by Jewish Law on divorce or widowhood,

I am satisfied that she is also entitled to interim periodical payments for her maintenance until the Ketuba is paid, and that if she does not claim the Ketuba she can go on drawing this allowance as long as she lives.

This periodical allowance has been called in the present case 'alimony' and in my opinion difficulty has arisen from this fact.

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

Alimony in English Law is either permanent alimony or alimony *pendente lite*. The former is an allowance for the support of a wife when there has been a sentence of divorce or of judicial separation, which is settled at the discretion of the Court on consideration of all the circumstances of the case, and is usually proportioned to the rank and quality of the parties.

Alimony *pendente lite* is that which, in cases between husband and wife, whether for divorce or judicial separation, the husband is ordered, whether the suit be commenced by or against him, to allow his wife as well to provide her with the means to obtain justice as for her ordinary subsistence.

Now, if, instead of this claim having arisen from the death of the husband it had its origin in the divorce of the parties, I conceive that the Chief Execution Officer would have no difficulty in executing the judgment of the Rabbinical Court in ordering an allowance to be paid to the wife for her support out of her husband's estate which would properly come under the definition of alimony, but as a matter of fact, I am informed by the Chief Rabbi that by Jewish Law such periodical sum is not payable to the wife pending payment of Ketuba on a divorce. But a post mortem payment out of the husband's estate is a different matter, and what I have to decide, since I hold that it is not alimony, is whether it is "a matter of marriage" which would bring it under Sec. 53 (a) of the Order in Council within the exclusive jurisdiction of the Rabbinical Court, or whether it is a matter of succession similar to the right of a widow in English Law on an intestacy to a specified share in her husband's estate or of a widow in Moslem Law to a specified share in her husband's estate.

I am satisfied from the authorities cited that there is an implied obligation upon the husband, arising from the marriage contract to maintain the wife, and that this obligation continues as a charge upon the husband's estate after his death until the Ketuba is paid. The authorities go further even than this and say not merely is the widow entitled to this payment for maintenance even if it is not provided for in the marriage contract, but even if the deceased husband expressed a wish that she should not be paid it, this will have no effect. It appears to me that the right to maintenance after widowhood until the payment of the lump sum Ketuba may well be considered a mere contination of the right to miantenance during the marriage which, with the right to clothing, co-habitation, medical attendance in ill health, release from imprisonment and burial is an implied condition for the benefit of the wife attendant on every contract of Jewish marriage.

It can, therefore, be distinguished from a right of succession to a share of the husband's estate and be held to be a matter of marriage under Section 53 (a) of the Order-in-Council.

Since the application is misconceived in being based on the ground that the payment was one of alimony, there will be no order as to costs.

Delivered this 29th day of April, 1929.

In the District Court of Jerusalem.

C. D. C. Jm. No. 178/28.

IN THE CASE OF:

Madge Morcus — PETITIONER.

vs

Anton Morcus — RESPONDENT.

Maintenance of Christian wife and child—Jurisdiction of Civil Courts in matters of personal status—Arts. 47, 51, 54, Palestine Order-in-Council, 1922—Jurisdiction of Courts of Christian Communities—Ability of deserting husband to pay.

JUDGMENT.

The first question for this Court to decide is whether we have jurisdiction to try such a case which is one for maintenance of a wife and her child.

The wife is a Palestinian by marriage and both parties belong to the Christian Community. Now, Article 47 of the Palestine Order-in-Council, 1922, provides that "the Civil Courts shall have jurisdiction, subject to the provisions contained in this Part of this Order, in matters of personal status as defined in Article 51, of persons in Palestine".

Article 51 prescribes that "jurisdiction in matters of personal status shall be exercised in accordance with the provisions of this Part by the Courts of the Religious Communities established and exercising jurisdiction at the date of this Order. For the purpose of these provisions matters of personal status mean suits regarding marriage or divorce, alimony, maintenance, etc".

Article 54 which deals with the Courts of the Christian Communities prescribes, inter alia, that such Courts shall have exclusive jurisdiction in matters of marriage, divorce and alimony. The question of maintenance is excluded from this Section. I am of opinion, therefore, that jurisdiction in questions of maintenance was given to the Civil Courts by virtue of Articles 47 and 51 of the Palestine Order-in-Council and that Article 54 does not exclude it from these Courts and that we have jurisdiction in such matters.

Having heard Petitioner and after perusing the documentary evidence produced in this case, I am satisfied:—

1. That Respondent Mr. Anton Morcus is the legal husband of Madge Morcus the Petitioner.

2. That Respondent is the father of a boy, the legal issue of the marriage, born on the 16th April, 1925.

3. That the husband deserted his wife and child in November, 1927, and since that time he has failed to maintain or provide for both his wife and child. I am also satisfied that Respondent is able to pay maintenance for his wife and child at the rate of £P. 25 per month.

It is therefore ordered that Respondent do pay his wife for her maintenance and that of her child, the issue of the marriage, a monthly sum of £P. 25 as and from the month of November, 1927. That this sum be paid pendente lite should this judgment be appealed or opposed.

It is also ordered that Respondent pay the costs of this action and also advocate's fees of £P. 5.

Given in absence subject to opposition and appeal this 2nd day of July, 1928.

In the High Court of Justice.

H. C. No. 5/30.

BEFORE:

Tute, J., Jarallah, J. and Khayat, J.

IN THE CASE OF:

Rafael Michakashwili — PETITIONER.

vs

Chief Execution Officer, Jerusalem

Esther Michakashwili — RESPONDENTS.

Imprisonment of husband for failure to pay alimony — Suit for alimony tried by Rabbinical Court constituted under the Communities Ordinance, 1926—Effect on judgment when judgment debtor has opted out of Community—Jurisdiction of Religious Court accepted by appearance—Execution of interim judgment.

Application for an Order to issue to the Chief Execution Officer in the District Court of Jerusalem to show cause why his Order in Execution file No. 1007/29 for the imprisonment of Petitioner should not be set aside.

JUDGMENT.

The Petitioner was sued by his wife for alimony. The suit was started before lists of the Community dealt with by the Vaad Leumi had been published. It was therefore tried by the Rabbinical Court as constituted under Article 30 of the Regulations made under the Communities Ordinance. That Court passed an interim judgment directing Petitioner to pay £P. 10 a month "till Moharrem" by which time it expected the parties to have become reconciled.

There was no reconciliation and later in the year—after Moharrem—the Court took up the case again and passed a definite judgment.

When the Execution Officer tried to execute it the Petitioner objected that he had opted out of the Community and that in consequence the judgment was ultra vires. On the rejection of his objection he has brought the matter to our Court.

He points out that three reasons exist for refusing to allow the judgment to be executed. They are as follows:

(a) He has served a notice on the Vaad Leumi notifying that body of his having left the Community dealt with by it,

(b) he is not on the published lists, and

(c) he denied the jurisdiction of the Court at the last trial.

The case turns on whether the last trial was independent of the trial which resulted in the executed judgment or not. If it was, the absence of the Petitioner's name from the published lists would in itself bar the jurisdiction of the Rabbinical Court.

If it was not, Petitioner having accepted the jurisdiction of that Court at the commencement of proceedings, could not avoid it at a later stage.

As a fact the first judgment, though executory, is on the face of it of an interim nature and contemplates the resumption of the trial in the event of no reconciliation being effected.

The second trial was and purported to be a resumption of the first for this very reason. This consideration is decisive as showing that the whole of the proceedings in the Rabbinical Court constituted a single trial.

Petitioner's application is rejected with costs and a fee of £P. 4.

Delivered this 5th day of February, 1930.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 117/30.

BEFORE:

The Chief Justice, The Senior Puisne Judge and Khayat, J.

IN THE CASE OF:

Shimon Deutsch — APPELLANT.

vs

Khaya Ester Deutsch — RESPONDENT.

Maintenance of wife — Evidence of misconduct of wife — Evidence of husband's means—Application of foreign law—Misconduct of wife disentitling her to maintenance.

Appeal from the judgment of the District Court, Jerusalem, dated 17th October, 1930.

JUDGMENT.

We hold that the Court below erred in not hearing evidence as to the alleged misconduct of the Respondent or as to the means of the Petitioner.

We therefore set aside the judgment of the District Court and remit the case to it to hear evidence on these points and to give judgment accordingly.

We wish to add that even if misconduct is proved, it will be necessary to prove also whether by the relevant law of Czecho-Slovakia such misconduct disentitles a wife to an order for maintenance in the absence of an order for separation.

Costs to follow the event.

Delivered this 25th day of September, 1931.

In the District Court of Jaffa.

C. D. C. Ja. of 1931.

BEFORE:

Sherwell, J.

IN THE CASE OF:

Rachel Shellim — APPLICANT.

vs

David Shellim — RESPONDENT.

Claim of alimony and maintenance by wife and children—Personal law of members of Sephardic Jewish Community—Application of doctrine of renvoi—Lex loci celebrationis—Sections 51, 64, Palestine Order-in-Council, 1922.

JUDGMENT.

This is a re-hearing of a claim for maintenance, alimony and rent by Mrs. Rachel David Shellim for herself and four children against her husband, Mr. David Shellim. Applicant and Respondent are both British Indian subjects who married each other in Bombay in accordance with Jewish law, both parties being Sepharadim. There are five children the issue of the said marriage, four of whom were at the commencement of these proceedings with their mother, while the fifth the eldest son is not concerned with these proceedings. Of the said four children Sophie is 21-22 years of age, Sara 17, Hana 15 and the youngest Shalem, a son, is 13 years old.

The wife's claim is really based on the alleged cruelty of and/or desertion by her husband. She has called evidence in support or her claim including her husband (Respondent himself). The latter has called no evidence on his own behalf, because as he alleges his witnesses are not in this country. Having heard the evidence and considered the submissions made on behalf of the parties, I have arrived at the following conclusions:—

1) The Respondent first came to Palestine with Appellant some 8 years ago. Since then he has purchased properties including a house at Hebron in which he allowed Applicant to settle with her children.

2) He acquiesced in her living there up to the time of the riots in 1929 when circumstances forced them to depart to Jerusalem.

3) Between 1922 and 1929 the Respondent was making periodical visits to Palestine where he has settled the second wife as well as the Applicant. Note: (Sepharadic Jews can have four wives).

4) During this period Respondent formed a definite and deliberate intention of exchanging his Indian for Palestinian domicile. He proceeded to carry this out by liquidating so far as possible his interests in India in addition to purchasing properties and settling his respective families as above mentioned, in particular, and as he himself states, he sold the more important of his Bombay interests and businesses. All this with the view of settling down himself ultimately in Palestine.

5) It is possibly true that up to the time of the commencement of these proceedings originally the Respondent was still in the habit of paying periodical visits to India in connection with the business interests which he still retained in that country.

6) For some time prior to the riots Respondent appears to have been dissatisfied with, and unduly suspicious of, his wife Rachel's conduct. As far as the evidence shows I am satisfied that his suspicions and dissatisfaction were neither warranted nor reasonable. He appears to possess an exacting, excitable and somewhat cruel nature as well as being of an extremely jealous and suspicious disposition. There seems no doubt that for some years past he has behaved extremely unkindly if not cruelly to the Applicant.

7) I am satisfied that after the removal from Hebron to Jerusalem, about August, 1929, Respondent has been guilty (without reasonable cause) of serious acts of cruelty towards his wife and did in fact desert and leave her without any sufficient means for her support and that of her four children. In particular, without sufficient excuse, he has beaten, insulted, and turned her out of the house in which they were living, thereby causing her physical and mental pain, grief and suffering. He has deliberately made it impossible for her to return to him without reasonable fear and apprehension that similar acts may be continued, possibly even in aggravated form if she were to live with him again.

8) I am not satisfied that the Respondent's present offer to take back his wife and to provide for her and the four children on condition that she will accompany him to India is made bona fide. There is in fact reasonable ground for Applicant's suspicions and fear that he wished to take her to India merely to mistreat and/or to facilitate his secret intention of divorcing her.

9) I am quite satisfied that Respondent has pursued the deliberate purpose of abandoning the conjugal society and has wilfully absented himself and refused to co-habit with Applicant without reasonable cause.

10) On the other hand Applicant has not proved that the Respondent is a very rich man though it is true that he has properties of certain value both here and in India.

11) After careful consideration (and assuming the law allows and demands it) I find that Respondent is at present in a position to pay not more than £P.6. per month for the maintenance, education and up-keep of the Applicant and the four children, if and when living apart from him.

12) The evidence here, in particular that of Rabbi Simha Assaf, shows that both parties are by presumption in Jewish law members of the Jewish Community. No evidence has been called to prove the contrary and I therefore find as a fact that both parties at the time of their marriage were members of the Sepharadic Jewish Community at Bombay and in due course became members of the Jewish Sepharadic Community in Palestine.

As regards the legal questions raised here, having regard to the above finding and to the terms of Sections 51 and 64 of the Palestine Order-in-Council, 1922, and in view of the particular circumstances of this case, I hold that the doctrine of renvoi must be followed here, and that the law which I must apply is that of the Respondent's matrimonial domicile, i. e. lex loci celebrationis. Now both parties through their respective counsel admit that if they are both members of the Jewish Community then Jewish Law applies to them in matters of personal status such as those with which we are here concerned. Perhaps I should add that if certain submissions made on behalf of the Applicant were correct then I am of opinion that this application in its present form must inevitably fail. But, however, as I have come to the conclusion on the facts found that I must apply not English but Jewish Law here, i. e. the lex loci celebrationis, then it is I think irrelevant as well as unnecessary here to deal further with such submissions. Rabbi Assaf, the expert in Jewish Law who was called by the parties, has stated (inter alia) that as far as Sepharadic Jews are concerned, their personal law regarding marriage, divorce, etc. is the same wherever they are living and wherever they were originally married. According to Jewish Law it is sometimes necessary to apply the custom of the country from which the people came and possibly the local law of the place where they are found.

In applying the doctrine of the renvoi here I might be unable to proceed any further with the matter in the absence of any positive evidence as to (a) what is the custom and/or internal Law of British India applicable in Bombay and (b) how far it may affect or modify the ordinary Sepharadic Jewish Law in matters of personal status such as here. But if it is right, in view of the peculiar circumstances of this case and the general principles of Sepharadic Law testified to by the expert, to hold and to assume as I do, from the absence of any positive evidence to the contrary, that the Sepharadic Jewish Law in Bombay in such a case as this in no way differs from the Sepharadic Jewish Law applicable here in Palestine, then I hereby order that the Respondent do pay to his wife Rachel, and support in addition thereto, the sum of 600 mils per month in respect of the 2 younger children Hana and Shalem so long as they are found in the care and charge of the Applicant, payment hereunder to be retrospective and to take effect from the 22nd December, 1929, and to continue for 12 months from date hereof and/or until further order of the Court.

Respondent to pay the Applicant's costs incurred in all the proceedings and £P. 5 for advocate's fees.

Delivered this 12th day of October, 1931.

In the High Court of Justice.

H. C. No. 53/31.

BEFORE:

The Senior Puisne Judge, and Frumkin, J.

IN THE CASE OF:

Joseph Danon — PETITIONER.

vs

Chief Execution Officer Jerusalem

Mrs. Esther (Etty) Danon — RESPONDENTS.

Husband and wife — Refusal by Chief Execution Officer to execute judgment of Rabbinical Court — Registration of judgment in Land Registry– Ketuba rights of husband—Jurisdiction of Religious Courts under Palestine Order-in-Council, 1922 in matters of personal status—Jurisdiction re mulk immovables.

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 refusing to execute the judgment of the Rabbinical Court should not be set aside.

JUDGMENT.

The Petitioner, Joseph Danon and his wife, the Respondent, Mrs. Esther Danon, have been engaged in litigation in the Rabbinical Court, which on the 7th Kislev, 5691, and the 2nd Teivet, 5691, gave judgments which the Petitioner desires to enforce.

The judgments deal, inter alia, with mulk immovable property; and the Petitioner has applied to the Chief Execution Officer, Jerusalem, to give effect to these judgments by directing that they be registered in the Land Registry. This order the Chief Execution Officer has refused to make, on the ground that in his opinion it was not "within the jurisdiction of the Rabbinical Court to decide a question involving rights in immovable property".

The Petitioner now prays for an order to issue against the Chief Execution Officer to show cause why he should not execute the judgment of the Rabbinical Court.

The relevant passages in the judgments which the Petitioner desires to have registered are, according to his own translation to the following effect:

> "In accordance with the Law of the Holy Torah relating to the conditions of the Ketuba, *the rent* of half of the house given by the husband to the wife by way of gift before the marriage and transferred by him in her name in the Land Registry Office in accordance with Kushan No. 1601 dated 7/11/27, is belonging to the husband".
>
> "Further to our judgment dated the seventh day of Kislev, 5691, No. 1353/A-C dealing with the dispute between Mr. Joseph Danon and his wife Esther Danon it was decided that, whereas para. 2 of the said judgment expressly provides that the husband has under the Jewish Law a right of usufruct including the wife being prohibited to sell in accordance with the Jewish Law relating to the conditions of the Ketuba, therefore both parties have been summoned to appear before us and we informed them as follows:
>
> (a) In accordance with Jewish Law relating to conditions of the Ketuba the said Mrs. Esther is not to be allowed to sell the half of the house mentioned in the said judgment and also she is not allowed to let, mortgage or convey as a gift.
>
> (b) Mr. Joseph Danon shall submit a guarantee that he will not leave Jerusalem without his wife's permission".

The question whether or not the jurisdiction conferred upon Religious Courts by the Palestine Order-in-Council, 1922, in matters of personal status includes the power to declare rights in mulk immovable property is one which it is unnecessary to decide for the purpose of this petition. For even if a Religious Court has such jurisdiction, it does not follow that the Court has jurisdiction to order entries to be made in the Land Registry in respect of the rights so declared. Nor indeed had the Religious Court purported to do so in the present instance. The jurisdiction to order registration is vested in the Land Court. It is true that upon the death of a registered owner, registration in the name of his heirs is effected upon production to the Land Registry of a judgment of the competent Religious Court. But even in that case, if any dispute arises with regard to the registration, it is to the Land Court, and not to the Religious Court, that application has to be made.

Further, it does not follow that because a judgment declares rights in land, the terms of that judgment are to be placed upon the register. Of the confusion that must arise if this practice were adopted, the present petition affords a vivid example.

In the earlier judgment above cited the Rabbinical Court declares that "the rent of half the house . . . . . belongs to the husband". It does not state whether the right thereby conferred upon the husband is conferred upon him for life, in perpetuity, or until further order of the Court.

In its later judgment the Rabbinical Court declares that "the wife is not to be allowed to sell the half of the house mentioned in the said judgment, or to let, mortgage, or convey it as a gift". But it does not declare in whom the power of selling, letting and mortgaging are vested.

It is obvious that if the practice of entering in the Register judgments of this kind were permissible, it would quickly render the Register useless as evidence of title to land.

We hold, therefore, that the Chief Execution Officer was right in refusing to direct that a copy of the judgment of the Rabbinical Court should be entered in the Register; and it is unnecessary to decide whether or not the position' has been affected by the fact that, since this petition was filed, the Respondent has registered a transfer of the land into the name of her mother.

The petition is dismissed.

Delivered this 24th day of December, 1931.

In the High Court of Justice.

H. C. No. 31/33.

BEFORE:

The Acting Chief Justice and Khayat, J.

IN THE CASE OF:

Dov Weinberg — PETITIONER.

vs

Chief Execution Officer, Jerusalem
Officer in Charge of Central Prison — RESPONDENTS.

Failure to pay alimony — Imprisonment of guarantor of judgment debtor—Committal by Chief Execution Officer—Sections 2, 6, 8, Imprisonment for Debt Ordinance, 1931—Grounds for setting aside order of imprisonment.

Application for an order to issue to the Respondents directing them to show cause why the orders of imprisonment of the Petitioner issued by the Chief Execution Officer, Jerusalem, dated January 21st, 1933, and April 29th, 1933, should not be cancelled and the Petitioner released from prison.

JUDGMENT.

Without going into the question whether in general an order may be made under Section 6 of the Imprisonment for Debt Ordinance, 1931, for the imprisonment of a person who has guaranteed a judgment debtor without production of "sworn evidence, oral or written" as to his means in accordance with Section 2 (c) (i) of the Ordinance, we are satisfied that that sub-section does not apply to a case where the judgment is for payment of alimony under sub-section (a) of the same Section.

The fact that the Petitioner has lands, which, when the debts in respect of which they have been attached have been paid, may leave a balance to be applied at some future date in payment of the judgment debt now in question, is not in our opinion a sufficient ground for applying Section 8 of the Ordinance and the petition must be dismissed.

In the District Court of Jerusalem.

C. D. C. Jm. No. 278/33.

BEFORE:

The President and Valero, J.

IN THE CASE OF:

Rasabi — PLAINTIFF.

vs

Pasahi — DEFENDANT.

Maintenance of illegitimate child—Application and proof of Jewish Law — No maintenance ordered where putative father refuses to recognize the child.

JUDGMENT.

This is a case of maintenance of an illegitimate child against the alleged father, which is within the jurisdiction of this Court.

After hearing evidence on the paternity of the Defendant, this Court came to the conclusion that he is the father of the child.

The two parties being Palestinians we decided to apply the Jewish Law, and we invited Rabbi Bension Kuenka, as an assessor. After hearing the references quoted by the two parties on the Jewish Law, and the opinion of the assessor, we have come to the conclusion that maintenance in favour of the illegitimate child cannot be granted unless the father recognizes him.

In the circumstances we dismiss the claim for maintenance with costs and advocate's fees of £P. 2.

In the District Court of Jaffa.

C. E. O. Ja. No. 2102/33.

BEFORE:

The Chief Execution Officer.

IN THE CASE OF:

Ismojik — PETITIONER.

vs

Ismojik — RESPONDENT.

Execution of judgment of the Rabbinical Court for alimony — Attachment of immovable property ordered by Chief Execution Officer—Removal of attachment—Security for future payment of Alimony—Jurisdiction of Rabbinical Courts in matters of personal status to order attachment of immovable property.

JUDGMENT.

This is an application by the judgment debtor asking me to remove an attachment, made on the 4th June, 1933, on certain

immovable property registered in his name in the Jaffa Land Registry.

This attachment was levied by me in execution of a judgment of the Rabbinical Court, Tel-Aviv, whereby the Petitioner was ordered to pay his first wife, the Respondent, alimony at the rate of £P. 30 per month, and ordering the attachment of his immovable property to secure payment of the said sums.

This case has been extremely well argued before me by both sides, and though the matter is not all free from doubt, yet I have arrived at a definite conclusion. With the statements of the Petitioner that judgment of the Rabbinical Court was a default judgment, that he was never summoned properly to appear, and that the sum awarded is out of proportion to his means, I have nothing to do. These are arguments which should be addressed to the Rabbinical Court and not to me as Chief Execution Officer, since I am not a Court of Appeal. The main argument of the Petitioner is that a Rabbinical Court in Palestine has no power to order the attachment of immovable property. It has been stated however, and has not been disputed, that under Rabbinical Law a wife has a lien on all property, movable and immovable, of the husband in order to secure payment of alimony. There is nothing contrary to natural justice in this. In fact the Divorce Division of the Supreme Court in England have a very similar power to order a husband to give security for the future payments of alimony or maintenance to his wife when the latter has obtained a divorce or decree of judicial separation from him.

All I am concerned with is to see that the judgment which I am asked to execute is a judgment issued by a competent Court in the exercise of its proper jurisdiction. There is no question about that here. Alimony is a matter of personal status within the meaning of the Palestine Order-in-Council, 1922. The parties are Jews and Palestinians, and the Rabbinical Court therefore has exclusive jurisdiction in this case. It is true that the judgment of these Courts are executed by the process and offices of the District Court, but the Rabbinical Court in this case is not executing its judgment. It has given an order in the exercise of its undoubted jurisdiction to secure the carrying out of its order, and by way of security has ordered the attachment of Petitioner's property. In my opinion they had the jurisdiction and the power to do so, and I must therefore decline to vary my original order of attachment.

The application must be dismissed.

ALIMONY AND MAINTENANCE—

SEE ALSO MARRIAGE AND DIVORCE.

APPEAL.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 202/23.

BEFORE:

The Vice President, Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Solomon Felman — APPELLANT.

vs

Feige Reise Rand — RESPONDENT.

Appeal—Civil procedure—Commencement of period for filing appeal is from date of service of judgment—Sufficiency of service of extract of judgment—Art. 181 Civil Procedure Code as amended—Validity of Rule of Court contained in letter from Legal Secretary not published in Official Gazette—Art. 19, Law of Execution.

JUDGMENT OF THE VICE-PRESIDENT.

The Court has been asked to dismiss this appeal on the ground that it has not been made within the time prescribed by law.

The Appellant alleges that time has not in fact begun to run against him, as he has never been served with a copy of the judgment of the District Court as required by Art. 181, Civil Procedure Code but only with an extract containing the operative part of the judgment. The Respondent maintains that in accordance with the amendment to the law as to notification made by Rules of Court, such service was valid.

The Rule in question was communicated to the Courts in a letter from the Legal Secretary's Office dated 22nd March, 1921. It is not stated that the Rule was made by the Legal Secretary with the sanction of the High Commissioner as required by Art. 28 of Proclamation No. 42 dated 24th June, 1918, but there is no evidence to the contrary and I hold that the Courts must assume that such Rule was duly made until the contrary is proved.

The Rule has never been published in the Official Gazette or otherwise, but having been communicated to the Courts, it is

in my opinion binding upon them, and must be carried into effect. This case is not governed by the decision of the Court in Zaslavsky vs Goldberg, C. A. No. 18/23 in which case what was communicated to the Court was an extract from an agreement entered into by the Government of Palestine without any Order or Rule which would render the agreement operative as an amendment of the law. What is the effect of the Rule?

It is expressed to be an addition to Art. 19 of the Law of Execution which required that a copy of the judgment to be executed should be served upon the judgment debtor before execution.

The law of execution however is quite distinct from the law as to appeal from a judgment of the District Court which is contained in the Civil Procedure Code. Art. 181 of that Code provides that the time for appeal shall run from the service of a copy of the judgment of the District Court upon the losing party.

The Rule of Court under consideration is not expressed to be, and does not appear to be intended as an amendment of that Article. I hold, therefore, that Article 181 as amended by Article 22 of the Supplement to the Civil Procedure Code, still governs the procedure of appeal.

The present Appellant has not been served in accordance with that Article and hence I hold that time has not begun to run against him and that his application is not out of time.

Delivered this 10th day of September, 1923.

JUDGMENT OF KHALDI, J. AND FRUMKIN, J.

We agree with the conclusions reached by the learned Vice-President in his judgment to the effect that in this case time of appeal has not yet begun to run and consequently the appeal is not out of time. Our reasons are that even if the Rule of Court added to Art. 19 of the Execution Law had been published and hence binding upon the Courts, this Rule does not alter the provisions of Art. 181 of the Civil Procedure Code as amended by Article 22 of the Appendix. These Articles however provide for a copy of the full judgment to be served and not only a copy of the operative part of the judgment.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 21/25.

BEFORE:

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

IN THE CASE OF:

Haj Salem Yassin Hajazi — APPELLANT.

vs

Hussein Khalil Emriesh — RESPONDENT.

Commencement of period for filing of appeal — Art. 181 Civil Procedure Code as amended by Art. 22 of Appendix — Appeal against judgment given on opposition.

Appeal from the judgment of the District Court of Jaffa dated 11th November, 1924.

JUDGMENT.

The Ottman Code of Civil Procedure recognizes only one period for appeal: namely 60 days under the original Code (Article 181), and 30 days under the Appendix (Article 22). In a case of judgment given by default the period begins (1) under the original Code, after the expiry of the period allowed for opposition, amounting altogether to 90 days as from the date of the notification of the judgment, and (2) under the amended law, as from the date of the notification of the judgment, so that under the law as it stands now there is no difference between a judgment given in presence and in default,—in both cases a period of 30 days being granted. Article 22 of the Appendix is very clear and strict. Any extension of time can only by granted under legal authority, and we find nothing in the Code to allow an appeal to be lodged after the expiration of the legal period beause of an opposition having been lodged.

In this case we have a judgment given in default. Opposition is lodged and decided. Appeal is entered against the judgment given on opposition. But we are asked to accept the appeal not only against the judgment on opposition but also as against the original judgment given by default. More than 30 days have, however, elapsed since notification of that original judgment and the entry of the appeal. We have no authority to accept an appeal out of time. This case is not covered by the Rules of Court, Civil Appeals, 1st June, 1921.

The appeal against the judgment given on default, is out of time. As to the judgment of the District Court dismissing the opposition, there is no reason to interfere with it.

Appeal dismissed with costs.

Delivered in presence the 26th day of October, 1925.

In the Supreme Court sitting as a Court of Appeal.

O.G. of 16th July, 1926.

BEFORE:

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

IN THE CASE OF:

Bishara Hanna Awad, as guardian of Michel and Isabella Jameel Hanna Awad — APPELLANT.

VS

Ahmed Ashur as heir of Haj Muhammad Ashur — RESPONDENT.

Sufficiency of Notice of Appeal — Failure to submit grounds of appeal—Questions raised on appeal to be stated.

Appeal from the judgment of the Land Court of Jerusalem.

When the case came on for hearing it was objected on behalf of the Respondent that no grounds of appeal had been submitted. The Appellant's advocate replied that he had stated in his Notice of Appeal that he raised the same questions as in his pleadings in the Court below.

Held that no grounds of appeal had been served. The questions raised on appeal must be stated. It is not sufficient to rely on the statement of defence. The Respondent has a right to be informed of the objections raised against the judgment appealed.

Appeal dismissed.

In the Supreme Court sitting as a Court of Appeal.

O. G. of 16th July, 1926.

BEFORE:

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

IN THE CASE OF:

George El Khoury — APPELLANT.

vs

Jacoub Hanna
Labbi Issa Hanna — RESPONDENTS.

Grounds of appeal not presented in time—Art. 186, Code of Civil Procedure—Rules of Court, 1st June, 1921.

No grounds of appeal were presented by the Appellants until nearly two months after the expiration of the delay allowed for appeal. This was a failure to comply with Article 186 of the Code of Civil Procedure and, as no good cause was shown for the omission, the Appellant was not allowed the indulgence provided by the Rules of Court dated 1st June, 1921, and his appeal was dismissed.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 31/26.

BEFORE:

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

IN THE CASE OF:

Leib Abramovitch — APPELLANT.

vs

Eliezer Drubin
Baruch Weiner — RESPONDENTS.

Appeal struck out—Failure of Appellant to appear—Right of Appellant to re-instate appeal on payment of fees—Civil procedure.

Appeal from the Judgment of the District Court of Jaffa.

JUDGMENT.

In this case an appeal was struck out on failure of the Appellant to attend an adjourned hearing. He subsequently obtained a reinstatement of his appeal for hearing in the list on payment of the prescribed fees. It was argued for the Respondent that there was no course open to the Appellant in such a case but opposition

to the judgment, and that he could not obtain a hearing in any other way.

Held that when an appeal is struck out for want of appearance by the Appellant that does not have the effect of dismissing the appeal, but of removing the appeal from the list of cases coming on for hearing. The Appellant may, within fifteen days of notice of the judgment striking out his appeal, apply to have his appeal reinstated on payment of the prescribed fee. He is not obliged to enter a fresh notice or fresh grounds of appeal.

Delivered in presence the 31st of May, 1926.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 219/26.

BEFORE:

The Chief Justice, the Senior British Judge, and Khayat, J.

IN THE CASE OF:

Lilian Lubin — APPELLANT.

vs

Samuel Wilson — RESPONDENT.

Words in judgment designating an appeal as of right — Leave to appeal under Section 15 (2), Arbitration Ordinance, 1926 — Judicial discretion of the Court.

Appeal from the judgment of the District Court of Jaffa, dated the 5th October, 1926.

JUDGMENT.

The words "given in presence subject to appeal" in the judgment of the District Court are the usual formula employed when there is an appeal as of right.

For a grant of "leave to appeal" which is required by Section 15 (2) of the Arbitration Ordinance, 1926, it is necessary that the Court should have exercised a judicial discretion as to whether such leave should be granted or not, which the very use of the above cited formula shows was not brought into play.

The appeal is dismissed with £E. 3 costs and advocate's fees.

Given in presence the 8th day of September, 1927.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 68/27.

BEFORE:

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

IN THE CASE OF:

Zakyeh Haj Ismail Shaker El Darwish Ahmad
Nafiseh » » » » » »
Bedawieh » » » » » »
Bahieh » » » » » »
Safa » » » » » » APPELLANTS.

vs

Ahmed El Shaker El Nabulsi
Ismail Tewfic Haj Ismail Shaker
Salomon Jacobson, Administrator
for the Estate of Joseph Moyal RESPONDENTS.

Appeal not lodged in time — Application for extension of time to appeal in interlocutory application — Rules of Court, Civil Appeals, June 1st, 1921 — Section 4, Courts Ordinance, 1924 — Rights of parties to be heard in interlocutory application.

Appeal from the judgment of the Land Court of Jaffa, dated 18th May, 1927.

JUDGMENT.

The appeal in this case has been lodged after the expiry of the period allowed by law.

Within the required period, however, the Appellant has applied in accordance with Rules of Court, Civil Appeals issued on 1st June, 1921, for an extension of time.

The question has been raised whether or not such an application is one which can be allowed or refused by the Chief Justice in Chambers without hearing the parties.

This Court has already held in the case of Aziz Irani vs. Yoshua Chankin, Civil Appeal No. 82/25 that such an order is an interlocutory order within the meaning of Section 4 of the Courts Ordinance, 1924, which can be made by a single judge.

But the question whether such an order can be made without hearing the arguments of the parties, has never previously been raised.

In the absence of any rules governing the making of interlocutory orders under Section 4 of the Courts Ordinance, 1924, we hold that the general rule is applicable and that the parties are entitled to be heard.

Delivered in presence the 29th day of December, 1927.

In the Supreme Court sitting a as Court of Appeal.

C. A. No. 76/27.

BEFORE:

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

IN THE CASE OF:

Iskandar Fiyani
Selim Bitar
Shukri Eff. Fiyani — APPELLANTS.

vs

Iezkel Liberson — RESPONDENT.

Failure to file grounds of appeal for a period of two months after the time prescribed—Cause may be shown for omission to file.

Appeal from the judgment of the District Court of Jaffa, dated 28th October, 1926.

JUDGMENT.

Appeal from Selim Bitar and Shukri Fiyani dismissed on ground that no reason for varying the decision of the Court respecting the opposition has been put forward.

Appeal of Iskandar Fiyani dismissed owing to failure to file grounds of appeal within the prescribed time and failure to show good cause for omission to do so, the delay in this instance having been no less a period than one exceeding two months.

£E. 3 costs and advocate's fees.

Given and delivered in presence the 25th day of October, 1927.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 4/28.

BEFORE:

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

IN THE CASE OF:

Nahman Spigel — APPELLANT.

vs

Sara Spigel & Others — RESPONDENTS.

Appeal not lodged in time—Procedure on application to the Court under Arbitration Ordinance, 1926—Ex parte application—Time for appeal under Civil Procedure Code is 30 days—Sec. 15 (1), Arbitration Ordinance, 1926.

Appeal from the judgment of the District Court of Jaffa, dated 30th day of March, 1927.

JUDGMENT.

The Court is unanimously of opinion that an application to the District Court under Section 15, Subsection 1 of the Arbitration Ordinance, 1926 (No. 9 of 1926), should not be made ex parte, and by a majority holds (Jarallah, J. dissenting) that the "accordance with the Rules of procedure prescribed for civil actions" imported by Section 15, Sub-section 1 of the Arbitration Ordinance, 1926, into such application requires that judgments such as this which are not appealable per se but which have to be made appealable by leave, must be appealed against within the 30 days prescribed by the Civil Procedure Code.

Being of opinion that the time for appealing has elapsed, no good purpose would be served, and costs would only be inflated by dismissing the appeal because it is based on leave granted on an ex parte application and so forcing Appellant to make a new application to the District Court with notice to the Respondent.

The appeal is therefore dismissed with £P. 12 advocate's fees.

Delivered in presence the 3rd day of April, 1928.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 26/28.

BEFORE:

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

IN THE CASE OF:

Zeev Schocher
Itzhak Isersky — APPELLANTS.

vs

Zvi Isakov Levin — RESPONDENT.

Leave to appeal to Court of Appeal granted by President, District Court — Point of law to be clearly set out — Sec. 4, Magistrates' Courts Jurisdiction Ordinance, 1924 — Appeal adjourned to enable Appellants to apply to President to set out point of law.

Appeal from a judgment of the District Court of Jaffa.

JUDGMENT.

By virtue of the Magistrates' Courts Jurisdiction Ordinance, 1924, Section 4, it is provided that the President of the Court may, if he considers it proper so to do, grant leave to appeal to the Supreme Court on a point of law.

In this appeal the President of Jaffa District Court has granted leave to appeal on the points raised in the application for the leave of appeal.

By virtue of Amer vs The American Zion Commonwealth, Civil Appeal No. 48/27 the Court of Appeal decided that the point or points of law must be clearly set out by the President.

Accordingly the case is adjourned to enable the Appellants to obtain from the President of the Jaffa District Court the point or points of law on which leave to appeal is granted. The same to be formally set out by the President.

Delivered the 2nd of November, 1928.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 73/28.

BEFORE:

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

IN THE CASE OF:

Shlomo Feingold — APPELLANT.

vs

Zelig Axelrod — RESPONDENT.

Commencement of period for lodging of appeal — Necessity of service of copy of judgment before appeal — Legal period for appeal.

Appeal from the judgment of the District Court of Jaffa, dated the 6th February, 1928.

JUDGMENT.

No copy of the judgment having been served by either party upon the other at the time when this appeal was lodged, the period for lodging appeal had not begun and hence the appeal was not made within the legal period, and in accordance with the judgment of this Court in Khalil Sorah vs Yousef Khoury & Others, Civil Appeal No. 102/28 the appeal is dismissed with costs including £P. 4. advocate's fees.

Delivered the 12th day of June, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 102/28.

BEFORE:

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

IN THE APPEAL OF:

Khahabl Sorah — APPELLANT.

vs

Yousef Khoury & Others — RESPONDENT.

Necessity of serving copy of judgment before appeal — Art. 186, Civil Procedure Code — Art. 22 of Amendments to Civil Procedure Code — Legal period of appeal is 30 days from the date of service of the judgment on the losing party.

Appeal from the judgment of the District Court of Haifa, dated 25th July, 1928.

JUDGMENT

The judgment appealed against in this case was delivered by the Haifa District Court on the 25th July, 1928. The appeal to this court is dated the same day and was presented and the necessary fees paid on the 3rd August, 1928. On this date the judgmen had not been served on the Appellant by Respondent, or on Respondent by Appellant. In fact there was no service of the judgment on Appellant until the 5th August, 1928. Article 186 of the Civil Procedure Code prescribes that the appeal application shall contain inter alia "the date of service of the judgment on the Appellant".

Article 22 of the Amendments to the Civil Procedure Code also presribes that the period for lodging appeal against a judgment shall be thirty days from the date of service of the judgment on the person adjudged against..

The Court of Appeal in Civil Appeal No. 268/22 held that an appeal did not lie where the judgment had not been notified to the Apellant nor by the Appellant to the Respondent. This ruling was followed in Civil Appeal No. 35/26, where judgment had not been notified and the appeal was dismissed.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 10/29.

BEFORE:

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

IN THE CASE OF:

Adib Hannawi — APPELLANT.

vs

Yacoub Abdul Huda — RESPONDENT.

Leave to appeal — Appeal made to Court possessing no appellate jurisdiction — Sec. 4, Magistrates' Courts Jurisdiction Ordinance, 1924— Land Court without appellate jurisdiction — Right of Court to transfer an appeal to another Court — Extension of legal period of appeal.

Appeal from the judgment of the Land Court of Jaffa, dated 17th November, 1928,

JUDGMENT.

In this case, by virtue of Section 4 of the Magistrates' Courts Jurisdiction Ordinance 1924, leave to appeal against the judgment of the Jaffa Land Court of the 17th November, 1928, has been allowed by the President thereof on two points:—

The first point for decision is:

> "Is the Land Court entitled to treat an appeal as in time when it was made originally by Appellant to the District Court and transferred by them to the Land Court on their deciding it was not within their jurisdiction?".

When the case was transferred to the Land Court, it is not denied that the time for appeal had expired and I am of opinion that the Land Court should have treated the appeal as being out of time and dismissed it.

The law prescribes the Courts to which appeals of different natures lie and an appeal made to a Court not possessing appellate jurisdiction, should be dismissed, for I know of no law enabling a Court to transfer an appeal to another Court.

The appeal having been dismissed, it follows that the appeal as such is non existent and it cannot be argued that by the presentation by Appellant of his appeal to a Court having no jurisdiction, that he has thereby prevented the time within which to bring his appeal from running against him. I am therefore of opinion that the appeal to the Land Court was out of time and should have been dismissed.

The judgment is therefore quashed and the appeal allowed on this point with costs and advocate's fees assessed at £P. 2.-

The first point having been decided in Appellant's favour, it is not necessary to enter into the merits of the second point upon which leave to appeal was granted.

Given the 15th day of May, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 42/30.

BEFORE:

The Acting Chief Justice, the Acting Senior Puisne Judge and Frumkin, J.

IN THE CASE OF:

Dov Sachs & Son — APPELLANTS.

vs

The Northern Insurance Co. Ltd. — RESPONDENT.

Court of Appeal not properly seised of Appeal — Appeal made to wrong Court.

Appeal from the judgment of the District Court of Jaffa, dated 22nd January, 1930.

JUDGMENT.

The appeal having been made to the wrong Court, and no correction having been made until after the time for appeal had expired, the Court holds, in accordance with the principle laid down in Shlank vs Greenberg and Others, Land Appeal No. 38/29, that it is not properly seised of the Appeal.

Judgment is therefore entered for the Respondent Company with costs including £P. 2.500 advocate's fees and expenses.

Delivered this 25th day of June, 1931.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 46/30.

BEFORE:

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

IN THE CASE OF:

Muhammad 'Ayesh (alias Mariam 'Ayesh) — APPELLANT.

vs

Safieh Mustafa Abu Husein — RESPONDENT.

Court not properly seised of appeal — Grounds of appeal not submitted in time — Discretion of Court of appeal to accept appeal under Rules of Court (Civil Appeals) of June 1st, 1921.

Appeal from the judgment of the Land Court of Jerusalem, dated 16th July, 1930.

JUDGMENT.

The judgment under appeal was delivered on the 16th July, 1930.

Grounds of Appeal have not been submitted in time for service on the Respondent or translation for the Court.

The Court therefore sees no reason to exercise in favour of the Appellant any discretion that may be vested in it and the appeal is dismissed with costs including £P. 1.- advocate's fees.

Delivered this 20th day of July, 1931.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 16/31.

BEFORE:

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

IN THE CASE OF:

Daoud As'ad Abu Havileh — APPELLANT.

vs

Sam'an Rizek

Shukri Rizek — RESPONDENTS.

Civil procedure—Legal period for appeal—Grounds of Appeal submitted three months after Notice of Appeal lodged.

Appeal from the judgment of the Land Court of Jaffa, dated and given in presence on the 29th December, 1930. Notice of Appeal was lodged together with the guarantee on the 26th January, 1931, but no grounds were stated in the Notice of Appeal. Grounds of Appeal were submitted on the 1st of April, 1931.

JUDGMENT

Under the circumstances, we are of opinion that the appeal must be accepted as in time.

Delivered this 28th December, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 19/31.

BEFORE:

The Chief Justice, the Senior Puisne Judge and Frumkin, J.

IN THE CASE OF:

Abraham Goodall — APPELLANT.

vs

The Anglo-Egyptian Bank
The Juge Commissaire — RESPONDENTS.

Legal period of appeal against a judgment opposing a declaration of bankruptcy—Grounds of appeal not filed in time—Appeal lodged on day of service of judgment — Article 286, Commercial Code.

Appeal from the judgment of the District Court of Jerusalem, dated 31st July, 1922.

INTERLOCUTORY JUDGMENT.

We overrule the preliminary objection on the ground that the period of appeal against a judgment opposing a declaration of bankruptcy ran in 1922 from the date of service of a copy of judgment.

Article 286 of the Commercial Code relates only to opposition and not to appeal.

Here the appeal was lodged on day of service of judgment and is therefore within time.

JUDGMENT.

On the authority of Civil Appeal No. 76/27* owing to failure to file grounds of appeal within the prescribed time and failure to show good cause for the omission so to file them (the delay having been more than eight months and a half) the preliminary objection must be upheld and the appeal dismissed with £P. 2 advocate's fees and costs.

Delivered this 11th day of March, 1932.

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* See report on page 149, ante.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 24/31.

BEFORE:

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

IN THE CASE OF:

Habib Ibrahim El Khoury — APPELLANT.

vs

Moh'd Abdel Halim Fahroon — RESPONDENT.

Civil procedure — Legal period of appeal — Reasonable cause to be shown for delay in presenting appeal — Discretion of Court under Rule I, Rules of Court, Civil Appeals, of June 1st, 1921.

JUDGMENT.

The judgment under appeal was delivered in the presence of the Appellant on the 13th April, 1931. The appeal fees were paid on the 5th May, 1931, but notice of appeal was not given within the period of 30 days allowed by law. An application for extension of time within which to appeal was registered in the Magistrate's Court on the 13th June, 1931. This application was filed within the period of one month from the date on which the period for appeal expired. The Appellant, however, has not been able to satisfy the Court that there was reasonable cause for his delay in presenting this appeal.

This Court, therefore, will not exercise in his favour the discretion conferred upon it by Rule 1 of the Rules of Court, Civil Appeals, dated 1st June, 1921.

The appeal is dismissed with costs including £P. 3 advocate's fees and expenses. Delivered the 28th of December, 1931.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 38/31.

BEFORE:

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

IN THE CASE OF:

Samuel Zubak — APPELLANT.

vs

Fanny Glovsky — RESPONDENT.

Legal period for appeal — Failure to pay fees for service of copy of judgment appealed — Filing of additional Grounds of Appeal — Delay in filing Grounds of Appeal without good cause shown — Discretion of Court of Appeal under Rules of Court, Civil Appeals of June 1, 1921.

Appeal from a judgment of the District Court delivered on September 16th, 1931, ordering Appellant to demolish certain buildings.

JUDGMENT.

The judgment under appeal was delivered on September 16, 1931. Notice of Appeal was filed on September 28, 1931, containing two grounds of appeal. Further grounds were filed on March 11, 1932. One copy of the judgment under appeal was filed with the Notice of Appeal, but no fees for service of such copy upon Respondent have at any time been paid in and consequently the Respondent has never been served with a copy of the judgment.

With regard to the first objection by the Respondent; we hold on the authority of the reported case George el Khouri vs Yacoub Hanna* and of Fitiani and Liberson (C. A. No. 76/27)** that where there is a delay of more than two months in filing Grounds of Appeal without good cause shown, the Appellant is not entitled to the exercise in his favour by the Court of the discretion conferred by Rules of Court, Civil Appeals of June 1st, 1921.

The Appellant's Grounds of Appeal therefore, filed on March 9th, 1932 cannot be taken into consideration and the appeal must be restricted to the grounds mentioned in the Notice of Appeal filed on September 28th, 1931.

With regard to the second objection taken by the Respondent as to the Appellant's failure to file more than one copy of the judgment under appeal and to pay fees for service on the Respondent, it appears that in Land Appeal No. 47/32, the judgment under appeal was given on February 20, 1932. On February 11, 1933 a copy of the judgment was served on the Respondent and at the same time a copy was lodged in Court. The Respondent had at no time called the attention of the Appellant to the fact that a copy of the judgment had not been served upon them or lodged in Court. No good cause for the omission was shown and the appeal was dismissed.

We hold that that case, in which at the hearing of the appeal a copy of the judgment had been served on the Respondent, must govern the present case in which no copy has been served up to the time of hearing, the judgment under appeal having been given on September 16th, 1931.

The appeal is therefore dismissed with costs and £P. 3. advocate's fees.

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* See report on page 146, ante.

** See report on page 149, ante.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 144/31.

BEFORE:

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

IN THE CASE OF:

Ibrahim Khalil — APPELLANT.

vs

Jad el Khury — RESPONDENT.

Civil procedure on application for leave to appeal — Necessity of service of application for leave to appeal — Jurisdiction of President of District Court — Comparison of procedure for leave to appeal under the Arbitration Ordinance, 1926, Magistrates' Courts Jurisdiction Ordinance, 1924 and Trial Upon Information Ordinance 1924 — Secs. 4, 5, Migistrates' Courts Jurisdiction Ordinance, 1924--Sec. 70, Trial Upon Information Ordinance, 1924.

Appeal from the judgment of the District Court of Haifa, dated 11th May, 1921.

JUDGMENT.

This is an appeal from the judgment of the District Court of Haifa given upon appeal from the Magistrate's Court.

The appeal to this Court is made in pursuance of leave to appeal granted by the President of the District Court under Sections 4 and 5 of the Magistrates' Courts Jurisdiction Ordinance, 1924.

The Respondent, Jad el Khury, has taken the objection that the application to the President of the District Court for leave to appeal was not served upon the Respondent; and hence that, in accordance with the judgment of this Court in the case of Benjamin Amirah vs Shlomo Shpan (Civil Appeal No. 131/31), the appeal is to be dismissed.

The case cited, however, is not the only occasion upon which the question of the proper procedure upon an application for leave to appeal has come before this Court. The point was raised in the case of Muhammad and Khalil Bayaa vs Etablissement Orosdi Back. In that case the Respondent argued that the decision of this Court in Benjamin Aloni vs Shaul Ratchko (Civil Appeal No. 13/31) governed the procedure; and hence that the application for leave to appeal must be served upon the Respondent.

The Court, however, held as follows:—

"On the first point we rule against the Respondent, as C. A. No. 13/31 is concerned with an application under the Arbitration Ordinance.

Under Section 5 (3) of the Magistrates' Courts Jurisdiction Ordinance, which concerns us here, it is only when leave to appeal is granted that the ordinary procedure of appeal has to be followed".

That judgment was delivered on the 19th November, 1931. It was not, however, cited when the same question came before the Court in the case of Benjamin Amirah vs Shlomo Shpan. In that case the Court was again asked to follow the decision in C.A. No. 13/31, and on this occasion it did so, the Court stating that—

"We can trace no distinction between the provisions governing application for leave to appeal under the Arbitration Ordinance and the Magistrates' Courts Jurisdiction Ordinance".

"Hence we hold that an application for leave to appeal must be served on the other side before such application can be granted, and that both the application for service must be made, and the fees therefor paid, simultaneously with the application for leave to appeal".

It is somewhat curious that in neither of these cases was the attention of the Court drawn to the provisions of Section 70 of the Trial Upon Information Ordinance, 1924, which appear to resemble Sections 4 and 5 of the Magistrates' Courts Jurisdiction Ordinance even more closely than do the provisions of Section 15(2) of the Arbitration Amendment Ordinance, 1928.

The relevant provisions of the latter Ordinance are as follows:—

"No appeal shall lie from the order of the District Court except by leave of the Court or of the Court of Appeal".

Thus it is clear that in arbitration proceedings, the application for leave to appeal is to the District Court and not to the President and that the decision of the District Court on such an application is subject to appeal to the Court of Appeal.

The provisions of the Magistrates' Courts Jurisdiction Ordinance, Sections 4 and 5 are as follows:—

"4. The decision of the District or Land Court in any appeal from a Magistrates' Court shall be final; but the President of the Court may, if he considers it proper so to do, grant leave to appeal to the Supreme Court on a point of law".

"5. Application for leave to appeal against a judgment under Articles 3 and 4 hereof shall be made in writing within 10 days of the delivery of the judgment if in presence or of notification to the Applicant if delivered in his absence and shall contain a statement of the grounds upon which leave to appeal is requested, and shall be accompanied by deposit in Court of the sum of £E. 1 which shall be forfeited if leave to appeal is refused.

(1) If leave to appeal is granted, the deposit shall be applied in payment of the fees of appeal, and any balance not required for the purpose shall be repaid to the Applicant.

(2) If leave to appeal be granted the ordinary procedure on appeal shall be followed, but no further ground of appeal shall be submitted. Within 10 days from the date upon which notification of leave to appeal is made to him the Applicant shall comply with the provisions of the law relating to appeals as to payment of fees, furnishing security, and otherwise. If the judgment was one of imprisonment, the President may order the release of the Appellant on bail".

Thus it is clear that an application under these Sections is made to the President, and not to the Court, and that no appeal lies from his decision.

Section 70 of the Trial Upon Information Ordinance, 1924, reads as follows:—

"From any final judgment which has been given by a Court of Criminal Assize or a District Court on the trial of a case and which is not subject to appeal, the Court before which the case was tried may give leave to appeal if in its opinion it is of such a nature that an appeal ought to be allowed; or the President of the Court of Appeal may give leave to appeal if it appears that there has been some irregularity of procedure which has occasioned a failure of justice or that a question of law has been wrongly decided. An application for leave to appeal must be made within 10 days from the conviction.

It shall contain a statement of the grounds upon which leave to appeal is requested and shall be accompanied by deposit in Court of the sum of £P. 1 which shall be forfeited if leave to appeal is refused. If leave to appeal is granted the deposit shall be applied in payment of the fees of the appeal

and any balance not required for this purpose shall be repaid to the Applicant.

When leave to appeal is granted under this Section the same provisions shall apply as in cases were no leave is required except that no further grounds of appeal may be submitted".

It will be seen that the position of the President of the Court of Appeal under this section is only differentiated from that of the President of the District Court in relation to an application for leave to appeal in a criminal matter under Sections 4 and 5 of the Magistrates' Courts Jurisdiction Ordinance, 1924, by the fact that under Section 70, leave to appeal, if granted, is general as regards rules of procedure and questions of law, while under the Magistrates' Courts Jurisdiction Ordinance the appeal is restricted to the points of law specified by the President of the Court.

It is further to be noted that the procedure after leave to appeal has been obtained under Section 70 is identical with that prescribed under Section 5 of the Magistrates' Courts Jurisdiction Ordinance.

Now the procedure to be followed upon an application for leave to appeal under Section 70 of the Trial Upon Information Ordinance, 1924, is settled beyond dispute. After perusal of the application and the record of the trial, the Chief Justice grants, or refuses, leave to appeal without reference to the Attorney General.

We can see no reason why a different course should be taken in the case of an application under Section 5 of the Magistrates' Courts Jurisdiction Ordinance, 1924, for leave to appeal to this Court against a conviction confirmed by the District Court in its appellate capacity, and Sections 4 and 5 of that Ordinance make no distinction between applications for leave to appeal in civil and in criminal matters.

Accordingly, we hold that it is within the competence of the President of the District Court to grant or refuse, an application for leave to appeal made under Section 5 of the Magistrates' Courts Jurisdiction Ordinance, 1924, without such application having first been served upon the other party.

The Respondent's objection is therefore overruled.

Delivered the 28th day of April, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 147/31.

BEFORE:

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

IN THE CASE OF:

Sara bint Ali Jadallah — APPELLANT.

vs

Shaker Ali Hammad — RESPONDENT.

Appeal on points of law—Appellate jurisdiction of District Court—Finding of fact not upset on appeal except when unsupported by evidence—Admission of oral evidence to disprove document—Legal question not raised by point of law.

Appeal from the judgment of the District Court of Jerusalem, dated the 24th April, 1930.

JUDGMENT

The points of law stated by the learned President of the District Court in this case are:

(1) Whether the District Court sitting in its appellate jurisdiction was justified in upsetting findings of facts by the Magistrate.

(2) Whether the District Court was right in ordering the Magistrate to hear oral evidence against the document on which the claim was based.

(3) Whether the findings of fact by the District Court are reasonable.

With regard to the first point the law is perfectly clear that an Appellate Court cannot interfere with or upset a finding of fact made by a Court of original jurisdiction unless such finding is unsupported by evidence.

With regard to the first point, both written and case law categorically allowed (save in certain cases which are not the subject of this appeal) the admission of oral evidence to disprove a document. In this case, the District Court was not justified in ordering the Magistrate to hear oral evidence to rebut the contents of the document in question.

With regard to the third point, we do not consider it to be a point of law and therefore do not propose to make any comments.

The case must, accordingly, be remitted for the District Court to enter judgment in the light of this decision.

Delivered the 20th day of May, 1930.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 12/32.

BEFORE:
The Chief Justice, the Acting Senior Puisne Judge, and Frumkin, J.
IN THE CASE OF:

William Rubinstein — APPELLANT.
vs
Esther Rubinstein — RESPONDENT.

Appeal to the Court of Appeal addressed to District Court — Civil Procedure — Dismissal of appeal for lack of jurisdiction.

Appeal from the judgment of the District Court of Haifa, dated the 11th of December, 1931.

JUDGMENT.

The appeal having been filed in and addressed to the District Court and not the Supreme Court, we are not properly seised of the appeal. See Land Appeal No. 38/29.

The application is therefore dismissed.

Delivered the 17th day of June, 1932.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 17/32.

BEFORE:
The Acting Senior Puisne Judge, Frumkin, J. and Khayat, J.
IN THE CASE OF:

Haj Ibrahim Saleh Ahmad Bahlul — APPELLANT.
vs
Amneh Bint Hassan Khalifeh
Halime Bint Hassan Abu Hymra
Ghafra Bint Hassan Abu Hymra
Zeihah Bint Hassan Abu Hymra
Miriam Bint Hassan Abu Hymra
Fatmeh Bint Hassan Abu Hymra — RESPONDENTS.

Procedure on appeal — Appeal to Court of Appeal from refusal by President of Land Court of application for leave to appeal — Travelling expenses allowed to parties.

Appeal from the judgment of the Land Court of Jaffa, dated the 3rd November, 1931.

JUDGMENT.

We are satisfied that there is no appeal before this Court. Applicant submitted an application to the Land Settlement Officer for leave to appeal which was refused. He then applied to the President of the Land Court for leave to appeal which was also refused. He now applies to the Court of Appeal appealing against the refusal of the President of the Land Court.

We know of no provision in any law allowing Applicant to do this, and the application must be refused with costs.

Advocate's fees in the sum of £P. 2, are allowed; also two hundred and fifty mils travelling expenses are allowed to each of the six Respondents.

Delivered the 13th day of June, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 58/32.

BEFORE:

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

IN THE CASE OF:

Joshua Khankin — APPELLANT.

vs

Qasem Muhammad Mustafa — RESPONDENT.

Failure to file Grounds of Appeal within legal period—Delay of one day not sufficient to prevent its being heard—Civil procedure.

Appeal from the judgment of the District Court of Nablus, dated the 29th March, 1932. The question was one of the jurisdiction of the District Court to interdict, where Defendant was a Moslem and Plaintiff not a Moslem.

INTERLOCUTORY JUDGMENT.

In accordance with previous decisions, the Court holds that a delay of one day in presenting the full grounds of appeal is not sufficient to prevent it being heard.

JUDGMENT.

In accordance with the decision of the Supreme Court in Civil Appeal No. 98/27, the appeal is allowed and the judgment of the District Court is set aside and the case is remitted to the District Court for completion with £P. 2 advocate's fees and costs.

Delivered the 7th day of February, 1933.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 72/32.

BEFORE:

The Acting Chief Justice, the Acting Senior Puisne Judge and Khaldi, J.

IN THE CASE OF:

Samara and Others — APPELLANTS.

vs

Keren Kayemeth Leisrael and Tayan — RESPONDENTS.

Failure to serve judgment before appeal—Judgment served must be officially certified to be a true copy — Attention of Appellant called to omission.

Appeal from a judgment of the District Court of Nablus dismissing the claim of the Appellants to an area of 800 dunams of land in Wadi Hawareth.

JUDGMENT.

The copy of the judgment under appeal served by the Appellant upon the Respondents is not officially certified to be a true copy. The attention of the Appellant to this respect was called by the Respondents in a reply dated February 17th, 1933, but the Appellant has not made good the defect.

Accordingly, in accordance with the judgment of this Court in George Kawar v. Anton Boutrus Matte (C. A. No. 113/32), the appeal is dismissed with costs including £P. 2 advocate's fees.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 76/32.

BEFORE:

The Acting Chief Justice: The Acting Senior Puisne Judge and Khaldi, J.

IN THE CASE OF:

Ahmed Abu Nyama — APPELLANT.

vs

The Anglo-Palestine Bank Ltd. and Another — RESPONDENTS.

Extension of time granted for filing grounds of appeal — Delay of 43 days in filing grounds of appeal held not too long where Respondent had not been prejudiced by the delay—Discretion of the Court exercised under Civil Appeals, Rules of Court, June 1, 1921—Art. 187, Civil Procedure Code.

INTERLOCUTORY JUDGMENT.

In this case there has been a delay in filing grounds of appeal of 43 days. The Respondent has not been prejudiced by this delay. It would be unreasonable, therefore, to dismiss the appeal on this ground. The objection is accordingly overruled.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 4/33.

BEFORE:

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

IN THE CASE OF:

Fahima Hanim — APPELLANT.

vs

Hazzak Marishud — RESPONDENT.

Failure to obtain leave to appeal—Leave to appeal refused by President of the Land Court on first application, but granted on subsequent application—President is functus officio after refusing application—Secs. 4, 5, Magistrates' Courts Jurisdiction Ordinance.

Appeal from the judgment of the Land Court of Haifa, dated September 9th, 1932.

JUDGMENT.

In this case the appellate judgment of the Land Court delivered on September 9th, 1932, was served on October 4th, 1932. The Appellants applied for leave to appeal on a point of law, on October 11th, 1932, under Section 4 of the Magistrate's Courts Ordinance, 1924. The President of the Land Court refused to grant leave on October 25th, 1932. The Appellants then lodged a second application on October 28th, 1932, and the President on reconsidering the matter granted leave on November 7th, 1932.

We are of opinion that the President having exercised his judicial discretion in refusing the first application was functus officio and that even if the second application had been made in time, namely ten days from delivery of the Land Court judgment under Section 5 of the Magistrates' Courts Ordinance, which it was not, the President of the Land Court having already exercised his discretion had no power once more to do so, and vary his decision.

The appeal is therefore dismissed with £P. 2 advocate's fees and costs.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 13/33.

BEFORE:

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

IN THE CASE OF:

Max Levite and Another — APPELLANTS.

vs

Jamal El Husseini — RESPONDENT.

Delay in filing grounds of appeal—Cause not shown for failure to file in time—Application by advocate for adjournment to ascertain reason for delay refused.

Appeal from a judgment of the District Court dated 14th December, 1932.

JUDGMENT.

No grounds of appeal have been filed within the period prescribed by law and no cause has been shown for such failure.

The Appellant's advocate has asked us for an adjournment to ascertain from his client the reason for the delay. As, however, the advocate himself filed both the notice of appeal and the grounds of appeal, we cannot allow an adjournment for this purpose.

In accordance with the judgment of this Court in Raji Issa vs Bella Schweidt and Another, (C. A. No. 100/32) the appeal is dismissed with costs including £P. 2 advocate's fees.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 38/33.

BEFORE:

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

IN THE CASE OF:

Sovransky — APPELLANT.

vs

Trachtenberg — RESPONDENT.

Section 15 (2), Arbitration Ordinance, 1926 — Application to set aside award of arbitrators — Interpretation of phrase "judgment in presence subject to appeal" — Words and phrases — Jurisdiction of Court to issue certificate interpreting its own judgment.

Appeal from the judgment of the District Court, Haifa, dated 14th September, 1928, refusing to set aside an award of arbitration.

JUDGMENT.

The judgment dated 14th September, of the District Court which gives rise to this application concludes with the phrase "judgment in presence and subject to appeal, delivered in presence of the advocates of both parties".

On 20th February, 1929, the learned judges who constituted the Court upon an ex parte application by the present Appellant signed a certificate that the expression "subject to appeal" in the judgment has the meaning of "leave to appeal from the said judgment granted in accordance with the special section of the Arbitration Ordinance".

We hold that it was not within the competence of the learned judges thus to interpret the expression used by them in their judgment, and further that in view of the judgment of this Court in Lubin vs Wilson, (C. A. No. 219/26), the words "subject to appeal" cannot be interpreted to mean that the Court has exercised the discretion which a grant of leave to appeal under Section 15 (2) of the Arbitration Ordinance, 1926, implies.

It follows that leave to appeal has not been granted as required by law and there is no appeal before this Court. The application is dismissed.

APPEAL—

SEE ALSO: CIVIL PROCEDURE, EVIDENCE.

APPEARANCE.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 129/22.

BEFORE:

The Vice President, Jarallah, J. and Khayat, J.

IN THE CASE OF:

Saleh Mohammed Shible — APPELLANT.

vs

Assad Habib Hawa & Sons and Others — RESPONDENTS.

Amendments to Articles 139-150 of Civil Procedure Code applied to Court of Appeal—Proceedings contested by appearance of party—Default judgments—Bills of exchange made in 1914—Substitution of party by court judgment—Claim of excessive interest.

JUDGMENT.

Whereas the bills which are the subject of this action are dated 4th July, 1914, that is, before the issue of Turkish notes.

And whereas the Respondents in this case, have, by virtue of the judgment of this Court (Civil Appeal No. 94/21) dated 13th June, 1921 been substituted for the Imperial Ottoman Bank in this action and have all the rights of the Bank as against the Appellant.

The Court holds that the nature of the payment made by Respondents to the Bank is immaterial and that the Appellant is liable to pay in respect of the amount adjudged against him the equivalent in Egyptian currency according to the official tariff of the currency in force at the time the debt was contracted: that is at the rate of 108.34 piasters (local currency) equivalent to one Napoleon, that is to 77.15 piasters Egyptian.

As regards the claim for excessive interest; the Respondents stand in the same position as the Bank and they are not the original payees of the bills but are bona fide indorsers for value.

Hence this defence cannot be raised against them.

The Appellant is to pay the costs.

It has been held in several previous cases in this Court that the Amendments to Articles 139 to 150 of the Civil Procedure Code made by Rules of Court dated 10th December, 1918, are applicable on appeal to this Court.

Accordingly, the Court holds by a majority that the Appellant having appeared in the previous hearings the proceedings as against him are to be treated as contested in accordance with Articles 145 and 146 as amended and judgment is given upon the pleadings which have already been put in, and is not subject to opposition.

The judgment of the Court of First Instance of Acre is confirmed.

DISSENTING JUDGMENT OF JARALLAH, J.

I am of opinion that the amended Rules mentioned in the above judgment with regard to judgments by default do not apply to proceedings in the Court of Appeal and I therefore hold that this judgment should be by default.

In the Supreme Court sitttng as a Court of Appeal.

C. A. No. 124/27.

IN THE CASE OF:

Awad El Habbab and sons — APPELLANT.

vs

Faydi Eff. Salahi — RESPONDENT.

Failure of Appellant to enter appearance — Oath of party to bill of exchange to establish date of endorsement.

Appeal from the judgment of the District Court of Jaffa dated 5th September, 1927.

JUDGMENT.

There being no appearance for the Appellant who was duly summoned and the Respondent having taken an oath to the effect that the endorsement was not made after maturity, the Court dismisses the appeal with costs.

Delivered the 8th May, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 103/28.

BEFORE:

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

IN THE CASE OF:

Adib Ibrahim el Zaben — APPELLANT.

vs

Sadya Baz — RESPONDENT.

Failure to enter appearance — Duty of trial Court to ascertain whether there was good cause for non-appearance — Opposition to judgment by default — Medical certificate produced to prove inability to appear.

Appeal from the judgment of the District Court of Haifa dated 23rd March, 1929.

JUDGMENT.

The opposition was dismissed by the Lower Court (according to their judgment) upon the grounds that the present Appellant did not produce a legal excuse for his non-appearance in the Court at the first hearing.

It is the duty of the Lower Court to ascertain whether the Opposer had good cause for not appearing and the question cannot be decided on the single issue of the production or non-production of an excuse at the original hearing,—if such were the case a person being run over and taken to a hospital whilst on his way to attend a first hearing would have no remedy.

Accordingly, the judgment of the Lower Court is quashed and returned for the Court to consider the medical certificate produced, and evidence as to the allegation by the Appellant that his brother attended the Court a quarter of an hour after judgment with the medical certificate and then to give judgment as to whether Appellant had good cause for not appearing at the original hearing.

Costs to follow the event.

Given the 24th day of April 1929.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 22/29.

BEFORE:

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

IN THE CASE OF:

A. Cohen
Harold Henry Harry — APPELLANTS.

vs

Hayim Tennenbaum — RESPONDENT.

No appearance entered for Appellant—Appeal struck out.

JUDGMENT.

The Court after hearing Mr. King for the Respondent, there being no appearance by or on behalf of the Appellants who have been duly served, orders and it is hereby ordered that the appeal be struck out.

No order as to costs.

Delivered the 16th day of July, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 33/29.

BEFORE:

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

IN THE CASE OF:

Alfred Jabour — APPELLANT.

vs

W. J. Fadi — RESPONDENT.

Opposition to judgment by default—Sufficiency ot medical certificate as excuse for not attending hearing—Discretion of Lower Court—Medical certificate presented after the first hearing.

Appeal from the judgment of the District Court of Haifa, dated 9th October, 1928.

JUDGMENT.

The question of accepting or not accepting a medical certificate as an excuse for not attending the hearing of a case is a matter for the discretion of the Lower Court.

In this case, however, the District Court disallowed the medical report on the ground that the same was not presented at the first sitting.

We cannot agree with this ruling. The Court should have considered the medical report, having regard to all the facts before the Court such as the time it was issued and alleged presence of the Appellant in the Court buildings upon the date of the first hearing.

The case is therefore remitted for the Lower Court to consider the above facts and if then not satisfied with the excuse, to then dismiss the opposition. Costs in the cause.

Delivered the 11th day of July, 1929.

APPEARANCE—

SEE ALSO CIVIL PROCEDURE.

ARBITRATION.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 53/22.

BEFORE:

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

IN THE CASE OF:

Isaac Trachtengot — APPELLANT.

vs

Samuel Wilson — RESPONDENT.

Action to set aside the award of arbitrators — Allegation that sum awarded exceeds amount claimed — Irregularities of procedure in arbitration—Special charges of misconduct made against arbitrator—Failure by one arbitrator to hear all the evidence—Private interview with arbitrator — Decisions of English Courts cited as authority — Principles of English Arbitration Act not applied—Arbitration under Article 1850, Mejelle — Arbitrator not acting in purely judicial capacity—Ground for setting aside award.

Appeal from a judgment dated 23rd November, 1921, of the District Court of Jaffa dismissing two consolidated actions brought by the Appellant against the Respondent in one of which the Appellant asked that an award of arbitration dated 20th September, 1921, whereby a sum of £E. 289.48 was adjudged to be payable by the Appellant to the Respondent, be set aside, and in the other of which the Appellant brought a claim for damages against the Respondent.

JUDGMENT.

With regard to the award, Appellant claimed that it must be set aside on the ground that the sum awarded exceeds that claimed by the Respondent. This argument is however based upon a misconception of the facts, as it is clear that the amount of the claim finally submitted by the Respondent to the arbitrators was £E. 437.072.

The Appellant also alleges irregularities in the manner in which the arbitration was conducted and argues that having made such an allegation he is entitled to call evidence in support of it.

It is clear, however, that he is not entitled to allege misconduct generally, but is bound to bring forward specific charges of misconduct.

He has in fact made the following allegations:

a. That Feinstein the arbitrator named by the Respondent was his advocate and was paid by the Respondent for his services as arbitrator and acted as a partisan of the Respondent.

b. That Katinsky, the 3rd arbitrator nominated by the other two did not have all the evidence placed before him in that he never heard the explanation given by the parties.

c. That the arbitrator Schwartz nominated by the Appellant had a private interview with the Respondent, subsequent to which an item of £E. 10 previously disallowed was re-inserted in favour of Respondent.

In support of his argument the Appellant has drawn the attention of the Court to a number of decisions of the English Courts in arbitration cases.

It must, however, be borne in mind that these decisions relate to arbitrations under the English Arbitration Acts, and the principles which govern them are not necessarily applicable in this country. It is unquestionably a common practice here for parties in disagreement who do not wish to go to the Courts, to submit their disputes to the decision of arbitrators, one of whom is chosen by each party and the third either by agreement between the parties or by the other two arbitrators; and such arbitration submissions are made with the full understanding and intention that the arbitrator appointed by each party is to some extent the representative of the party empowered by him to come to a reasonable settlement, and is not acting in a purely judicial capacity; and that the 3rd arbitrator is an umpire only called in to decide points upon which the other two arbitrators cannot come to an agreement. This is the form of arbitration which appears to be contemplated by Article 1850 of the Mejelle.

This practice has obvious disadvantages but where it is the parties' intention to adopt it, an award is not to be set aside on the ground that the arbitrators have not acted purely judicially.

It is clear that such was the intention in the arbitration in question from the fact that the Appellant states that he has offered a remuneration to Schwartz, the arbitrator nominated by him.

Arbitrators appointed in this manner by the parties are in a totally different position from arbitrators under the English Arbitration Acts, and are not necessarily bound by the rules that would govern an arbitration in this country under a reference made by leave of the Court. With regard to the alleged interview between Schwartz and Wilson, the Appellant has stated that he does not allege corruption. Accordingly the Court holds that proof of such

an interview would not afford a ground for setting aside the award in an arbitration of this nature.

It remains for the Court to deal with the question of the counter-claim by Appellant for damages caused by alleged defective work on the part of the Respondent.

The Court holds that on the true interpretation of the submission, such claim for damages was included therein. And hence that the Appellant cannot claim outside the award in respect of any defect existing at the date of submission which has not been subjected to investigation, whether in fact such defect was within his knowledge or not; and further that the defects alleged to have been disclosed by the Report of Messrs. Blader and Theiner upon which the counterclaim is based might have been discovered by a similar expert examination made before the date of the submission. The Appellant's claim to have the counterclaim decided apart from the award therefore fails.

If however, it were established that Appellant's claim in respect of the defects alleged was put before the arbitrators, and that they had neglected to take such claim into account in making their award, this would be a ground for refusing to confirm it. The award does not contain any indication of the claims dealt with, and it is not accompanied by any minutes of the arbitrators proceedings, nor is there any other evidence before the Court from which this point could be established.

The Court therefore sets aside the judgment and remits the case to the Court to determine, whether any claim in respect of alleged defective work by Respondent was submitted to the arbitrators by the Appellant, and if so, whether in making their award they took such claim into account and to give judgment accordingly.

Costs to be costs in the case.

Dated the 20th day of December, 1922.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 180/22.

IN THE CASE OF:

Menaham Y. Weidman — APPELLANT.

VS

Taube Weidman — RESPONDENT.

Confirmation of award of arbitrators by District Court--Arbitrators' decision regarding rights to immovable property held invalid.— Jurisdiction of the Court re immovable property.

Appeal from the judgment of the District Court, dated 25th December, 1922, confirming an award of arbitrators delivered on the 27th Ellul, 5678, in connection with the distribution of the estate of the late Ibrahim Zelige.

JUDGMENT.

On examining the appeal and the dossier of this case the Court is satisfied that the District Court on the 25th December, 1922 confirmed the judgment of the arbitrators given on the 27th Ellul, 5678. The Appellant pleaded that the said decision was contrary to Proclamations Nos. 75 and 76, regulating the right to deal with Immovable Property. The Respondent replied that the Appellant could not deny the decision of the arbitrators because they agreed to accept a part of the decision, but the Court finds that the arbitrators' decision is contrary to law in that it gives a decision in connection with Immovable Property. Such point should be determined by the Court, and since there is no such claim or defence in the dossier, the Court decides to reject the decision of the District Court, with costs against the Respondent.

Given in presence the 27th February, 1923.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 198/22.

BEFORE:

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

IN THE CASE OF:

William Entin — APPELLANT.

vs

Litwinsky Brothers — RESPONDENTS.

Goods returned as not being up to sample—Awards of two different sets of arbitrators—New arbitration not illegal—Art. 1849, Mejelle—Proceedings commenced before District Court, but continued by President alone — Arbitrations not against public policy — District Court cannot be constituted by one Judge even with consent of parties.

Appeal from the judgment of the District Court of Jaffa.

JUDGMENT.

In this case the Plaintiff brought an action in the District Court of Jaffa, against the Defendants in respect of a sale and purchase of goods which Plaintiff complained were not according

to sample and were deficient in quantity. He claimed a right to return the goods and in addition and alternatively damages.

The Defendants set up that this claim had been settled by arbitration by consent of the parties. It appeared that there had been two arbitrations, one before arbitrators at Haifa, in which Plaintiff had succeeded, the second at Jaffa before arbitrators who professed to sit as a sort of appellate Court in which the Plaintiff was defeated. How it came to pass that having obtained an award in his favour before one set of arbitrators, he consented to go before another set and risk losing his award was not explained, but it has been admitted that he consented to the second arbitration.

Unless there was something illegal in the conduct of the second arbitration of which no evidence was produced, it would be upheld by a Court of Justice. This practice which is sanctioned by Article 1849 of the Mejelle has its origin in the Law of Contracts.

The objection raised by the Plaintiff was that the existence of these arbitrations is against public policy but there has been no fact brought before us or appearing in the President's notes to show that there is anything in the conduct of the arbitrations which is objectionable as being contrary to law or against public policy.

The proceedings were opened before a regular District Court but were continued before the President of the District Court sitting alone by consent of the parties. The President disregarded the argument of the Plaintiff that the arbitrations or rather what was styled the arbitration Court was a body which competed with the Courts of Justice so as to be against public policy and refused to reopen the dispute. A claim made by the Plaintiff based on a charge against the Defendants of wrongfully retaining samples from the arbitrator so as to prejudice their case was apparently not entered into. The Plaintiff's action was dismissed with costs.

It may have been a very sensible plan for the parties to agree to abide by the judgment of the President sitting alone so as to avoid delay, but when the question is brought before a Court of Appeal, it is not possible to hold that a District Court can be legally constituted by one judge even by the consent of the parties. It might be said that the parties really agreed to go before the President as before an arbitrator and they could have done this, and then there would have been no appeal to this Court because a Court of Appeal does not hear appeals from arbitrators. Strictly speaking, there is no such thing as an appeal from an award of arbitrators, because arbitrators do not constitute a Court of Justice, on grounds similar in some respects and in others different from

those which determine a Court of Appeal in its dealings with the judgments of Courts, but awards are not subject to appeal.

But Mr. Seton did not regard himself as an arbitrator because he gave judgment which is therein stated to be appealable. All that we can say is that it is not a judgment of a District Court. So far as it purports to be a judgment of a District Court it must be set aside.

No costs of appeal will be allowed. Appellants agreed to a proceeding to which they now object. Had they objected from the first the present difficulty would not have arisen.

Delivered the 22nd November, 1922.

In the Supreme Court sitting as a Court of Appeal.

C. L. A. C. A. No. 10/27.

BEFORE:

The Acting Chief Justice. The Acting Senior British Judge, and Khayat, J.

IN THE CASE OF:

Nathan S. Baron, Tel-Aviv — APPLICANT.

vs

M. Bedolach, Syndic of Estate of H. Moses, Bankrupt — RESPONDENT.

Sect. 15(2), Arbitration Ordinance, 1926—Procedure—Application for leave to appeal — Jurisdiction of Court of Appeal to grant leave — English rules of procedure applied—Judicature (Procedure) Act, 1894.

Application for leave to appeal against the judgment of the District Court of Jaffa dated the 8th August, 1926, whereby an award of arbitration on the matter in dispute between the parties was confirmed.

JUDGMENT.

This is an application for leave to appeal against the judgment of the District Court of Jaffa dated 8th August, 1926, confirming an award of arbitration.

Section 15 (2) of the Arbitration Ordinance, 1926, provides that "No appeal shall lie except by leave of the Court, or by leave of the Court of Appeal". The Applicant has applied to the Court, that is, the District Court, for leave to appeal, which has been refused.

The question we have now to determine is whether under these circumstances the Applicant has now the right to apply to this Court.

In support of this application the Applicant has cited the practice under the Judicature Procedure Act, 1894, Section 1 (1). That sub-section enacts that:

"No appeal shall lie, (b) Without the leave of the judge or of the Court of Appeal from any interlocutory order made by a judge".

The settled practice under this sub-section is that:

"Where both the Court making the order and the Court of Appeal have jurisdiction to grant leave, the application shall be made to the Court or judge making the Order, and on refusal may be renewed to the Court of Appeal" (Annual Practice 1923, p. 1121).

The Arbitration Ordinance, 1926, is based upon the English law of arbitration, and we hold that in questions of procedure arising under that Ordinance regard should be had to English rules of procedure. No authority has been quoted in support of the contrary view. We, therefore, hold that the applicant is entitled to apply to this Court for leave to appeal.

Delivered in presence of both parties the 6th day of May, 1927.

In the Supreme Court sitting as a Court of Appeal.

C. L. A. C. A. No. 10/27.

BEFORE:

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

IN THE CASE OF:

Nathan S. Baron — APPLICANT.

vs

M. Bedolach, Syndic of Estate of H. Moses Bankrupt — RESPONDENT.

Sec. 13, Arbitration Ordinance, 1926—Leave to appeal refused—No error of law obvious on face of award—Refund of fees paid in error.

Application for leave to appeal against the judgment of the District Court of Jaffa dated 8th August, 1926.

JUDGMENT.

There is no error of law so obvious on the face of the award that the Court would be entitled to grant leave to appel under the Arbitration Ordinance 1926, Section 13. Leave to appeal is refused.

Costs are to be paid by the Applicant including £P. 5 advocate's fees.

The Applicant is entitled to be repaid the fees paid by him in error in respect of the application for leave to appeal to the extent of £P. 13.651.

Delivered in presence the 7th day of November, 1927.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 56/27.

BEFORE:

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

IN THE APPEAL OF:

Zhara bint Yehia Kweider — APPELLANT.

vs

Haj Said Abdel Salam Kweider — RESPONDENT.

Reference of waqf dispute to arbitration — Power of the Mutawalli of waqf to consent to arbitration on behalf of the waqf.

Appeal from the judgment of the Land Court of Jerusalem, dated 2nd February, 1927.

JUDGMENT.

The Court, after hearing Sheikh Abdel Kader El-Muzafer for the Appellant and Ibrahim Eff. Kamal for the Respondent, holds that there is nothing to prevent a Mutwalli of a Waqf consenting to an arbitration. This has been done in the present case.

The case, is therefore, referred to the arbitrator and it must take the ordinary course of arbitration proceedings and consequently the Court will not enter into the merits of the appeal.

Delivered in presence the 16th day of January, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 78/27.

BEFORE:

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

IN THE CASE OF:

Muhammad Said Filfil — APPELLANT.

vs

Fahimeh Muhamed Kutteh — RESPONDENT.

Enforcement of award of arbitration — Jurisdiction of Magistrates' Courts—Sec. 14, Arbitration Ordinance, 1926.

Appeal from the judgment of the District Court of Jaffa, dated 16th April, 1927.

JUDGMENT.

The Court holds that the enforcement of the award of an arbitration, whether the submission to arbitration is effected in a Magistrate's Court or not, must, by Section 14 of the Arbitration Ordinance No. 9 of 1926, be effected by the District Court (See definition of "Court" in Section 2 of that Ordinance).

If therefore in the opinion of the District Court the judgment of the Magistrate's Court in the present case purported to be an enforcement of the arbitrators' award it must be set aside and remitted to the District Court.

No order as to costs.

Given and delivered in presence the 26th day of October, 1927.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 63/28.

BEFORE:

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

IN THE CASE OF:

Ahmed Haj Ibrahim Brothers — APPELLANTS.

vs

The Secretary of State for Air — RESPONDENT.

Questions of law arising out of arbitration proceedings submitted to Court for opinion—Contract with Air Force to make alterations in building—Contract terminated for failure to complete in time—Service of Public Notary notice—Judge as arbitrator—Admissibility of verbal evidence to prove extension of contract—Application to Court for Order under Article 8 (2), Arbitration Ordinance, 1926, dismissed—Discretionary power of Court exercised to order arbitrator to state a case on point of law for opinion of the Court.

Appeal from the judgment of the District Court of Jerusalem dated 27th March, 1928.

JUDGMENT.

This is an appeal against a decision of the District Court, Jerusalem, dismissing an application by the Appellants under Section 8 (2) of the Arbitration Ordinance, 1926, for an order. directing the arbitrator, His Honour Judge A. H. Webb, K. C. who had been appointed sole arbitrator to decide a dispute between the Appellants and Respondent, to state in the form of a special case, for the opinion of the Court, certain questions of law, which the

Appellants allege arose during the said arbitration proceedings.

The material facts are as follows:

On the 16th May, 1925, the Appellants, who are a firm of building contractors, entered into a contract with the Respondent the Secretary of State for Air, acting by the Air Officer Commanding Palestine, for the adaptation of a camp at Sarafand for use as a hospital.

Under the terms of the contract the whole was to be completed by the 24th October, 1925.

On the 18th November, 1925, the work not having been completed, the Respondent's local representative, the Air Officer Commanding Palestine, purporting to act under Article 13 of the contract, determined the contract and ordered the Appellants and their workmen to cease work and withdraw from the site.

The Respondent, by the Air Officer commanding Palestine, completed the work, and alleged that by virtue of the provisions of Clause 13 of the contract of 16th May, 1925, the Air Force were entitled to recover as damages from the Appellants the excess costs involved in the completion of the work.

The Appellants, on the other hand, contending that the alleged determination of the contract by the Respondent on 18th November, 1925, was illegal, claimed from the Respondent the sum of £E. 1172 plus running interest from 30th November, 1925, the date of the Public Notary protest served on the Air Officer Commanding Palestine by the Appellants.

In August, 1927, the Appellants and the Respondent, by a submission in writing out of Court referred the question "Whether any or what sum was due and owing to the Appellants under or arising out of the contract of May, 1925, and the determination thereof, and the completion of the work by the Respondent" to his Honour, Judge A. H. Webb, K. C. to settle and determine under the provisions of the Arbitration Ordinance, 1926.

The hearing of the said arbitration commenced on 27th September, 1927.

During the course of the arbitration proceedings, H. B. Samuel, counsel for the Appellants applied to the arbitrator to reserve, for the opinion of the Court, the following legal questions:—

(a) Whether verbal evidence is admissible to prove the alleged extension.

(b) Whether such right, if any (which is not admitted) as the Air Force may have to determine the contract, was not barred by reason of their failure to give a Public Notary notice in accordance with the terms of the Code of Civil Procedure.

(c) Whether such right, if any (which is not admitted) as the Air Force may have had to debit the creditor with the alleged excessive cost of completing the work, is not barred by the failure to give a Public Notary notice.

The arbitrator adjourned the proceedings to consider the application by counsel for Appellants.

On 20th December, 1927 in a letter to the arbitrator, counsel for Appellants asked the arbitrator to reserve the following further questions of law for the opinion of the Court:—

(d) Whether the letter written by Mr. Bell on the 4th October, and the letter written by Mr. Humphries on the 2nd November, even when taken in conjunction with the fact that the contractor continued to work, can be construed in law as a substitution of November 30th for October 24th as the date limited in the contract as the date of completion.

(e) Whether any substitution of November 30th for October 24th as the date of completion would or would not carry with it the forfeiture clause, no machinery to that effect having been provided in the contract.

(f) Whether, even assuming that an extension in the full legal sense of the terms was granted by Mr. Humphries, and legally accepted by the contractors, and even assuming that such an extension was ratified by the Air Force Officer Commanding any such act on the part of Mr. Humphries could be capable of ratification inasmuch as it did not purport specifically to be done on the part of the Air Officer Commanding.

(g) Whether in law Mr. Bell would be considered as the agent of the contractor to enter into the new contract involved by such extension in face of the official document filed in the District Court of Haifa to the effect that only the partners could administer the partnership.

On the 28th December, 1927, the arbitrator, in a letter to counsel for the Appellants, (copy to the Solicitor General for Respondent) wrote:—

> "I have decided that it is not right that I should reserve for the opinion of the Court, the questions of law mentioned by you. You will therefore, if so advised, apply to the Court for an Order under Article 8(2) of the Arbitration Ordinance".

Counsel for Appellants then made an application to the District Court praying, inter alia, for an order directing the learned arbitrator to state, for the opinion of the Court, cases on the seven points of law set out above.

The Court which heard the application was composed of the President, His Honour Judge F. H. Baker, and His Honour Judge Mohammed Barady.

The President gave judgment dissmissing the application and Judge Barady's judgment was to the effect that the application should be granted in respect of two of the points of law raised and should fail in respect of the other five points of law.

The Court being equally divided the application was dismissed.

In this appeal the Appellants, in addition to appealing againt the judgment of the District Court refusing to direct the arbitrator to state cases for the opinion of the District Court on the seven points of law, raised other points in their submission of grounds of appeal but subsequently abandoned the other points raised.

Therefore, this Court is called upon to decide whether the District Court was right in refusing an order to the arbitrator to state cases for the opinion of the Court on all or any of the seven points of law set out above.

It is admitted by counsel for both parties that a Court has a discretionary power to order an arbitrator to state a case on a point of law for the opinion of the Court.

Counsel for the Appellants contends that the points of law he has raised are all of great importance and relies on the ruling in re Nattall and Lynton and Barustaply Railway Co. 1890, 82 Law Times, 17. In that case the Court held that where a substantial and serious point of law arose upon the construction of a contract, the Court should, in the exercise of its discretion, order an arbitrator to state a special case for the opinion of the Court.

The Solicitor General for Respondent contends that the Court, in exercising its discretion should take into consideration the fact that the arbitrator is not a layman and that all questions of law, arising out of the reference, can be safely left to him to decide. He has not quoted any authority in support of his argument that the Court should distinguish between an arbitrator who is a qualified barrister and an arbitrator who is a layman, and we are of opinion that there is no general rule that when an arbitrator is specifically qualified to decide on questions of law, Court should not direct the arbitrator to state a case on a point of law.

We are of opinion that we must consider on their merits all the points of law on which the Appellants ask for an order directing the arbitrator to state a case.

It necessarily follows that to come to a decision on the importance of the points of law raised, we must consider carefully

the terms of the agreement of August, 1927. Now, the agreement of August, 1927, after reciting the history of the transaction between Appellants and Respondent, continues:—

> "And whereas the contractor and the Air Officer Commanding Middle East have agreed to submit the contractor's claim to the arbitration of His Honour Judge Webb, K. C. as a dispute which, under clause 26 of the said contract may be determined by arbitration;
>
> Now it is hereby agreed and declared between the parties hereto that it shall be referred to His Honour Judge Webb, K. C. to settle and determine under the provisions of the Arbitration Ordinance, 1926, whether any or what sum is due and owing to the contractor under or arising out of the said contract and the determination thereof and the completion of the works as hereinbefore recited".

In the agreement the claim of the contractors is set out in detail. The first item of the claim is "Cost of work done up to the conclusion of the contract, £. 5153". The contract, rightly or wrongly was cancelled on November 18, 1925, although according to the terms of the contract itself the work was to be completed, and consequently the contract was to terminate on October 24, 1925. Clearly this Court must, when giving its decision, avoid expressing any opinion, or giving any reasons for its judgment which might even in a remote way influence the arbitrator who has got to give his award.

We are of opinion that the judgment of the District Court with regard to five of the points raised by the Appellants, namely (a), (d), (e), (f), and (g) should be affirmed, without prejudice to the right of the Appellants to raise all or any of these points, if and when the case is brought before the Court after an award has been given.

With regard to the two points of law (b) and (c) raised by Appellants we are of opinion that the question whether a submission to arbitration per se excludes the right to raise a defence in an arbitration which would be raised in a civil action filed in a Court of Palestine, is an important legal question.

We are of opinion that the District Court should have issued an order directing the arbitrator to state a case on the two points (b) and (c) for the opinion of the Court.

The judgment of this Court is, therefore, that the appeal must be allowed and the case remitted to the District Court

with direction to order the arbitrator to state a case on points (b) and (c) for the opinion of the Court."

Delivered in presence the 29th day of April, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 122/28.

BEFORE:

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

IN THE CASE OF:

Abdul Kader Haj — APPELLANT.

vs

Mohammed Eff. El-Haj — RESPONDENT.

Addition of words "judgment in presence appealable" to judgment of District Court—Discretion of District Court under Section 15(2), Arbitration Ordinance, 1926, as amended.

Appeal from the judgment of the District Court of Haifa, dated 4th August, 1928.

JUDGMENT.

Following the judgment of this Court in Lubin vs Wilson, Civil Appeal No. 219/26, the Court holds that the words "judgment in presence appealable" do not constitute an exercise by the District Court of its discretion under Section 15 (2) of the Arbitration Ordinance, 1926, as amended by the Arbitration Amendment Ordinance, 1928, Section 3.

The appeal is therefore dismissed with costs including £P. 5 advocate's fees and expenses.

Given the 21st day of March, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 88/29.

BEFORE:

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

IN THE CASE OF:

Jacob Behor — APPELLANT.

vs

The Anglo Palestine Co., Ltd. — RESPONDENT.

Appointment by District Court of arbitrator pursuant to provision in contract—Disposition of land without consent of Government—Section 11, Land Transfer Ordinance, 1920—Agreement to submit to arbitration disputes arising out of void agreement is void.

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

JUDGMENT.

This is an appeal from a judgment dated the 15th April, 1929, of the District Court, Jaffa, whereby the Court, upon an application made by the Respondent Co. under Section 7 of the Arbitration Ordinance, 1926, appointed Mr. Grazowsky an arbitrator in a dispute between the Appellant, Jacob Behor, and the Respondent.

In making this appointment, the Court had regard to Clause 18 of an agreement between the parties dated 9th October, 1922, which provided that:—

> "All contentions or differences regarding any clause of this contract shall be dealt with by three arbitrators who shall be selected among the directors and officials of the Bank, one of them shall be appointed by the Bank, one by the employees, and the third by the two arbitrators so appointed. No appeal shall lie from the award of these arbitrators".

The Court held that the provisions of this clause applied to the circumstances of this case, and accordingly made the appointment.

In appealing against this judgment, the Appellant (inter alia) argues that the agreement in question was a disposition of land within the meaning of Section 2 of the Transfer of Land Ordinance, 1920, and that having been made without the consent of the Administration, it is null and void by virtue of Section 11 of that Ordinance.

By clause 1 of the agreement, "the Respondent (therein called the Bank) lends to the Appellant (therein the employee), a sum of £525, and sells to him a plot of land containing 391 pics".

So far as the sale is concerned, the agreement is clearly within the terms of Section 11, and is to that extent void.

From the subsequent clauses of the agreement, moreover, it is clear that the loan is for the purpose of enabling the Appellant to build a house upon the land sold, and is thus merely ancillary to the sale.

As regards to the loan, therefore, the agreement is also void.

I do not think it can be maintained that an agreement to submit to arbitration, disputes arising out of a contract which is void as regards its objects, can be valid.

In my view, therefore, the District Court had no jurisdiction to appoint an arbitrator, and accordingly the appeal must be allowed and the judgment of the District Court set aside, with costs here and below, including £3 advocate's fees of Appellant.

Delivered the 30th day of April, 1931.

In the Supreme Court sitting a as Court of Appeal.

C. A. No. 13/31.

BEFORE:

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

IN THE CASE OF:

Benjamin Aloni — APPELLANT.

vs

Shaul Ratchko — RESPONDENT.

Alternative award of arbitrators for money payment or for goods—Dispcsal of part of the goods—Performance of award as acquiescence.

Appeal from a judgment of the District Court of Haifa, dated 31st October, 1930, confirming an award of arbitrators.

JUDGMENT.

The award is for money primarily and as an alternative for a lesser sum of money to be supplemented by merchandise,—namely, oil. The fact that some of this has been sold does not prevent the award being entirely in money.

The authority cited (Goodman vs Sayen, 1820, 2 J. & W. 249) is merely that it is very questionable whether a party by performing an award so acquiesces in it that he will be precluded from moving subsequently to have it set aside for irregularity. This has no relevance for here we have no performance of the award; on the contrary, a disposal of some of the goods which might render a performance of the alternative award impossible and which in consequence might leave the Appellant, if he loses the appeal, with no choice but to perform the alternative award.

For this reason we overrule the preliminary objection.

Delivered the 13th day of April, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. L. A. C. A. No. 16/31.

BEFORE:

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

IN THE CASE OF:

Hayim Engel — APPELLANT.

vs

Abraham Farhi — RESPONDENT.

Award of arbitrators confirmed in part by District Court and balance remitted — Leave to appeal refused by District Court and renewed to Court of Appeal—Judgment of District Court embracing only part of subject matter of the arbitration is not appealable.

Application for leave to appeal from the judgment of the District Court of Jaffa, dated 17th September, 1930.

JUDGMENT.

The Jaffa District Court, upon application to it, has confirmed one part of an award of arbitration, and set aside the second part thereof and remitted it to the arbitrators. Against this decision, Appellant applied to the District Court for leave to appeal. This was refused, and now application has been made to this Court for leave to appeal.

The Jaffa District Court was within its rights in remitting a part of the award. By such remission the award as a whole is in suspense, and we are of opinion that no leave to appeal can be granted from a judgment of this nature. The judgment from which leave to appeal can be granted must embrace every matter originally referred to the arbitrators (i. e. a judgment dealing with the whole subject of arbitration) and until the District Court has given a judgment embracing the second part, no question of appeal can arise. The amended award should and must embrace every matter originally referred to the arbitrators so that the part confirmed must be recopied and presented to the Court with the amended award. The District Court will then adjudicate on the part remitted, reiterate its previous judgment on the part it confirmed, and then from this judgment appeal may lie by special leave.

Leave to appeal at the present stage is refused, for the reasons above stated with costs and £P. 2 advocate's fees.

Delivered the 24th day of November, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 131/31.

BEFORE:

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

IN THE CASE OF:

Dr. Benjamin Amirah — APPELLANT.

vs

Shlomo Shpan — RESPONDENT.

Application for leave to appeal not served on other party—Section 15 (2), Arbitration Ordinance, 1926—Magistrates' Courts Jurisdiction Ordinance, 1924, compared with Arbitration Ordinance, 1926 — Fees for service not paid simultaneously with application for leave to appeal.

Appeal from the judgment of the District Court of Jerusalem, dated the 30th June, 1931.

JUDGMENT.

The Supreme Court of Appeal has laid down in Civil Appeal No. 13/31 that an application for leave to appeal under Section 15 (2) of the Arbitration Ordinance, 1926, must be served on the other side otherwise the appeal if granted must be dismissed.

We can trace no distinction between the provisions governing applications for leave to appeal under the Arbitration Ordinance, 1926, and the Magistrates' Courts Jurisdiction Ordinance, 1924.

Hence we hold that an application for leave to appeal must be served on the other side before such application can be granted and that both the application for service must be made and the fees therefor paid simultaneously with the application for leave to appeal.

In the present case the application for leave to appeal did not contain a request for service of the application for leave to appeal and moreover the fees for service were only paid on or about three months after the date of this application.

In these circumstances the appeal must be dismissed with costs and advocate's fees assessed at £P. 2.

Dated the 29th February, 1932.

In the District Court of Jaffa.

C. D. C. Ja. 392/31.

BEFORE:

Sherwell, J. and Nimmer, J.

IN THE CASE OF:

M. Borger — APPLICANT.

vs

Heinrich Cohen — RESPONDENT.

No record kept of arbitration proceedings—English principles applied—Interim decision of arbitrators to be signed by all the arbitrators.

JUDGMENT.

In view of the statement made in Court, the Court refuses the application herein because there is no record available of the arbitration proceedings (in this connection see principles in Halsbury Vol. 1 page 466, last of para. 971), and we are of opinion that a record should be kept. Secondly, the interim decision of 14th October, 1931, should be signed by all the arbitrators concerned. Application is dismissed with costs, and case remitted to the arbitrators for rehearing and delivery of fresh award. Advocate's fees £P. 1 to Respondent.

Judgment delivered in presence of parties, the 11th day of January, 1932.

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

C. A. D. C. Ja. No. 233/32.

IN THE CASE OF:

Venziana Di Mayo — APPELLANT.

vs

Estate of Doudah Fahri — RESPONDENT.

Award given by Rabbinical Court as arbitrator—Award given after death of party to submission — Proceedings avoided by death of party—English principles applied.

Appeal from the judgment of the Magistrate's Court of Tel-Aviv dated 23rd June, 1932, whereby a judgment of the Rabbinical Court was confirmed, with costs.

JUDGMENT.

After consideration the Court finds that the award given by the Rabbinical Court as arbitrator was given after the death of one of the parties to the submission namely: Doda Fahri.

In our opinion and in accordance with the provisions of the English Law, in matters of arbitration the death of one of the parties to the submission and all proceedings after the death are void.

The judgment is set aside and the case dismissed with costs, and £P.2 advocate's fees.

Given the 13th day of September, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. L. A. C. A. No. 2/33.

BEFORE:

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

IN THE CASE OF:

Zvi Dissler — APPLICANT.

vs

Naftali Rieger — RESPONDENT.

Leave to appeal dismissed by Court of Appeal—Rules of Court not binding on arbitrator — Substitution of Section by amending Ordinance — Application for leave to appeal refused by District Court and renewed to Court of Appeal—Interpretation of word "or" used in Ordinance — Inspection of premises by arbitrators in absence of parties alleged as misconduct—Sec. 15(2), Arbitration Ordinance, 1926—Sec. 3, Arbitration Amendment Ordinance, 1928 — Sec. 27, Interpretation Ordinance, 1929—Rules of Court, November 3rd, 1926.

Application for leave to appeal from the judgment of the District Court of Jaffa dated February 12, 1933.

JUDGMENT.

On the preliminary points we overrule the Respondent for the following reasons:

We hold that an appeal based on Section 15 (2) of the Arbitration Ordinance, 1926, cannot be invalid merely because Section 3 of the Arbitration Amendment Ordinance, 1928, provides that "Section 15 (2) of the Principal Ordinance shall be repealed, and the following shall be substituted therefor".

What Section 3 of No. 14 of 1928 does, is merely to substitute for the original Section 15 (2) of the Arbitration Ordinance, No. 9 of 1926, a new Section 15 (2), and though for purposes of

ease of reference a mention of the Ordinance of 1928 may be desirable it is by no means essential.

On the second preliminary point the Respondent urges that since the second paragraph of Section 15 (2) of the Principal Ordinance as replaced by Section 3 of the amending Ordinance, No. 14 of 1928, states that "no appeal shall lie from the order of a District Court except by leave of the Court or of the Court of Appeal", therefore, since the Applicant has elected to apply to the District Court he cannot now ask leave of the Court of Appeal.

We hold that Seetion 27 of the Interpretation Ordinance, 1929, (No. 34 of 1929) can have no bearing on the interpretation of this Section.

This Court has several times held that under it applications to the Court of Appeal will not be heard if the District Court has not first been approached. If the advocate for Respondent were right in holding that an election by the Applicant barred access to the other Court, the effect under the decisions of the Court of Appeal that the District Court must first be approached would be to render the words in the section allowing application to the Court of Appeal absolutely valueless.

On the merits of the application, two of the arbitrators elected to view the premises not in the presence of the parties. On this ground the Applicant urges misconduct which would justify us in granting leave to appeal.

He cites the second paragraph of the Rules of Court (Evidence taken out of Court) of November 3rd, 1926. These Rules deal not with a view of a locus in quo by a Court, but with an inspection by persons nominated by each of the parties and by the Court itself. Moreover, they are Rules of Court which do not bind arbitrators, and in the absence of any provision of law requiring that arbitrators, if they effect a view, can only do so in the presence of the parties, we hold that no misconduct by arbitrators within the meaning of Section 13 of the Arbitration Ordinance, 1926, has been proved which would enable us to grant leave to appeal.

The application is, therefore, dismissed with costs including £P. 2. advocate's fees.

Delivered the 6th day of November, 1933.

In the Supreme Court sitting as a Court of Appeal.

C.L.A.C.A. No. 7/33.

IN THE CASE OF:

Shakir Hammameh and Sons — APPELLANTS.

vs

Israelit and Shifrin — RESPONDENTS.

Submission of dispute to arbitration—Appointment of umpire to settle disagreement between arbitrators—Application to confirm award refused by District Court—Application of English principles of arbitration—Award of arbitrators must be unanimous—Arbitration Ordinance, 1926, based on English Law.

Application for leave to appeal from a judgment of the District Court of Jaffa dated 18th July, 1933, refusing to confirm an award of arbitrators.

JUDGMENT.

On the 5th January, 1933, the parties signed an agreement submitting to arbitration a dispute which had arisen between them and appointed Mr. Oziel and Khalid Eff. Farkh as arbitrarors. The submission contained a provision that in case of disagreement between the said arbitrators an umpire should be appointed by them. On the 10th January 1933, the parties modified the terms of the submission by appointing Mr. Chacron as a third arbitrator.

The arbitrators held 13 sittings and eventually on the 7th April, 1933 issued an award, the final paragraph of which is as follows:

> "The above award is passed by majoriy and is duly signed by arbitrator, Khalid Eff. Farkh and the umpire Advocate Mr. Chacron. The other arbitrator, Mr. Oziel has written his own award".

On 24th May, 1933, the Appellants, Messrs. Shakir Hammameh and Sons, applied to the District Court, Jaffa, for an Order confirming the award. On the 18th July, 1933, the Court gave judgment refusing to confirm the award on the ground that an award by three arbitrators must be given unanimously. Against this judgment this appeal is now brought.

Now it is clearly the rule in English Law that when the reference is to arbitrators, the award to be valid must be unanimous, in the absence of a provision to the contrary in the submission; see United Kingdom Mutual Steamship Assurance Association vs Houston & Co. (1896) 1 Q. B. 567.

The Arbitration Ordinance, 1926, is based upon English Law and no reason has been suggested to this Court for holding that the English Rule in this respect does not apply in Palestine.

We have, therefore to determine whether the appointment of Mr. Chacron was, as the Appellants allege, an appointment as umpire or whether as the Respondents allege and as the District Court has held, he was appointed as a third arbitrator.

From the above cited passage from the award, it is clear that Mr. Chacron and the two arbitrators originally appointed were acting under the belief that Mr. Chacron was appointed as umpire and in support of this view it is argued by the Appellants that on 10th January, 1933, when the appointment was made, it was already clear there was no hope of agreement between the two arbitrators originally appointed.

There is, however, no evidence to this effect before us and the wording of the appointment is clear. "The parties agreed to elect Mr. Albert Chacron as a third arbitrator".

The parties must be taken to have meant what they said, and the appointment was not accompanied by any provision enabling the arbitrators to give judgment by a majority.

We hold, therefore, that the District Court was right in its view.

The appeal is dismissed with costs and £P. 2.500 advocate's fees.

ATTACHMENT.

SEE CIVIL PROCEDURE & EXECUTION.

ATTORNEY GENERAL.

In the High Court of Justice.

H. C. No. 58/30.

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

IN THE CASE OF:
Rifka Aaronson
Toba Rutman — PETITIONERS.

vs

The Attorney General
Junior Government Advocate, Haifa — RESPONDENTS.

Mandamus issued to Attorney General—Junior Government Advocate's right of audience in Court depends on Court before which he is appearing—Sec. 2, Advocates' Ordinance, 1922—Rejection of application by High Court for lack of jurisdiction—Rights of private persons affected by instructions of Attorney General.

Application for an Order to issue to the Attorney General to show cause why his instructions to the 2nd Respondent should not be cancelled and to abstain from giving such instructions, and for an Order to issue to the 2nd Respondent to show cause why an Order should not issue directing him to abstain from acting under the Power of Attorney dated 7th June, 1930.

JUDGMENT.

In this case we are asked to issue a mandamus to the Attorney General ordering him to cancel, and abstain from giving to the Junior Government Advocate, Haifa, instructions which are referred to in a letter marked "B" addressed on the 5th July, 1930, to the Settlement Officer, Khudera, by the Junior Government Advocate, Haifa, as follows:—

> I have the honour to state that I have been instructed by the Attorney General to institute in the Land Court, Nablus, an action concerning Khor-el-Wasa' lands on behalf of some of the villagers of Zeita.
>
> I am instructed by the Attorney General to apply for the exclusion of Khor-el-Wasa' from the Settlement Area to enable me to proceed with the action before the Land Court of Nablus".

Also we are asked to issue a mandamus to the Junior Government Advocate, Haifa, to abstain from acting under the

Power of Attorney dated 7th June, 1930, which he holds from Hassan El-Haj Said which empowers him to appear on the latter's behalf in all suits in respect of his rights in Khor-el-Wasa' lands.

The application is based on the fact that Mr. Kousa, Junior Government Advocate, cannot practice as an advocate under Section 2 of the Advocates' Ordinance, No. 13 of 1922, and that inasmuch as he does not hold a licence from the Chief Justice, and that as the Attorney General's representative he has the right to be heard under the first proviso to Section 3 only when acting on behalf of the Government. In my opinion the question of the right of the Junior Government Advocate to audience in any particular Court is one in the first instance within the jurisdiction of that Court, and consequently not at this stage rightly within the jurisdiction of the High Court. So far, therefore, as this part of the application is concerned the rule nisi should be discharged.

As to the instructions given by the Attorney General to the Junior Government Advocate, the question whether he can be compelled by mandamus to cancel and abstain from giving such instructions must depend on whether in giving such instructions he was performing a duty which he owed to the High Commissioner alone, or whether he was performing a duty of a public nature in which the Applicants are interested. (Regina vs. Secretary of State for War 1891, 2 Q.B.D. p. 334, per Charles J).

In this case it appears to me that the executive duty which the Attorney General performed in issuing such an instruction affected the rights of private persons namely the Petitioners and that, in consequence, so far as this part of the application is concerned, the rule nisi must be made absolute.

In the High Court of Justice.

H. C. No. 49/31.

BEFORE:

The Acting Chief Justice and Frumkin, J.

IN THE CASE OF:

Hana Bishara — PETITIONER.

vs

The Attorney General — RESPONDENT.

Advocate appointed to represent Attorney General in prosecution of Criminal offence—Prosecution at preliminary enquiry—Secs. 14, 41, Trial Upon Information Ordinance, 1924.

Application for an order to issue to the Respondent directing him to show cause why the authority given by him to counsel of Tannous Bros. should not be restricted to the prosecution of the case during the trial in Court only.

JUDGMENT.

The Court is satisfied that the expression "the prosecution of a criminal offence" in Sec. 41 of the Trial Upon Information Ordinance, 1924, includes "the prosecution" at a preliminary enquiry before a Magistrate mentioned in Section 14 of that Ordinance.

The Attorney General is, therefore, entitled to appoint an advocate to represent him at such enquiry.

No order will issue.

Delivered the 20th day of August, 1931.

ATTORNEY GENERAL—

SEE ALSO CRIMINAL PROCEDURE.

BANKRUPTCY.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 98/27.

BEFORE:

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

IN THE CASE OF:

Haj Mustafa Ismail Sakija — APPELLANT.

vs

Soloman Jacobson for the Estate of Joseph Bey Moyal — RESPONDENT.

Declaration of Bankruptcy under the Commercial Code refused — Insolvent person interdicted under Arts. 998, 999, Mejelle—Meaning of "trader", and "bankrupt"— Trustee of estate appointed to work under supervision of Chief Execution Officer — Civil bankruptcy is matter of personal status — Jurisdiction of Civil Courts — Arts. 47, 51, 52, Palestine Order-in-Council, 1922.

Appeal from the judgment of the District Court of Jaffa, dated 4th May, 1927, and cross-appeal by the Respondent.

JUDGMENT OF THE DISTRICT COURT.

This is an application for a declaration of bankruptcy against the Defendant on the ground that he is a trader under the Commercial Code or alternatively under Articles 998 and 999 of the Mejelle.

We have heard evidence on the question as to whether the Defendant is a trader and on this point the Court is divided. I am satisfied from the evidence that the Defendant was in fact trading in oranges and therefore can be declared bankrupt, but my colleagues hold the contrary view and the action fails on this ground.

With regard to the alternative claim we are all of the opinion that a case has been made out for the Defendant on his showing his insolvency.

Therefore, in accordance with the above mentioned Articles of the Mejelle, we give the declaration asked for and appoint Daoud Eff. Dajani as trustee of the debtor's property to work under the supervision of the Chief Execution Officer.

Costs to be paid out of the Defendant's estate, with £E. 5. advocate's fees.

Dated the 4th day of May, 1927.

JUDGMENT.

An application was made to the District Court, Jaffa, by the attorney of the Estate of Moyal, asking for an order declaring Haj Mustafa Sakija bankrupt, for his failure to pay his debts to the estate considering him to be a trader. The Court below held by majority that he was not a trader.

The Plaintiff then asked the Court to declare him bankrupt under the Mejelle which it did and it appointed a trustee to work under the supervision of the Chief Execution Officer.

Against this order Haj Mustafa appealed.

The important grounds of his appeal were: That civil bankruptcy has been abolished by the provisions of the Commercial Code. Alternatively that civil bankruptcy is a matter of personal status which falls within the jurisdiction of the Sharia Court (vide Palestine Order-in-Council). Further and alternatively that the debt, in respect of which an order of bankruptcy is sought, has been adjudicated upon and consequently that no such order can be made.

The Plaintiff, on the other hand. made a cross-appeal on the grounds that the Appellant is a trader; that the Civil Court can make an order for interdiction; and that assuming that interdiction is considered a matter of personal status, the Civil Court has jurisdiction in view of the fact that the Plaintiff is not a Moslem.

We are of the opinion:

(1) That the District Court was right in holding that the Appellant was not a merchant.

(2) That although civil bankrupcy amounts to interdiction and is in accordance with the Palestine Order-in-Council a matter of personal status falling within the jurisdiction of the Sharia Court, yet Article 52 limits the jurisdiction of this tribunal to matters between Moslems, while allowing jurisdiction in cases such as this to the Civil Courts under Article 49.

(3) That since in this case the personal law should be applied, therefore Article 999 of the Mejelle is to be taken into consideration.

This Article lays it down that a bankrupt is a person whose debts are greater than or equal to his assets. Cessation of payment is not sufficient to create him bankrupt under this Article. The Court below did not ascertain this point in a clear manner.

The judgment of the District Court should therefore be set aside and the case remitted.

Delivered in presence the 7th day of May, 1928.

In the Supreme Court Sitting as a Court of Appeal.

C. A. No. 107/27.

IN THE CASE OF:

Mohammed Sharrab — APPELLANT.

vs

Youseph Sharrab — RESPONDENT.

Failure to pay bill of exchange—Grounds for adjudication of bankruptcy by the District Court.

Appeal from the judgment of the District Court of Jaffa, dated 20th September, 1927.

JUDGMENT.

We hold that before adjudicating the Appellant a bankrupt the District Court should have been satisfied:

1. That value was given either on the making or the endorsement of the bill, so as to render the Appellant liable thereon.

2. That the Appellant had no recourse against any third party in respect of the bill.

3. That the Appellant was unable to pay the amount of the bill or to furnish security. Therefore the judgment of the District Court must be set aside and the case remitted.

Delivered in presence the 24th day of January, 1928.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 26/29.

BEFORE:

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

IN THE CASE OF:

Ali Mustakim — APPELLANT.

vs

The Estate of Yousef Dajani — RESPONDENT.

Declaration that deceased died bankrupt — Sufficiency of evidence before the District Court to designate trader.

Appeal from the judgment of the District Court of Jaffa, dated the 31st January, 1929.

JUDGMENT.

We are satisfied that there was evidence before the Jaffa District Court that the deceased carried on acts of commerce and was engaged in commerce, whereby he could be designated a trader.

The judgment of the Lower Court must be quashed and the case remitted for a declaration that the deceased died a bankrupt.

Costs and advocate's fees to Mr. Gorodissky in the sum of £P. 3 to be paid out of the estate.

Delivered the 30th day of June, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 1/30.

BEFORE:

Baker, J., Khaldi, J. and Daoudi, J.

IN THE CASE OF:

Tuhfeh bint Said Jaber — APPELLANT.

vs

Subhi El Ayoubi - Syndic in the bankruptcy of Ismail Tellawi Ismail Tellawi — RESPONDENTS.

Contract to transfer immovable property—Voluntary bankrupcy of vendor—Deposit paid by purchaser—Action against bankrupt's estate for agreed and liquidated damages—Privileged debts in bankruptcy—Art. 155, Commercial Code.

Appeal from the judgment of the District Court of Jaffa dated the 11th July, 1929.

JUDGMENT.

On the 18th February, 1929, one Ismail Tellawi entered into a contract with Tuhfeh bint Said Jaber whereby he agreed to sell certain property to Tuhfeh Jaber for a sum of money therein mentioned. The purchaser Tuhfeh paid to the said vendor, the said Ismail Tellawi, as a deposit, the sum of £P. 250, and covenanted that within three months from the date of the said contract he would complete the transfer and in case of failure to do so he would refund to the purchaser the £P. 250 deposit and pay a sum of £P. 500 as compensation.

On the 18th April, 1929, one month before the time for completion of the sale, the vendor, at his own request was made bankrupt, and on the 16th May, 1929, two days before the agreed date for completion, the purchaser commenced this action against the Syndic in the vendor's bankruptcy claiming against the bankrupt's estate the refund of deposit of £P. 250 and the sum of £P. 500 (the sum agreed to be paid by the bankrupt in default of completion). The sum of £P. 250 the purchaser asked to be treated as a privileged debt. The proposed vendor did not call upon the representative of the original vendor (the Syndic) to complete or to disclaim the contract.

The District Court decided in its judgment given on the 11th July 1929, that:

> (1) "The Court orders payment of the sum of £P. 250 to the Plaintiff as a privileged loan viz: it must be paid out from the price of the house to which reference is made.
>
> (2) The Court dismisses the claim for compensation for the reason that on the 7th April, 1929, the bankrupt was served with the notification while he was adjudicated as bankrupt on the 18th April 1929. Within the space of such a short period it was impossible for him to effect the registration of the said house".

Against this judgment both parties appealed. The original Plaintiff against the decision in the first part of the Court's judgment that the £P. 250 must be paid out from the price of the house to which reference is made and the dismissal of her claim for £P. 500 damages under the contract.

The Syndic in Bankruptcy appeals against the first part of the Lower Court's decision that the £P. 250 be treated as a privileged debt in the bankruptcy.

After hearing counsel for both Appellants we find that the

judgment of the District Court cannot be upheld with regard to its decision that the deposit of £P. 250 made by the proposed vendor should be treated as a privileged debt in the bankruptcy.

Privileged debts are defined in Article 155 of the Commercial Code. The said Article does not specify a deposit as being privileged neither do we consider it can be construed as such. Accordingly, its part of the judgment must be quashed and the said Tuhfeh bint Said Jaber must resort to a claim for the said sum against the bankrupt's estate.

With regard to the second part of the Court's decision relating to the claim for £P. 500 being the penalty agreed upon in the contract to be paid in default of completion within the agreed period, the decision of the District Court must be upheld.

The date agreed upon for completion was the 18th May, 1929. On the 16th May, 1929, Tuhfeh bint Said Jaber launched her action, (two days before the expiration allowed under the contract for completion). The vendor cannot be held responsible for any damages until after the specified time allowed to him to complete and he then fails to comply with his undertaking. Accordingly, this part of the Jaffa District Court's decision is upheld.

Costs of both appeals to be paid by the Appellant Tuhfeh bint Said Jaber with £P. 2 advocate's fees.

Delivered the 16th day of April, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 61/30.

BEFORE:

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

IN THE CASE OF:

Hashem Ramadan Abu Khadra — APPELLANT.

vs

Mrs. Mas'ouda Moyal — RESPONDENT.

Application by bankrupt for annulment of adjudication of bankruptcy— No opposition by petitioning creditor and Syndic — Sufficiency of estate to satisfy creditors.

Appeal from the judgment of the District Court of Jaffa, dated 15th June, 1930.

JUDGMENT.

The petitioning creditor and the Syndic in Appellant's bankruptcy do not oppose this appeal.

The Court having heard the Syndic is satisfied that the interests of the other creditors will not be endangered if the adjudication of bankruptcy is annulled and that the estate is more than sufficient to pay all creditors in full.

Judgment will therefore be entered allowing the appeal and declaring the adjudication of bankruptcy annulled.

No costs.

A notice of the terms of this judgment will be published by the Syndic.

Delivered the 24th day of June, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 68/30.

BEFORE:

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

IN THE CASE OF:

Bank Zwiasku Spelek Zaborkowych APPELLANT.

vs

Jacob Adler
Abraham Adler RESPONDENTS.

Jurisdiction of District Court to order adjudication of bankruptcy—Bankrupts not trading in Palestine — Meaning of "Trader" and "carrying on business in Palestine"—Art. 147, Commercial Code—Admission by advocate before Lower Court — Para. 7, Art. 1, of Civil Procedure Code.

Appeal from the judgment of the District Court of Jaffa, dated the 12th June, 1930.

JUDGMENT.

On the 14th November, 1929, the Appellant Bank obtained judgment against the Respondents in the District Court of Jaffa for the sum of £P. 607.630.

On the 30th January, 1930, the judgment being unsatisfied, the Appellant applied to the District Court of Jaffa for an order adjudicating the Respondents bankrupt.

On 12th June, 1930, the District Court gave judgment dismissing the Appellant's application on the ground of lack of jurisdiction. The judgment is in the following terms:—

"It appears to this Court that the two Defendants were not, at any time, traders in Palestine and that they were adjudicated bankrupts by the Polish Courts and their present place of residence is now outside Palestine. The case is therefore dismissed".

The Appellant, while admitting that at the time of the application the Respondents had left Palestine, argues that the District Court had jurisdiction, on the ground that the Respondents had previously carried on business in Poland, and that the term trader in Art. 147 of the Commercial Code in not to be restricted to traders carrying on business in Palestine.

Alternatively, the Appellant argues that the Respondents were carrying on business in Palestine, and in support of this contention has submitted a copy of criminal proceedings against the Respondents in the Magistrate's Court of Tel-Aviv at which the Respondents were present, in which each of them is described as "a merchant at Tel-Aviv".

From the record of the proceedings in the District Court, Jaffa, however, it appears that Appellant's advocate then stated that Respondents had not carried on business in Palestine. This Court, therefore, cannot now, take into consideration evidence to the contrary.

It thus remains for the Court to decide whether the District Court had jurisdiction to adjudicate as bankrupt a person who was a trader elsewhere than in Palestine. In determining this question regard must be had to the terms of paragraph 7 of Art. 1 of the law Amending the Code of Civil Procedure dated 9th April, 1911.

"Suits concerning the bankruptcy of a merchant or partnership will be heard in one Court only, namely, the place where the bankrupt's office is situated".

Hence, if a person is not carrying on business in Palestine and consequently has no office in Palestine, no Court in Palestine has jurisdiction to declare him bankrupt.

On this ground we hold that the District Court had no jurisdiction to entertain the Appellant's application and dismiss the appeal.

Delivered in presence of the Respondents and in absence of the Appellant the 21st day of January, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 120/30.

BEFORE:

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

IN THE CASE OF:

Caesar Khouri — APPELLANT.

vs

Michael M. Atallah — RESPONDENT.

Declaration of bankrupcy of commercial partnership—Failure to pay promissory note — Syndic admitted as third party — Effect of death of partner under Ottoman law—Law of collective partnerships under Ottoman Commercial Code discussed—Art. 1352, Mejelle—Arts. 12, 51, Ottoman Commercial Code—Art. 62, French Commercial Code—Ante-dating of commencement of bankruptcy.

Appeal from the judgment of the District Court of Haifa dated the 27th October, 1930.

JUDGMENT.

This is an appeal against a judgment of the District Court of Haifa dated the 27th October, 1930, in an action brought by the Respondent, Michael M. Atallah against the Appellant, Caesar Khouri and his brother Nasrallah, as members and managers of the firm S. N. Khouri, personally, and on behalf of the estate of their deceased brother Joseph Khouri, claiming a declaration of the bankruptcy of the Defendants and of their firm.

The action was brought upon a promissory note drawn on 16th April, 1928, and maturing on 31st December, 1929. The bill was signed "S. N. Khouri, per N. S. Khouri". The bill was protested on the 23rd June, 1930, and action was commenced on 28th June, 1930.

Judgment was given in favour of the Plaintiff, declaring the Defendants and the firm bankrupt as from the 7th March, 1927, and appointing a Syndic and a Judge Commissaire. In the course of the proceedings in the District Court, the Defendant Nasrallah admitted his insolvency, and no appeal has been submitted by him or by the heirs of Joseph Khouri.

As the appeal by Caesar Khouri affected the interests of creditors other than original Plaintiff, the Syndic has been admitted as a party.

The Appellant has put forward a number of grounds of appeal, of which the principal was that neither at the date when the bill

was drawn, nor at any time subsequently, was he a partner in a commercial partnership trading under the name of S. N. Khouri.

Upon this issue the only evidence submitted by the Plaintiff was notice given to the Imperial Ottoman Bank at Haifa dated 9th May, 1914, which declared —

> " Que la maison de commerce connue sur la place de Caiffa sous la raison sociale S. N. Khouri est composée des sous signés comme associés en nom collectif, solidairement responsables pour toute leur fortune personelle de ses engagements".

This notice is signed by Joseph Khouri (since deceased), the Appellant and Nasrallah Khouri. In face of this document the Appellant cannot maintain that he was not at that date a member of a trading partnership.

In September, 1927, however, Joseph Khouri died, and the Appellant argues that the partnership was ipso facto dissolved.

Collective partnerships owe their existence in Palestine to the Ottoman Commercial Code, and it is primarily in that Code that the rules governing such partnerships are to be sought.

Article 51 of the Code translated literally from the Turkish Text runs as follows:—

> "If one of the partners dies, his partnership is dissolved and his heirs shall be bound to have his commercial accounts settled in the Commercial Court in accordance with the terms of his contract with his partners and the provisions above stated."

The Respondent argues that the phrase "his partnership is dissolved" implies that as regards the surviving partners (if more than one) the partnership continues; intention of the legislator being that in this respect collective partnerships shall obey the same rule as prevails under Article 1352 of the Mejelle with regard to partnerships created under the Ottoman Common Law.

It is to be observed however, that the Ottoman Commercial Code requires to be interpreted with the French Code, the majority of its articles being merely a translation of the corresponding provisions of the French Code. It was administered in the Special Courts, the Commercial Courts, and it was interpreted in accordance with the principles of French jurisprudence rather than with those of the Ottoman Common Law contained in the Mejelle, subject only to such modifications as may have been introduced by the Ottoman legislator.

Article 62 of the French Commercial Code, from which Article 51 of the Ottoman Code is derived, reads as follows:

"Les dispositions ci-dessus sont communes aux veuves, heritiers ou ayants cause des associés".

It will be noted that neither in this Article nor elsewhere in the French Commercial Code is there any express provision as to the rights and obligations of the surviving partners upon the death of one of them, but the French rule is clear. Upon the death of a partner, the partnership is dissolved unless it is provided in the articles of partnership that the partnership shall either (a) by the surviving partners alone be continued, or (b) by the surviving partners and the heirs of the deceased partner. (Lyon Caen and Renault, Droit Commercial, 11th edition, page 286, s. 352).

Applying this rule subject to the modification contained in the Article 51 of the Ottoman Commercial Code, namely: that the heirs of the deceased partner cannot continue as members of the partnership, it follows that in a collective partnership under the Ottoman Commercial Code, the death of a partner dissolves the partnership unless the articles of partnership contain a provision that the partnership shall be continued by the surviving partners.

In the present case no partnership agreemnt is before the Court, and the terms upon which the partnership was created can only be ascertained by inference from the acts of partners.

Now, as already stated, the only evidence of participation by the Appellant in the partnership that was before the District Court was a document signed in May, 1914.

The Syndic was given an opportunity of submitting evidence to this Court and he has filed copies of correspondence signed by the Appellant. It is most remarkable that none of the letters filed bears date more recent than 1914. It is also highly significant that, with all the books of the firm at his disposal, the Syndic has not submitted any evidence of any drawings by the Appellant against the firm.

It is also to be noted that the name S. N. Khouri (or Sali Nasrallah Khouri, as it appears in the correspondence filed) does not comply with the requirements of either French or Ottoman Law as to the firm name (raison sociale).

According to Article 12 of the Ottoman Commercial Code, the firm name of a collective partnership "shall contain the name or names of one or two partners only".

S. N. Khouri is in fact what is known in French law as a "raison de commerce", a trade-name, which unlike a "raison

sociale" does not give rise to any inference that the business is carried on by more than one person. (Lyon-Caen and Renault, Droit Commercial, 11th edition, page 110 s. 130).

As regards the Appellant, therefore, we must hold that there is no evidence that at the time when the debt to the Respondent wat contracted, or at any later date, he was trading in partnership under the name of S. N. Khouri, and the appeal must succeed.

We have not, therefore, to consider the further questions raised by the Appellant, namely, whether the debt was of such a nature that a declaration of bankruptcy could be founded upon it; or whether it was within the scope of a partner's authority to borrow money on behalf of his firm.

One other point, however, remains to be dealt with. The District Court has held (para 5 of the judgment) that the question whether the partnership was dissolved by the death of Joseph Khouri or not was immaterial because "in view of the protest produced before the Court (No. 70/30)", and attached hereto, it appears that the partnership, including Joseph Khouri, was insolvent even before his death as the first protest was made on the 7th of March, 1927, and the death of the partner took place in September, 1927. The Court, therefore, declared the partnership bankrupt as from 7th of March, 1927.

The Appellant alleges and it is not denied, that case No. 70/30 was referred to by the Court of its own motion, and was the file of an action which never came before the Court for hearing, so that the Defendants never had an opportunity of presenting their answer to the list of protest filed. If such be the fact, the procedure adopted was clearly irregular.

It must further be observed that, even if the list of protests was produced by the Respondent, the Court was bound to determine whether the Appellant was a partner in the firm or not at the date when the act of bankruptcy upon which the action was founded was committed.

It would not be within the competence of the Court, after declaring the firm bankrupt in respect of an act of bankruptcy committed after the Appellant had ceased to be a partner, to date the commencement of bankruptcy from some earlier default committed while the Appellant was still a member of the firm, so as to include him in the bankruptcy.

The appeal must be allowed and the judgment of the District Court, so far as it relates to the Appellant, set aside, with costs here and below.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 47/31.

BEFORE:

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

IN THE CASE OF:

Elias Mulhi — APPELLANT.

vs

Zahiah Mulhi, widow of George Habib Hanna — RESPONDENT.

Bankruptcy terminated by concordat—Exemption from Court fees—Sec. 6, Court Fees Rules of 28th November, 1918—Rules of Court, Civil Appeals, 1st June, 1921.

Appeal from the judgment of the District Court of Haifa, dated 24th September, 1930.

INTERLOCUTORY JUDGMENT.

The Court holds that Section 6 of the Court Fees Rules of 28th November, 1918, applies to the Supreme Court and holds further that under Section (b) of the Civil Appeal Rules of 1st June, 1921, it is seised of this application.

JUDGMENT.

We hold that the Court below was in error in holding that the words on page 13 of the Syndic's proceedings "emanating from the books of his commercial firm" had reference to the first of the two statements of account, viz: that for £P. 3956 odd, which is the subject matter of this action.

We also hold that the Court below was in error in taking no notice of the fact that the bankruptcy of the Plaintiff was terminated by the concordat.

For these reasons we set aside the judgment of the District Court and remit the case to that Court to enter into the merits thereof and give judgment accordingly.

Costs to follow the event.

Delivered the 16th day of March, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 38/32.

BEFORE:

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

IN THE CASE OF:

David Moyal — APPELLANT.

VS

The Syndics in Bankruptcy of Adler — RESPONDENTS.

Naftali Bermann — THIRD PARTY.

Sufficiency of notification of order of adjudication of bankruptcy—Arts. 152, 170, 173, 286, Commercial Code — Time for filing of opposition — Syndics in bankruptcy to act together.

Appeal from the judgment of the District Court of Jaffa, dated the 15th February, 1932.

PRELIMINARY JUDGMENT.

The Court holds that in accordance with Article 170 of the Commercial Code in the absence of one Syndic if the one appearing does not hold a power of attorney from the absent one, the Syndic cannot be heard.

JUDGMENT.

We hold that the publication in the Davar of the 21st October, 1931, is a sufficient notification of the purport of the order of adjudication to satisfy Article 152 of the Commercial Code.

With regard to the provisions of Article 286, the notice of opposition of 16th November, 1931, which was clearly filed within the prescribed 30 days, was filed at a time when Bach was no longer sole Syndic as Ouni Bey had been added as Syndic by an Order of Court dated the 7th November, 1931, published on the 10th November, 1931. Can it be said, in view of Article 173 of the Commercial Code, which lays down that several Syndics must in all cases act together, that an opposition of this nature can retain its validity when Bach is no longer sole Syndic? In our opinion it cannot.

The appeal is, therefore, dismissed.

Delivered the 18th day of November, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 56/32.

BEFORE:

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

IN THE CASE OF:

Syndic in Bankruptcy of Chaim Lederberg — APPELLANT.

vs

Bank Metropolin Ltd. — RESPONDENT.

Administration of estate in bankruptcy—Jurisdiction of District and Commercial Courts—Claim to set off shares against creditor Bank—Art. 206 Commercial Code—Ottoman procedure re bankruptcy.

Appeal from the judgment of the District Court of Jerusalem, dated the 28th March, 1932.

JUDGMENT

The Respondent Bank is a creditor in the bankruptcy of Chaim Lederberg of which the Appellant is Syndic.

A dividend of 35% of the claim admitted in the bankruptcy has been declared, and the amount to which the Respondent is entitled in respect of such dividend is £P. 99.531 mils. The Syndic claims to set off against this amount the value at par of certain shares in the Respondent Bank which form part of the bankrupt's estate.

The Respondent Bank, having applied to the District Court of Jerusalem, the Court, by its judgment dated 28th March, 1932, ordered that the claim should be accepted without any qualification. Against this judgment the Syndic has appealed.

The first point raised by the Appellant is one of jurisdiction. The Appellant argues that as the amount claimed by the Respondent is less than £P. 100.- the proper course was for the Respondent to take proceedings in the Magistrate's Court for the recovery of the sum claimed; and he argues that Article 206 of the Commercial Code under which the District Court purported to act does not apply.

Under the Commercial Code, however, all questions with regard to the administration of an estate in bankruptcy were referred under Ottoman procedure to the Commercial Court; that is to the Court by which the Syndic and Juge Commissaire were appointed.

In the present case the Syndic and Juge Commissaire were appointed by the District Court of Jerusalem; and we therefore

hold that any question relating to the due administration of the bankrupt's estate should be referred to that Court.

This objection is, therefore, overruled.

On the merits of the case, we see no ground for holding that the Syndic is entitled to set off against the Bank's claim an amount equal to the value of the shares at par. It is admitted that the shares are at a discount, and the loss must be borne by the general body of the creditors.

The appeal must be dismissed.

Delivered the 25th day of November, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 69/32.

BEFORE:

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

IN THE CASE OF:

Banco di Roma — APPELLANT.

vs

Muhamed Ali Tamimi and Najib Hakim, Syndics in the Bankruptcy of Salim Najia & Mirza Jallal
The Ottoman Bank, Haifa
Mirza Jallal, bankrupt, Haifa — RESPONDENTS.

Adjudication of bankruptcy—Fixing of date of cessation of payments—Question of fact for Lower Court.

Appeal from the judgment of the District Court of Haifa, dated the 14th April, 1932.

JUDGMENT.

We hold that the fixing of the date of cessation, upon the authorities cited before us, is based upon a question of fact which the Court below had sufficiently before it to justify it in the conclusion to which it came, and that the appeal must therefore be dismissed with costs to include £P. 3 advocate's fees to the representatives of the bankrupt and the Ottoman Bank respectively and travelling expenses £P. 3 to each of the Syndics.

Delivered the 8th day of November, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 81/32.

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

IN THE CASE OF:

The Syndic in the Bankruptcy of Saporta and Alkalay — APPELLANT.

vs

A. Levitzky — on behalf of the creditors — RESPONDENT.

Registration of claims by creditors of bankrupt — Proof of debt — Right to oppose concordat.

Appeal from the judgment of the District Court of Jerusalem, dated the 1st May, 1932.

JUDGMENT.

On the 15th March, 1932, when a creditors' meeting was held to discuss the concordat, Respondent was not a registered creditor, neither had he at that time taken any steps to have his alleged debt proved before a competent court despite the fact that his debt has been refused at a creditors' meeting. He, therefore, had no right to vote on the concordat and consequently has no right to oppose it.

The appeal is therefore allowed, and the judgment of the District Court set aside. Respondent to pay the costs.

Delivered the 20th day of July, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 133/32.

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

IN THE CASE OF:

Arafat — APPELLANT.

vs

Bedawie and Another — RESPONDENTS.

Application for adjudication of bankruptcy — Letters produced to prove that debtors were merchants — Value of evidence is question for Lower Court.

Appeal from the judgment of the District Court of Nablus refusing an adjudication of bankruptcy requested on the ground that debtor had defaulted in payment of a promissory note for £P. 20.

JUDGMENT.

The letters produced in the District Court do not prove that the Respondents were traders at the time when the debt which forms the subject of this application was contracted, and the Court was not satisfied with the evidence of the witnesses heard.

This was a question for the Court which heard the witnesses, and we see no ground for allowing the appeal, which is, therefore, dismissed with costs, including 500 mils each travelling expenses.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 150/32.

BEFORE:

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

IN THE CASE OF:

Defus Hasefer Y.L. Shechter, & Co. APPELLANTS.

VS

Haim Weiner RESPONDENT.

Adjudication of bankruptcy annulled—Partnership declared bankrupt for debt of £P. 20 — Creditors not prejudiced by annulment of bankruptcy.

Appeal from the judgment of the District Court of Jerusalem, dated the 13th November, 1932.

JUDGMENT.

We are at a loss to understand why, for one debt of only just over £P. 20, especially when the creditor had agreed to accept payment by instalments in the Execution Office, this partnership was declared bankrupt.

Moreover the Syndic has brought before us no evidence of creditors whose rights may be prejudiced by annulment of the bankruptcy.

We therefore give judgment allowing the appeal and declaring the bankruptcy annulled.

Delivered the 16th day of November, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 172/32.

BEFORE:

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

IN THE CASE OF:

Waddad bint Abdo Kassab,
for heirs of Iskandar Kassab — APPELLANTS.

vs

Habib and Nejib Battish and Others — RESPONDENTS.

Adjudication of bankruptcy based on judgment under appeal—Proof of commercial debt — Registration in Chamber of Commerce as evidence that debtor is merchant—Admission by advocate—District Court to decide whether debtor is trader—Grounds for declaration of bankruptcy—Effect of failure of principal application on third party application.

JUDGMENT OF MR. JUSTICE BAKER AND MR. JUSTICE KHAYAT.

This is an appeal from a judgment dated 28th November, 1932, of the Haifa District Court, whereby the said Court adjudicated the late "Iskandar Kassab a bankrupt as from the date of his insolvency" fixing the date of the cessation of payments a week prior to his death. The Lower Court would appear to have based their judgment on the facts: (1) that present Appellant's counsel acknowledged that Iskandar Kassab was a merchant and a member of the Chamber of Commerce, and that when he signed the bill which formed one of the grounds for the petition in bankruptcy, the said counsel failed to prove he was not then acting as a merchant; (2) the second ground for the petition was a judgment for a debt alleged to have been incurred by a commercial partnership consisting of one Rays and the said Iskandar Kassab. Against this judgment the heirs of the late Iskandar Kassab have appealed submitting (1) that the fact that the deceased was registered by the Chamber of Commerce in 1928 is not conclusive that he was a merchant at that time or that he was a merchant a week prior to his death, the date which the Lower Court fixed as the time of the bankrupt's cessation of payment, (2) that the acknowledgment of a debt by way of a promissory note does not necessarily imply that the debt is a commercial one, (3) that the judgment in favour of the Second Respondent, and stated by the Lower Court to have arisen out of and in connection with a commercial partnership was in fact a

judgment in favour of Second Respondent in satisfaction of her inheritance from her father Salim Rays, and therefore could not be considered a judgment for a commercial debt.

Respondents allege that the fact that the late Iskandar Kassab was a trader was established by the fact that there was no evidence that he had ceased to trade, and that the certificates of the Ottoman Bank and Banco di Roma could not be relied on.

We are satisfied that the District Court has not dealt with the question as to whether the deceased was a trader at the time the debt was incurred, and upon which it based the adjudication, neither has it properly considered whether the debts upon which the grounds for deceased's bankruptcy was based, were commercial debts, also that one of the grounds for the petition on which the Court presumably based its judgment was a judgment from which an appeal was and still is pending. The appeal must, therefore, be allowed and the judgment of the District Court set aside with costs and advocate's fees assessed at £P. 2.

JUDGMENT OF MR. JUSTICE FRUMKIN.

Nejib and Habib Battish sued the heirs of the late Iskandar Kassab through one of the heirs Waddad, asking for a declaration of bankruptcy of the deceased Iskandar.

The application was based on a judgment given by the District Court of Nablus on the 18th of February, 1932. At the the time of the application this judgment was, to the knowledge of the Court below, pending and is still pending on appeal under No. 36/32. Moreover, from the judgment of the Nablus Court it does not appear as to what was the nature of the debt forming the basis of the action for which judgment was given. The promissory note alleged to have been the subject-matter of that judgment was never produced.

I hold that a judgment under appeal from which it does not even appear that the sum claimed arose out of a commercial transaction cannot form the basis for a declaration of bankruptcy, and the application of Nejib and Habib Battish should have been dismissed.

The present Respondent joined as a Third Party to the said application. In my view where a principal application fails, an auxiliary application cannot stand, and the Third Party application of the present Respondent should also have been dismissed, leaving it for him to institute independent proceedings if he so wished.

For these reasons I hold that the appeal must be allowed, and the judgment of the District Court set aside with costs.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 179/32.

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

IN THE CASE OF:
Anglo-Palestine Bank Ltd. APPELLANT.
vs
Syndic of Barsky's Bankruptcy RESPONDENT.

Adjudication of bankruptcy—fixing of date of cessation of payments by judgment of Court—Cessation of payments is question of fact—Art: 151 Commercial Code.

JUDGMENT.

There is nothing in the Commercial Code which prevents the Court from fixing the date of cessation of payments by judgment given after the order of adjudication.

Under Article 151, the date may be fixed by the Court of its own motion; and it is clear that this power is not removed from the Court by the fact of a report having been made to it by the Juge Commissaire.

The date when the bankrupt ceased to pay his debts is a question of fact. All the facts were before the District Court and it is not suggested that there was not evidence before them upon which they could make their finding.

In accordance therefore with the judgment of this Court in Banco di Roma v Mohamed Ali Tamimi and Others. (C. A. No. 69/32)*, the appeal must be dismissed with costs.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 6/33.

BEFORE:
Baker, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:
Nimer Yousef Shanti,
Yousef Nimer Shanti
Mohamad Nimer Shanti APPELLANTS.
vs
The Attorney General RESPONDENT.

Voluntary petition for adjudication of bankruptcy — Meaning of "trader"—Effect of registration with Chamber of Commerce—Art. 147, Ottoman Commercial Code.

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* Reported ante, page 215.

Appeal from the judgment of the District Court of Nablus dismissing the voluntary petition of the Appellants for adjudication of bankruptcy.

JUDGMENT.

On the 12th November, 1932 the present Appellants petitioned the Nablus District Court that they may be adjudicated bankrupt. The District Court on the 11th December, 1932 decided to dismiss their petition on the grounds that all the Applicants had at the hearing stated that they were not traders and were accordingly not entitled to an adjudication.

Against this decision the original Petitioners have appealed alleging that at no time did they state before the Lower Court they were not traders but what they did say was that they were not registered with the Chamber of Commerce as traders inasmuch as no Chamber of Commerce existed.

After hearing counsel on behalf of the Appellants, and the Government Advocate, we are satisfied that the judgment of the Lower Court cannot stand, for registration or non-registration as a trader in a Chamber of Commerce cannot be held to be conclusive thereon and it appears that this was the only evidence before the Lower Court.

The case is accordingly returned for the Lower Court to hear evidence as to whether Appellants were traders within the meaning of Article 147 of the Commercial Code and to give a fresh judgment. No costs.

In the District Court of Jaffa.

C. D. C. Ja. No. 154/33.

BEFORE:

Copland, J. and Mani, J.

IN THE CASE OF:

Tadros Nimmo and Co.,
Barclays Bank, and Z. A. Chelouche — PLAINTIFFS.

vs

Alfred Roch — DEFENDANT.

Application for annulment of concordat—Joinder of plaintiffs in one claim — Application by creditors to be joined as third parties — Grounds for joinder of third party — Ottoman Commercial Code based on French Law — Art. 255, Ottoman Commercial Code — Civil claim arising out of criminal offence.

INTERLOCUTORY JUDGMENT.

First of all I must deal with two out of three preliminary points which have been raised; one by the Defendant and another by Mr. Richardson, who appears on behalf of two other creditors.

The first point raised by the Defendant is this: That in an action of this nature we cannot have three Plaintiffs joining in one petition. I think that this contention is right, for this reason: Each of the Plaintiffs has himself a complete cause of action. The cause of action of each is independent of the cause of action of the others. It is not as though two or more persons are claiming on the same cause of action. In that case the cause of action is not complete in itself. It is shared by the other or others. In this present case either of the Plaintiffs can proceed independently from the other, and I think that only one Plaintiff can appear in respect of each action. There is nothing, of course, to prevent any aggrieved creditor to file himself an action on his own behalf for the annulment of the concordat, and all actions can be consolidated if the Court finds it convenient.

The second point is the application by two further creditors who did not sign but who are bound by this concordat, to be joined as third parties. I think that the correct statement of the law is that nobody can be admitted as a third party unless that person is affected either directly or indirectly by Plaintiff's action. By "affected" I mean adversely affected. There are two instances where there is a common cause entitling a person to enter as a third party: Where a person asks to be admitted to an action and he too resists the Plaintiff's claim inasmuch as it may affect his interests, and where a Defendant has a right of recourse against a third party. Neither of these two reasons apply in this case. A person, in our opinion, cannot join as a third party in order to support the Plaintiff's claim.

We come now to the second preliminary point raised by the Defendant which is the more serious point. He contends that this action is misconceived inasmuch as before it can be brought before a civil court there must be instituted criminal proceedings and the alleged fraud proved before a criminal court. I fully agree that in ordinary criminal law before one can bring a civil action arising out of a criminal offence, he must prove that the criminal offence has been established.

The present action is based upon Article 225 of the Ottoman Commercial Code. This Article reads as follows:

"No action to annul or set aside the composition can be maintained after the same has been ratified, unless it be proved that any fraud, such as concealment of the bankrupt's property, exaggeration of his debts, and the like, has been committed".

This Article is based on Article 518 of the French Code. The French section is practically the same. We have referred to the French commentators because since the Ottoman Commercial Code is based on the French Code, it must be interpreted by reference to the French commentators.

On reading the comments very carefully from Lyon Caen, (p. 522) it is quite clear that a concordat can be annulled whether there is a fraudulent bankruptcy or not. All that is necessary is that there should be "dol", and "dol" of a particular kind either by concealment of assets or exaggeration of debts. It is not, therefore, necessary that there should be a conviction for fraud. There may be a good reason why the Ministère Publique or in this country the Attorney General does not wish to institute criminal proceedings, but the creditors should not thereby be deprived of their right to bring a civil action for the annulment of the concordat.

We, therefore, make the following preliminary order:—

The Defendant's first preliminary point succeeds. Only one of the Plaintiffs can be admitted. Mr. Richardson's application to join as a third party on behalf of two other creditors is refused. The Defendant's second preliminary point fails, and the case will proceed on the merits on the above lines.

BANKS.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 323/20.

IN THE CASE OF:

Ottoman Bank — APPELLANT.

vs

Abd El Salem Eff. Awedah — RESPONDENT.

Deposit in bank in gold coin—Right to repayment in gold—Claim of interest on bank deposit — Point not raised on appeal not considered by Court of Appeal.

JUDGMENT.

By the first judgment the Bank was ordered to pay to the Respondent, 49227 Egyptian piasters plus costs and interest. Judgment

was in presence of the parties. Service of the judgment was made on 11th Tamus, 1920; appeal was made on 7th Ab, 1920. Case fixed for hearing on 4th Elul 1920, and parties duly summoned.

On the day fixed the Court assembled duly constituted of the A/President Mr. Kermack and the members, George Eff. and Ali Eff. The attorneys for the parties appeared and the hearing of the case in public began.

Whereas the appeal was lodged in due time, it is decided to hear the appeal.

Attorney for Appellant, Faiz Eff. repeats the statement of appeal. Ibrahim Eff. Kemal says: Appellant pleads that we received our money and again deposited banknotes instead, this is not correct; where is the receipt they ought to have obtained from my clients in case my client would have really received back the gold coins. On what date did he receive the money and on what date did he deposit again banknotes. And whereas it is understood that the parties have nothing to add, the President delivers the following judgment:

After consultation and as result of the appeal dealt with between the Branch of the Ottoman Bank, Jerusalem, as Appellant, and Abd El Salem Effendi Awedah it has become clear that the grounds of appeal as submitted do not justify the annulment or amendment of the judgment in first instance.

The objection raised with regard to the amount of the judgment being in excess of the amount claimed by the Plaintiff cannot be upheld as the Respondent when claiming 45100 Francs claimed as well interest which had been agreed upon. He claimed it from the date of depositing the money at the branch of the said Bank in 1914 and if the Court would have recognized this claim then the judgment would be in excess of the sum adjudged in his favour.

And whereas the Respondent has not appealed on this point and has only asked to confirm the judgment and whereas the judgment is in accordance with the law and does not contain anything contrary to justice we therefore unanimously decide to confirm the judgment and to order Appellant to pay the costs both in first instance and appeal.

Judgment delivered in presence of the parties. 100 Piasters advocate's fees.

Delivered in public according to law on 4th Elul, 1920.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 89/26.

IN THE CASE OF:

Isadore Skora — APPELLANT.

vs

American-Palestine Bank Limited,
Max Bension — RESPONDENTS.

Authority requested for transfer of monies from bank account—Knowledge as basis of estoppel—Silence as consent—Art. 80, Civil Procedure Code.

JUDGMENT.

In November, 1924, the Defendant Isadore Skora (otherwise Isaac Skora) had an account with the Respondent Bank of which he was a cashier. The father, Philip Skora was a director of the Bank and also had an account there. The Respondent Max Bension (otherwise Max Benjamin) was a director and treasurer of the Bank. The President and Managing-Director of the Bank was Dr. Benjamin son of Max Bension, who with his father and Philip Skora constituted the executive committee of the Bank.

The action which gives rise to this appeal was brought by the Appellant against the Bank and Bension jointly and severally claiming £5000 on the ground that this sum was transferred without his authority from his account to that of Bension.

With regard to this claim the District Court made the following finding:—

> "From the evidence heard and the documents produced we are satisfied that the Plaintiff knew of the payment of the £5000 to the Defendant Max Bension and consented thereto".

Judgment was entered for the plaintiff.

The Appellant argues inter alia that there was not evidence before the District Court on which it could find that he consented to the payments. We are therefore to ascertain what evidence there was upon which, if believed, such a finding could be based.

On the 7th November, there was a sum of £E. 6550.465 standing to the credit of Philip Skora's account and on that date in accordance with verbal instructions given by Philip Skora to a clerk of the bank, Kahner, the whole of this amount was transferred to the account of the Appellant.

The reason of this transfer is disputed, the Respondents say that it was made in order to avoid attachment for a judgment debt and that the sum transferred remained the property of Philip Skora.

The Appellant says that the transfer was a gift to him in anticipation of his marriage with the daughter of the Respondent Bension which took place in the following month.

From the 18th November onward Philip Skora from time to time drew against the Appellant's account, the number of such drawings between that date and the end of February being 13.

The signature on the slips relating to these transactions are either "Philip Skora" or "Isadore Skora per Philip Skora". When Kahner asked Philip Skora how he could sign for his son, Philip according to Kahner's evidence gave him a verbal order to make the transfer.

On the 27th November, according to Kahner, Philip Skora gave him verbal instructions to transfer £5000 from the Appellant's account to the credit of the Respondent Max Bension.

On the same day Bension produced to Kahner a letter written by Philip Skora to Bension dated 25th November—(Exh. "A"). This letter Kahner stated that he regarded as authority for the transfer.

In fact no direct transfer from Appellant's account to Bension was made on that day but £4000 was transferred from the Appellant's account to that of Philip Skora and from Philip Skora to Bension's account.

The entry in Philip Skora's account in the ledger says "transferred from I. Skora on 27.11.25 to account of M. Bension according to his letter".

On third December, Philip Skora wrote to the Bank as follows:—

> "I herewith beg you to transfer my account to the order of Mr. Max Bension the sum of £5000 Pounds Egyptian (£5000)".

On the 4th December Philip Skora wrote a further letter to the Bank: "Kindly transfer all the money on my account to the name of Mr. Isadore Skora above the five thousand pounds loaned to Mr. M. Bension".

Both of these letters were typed by the Appellant for signature by Philip Skora.

On the 4th December a further £1000 was transferred from Appellant's account to that of Bension.

In Appellant's account there appears against this transfer the entry of "£1000 more to the account of Max Bension in accordance with the letter of Philip Skora".

It is in respect of these transfers of £4000 and £1000 that this action was brought.

It is to be noted that there is no express authority in writing from the Appellant for the transfers nor any express written satisfaction of them.

The Appellant argues that in view of Article 80 of the Code of Civil Procedure such express authority is required to enable one person to draw upon an account in the name of another, but if there was evidence that the Appellant was aware of and acquiesced in the fact that his father was drawing upon his account in favour of Bension he is estopped from now raising the objection that he never gave a written authority.

We have, therefore, to see whether there was evidence from which the Court could infer that the Appellant knew and acquiesced in the fact that Philip Skora was drawing upon his account.

The Appellant has admitted somewhat reluctantly that he knew of the letter of the 25th November on the day when it was written. He was thus aware that Philip Skora at a date when the whole balance of his account had been transferred to the Appellant was offering to lend to Bension £5000.

It is argued for the Appellant that he did not discover that the money had been taken from his own account until his return from his honeymoon in February. Such however, is not his own story.

What he says is that on the 3rd December when assisting the cashier in an attempt to trace the original of a small discrepancy in the cash he searched his own ledger account and there came upon the entry of the transfer of £5000 to Bension. That he thereupon objected to Bension and his son and was promised that the matter should be put right.

This story is certainly not wholly true. On the 3rd December no transfer of £5000 from the Appellant's account to Bension had been made. What the Appellant would have seen on that date was the transfer of £4000 to the account of Philip Skora.

Kahner denies that the Appellant made any protest and it is clear that the District Court did not believe that he did so. Moreover, it was on that very day that the Appellant typed the letter which has been quoted whereby Philip Skora instructed the Bank to transfer £5000 from his account to Bension. There is a

conflict of evidence as to what was the intention of this letter and that of the 4th December.

There is, however, evidence that the auditor of the Company had asked for written authorities to cover the transfers which had been made on verbal instructions. And although these letters do not authorise the actual transfers that were made, the Court might well infer from the fact that Philip Skora had on those dates no account in his own name to which the letter could apply that the letters were intended to furnish authority for the state of affairs to which those transfers give rise: namely, that of the £E. 6550.465 originally standing to the credit of Philip Skora £5000 had gone to Bension and the balance to the Appellant's account.

The Appellant typed those letters and he must be held to have known what the meaning of them was. I hold, therefore, that there was evidence upon which the Court could base its finding that the Appellant knew of, and consented to, the transfers.

This decides the case as regards both of the Respondents. There is thus no occasion to consider any of the other points that have been raised on this appeal.

The appeal must be dismissed with costs.

Delivered in presence the twenty-sixth day of November, 1926.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 92/29*.

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

IN THE CASE OF:

Arieh Gurevitz
Israel Noah Gurevitz — APPELLANTS.

vs

The Anglo Palestine Co. Ltd. Jaffa — RESPONDENT.

Instructions to bank to place monies to account of third person — Relationship of banker and customer — Claim for monies deposited through agent—Privity of contract—Disposition by trustee of monies held in trust—Liability of Bank to pay out remittance.

Appeal from the judgment of the District Court of Jaffa dated 18th June, 1928.

JUDGMENT.

This appeal arises out of an action brought by the Appellants, Arieh Gurevitz and Israel Noah Gurevitz, in the District Court of

* ED. NOTE: This judgment is now on appeal before the Privy Council.

Jaffa, claiming a sum of £. 10,000 from the Respondent, the Anglo Palestine Company Ltd. a banking Company carrying on business in Jaffa.

The District Court dismissed the Appellant's action on an objection raised by the Respondent that the statement of claim disclosed no cause of action.

The main facts alleged in the statement of claim are as follows:—

In 1918 the Appellants arranged with the Russian Zionist Organisation through its President and Commercial Director the late Mr. Boris Goldberg, that a credit of £. 10,000 should be opened in their joint names with the Jewish Colonial Trust, London.

In 1919 the Respondent received from the Jewish Colonial Trust, London, a letter of instructions in the following terms:—

"August 15, 1919,

To the Manager, Anglo-Palestine Co. Ltd.,
Jaffa.

Dear Sir:

At the request of Mr. B. Goldberg, please open an account in your books in the name of:

Brothers Arieh Leib and Israel Noah Gurevitz from Petrograd, and credit them with:

£. 10,000 (Ten thousand pounds) for the debit of our account.

Yours faithfully,
Jewish Colonial Trust.
(sgd) W. Wolf, Manager".

The Respondent has furnished the Appellants with a copy of the following account:—

"Bros. Arieh Leib and Israel Noah Gurevitz, Petrograd.

1919	Cr.	Cr.	Balance.
July 1 Transfer from J. C. T.	£. 10,000	970000	
December 31 Interest up to date		9700	
» » » » » »		3233	
1920			
June 20 » » » »		19647	
October 25 Transfer to a/c B. Goldberg			
Land a/c £. 8,000=776,000			2088977
			P. T. 1009261

The Appellants have applied to the Respondent to pay over to them the sum of £. 10,000 which the Respondent has refused to do.

In its judgment the District Court has assumed that the transfer from the account in the name of the Appellants to the Goldberg Land Account made on October 25th, 1920 was made upon the instructions of the Appellants. That fact is not alleged in the statement of claim, but it is common ground between the parties that the transfer was not made upon the instructions of the Appellants. It is not contested by the Respondent that the Appellants are the persons to whom the letter of instructions of the 15th August, 1919, refers.

In reply to the objection taken by the Respondent the Appellants argue that the letter of instructions disclosed them as the principals of Mr. B. Goldberg, and that from the time when the Respondent transferred £. 10,000 to the account in their names, the relation of banker and customer subsisted between the Respondent and themselves, and hence that from that moment the Respondent was not entitled to obey any instructions given with regard to the £. 10,000 by any person other than the Appellants.

Against this the Respondent argues that until the relation of banker and customer had been established by communication between the Respondent and the Appellants, the Respondent held the £. 10,000 as agent for Mr. B. Goldberg.

In support of this view the English case of Williams vs Everett (3 English & Empire Digest p. 249 para 735) has been cited.

In that case the Defendants, London bankers, received bills from a customer abroad with a letter of instructions directing them to pay the proceeds to the Plaintiff and other named creditors of the customer. It was held (1) that the Defendants did not by the mere act of receiving bills and afterwards the proceeds of them with such directions, bind themselves to the Plaintiff (between whom and the Defendan's there was no privity of contract, express or implied) and that the Plaintiff could not maintain an action against the Defendant's for money had and received by them to his use; and (2) that the property in the bills and their proceeds still continued in the remmiter.

A similar principle was laid down by this Court in Ibrahim Kamal vs Adib Daudi (Civil Appeal 50/31).

In that case the Respondent Adib Daudi had received and collected the proceeds of bills drawn in his favour by one Taher el Masri. The Appellant, who was the Syndic in the bankruptcy of Abdel Mu'ti Chnesim, alleged that the Respondent acting under instructions from Taher, who owed money to the bankrupt was applying the proceeds of the bills for the benefit of the bankrupt,

in fraud of his creditors, and the Appellant accordingly claimed the proceeds of the bills as forming part of the bankrupt's estate.

It was held in so far as it might be proved that the Respondent held such proceeds in trust, he did so as trustee not for the bankrupt but for Taher, whose directions as to the disposal of such proceeds he would be bound to obey.

We are unable to hold that, on the facts alleged in the statement of claim, Mr. B. Goldberg either was, or represented himself to the Respondent to be, the agent of the Appellants when he gave the instructions to place £. 10,000 to their account.

On the contrary the terms of the letter of instructions of 15th August, 1919, clearly indicated Mr. B. Goldberg himself as the principal.

Accordingly, on the authority of the cases cited we hold that the Respondent, on the facts alleged in the statement of claim, owed no duty to the Appellants, and that their appeal must be dismissed.

The Appellants will pay the costs of this appeal.

Delivered the 11th day of April, 1932.

BANKS.

SEE ALSO PLEDGE.

BILLS OF EXCHANGE.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 111/26.

Law of contract – Ottoman Commercial law re bills of exchange — Document in form of promissory note payable to bearer regarded as admission of debt though otherwise invalid—Arts. 72, 144, 145, Ottoman Commercial Code – Art. 64 Civil Procedure Code—Validity of contracts not repugnant to custom, morality or law — Right to issue paper money—Definition of commercial transaction.

JUDGMENT.

This is not a promissory note valid as a negotiable instrument under Article 145 of the Ottoman Commercial Code because the name of the promissee is not in the document. Promissory notes payable to bearer were made lawful by Article 28 of the Appendix

of the Code of 14th Shaaban, 1284, but was later invalidated by an Amendment of 6 Rajab, 1296.

If regarded as an admission of a debt it may be that such a document is evidence of such an admission, if supported and completed by proof of the person who advanced the money and to whom the promise is originally made, but we are not required to decide that question because the Plaintiff in the case does not pretend to be the creditor of the Convent, but a mere holder.

An alternative could be to treat it as a contract valid under Article 64 of the Ottoman Code of Civil Procedure. That Article was apparently intended to sanction contracts not recognised by the Mejelle provided they are not repugnant to custom, morality or law. The document is not objectionable on moral grounds but it is of a kind expressly excluded from the Commercial Code on grounds of public policy (14 Rajab 1906). So clearly is the law opposed to this sort of document, which is of the nature of paper money which is a promise to an unascertained bearer and may be sold for money or any other consideration, that there is a law expressly forbidding any but the Government and the Imperial Ottoman Bank to issue such documents. (16 Shaaban 1299, Art. 9).

The Convent is not a body prossessing any such privilege.

I hold that the judgment of the District Court should be reversed and appeal be allowed dismissing Plaintiff's action.

DISSENTING JUGDMENT OF MR. JUSTICE FRUMKIN.

The note which is the subject matter in this case, was drawn in the usual form of promissory note, with the only exception that instead of mentioning the name of the promissee, it was made payable to the order of bearer. This being contrary to Article 145 of the Commercial Code, the note is defective as a negotiable instrument.

Article 72 of the Commercial Code dealing with bills of exchange provides that certain defects render a bill of exchange invalid as such but it is to be regarded as an ordinary document. In the light of Article 144 dealing with promissory notes, it has been the practice of the Ottoman as well as of this Court, that subject to any provisions to the contrary, the law as to bills of exchange applies to promissory notes. Hence the note in question being invalid as a promissory note is to be regarded as an ordinary undertaking subject to the general law of the country other than the Commercial Law.

The Mejelle does not deal with notes of this kind, but we have Article 64 of the Ottoman Code of Civil Procedure as amended

on tbe 21st Nissan, 1330, which has to a very large extent, modified the law of contract of Turkey.

The Article provides, inter alia:—

All contracts and undertakings are binding upon the parties unless such contracts or undertakings are:

(1) prohibited by special law:

(2) prejudicial to morals and public security:

(3) contrary to established principles relating to capacity of parties, inheritance, the disposal of waqf money and waqf land, and disposal of Immovable property.

Consequently as long as any contract or undertaking does not fall under any of the restrictions of the said article, it is binding and enforceable by law.

As it is not alleged that the note in question is prejudicial to morals and public security or contrary to any of principles mentioned, we have only to see if it is prohibited by special law. In my opinion it is not, even if the note is regarded to be of the kind known under the name of "Blank Bono". The Ottoman legislation on Blank Bono, or what it really means, note payable to bearer, is a follows:

Article 28 of the Appendix to the Commercial Code, contains a list of matters which are to be regarded as commercial transactions for jurisdiction purposes. Among these transactions the Article in its original version counts "bonos made out payable to whoever might produce them". This Article has been amended (6 Rajab 1296) so as to make the said passage read "and bonos payable to the order of a person".

In a circular addressed to the Court (14 Rajab 1296, Destour Vol. 4, Page 719), the motives of the amendments are explained by stating that like in other countries notes payable to bearer are not to be considered as commercial transactions, and are to be tried in the Civil Courts. The effect of this amendment was therefore to remove notes of this kind from the jurisdiction of the Commercial Courts by excluding them from the list of commercial transactions. But there is nothing in this amendment or in any other law I know of, prohibiting the issue of notes payable to bearer.

In his note the Appellant in this case undertook to pay on a certain date a certain sum of money to any person who will at that time be in possession of the document. Under Article 64 of the Code of Civil Procedure this undertaking is binding and the judgment of the District Court should be confirmed.

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

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 133/26.

BEFORE:

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

IN THE CASE OF:

M. Joseph Tepper — APPELLANT.

vs

The Ottoman Bank, Jaffa — RESPONDENT.

Ottoman law of bills of exchange—Art. 145, Ottoman Commercial Code—Promissory note not negotiable because nature of consideration not stated—Admissibility of evidence to remedy omission in note.

Appeal from the judgment of the District Court of Jaffa, dated the 14th February, 1926.

JUDGMENT.

The promissory note is not negotiable under Article 145 of the Commercial Code because it does not state the nature of the consideration. Whether the omission should be remedied by evidence as to the nature of the consideration as one of the commentators holds we are not required to decide because that point has not been raised.

The appeal will be allowed, the judgment of the District Court set aside and entered for Defendant against Plaintiff with costs.

Delivered in presence the 15th day of February, 1927.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 98/28*.

IN THE CASE OF:

Leib Gluckman — APPELLANT.

vs

The Attorney General — RESPONDENT.

Bills of exchange—Guarantee per aval forming part of bill and not a collateral engagement—Aval on bill does not attract additional stamp duty.

Appeal from the judgment of the District Court of Jaffa, dated the 26th June, 1928.

* Followed in Civil Appeal No. 127/28 (not reported).

JUDGMENT.

We are of opinion that a guarantee per aval forms part of the bill itself and cannot be distinguished from it, and that it is not a collateral engagement but one of the bill, and it is for that reason and because the original bill has incident to it the capacity of an endorsement in the nature of an aval, that it does not attract additional duty (see Steele v. M'Kinlay, 5 Appeal Cases, 754).

The appeal must be allowed and the judgment of the District Court quashed.

Delivered the 15th day of March, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 74/29.

BEFORE:

Tute, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

Executors of the Estate of Abraham Srogov — APPELLANT.

vs

Haim Srogovitz — RESPONDENT.

Consideration for promissory note impeached—Application to prove alleged real consideration by oral evidence—Art. 82, Civil Procedure Code.

Appeal from the judgment of the District Court of Jaffa, dated 25th January, 1929.

JUDGMENT.

The Respondent was Plaintiff in a case in the District Court of Jaffa. In that case he sued the estate of one Abraham Srogov, deceased, on two promissory notes. Each promissory note is for £E. 500. One was given by the deceased to the Plaintiff (Respondent) and one to his wife. The latter transferred her rights to her husband.

The plea of the Defendant (Appellant) is that the consideration really given was not loan as alleged in each note; but that in the case of the husband the promissory note was given to enable him to show means for the purpose of admission to Palestine, while in the case of the wife the promissory note was intended to guarantee her future.

The Court rejected an application to prove the alleged real consideration by means of oral evidence and gave the Plaintiff a decree. Defendant now appealed on the ground that the Court ought to have given permission to produce such evidence under Article 82 of the Civil Procedure Code, the parties being related within the degrees indicated by that Article.

We hold that Article 82 was never intended to apply to transactions which are evidenced in the manner laid down by law, and which are not alleged to be tainted by fraud or duress.

The appeal is dismissed with costs and advocate's fees £P.2.

Delivered the 28th day of November, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 35/30.

BEFORE:

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

IN THE CASE OF:

A'quiva Librecht
Shoshanna Librecht — APPELLANTS.

vs

Bulgaro Palestinian Bank Ltd. — RESPONDENT.

Ottoman law of bills of exchange—Endorsement of overdue bill—Negotiation of bill—Endorsee considered as agent of endorser.

Appeal from the judgment of the District Court of Jaffa dated 19th July, 1929.

JUDGMENT.

The Court holds that according to the Ottoman Law an endorsement of an overdue bill operates merely as a procuration not as a negotiation of the bill and the endorsee is considered as the agent of the endorser.

The appeal must therefore be allowed and the case remitted for the District Court to enter into the merits of the case and give judgment accordingly.

The Respondent is ordered to pay the costs and advocate's fees assessed at £P. 2.-

Delivered the 19th day of June, 1931.

In the District Court of Jaffa, sitting as a Court of Appeal.

C. A. D. C. No. 80/30.

BEFORE:

Copland, J., Khaldi, J. and Mani, J.

IN THE CASE OF:

El Haj Issa Bedas — APPELLANT.

vs

Moh'd Adib Jahlit — RESPONDENT.

Bills of exchange — Proof of payment of bill — Right to administer oath that no money due.

Appeal from the judgment of the Magistrate's Court Tel-Aviv, dated 28th January, 1930, whereby the Appellant was ordered to pay to the Respondent the sum of £P. 15.-

JUDGMENT.

After consideration the Court finds that the fact that the bill is in the possession of the Appellant is a sufficient proof that the said bill has been settled. The Respondent is only entitled to administer an oath to the Appellant that he is no more indebted to him (Respondent).

Judgment of the lower court is therefore quashed and case remitted. Costs to be costs in the case.

Given the 14th day of March, 1930.

ED. NOTE:

But see the judgment of Court of Appeal in Hachaklai Society vs Nahum Perlman, C. A. 92/32.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 6/31.

BEFORE:

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

IN THE CASE OF:

Malek Elias Hallak — APPELLANT.

vs

Miriam bint Audi Hallak — RESPONDENT.

Civil procedure—Allegation that receipt endorsed on back of bill—Court to require production of documents — Evidence rejected by District Court.

Appeal from the judgment of the District Court of Nablus dated the 11th October, 1930.

JUDGMENT

We hold that the District Court before refusing to accept the truth of the evidence given by the witnesses called by the Appellant should have required the production by the Respondent of the bill upon the back of which the Appellant alleges that a receipt for £P. 100 has been endorsed and signed by the Respondent.

The judgment is set aside and the case is remitted to the District Court for completion in accordance with this judgment. Costs will be costs in the case.

Delivered the 6th day of October, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 126/31.

BEFORE:

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

IN THE CASE OF:

Abd el Rahman el Dibs — APPELLANT.

vs

Muhammad Sha'aban el Zibdeh — RESPONDENT.

Note drawn before and endorsed after enactment of Bills of Exchange Ordinance, 1929—Time when bill payable on demand deemed to be overdue—Validity and effect of endorsement—Note subject to defect of title affecting it at its maturity—Title of holder of overdue bill—Section 35 (2) Bills of Exchange Ordinance, 1929—Articles 117, 144 Ottoman Commercial Code.

Appeal from the judgment of the District Court of Jaffa, dated 20th September, 1931.

JUDGMENT.

This action is based on a promissory note, dated 1st July, 1929, signed by Abd el Rahim el Dibs of Jiyous to the order of Ahmad el Salahi, for the sum of £200, payable on demand. The promissory note was endorsed to the order of Muhammad Sha'aban el Zibdeh on the 9th of June, 1931.

The note was drawn at the time the Commercial Code was in force and was endorsed when the Bills of Exchange Ordinance, which was enacted on the 30th December, 1929, had been promulgated.

This being the case, we must consider the time of maturity of the note in the light of the Commercial Code. We must also consider whether the endorsement was before or after maturity and whether such endorsement is perfect and conveys a good title, or is imperfect and subject to any defect of title affecting it at maturity thereby enabling the Appellant to set up any defence against the holder he otherwise would be entitled to set up against the endorser.

Article 144 of the Commercial Code prescribes that all the provisions relating to maturity etc., which govern bills of exchange are equally applicable to a promissory note. The Code, although silent with regards to the time when an inland bill payable on demand is deemed to be overdue, does however by virtue of Article 117 prescribe that in the case of bills drawn on the Continent of Europe or the North Coast of Africa and payable in the Ottoman Empire the holder must demand the payment or acceptance thereof within six months from the date of the bill, and in case of bills drawn in remoter countries within one year.

By analogy with the before mentioned Article 117 of the Commercial Code, we are of opinion that the promissory note the subject matter of this action must be held to have matured before the 9th June, 1931 (nearly two years after it was drawn).

Accordingly the endorsement, having been made after maturity, by virtue of Article 35 Section 2 of the Bills of Exchange Ordinance, renders the note subject to any defect of title affecting it at its maturity and the holder cannot acquire a better title than that which the endorser had.

We therefore order that the judgment of the lower Court be set aside and the case remitted for the District Court to hear any objections that the Appellant may have against the holder with regard to the promissory note in question.
Costs to follow the event.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 118/31.

IN THE CASE OF:

Banco Di Roma, Haifa — APPELLANT.

VS

Abd el Ghani el Mashlawi — RESPONDENT.

Law in force at date of making of bill of exchange applied—Mere signature on bill not indicating refusal held to be acceptance—Service of protest on acceptor—Art. 80, Turkish Commercial Code.

Appeal from the judgment of the District Court of Haifa, dated 23rd June, 1931.

JUDGMENT OF THE DISTRICT COURT.

On consideration the Court finds that the sole proof in support of the Defendant's liability to pay the value of the bill, is his signature on the same instrument at the time of its drawing on him by one called Yusuf Fakhr, and the service of protest for non payment on the Defendant and his failure to file his reply to the said protest.

Defendant's counsel contended that his client's signature on the bill was set for refusal of the same instrument, and that service of the protest on him does not mean his acceptance of the same.

The Court holds that the mere signing of the bill does not prove acceptance; but that in order to consider it as a valid instrument, the word "accepted" must necessarily be inserted on the same bill or some expression to that effect should be inserted on it, as is provided by Article 80 of the Turkish Commercial Code, which Code was in force at the date of the issue of the bill. The mere service on Defendant of the protest does not mean acceptance on his part.

Therefore, in pursuance of Article 80 of the Turkish Commercial Code, the Court does unanimously dismiss Plaintiff's action with costs and £P. 2 advocate's fees.

Judgment given in open Court and subject to appeal.

Given the 23rd day of June, 1931.

JUDGMENT.

On the authorities before us we cannot hold that the signature of the Respondent indicates a refusal, and we are bound to hold that it is sufficient to indicate an acceptance.

We therefore set aside the judgment of the District Court and remit the case to the District Court to enter into the merits of the case and to give judgment accordingly.

Costs to follow the event.

Delivered the 22nd day of February, 1932.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 8/31.

BEFORE:

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

IN THE CASE OF:

'Ali Abu 'Adieh — APPELLANT.

vs

The Attorney General — RESPONDENT.

Bill replaced by new bill is satisfied—Criminal conversion of property—Cancelled bill is property of maker—Art. 236, Ottoman Penal Code—Person in possession of property belonging to another held to be trustee.

Appeal from the judgment of the District Court of Jurusalem, dated 22nd March, 1931, whereby the Appellant was convicted under Article 236 of the Penal Code and sentenced to two months imprisonment.

JUDGMENT.

The Appellant, 'Ali Khalil Abu 'Adieh, had lent money to the Complainant, Isaac Michael Rafidi, from whom he received bills for the amounts lent. Among these was a bill whereby the Complainant admitted that he owed the Appellant the sum of £P. 90.

When the bills matured, the loans were renewed and the Complainant gave the Appellant fresh bills in substitution for those which he held. The Appellant in the presence of the complainant tore up a number of documents, and stated that he was tearing up the old bills instead of handing them back to the Complainant, and that it was customary for lenders to do this in order to prevent any question being raised subsequently as to excessive interest.

Eventually the Appellant sued the Complainant on the bills held by him. Among these was a bill for £P. 90 which the Court, after hearing the evidence, held was one of the original series of bills which had been replaced.

Criminal proceedings were therefore taken against the Appellant, and he was convicted under Article 236 of the Penal Code.

In his appeal the Appellant argues that on the facts as found by the Court, no offence under Article 236 has been committed.

Article 236 was amended by the Imperial Decree of the 15th Jamadi El Akhar, 1332 (28th April, 1330). The literal translation of the amended Article reads as follows :—

"The person to whom is given and delivered by way of trust and commission or in order to produce and return, or to use or keep in a specified manner, as paid or unpaid service, and in short any person who is in possession of goods and things and cash and bonds and other deeds containing any kind of undertakings and discharges etc. and whether for his own or others benefit, conceals or exchanges or disposes or appropriates or consumes the same, or ventures to commit on the same any act in the nature of trespass or refuses to deliver the same to the persons concerned, is imprisoned for two months to two years. And with the payment of the necessary compensation by him, a fine of one fourth of the amount of compensation will be taken from him. In case this offence is committed by one of the category of an employed servant, apprentice, or labourer, to the prejudice of his superior or master, he is after the compensation of the damages, imprisoned for not less than one year. Proceedings are subject to complaint".

The Appellant argues that the bill was not delivered to him by way of trust or commission, but as his own property, and hence that the provisions of the Article cannot apply to him.

It is true that the bill was delivered to the Appellant as owner, and as long as it remained unsatisfied he was entitled to deal with it as he pleased.

From the time, however, when the bill was satisfied by replacement by a fresh bill, the property in the original bill reverted to the maker, and the Appellant was bound to deal with it as the maker directed. That is to say, the Appellant was "a person who has in his possession property belonging to another", within the meaning of Article 236.

It follows that when the Appellant wrongfully converted the bill to his own use by suing upon it, he was committing an offence within the terms of Article 236 of the Penal Code.

The appeal must therefore be dismissed.

Delivered the 13th day of June, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 36/31.

BEFORE:

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

IN THE CASE OF:

Mrs. Zivia Bershanko — APPELLANT.

vs

The Syndic in Bankruptcy of Elhanan Lerner — RESPONDENT.

Bankruptcy of maker of promissory note—Award made by Rabbinical Court as arbitrators—Promissory notes given for payment of monies due under award — Possibility of debt being twice recovered — Presentment of creditor's claim.

Appeal from the judgment of the District Court of Jaffa, dated the 20th May, 1930.

JUDGMENT.

This appeal is against the judgment of the District Court of Jaffa refusing to enforce an award made by the members of the Rabbinical Court, sitting as arbitrators with regard to a dispute between the Appellant and her husband Elhanan Lerner.

By that award the arbitrators determined that the Appellant was entitled to receive from her husband the sum of £P. 450 and before the actual issue of the award, her husband gave the Appellant promissory notes for that amount. Subsequently, the Appellant's husband was declared bankrupt, and the present Respondent was appointed Syndic of his bankruptcy.

The Appellant endorsed the bills is favour of one Godhard for "value in account". Mr. Godhard presented the bills to the Respondent for payment which was refused. The Appellant thereupon commenced this action, which was dismissed on the ground that she had negotiated the bills and was therefore not entitled to ask for confirmation of the award "as a debt could not be recovered twice from the same person".

The bills have been produced by the Respondent in whose hands they were left by Mr. Godhard. An extract from the proceedings in bankruptcy has been put in. This includes an application to the Juge Commissaire, dated 25th March 1930,

enclosing a copy of the judgment of the Rabbinical Court "with regard to the claim of the amount of £. 450 by Mrs. Zivia Bershanko the divorced wife of the above named bankrupt" and stating that "this debt arising from disputes of porsonal status was secured by bills of the same amount presented before the meeting of creditors". This application was signed "on behalf of Mrs. Zivia Bershanko — M. Z. Godhard".

The application makes it clear that Mr. Godhard was acting as the Appellant's agent and not on his own behalf. It follows that the possibility of the same debt being recovered twice cannot arise and the appeal it not to be dismissed on this ground.

The appeal is allowed, the judgment of the District Court is set aside and the case is remitted for completion.

Costs will follow the event.

Delivered the 8th day of April, 1932.

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

C. A. D. C. Ja. No. 39/31.

IN THE CASE OF:

Abraham Ghour — APPELLANT.

vs

Mayor (Max) Klouk — RESPONDENT.

Mejelle not applicable to promissory note—Bills of exchange governed by principles of Commercial Code—Art. 1775, Mejelle.

Appeal from the judgment of the Magistrate's Court of Tel Aviv dated 9th January, 1931, whereby the Appellant's claim for the sum of £P. 25 was dismissed with costs.

JUDGMENT.

After consideration the Court finds that the Magistrate was wrong in applying Article 1775 of the Mejelle to the case of a promissory note, which is a document governed by the law and principles of the Commercial Code.

The judgment of the Court below, is therefore, set aside and the case remitted for re-hearing.

Delivered on February, 1931.

In the Supreme Court Sitting as a Court of Appeal.

C. A. No. 54/31.

BEFORE:

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

IN THE CASE OF:

Rafael Rosoff
Israel Rosoff — APPELLANTS.

vs

Litvinsky Bros. — RESPONDENTS.

Bills of exchange — Endorsement in blank by payee — Failure of acceptor to pay — Endorsement struck out — Time for protest for non payment — Effect on civil action of criminal investigations re delivery of bill—Articles 56, 115 Civil Procedure Code—Joinder of Third Party—Right of recourse under Article 1627, Mejelle—Rules as to presentment for payment — Particulars to be contained in notice by Bank in lieu of presentment demanding payment of bill—Presentment for payment effected by registered post—Non-business days for purpose of Bills of Exchange Ordinance—Sections 29, 44, 92, Bills of Exchange Ordinance, 1929.

Appeal from the judgment of the District Court of Jaffa, dated 4th February, 1931.

JUDGMENT.

The Appellant Raphael Rosoff was the maker and the Appellant Israel Rosoff the payee, of a bill of exchange for £P.780 drawn upon and accepted by the Halvaa Vechissachon Co-operative Society.

The bill was endorsed in blank by the payee, was subsequently endorsed by one, A. Z. Ostrovosky in favour of the Respondents Litvinsky Bros. and was endorsed by the Respondents to the Ottoman Bank, Jaffa, who were holders at the date of maturity. The bill was not paid by the acceptor. The endorsement in favour of the Ottoman Bank has been struck out and the Respondents are now the holders of the bill.

The bill was protested for non-payment against the acceptor and the Appellants. On the 4th February, 1931, the Respondents obtained a judgment in the District Court of Jaffa against the Appellants jointly and severally for the amount of the bill with interest from date of protest and costs. Against this judgment the Appellants are now appealing.

The first point taken by the Appellants is that at the time of the proceedings in the District Court, the bill was the subject matter of criminal investigations in connection with its delivery by one of the Appellants and hence that on the principle laid down in Article 56 of the Civil Procedure Code, the Court should have stayed proceedings pending the termination of the criminal proceedings.

Article 56, however, relates only to the question of an allegation of forgery of a document, and we see no reason to extend the rule laid down in that Article so as to apply to other cases in which criminal conduct is alleged.

The next ground of appeal is that in accordance with Article 115 of the Civil Procedure Code, the Halvaa Society should have joined as a Third Party.

In a case such as the present, in which the Defendant claims the right of recourse against a person not a party to the action, it may be desirable that such person should be joined as a Third Party. Article 115, however, applies only to such right of recourse as is provided in Article 1637 of the Mejelle; and that Article does not apply to an action upon a bill of exchange. Hence there was no obligation to join the Halvaa Society and the Appellants have not been able to satisfy us that the joinder of the Halvaa Society would have affected the judgment of the Court as between themselves and the Respondents. It follows that the fact that the Halvaa Society was not made a party is not a reason for setting aside the judgment.

The Appellants' next ground of appeal is that they are discharged from liability upon the bill by the fact that the presentment for payment was not made in accordance with the requirements of the Bills of Exchange Amendment Ordinance, 1930.

Sec. 44 (1) of the Bills of Exchange Ordinance, 1929, provides that—

> "subject to the provisions of this Ordinance, a bill must be duly presented for payment, and if dishonoured must be duly protested. If it be not so presented and protested the drawer and endorsers shall be discharged".

Sub-Secs. (2) to (8) prescribe for presentment; Sub-Sec. (2) providing that—

> "where the bill is not payable on demand, presentment must be made on the date it falls due".

Section 2 of the amending Ordinance adds the following Sub-Section to Section 44:—

> "(9) Where a holder of a bill is a Bank, presentment shall be deemed to have been duly made by the service through registered post of a notice by the Bank demanding that payment of the bill shall be effected at the office of the Bank".

The notice given in the present case by the Ottoman Bank was a printed slip in the following terms:—

> "We beg to inform you that we hold the following bill for collection which you are kindly requested to pay at maturity. In case this bill is not settled at the latest on the day following the date of maturity before 11 a.m. we shall have to protest it, and according to present regulations, full protest fees will be charged in advance.

Drawer or Remitter.	Amount.	Maturity.
Litvinsky Bros. T.A.	£P.780	28.11.30."

The Appellants argue that this slip did not afford sufficient particulars of the bill held by the Bank, and hence that the Respondents have not fulfilled the requirements of the Sub-Section.

In our opinion this is a valid objection. It is clearly desirable that the notice in lieu of presentment, if it does not include a copy of the bill, should be in such form as to convey to the person to whom it is given all such information as he could have obtained from actual presentment of the bill; and it is, in our opinion, essential that the notice should contain such particulars as will enable an acceptor to identify the bill referred to in the notice with the bill he has accepted. That is to say, the notice must state not only the amount of the bill and the date of maturity, but also the names of the drawer and the payee.

In the present case, so far as the evidence before us goes, the Halvaa Society had no knowledge of Litvinsky Bros. in connection with this bill, or indeed of any persons other than the Respondents, and their names do not appear in the notice. We therefore hold that the terms of the Sub-Sec. have not been complied with.

The Appellants also argue that Sub.-Sec. (9) of Sec. 44 does not over-ride the provisions of Sub-Sec. (2) (a), and that accordingly where presentment is effected by registered post, the notice must be received upon the day that the bill falls due. This argument

we are unable to accept. We hold that the provisions of Sub-Sec. (2) (a) are not applicable to a notice in lieu of presentment given under Sub-Sec. (9).

It is obvious that if the notice served under Sub-Sec. (9) had to be delivered on the day of maturity and on no other day, considerable practical difficulties would arise both as to the date when such notice was to be dispatched and as to payment in due time by the acceptor, who, as in the present case, was not resident in the locality where the Bank had its office.

The Appellants have also argued that the protest was not made within due time. The date of maturity, the 28th November, 1930, was a Friday, and the protest was not made until the following Monday, 1st December, 1930. The Appellant's argument is that in applying Section 92 of the Ordinance the holder is entitled to treat a Friday or Saturday or Sunday as a non-business day, but is not entitled so to treat more than one of those days. We are unable to accept this view. We hold that the meaning of the Section is that where a day is a Friday or Saturday or Sunday or a legal holiday notified as such in the Official Gazette, such day is a non-business day for the purpose of the Ordinance. It follows that in the present case the protest was made upon the first business day following the date of maturity. As protest was made against the Appellants, as well as the acceptor, there is clearly no substance in their contention that notice of dishonour was not given to them in due time.

The Appellants contend that the District Court should have given them an opportunity to prove that no valid delivery had been made. As, however, they do not appear to maintain that the Respondents are not holders in due course as defined in Section 29 of the Ordinance it is difficult to see how it would help them even if they were able to prove their allegation, and in our view the District Court was right in rejecting this evidence.

As we hold that the notice given by the Bank to the Appellants did not contain the particulars requisite in a notice given in lieu of presentment under Section 44 (9), it follows that in our view the Appellants are discharged from liability on the bill.

The appeal must, therefore, be allowed, the judgment of the District Court set aside, and the Respondents' action dismissed with costs here and below including £P. 6 advocate's fees and expenses.

Delivered the 29th day of April, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 55/31.

BEFORE:

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

IN THE CASE OF:

Yusef Issa Hamoud El Faghouri — APPELLANT.

vs

Jamileh Mousa Hamoud — RESPONDENT.

Bills of exchange — Agreement by woman to pay for divorce not contrary to public policy where parties are Moslems—Consideration for bill of exchange—Art. 64, Civil Procedure Code—Sharia Law.

Appeal from the judgment of the District Court of Jerusalem, dated the 7th February, 1931.

JUDGMENT.

It is clear that the consideration for the promise by the Respondent to pay £P. 20 to the Appellant upon her re-marriage was the agreement by the Appellant to divorce the Respondent. Hence it cannot be maintained that there was no consideration for the bill.

As regards the application to this case of Article 64 of the Code of Civil Procedure as amended, we must infer that the District Court was of opinion that the bill was not in accordance with the provisions of that Article because it was contrary to public policy that a woman should agree to pay money for divorce and further should make such payment dependent upon her re-marriage.

With regard to this we hold that the parties, being Moslems, are entitled by Sharia Law to make an agreement whereby the wife undertakes to pay a sum of money to her husband in consideration of his agreeing to her divorce.

Further, it does not render such an agreement void that the payment of such sum is under the agreement deferred to the date when the woman re-marries.

The Respondent has re-married, and it cannot be maintained that the bill constituted an illegal restraint upon marriage.

The appeal is allowed, the judgment of the District Court is set aside and the judgment of the Magistrate's Court affirmed with costs here and below.

Delivered the 5th day of November, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 76/31.

BEFORE:

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

IN THE CASE OF:

E. A. S. T. Co. — APPELLANT.

vs

Israel Sayger — RESPONDENT.

Endorsement on bill of exchange in form of power of attorney—Rebuttal of presumption that blank endorsement does not transfer ownership but operates as power of attorney—French and Turkish Laws of bills of exchange—Sec. 95, Ottoman Commercial Code.

Appeal from the judgment of the District Court of Haifa, dated 8th May, 1931.

JUDGMENT.

We are concerned with the meaning of Section 95 of the Ottoman Commercial Code upon the strength of which the District Court held that the endorsement of the bill sued upon, being in blank, the Plaintiff (now the Appellant) could only hold the bill as the agent of Defendant (now the Respondent).

Upon the authority of Lyon Caen, 1908 edition, p. 436, of Williamson on French Law relating to Bills of Exchange, 1912 p. 97 and on Turkish Commentary on the Commercial Code by Muhammad Jelal ed Din 1328, p. 441, we are of opinion that as between the endorser and the endorsee there is only a presumption that a blank endorsement does not transfer ownership but operates merely as a power of attorney.

Such presumption can be displaced by proof tendered by the latter that he has given value for the bill so as to show that he is not the mere attorney of the endorser but the legitimate proprietor of the instrument.

As it has been urged by the Respondent that the Turkish Authorities departed from the French interpretation of the corresponding Article of the French Code of Commerce, we quote the following from the commentary of Jelal ed Din:—

> "A claim, that an endorsement which is in the form of a power of attorney because of deing defective or given for collection only is in fact an endorsement transferring ownership namely for full consideration will be accepted in

a dispute between the bearer and the endorser: but such claim cannot be brought forward against a third party".

Such proof, as is requisite, is to be found in our opinion in the letters which passed between the Respondent and Appellant on 20. 11. 27 and 21. 11. 27.

This being so we hold that the judgment of the District Court must be set aside and that there be substituted therefor judgment for the Appellant for the equivalent in Palestine currency of £E.150 with interest at 9% from the date of action with costs to include £P. 2 advocate's fees.

Delivered the 1st day of April, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 106/31.

BEFORE:

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

IN THE CASE OF:

Kevork Havaginian — APPELLANT.

vs

Mrs. Pilpil Nassarian — RESPONDENT.

Death of maker of promissory note—Application of Bills of Exchange Ordinance, 1929—Mejelle not applied—Sec. 2 (2), Bills of Exchange Ordinance, 1929.

Appeal from the judgment of the District Court of Jerusalem, dated the 11th September, 1931.

JUDGMENT.

The Court holds that in view of the date of the promissory notes in this case the Bills of Exchange Ordinance, 1929, and not the Mejelle must be consulted to see whether such promissory notes mature on the death of the debtor.

There being no such provision in the Ordinance we need not concern ourselves to interpret the provisions of the Mejelle, and no authority under the law of England having been cited to us under Section 2 (2) of the Bills of Exchange Ordinance, 1929, the appeal is 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. 141/31.

BEFORE:

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

IN THE CASE OF:

Ya'qoub Abul-Huda — APPELLANT.

vs

Adib el Hinnawi — RESPONDENT.

Action on bill of exchange—Plea of insufficiency of consideration—Adequacy of consideration for bill not considered by Court—Burden of proving total failure of consideration as defence — Judgment against estate for debt of deceased.

Appeal from the judgment of the District Court of Jaffa, dated the 9th November, 1931.

JUDGMENT.

The District Court has held with regard to the bill that "the works which the Plaintiff set forth as a consideration for this sanad are not sufficient to be a consideration for its value" and the Plaintiff's claim was therefore dismissed.

It is not, however, for the Court to estimate the value of the services rendered and to decide whether they afford adequate consideration or not.

The bill having been proved to be authentic, it was for the Respondent to establish the defence that there was total failure of consideration by the Appellant, and this defence has not been established by the Respondent.

The appeal is therefore allowed; the judgment of the District Court set aside and judgment entered for the Appellant against the estate of Fatmeh bint Muhammad Hinnawi, deceased, for the equivalent in Palestine currency of £E. 4000 with interest from date of protest and costs.

Delivered the 5th day of April, 1932.

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

C. A. D. C. Ja. No. 180/31.

IN THE CASE OF:

Yecheskiel and Yacoub Karach Co. APPELLANTS.

vs

Shaker Ghalayini RESPONDENT.

Failure to pay promissory note — Protest made against maker — Necessity of protest against indorser — Notice of dishonour.

Appeal from the judgment of the Magistrate's Court of Tel Aviv, dated 11th February, 1931, whereby the Appellant's claim for the sum of £P. 18 against the Respondent was dismissed and judgment entered in his (Appellant's) favour against other persons.

JUDGMENT.

After consideration the Court finds that the Magistrate in his judgment does not give any reason why the case should be dismissed against the Respondent. Yet from the pleadings of the parties it appears that the Appellant's case was dismissed for not having protested the promissory note in question against the Respondent.

We are of opinion that a protest having been duly made against the maker, there is no need for a protest against the indorser. A notice of dishonour is the only thing required in order to make indorser liable.

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

Delivered the 10th day of July, 1931.

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

C. A. D.C. Ja. No. 33/32.

BEFORE:

Sherwell, J., Nimmer, J. and Mani, J.

IN THE CASE OF:

Loolo Ammar APPELLANT.

vs

Leib Brill RESPONDENT.

Action on bill of exchange — Plea of bankruptcy — Debtor required to prove he was trader or that bill was commercial undertaking.

Appeal from the judgment of the Magistrate's Court of Tel Aviv dated 23rd December, 1931, whereby the claim of Appellant for the sum of £P. 35.897 was dismissed.

JUDGMENT

We are of opinion that the Respondent has to prove that he was a trader when he signed the bills in question or that these bills were given in connection with a commercial undertaking. The evidence produced before the Magistrate was not sufficient in this respect.

The judgment of the Court below is therefore set aside, and the case remitted in order to hear further evidence on this point.

Judgment delivered the 29th day of January, 1932.

In the District Court of Nablus.

C. D. C. Na. No. 86/32.

BEFORE:

Sherwell, J. and Ali Hasna, J.

IN THE CASE OF:

Musbah and Abdel Aziz Nabulsi — PLAINTIFFS.

vs

Majjeh Ghusun Tamimi — DEFENDANT.

Action by two of three payees for share of promissory note — English procedure re bills of exchange not applied — Proof of total failure of consideration — Sections 2 (2), 83, Bills of Exchange Ordinance, 1929 — Article 1100, Mejelle — Oral evidence against written document not received — Section 12, Law of Evidence Amendment Ordinance, 1924 — Evidence of party — Procedure on hearing of evidence of Moslem woman—Article 87, Civil Procedure Code—Rules of Court, 3rd November, 1926.

INTERLOCUTORY JUDGMENT.

For the purpose of this order and without prejudice to the final determination of the main issue in this case the Court hold that the document on which the Plaintiffs based their claim here appears on the face of it to be a genuine promissory note by the Defendant made payable by her to three persons jointly, namely: the two Plaintiffs and their brother Mohammed Rashid. The last mentioned, however, is not a party to these proceedings and has not appeared before us. Further, we think that the document in

question as above stated falls within the provisions of the Bills of Exchange Ordinance, No. 47 of 1929, in particular, Section 83 which must be read with Articles 14 and 31 of the General Definitions, para. (c) in Section 3 of the Interpretation Ordinance, No. 34 of 1929.

We do not, however, think that Sec. 2 (2) of the Bills of Exchange Ordinance enables or intended the Courts of Palestine to apply the law of England as to evidence or procedure in regard to bills of exchange, cheques and promissory notes, and therefore we hold that, having regard to Article 1100 of the Mejelle, the two Plaintiffs are entitled to sue the Defendant here for their shares in the £P. 3,000.

Again, — as regards the question of evidence, we hold that we must apply the Law of Evidence Amendment Ordinance, 1924, under which, by Section 12, the Defendant is entitled to give evidence on her own behalf and to call both the Plaintiffs as her witnesses if she so desires. Having regard, however, to the principle underlying the judgments C. A. No. 100/29, C. A. No. 106/32, C. A. No. 3/30 and that in Civil Appeal No. 72/31 dated 25.1.32, we hold that the Defendant cannot call any further witness or oral testimony other than above mentioned to prove that she did not receive the money or that there was a total failure of consideration. In other words she cannot rebut the terms of the written document except by documentary evidence or by the oral testimony of the parties themselves.

As in the particular circumstances here it is not being denied that the Defendant is a very elderly Moslem lady with religious scruples, and the Plaintiffs making no objection, and applying Article 87 of Civil Procedure Code which must be read with Rules of Court of 3rd November, 1926, in particular Rule No. 1, we hereby order that her evidence be taken at her house in Nablus before His Honour Judge Yousef Eff. Khaldi in accordance with the provisions of the said rule, and on a day to be fixed within one month from the date hereof and to be notified beforehand to all parties by the said Judge, and further that the record clerk herein do attend also for that purpose with the other parties and their advocates as above stated. The Defendant must provide the necessary transport from the Court to her place of residence for the said Judge, clerk and the other parties, if they so desire. A copy of this order to be served forthwith on both parties through the Court in the usual way and a further copy on their advocates by registered post. Liberty to either side to apply.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 87/32.

BEFORE:

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

IN THE CASE OF:

Ben Zion Braverman — APPELLANT.

vs

Shmuel Rozov
Zeev Ben Arieh — RESPONDENTS.

Action by holder in due course against prior indorsers—Protest for non-payment — Guarantee appearing on face of bill deemed to be given for first endorser — Oath administered to former holder to prove that guarantee was not on bill when it was in his hands.

Appeal from the judgment of the District Court of Jaffa.

JUDGMENT.

The action which gave rise to this appeal had been brought in the District Court of Jaffa by the Appellant Ben Zion Braverman as holder in due course of a promissory note, against the Respondents, Shmuel Rozov and Zeev Ben Arieh as prior indorsers.

The note which was for £P. 3000 was made by Israel Rozov in favour of the Respondent Shmuel Rozov who indorsed it to the order of the Respondent Zeev Ben Arieh. The latter indorsed it to the Appellant by whom it was indorsed in blank and delivered to the Ashrai Bank.

At maturity it was protested by the Bank against the maker for non-payment; and the Bank had recourse to the Appellant. The Appellant recovered the bill from the Bank upon the payment of its value and subsequently commenced his action against the present Respondents.

The bill bore upon its face under the maker's signature the words "I guarantee complete and joint guarantee" (in Hebrew) "pour aval, Ben Zion Braverman."

The defence set up by the Respondents was that this constituted a guarantee that the bill would be duly met by the maker, and hence that, whatever rights the Appellant had against the Respondents as prior indorsers, the Respondents had the like rights against the Appellant as guarantor of the maker. The District Court apparently accepted this view and dismissed the Appellant's action.

In his appeal the Appellant relies upon two arguments. In the first place he says that by virtue of Sections 57 (2) and 89 (2) of the Bills of Exchange Ordinance, 1929, in default of a statement on whose account the guarantee is given, it is deemed to be given for the first indorser; that is to say that the Appellant is to be deemed to have guaranteed payment by the Respondent Shmuel Rosoff, and thus has the right to recover from the Respondent Rosoff the value of the bill.

The Appellant further maintains as against both the Respondents that his guarantee was given in favour of the Ashrai Bank alone, and that he is entitled to prove this claim by obtaining from the Respondents an admission that when they were the holders of the note his guarantee had not been given.

With regard to the first of these arguments: Section 57 (2) of the Bills of Exchange Ordinance, 1929, provides with respect of an aval that:

"In default of a statement on whose account it is given, it is deemed to be given for the drawer".

Section 89 (2) provides that in applying the provisions of the Ordinance to promissory notes:

"the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order".

It follows that in default of a statement on whose account it is given, a guarantee of a promissory note is deemed to be given for due payment by the first indorser of the note.

With regard to the Appellant's second claim: it is clear that he is entitled to prove, if he can do so, by the admission of the Respondents that his guarantee had not been given when they were respectively holders of the note, and for this purpose he can administer an oath to each of the Respondents.

The Appellant is, therefore, entitled to succeed on both points and the judgment of the District Court must be set aside. As against the first Respondent, judgment will be entered for the Appellant with costs here and below. With regard to the second Respondent, the case is remitted to the District Court for the Appellant to be afforded the opportunity of obtaining from the second Respondent the admissions he claims. As between the Appellant and the second Respondent costs will follow the event.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 106/32.

BEFORE:

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

IN THE CASE OF:

Shaker Husseini — APPELLANT.

vs

Menahem Horowitz and others — RESPONDENTS.

Oral evidence of parties heard against promissory note — Art. 80 Civil Procedure Code—Secs. 2, 12, Law of Evidence (Amendment) Ord. 1924—Necessity of corroboration of evidence.

JUDGMENT OF BAKER J.

This is an appeal against the judgment of the Jerusalem District Court. The question was upon a promissory note and upon the request of the Respondents, the District Court heard evidence of the two Respondents and the Plaintiff (the Appellant in this case) in order to contradict the contents of the promissory note. The Plaintiff denied the allegations against the truth of the documents set up by the Defendants (the Respondents in this case). The Court, however, in its judgment stated that it did not believe the Plaintiff and decided in Respondents' favour. Now, the Law of Evidence (Amendment) Ordinance, 1924, Section 12, enables either party to give evidence on his own behalf or be summoned to give evidence for the other party, and the Court has previously decided that such evidence may be called by the Defendant, even in a case where a written document within the meaning of Article 80 of the Ottoman Code of Civil Procedure is produced. See Civil Appeal No. 77/32.

It is however, clear that a document of this nature can only be contradicted by the evidence of the person who is setting up the document and suing upon it, and not by the evidence of the person being sued. Defendants may give evidence contradicting a written document of the nature set out in Article 80 of the Civil Code of Procedure, but such evidence cannot be of any avail unless the same is materially corroborated by the evidence of the other party. The appeal is allowed with costs.

The promissory note runs as follows:— "We promise to pay" and is signed by two persons. Accordingly, the note is deemed to be a joint note only and not joint and several. (See Pearson on

Bills, Vol. 1 p. 247). The judgment of the Lower Court must be quashed and judgment entered for the Plaintiff for the sum claimed, £P. 635.- together with interest from date of action, as claimed.

JUDGMENT OF FRUMKIN J.

No verbal evidence is admissible against documentary evidence.

This rule which is laid down in Article 80 of the Ottoman Code of Civil Procedure, has not been overruled by Sections 2 or 12 of the Law of Evidence Amendment Ordinance. The provisions of these sections go only so far as to make parties to a civil case competent to give evidence, and their evidence to be relied upon in all such cases where oral evidence is otherwise admissible.

Hence, the evidence of the Defendants in this case is not legal evidence against the document. On the other hand, there is nothing definite in the evidence of the Plaintiff which could be taken against him in contradiction of the document given in his favour.

The appeal is therefore allowed, and the judgment of the District Court set aside, and judgment entered for Appellant against Respondents jointly for the amount of £P. 635.- with interest from date of maturity and costs here and below, including £P. 2.- advocate's fees.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 122/32.

BEFORE:

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

IN THE CASE OF:

Mulla Ahmed Durzi — APPELLANT.

vs

Syndics in the Bankruptcy of Salim Najia and Mirza Jalla — RESPONDENTS.

Bills of exchange — Ottoman form of protest held to be valid — Protest of promissory note dishonoured for non-payment — Action against syndics in bankruptcy — Secs. 47, 50, 51, Bills of Exchange Ordinance, 1929.

Appeal from the judgment of the District Court of Haifa, dated the 19th June, 1932.

JUDGMENT.

This appeal arises out of an action brought by the Appellant, Mulla Ahmed Durzi, against the Respondents, the Syndics in the bankruptcy of Salim Najia and Mirza Jalla, to recover the amounts secured by 2 promissory notes for £P. 500 and £P. 590 respectively.

The notes were made by Said el Bitar in favour of the bankrupts; they were endorsed by the latter to Ahmed Sharabi, who endorsed them to the Appellant, by whom they were endorsed to Khadouri Abudi Zilkha.

The notes, which matured on the 6th November, 1930, and 27th November, 1930 respectively, were not paid at maturity, and were protested for non-payment by the Anglo-Palestine Bank Ltd., as agents for the holder, through the Notary Public, Tel-Aviv.

The Appellant then sought to prove for the amount of the notes in the bankruptcy of Salim Najia and Mirza Jallal, but the Respondents refused to admit the claim. Thereupon the Appellant took proceedings against the Respondents in the District Court, which by a judgment dated 19th June, 1932, dismissed his action on the ground that the notes had not been duly protested against the bankrupts.

Against this judgment this appeal is now brought.

The relevant provisions of the Bills of Exchange Ordinance, 1929, are as follows:—

SECTION 47. Subject to the provisions of this Ordinance, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged.

SECTION 50 (1). When a bill has been dishonoured by non-acceptance, it must be duly protested for non-acceptance, and where a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment it must be duly protested for non-payment.

If it has not been so protested the drawer and indorsers are discharged.

SECTION 50 (9). Where a bill is noted or protested, notice of protest shall accompany or form part of the notice of dishonour.

Notice of dishonour and of protest was given by the Anglo-Palestine Bank Ltd., to the bankrupts by letters which in form were not greatly dissimilar from the ordinary form of notice under the English Bills of Exchange Acts.

It is to be observed that Section 50 (9) of the Ordinance does not require that a copy of the protest should be served upon the person to whom notice of protest is to be given.

The Court holds that the notices of dishonour and protest served upon the bankrupts were in a form which fulfilled the requirements of the Ordinance. The Respondents, however, now raise the objection that the protest itself was not made in due form.

This objection is based upon the fact that while in the form of protest presented by rule made under the English Acts, the protest is expressed to be made against the maker and indorsers of the note, the protest in the present case was in the form in use in Palestine under the Turkish Commercial Code, and was thus addressed to the maker of the note alone. We are unable to see that this constitutes a valid objection to the protest.

The Bills of Exchange Ordinance, 1929, contains no provisions as to the form of protest or as to the persons to whom it is to be addressed.

The Respondents, it is true, argue that a comparison of the terms of Section 50 (4) of the Ordinance with the corresponding Section of the English Act, Section 51 (5), shows that protest under the Ordinance is to be made against any endorser, who is to be made liable.

But it must not be forgotten that in framing the Ordinance, a departure was made from the provisions of the English Act by retaining the requirement in force under the Turkish Commercial Code, that a protest must be made in every case of dishonour of a bill.

The Ordinance having retained the rule as to protest previously in force, we hold that in the absence of express previsions to the contrary, it must be taken to have retained the form of protest previously in use.

Until, therefore, a form of protest is prescribed by Rule made under the Ordinance, it is our view that a protest made in the manner and form in use before the enactment of the Ordinance is validly made.

We, therefore, hold that the judgment of the District Court must be set aside.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 159/32.

BEFORE:

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

IN THE CASE OF:

Histadruth Hamizrachi
Shlomo Feingold — APPELLANTS.

vs

Eliahu Klinger — RESPONDENT.

Claim on burnt promissory note—Proof of claim by administration of oath—Preservation by protest of rights on lost bill—Compliance with formalities under Article 110 Ottoman Commercial Code — Concordat entered into by bankrupt and creditors — Article 223 Ottoman Commercial Code.

JUDGMENT.

After hearing counsel for the first and the second Appellants and counsel for the Respondent we are of opinion that with regard to the first Defendant (Appellant), the Plaintiff (Respondent) having based his claim on a burnt promissory note which he did not produce, the Court should have applied Article 110 of the Commercial Code and ascertained whether the Plaintiff had complied with the requisite formalities enabling him to have recourse against any of the indorsers of whom the first Defendant is one. The Court could not administer to him the oath unless he was found liable for the amount.

With regards to the second Appellant, who had been adjudicated bankrupt and had entered into a concordat with his creditors, after proof of the debt against him, Article 223 of the Commercial Code should be applied to the creditor and the concordat should be enforced in respect of his claim in accordance with the terms previously approved by the Court.

The judgment must, therefore, be set aside and the case remitted to the District Court for compliance.

Costs to follow the event.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 162/32.

BEFORE:

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

IN THE CASE OF:

Nasiha bint Ali Dajani — APPELLANT.

vs

Shlang — RESPONDENT.

Plea by maker of promissory note that he was accommodation party—Oral evidence refused as against written admission—Value of consideration immaterial as against indorser—Release of debt good consideration for indorsement of note — Failure to serve copy of order appealed from on Respondent—Discretion of Court not exercised to waive failure of Appellant to serve order appealed from—Third Party not admitted.

JUDGMENT.

The Appellant Nasiha bint Ali Dajani is asking the Court to set aside:

An order of the District Court of Jaffa rescinding an order previously made by the Court and refusing to admit Yusef Dia Dajani as a Third Party to the action; and

A judgment given by the District Court on the same date whereby the Appellant was ordered to pay to the Respondent the sum of £P. 557.500 with interest and costs, and a provisional attachment made by the Court was confirmed.

As regards the refusal to admit a Third Party, no copy of the order has been filed or served upon the Respondent, and no reason for such failure has been given. Hence there is no ground upon which this Court can be asked to exercise its discretion in favour of the Appellant and her appeal must de dismissed.

As regards the judgment, the Appellant's defence is that she made the promissory notes upon which she is sued as an accommodation party in favour of Yusef Dia Dajani, by whom it was indorsed to the Respondent, and that the amount secured by the note represented a debt due by Yusef to the Respondent to which was added a further sum for interest in excess of the legal rate. The Appellant claims the right to prove these allegations by oral evidence.

It is clear, however, that as between the Appellant and the Respondent the value of the consideration given by the Respondent to the indorser is immaterial.

Unless the Appellant can prove not only that she received no consideration for the note but also that the Respondent gave no consideration for it, she is liable on the note.

But this is not alleged by the Appellant who admits that part of the consideration for the indorsement of the note was the release of a debt due from the indorser to the Respondent.

There is no ground, therefore, for the admission of evidence to prove the Appellant's allegation and the appeal must be dismissed with costs including £P. 2 advocate's fees.

In the District Court of Jaffa.

C.D.C.Ja. No. 165/32.

BEFORE:

Copland, J. and Mani, J.

IN THE CASE OF:

Bank der Tempelgessellshaft — PLAINTIFFS.

VS

Daoud Moyal
J. Homa
Bella Schweid — DEFENDANTS.

Promissory note dishonoured at maturity—Part payment of bill by other bills — Protest dispensed with by circumstances dispensing with notice of dishonour—Express waiver of protest—Sections 49, 50, Bills of Exchange Ordinance, 1929.

JUDGMENT.

This is an action on a bill for £P. 197 drawn on the 16th December, 1931, by Mr Moyal in favour of Madam Schweid and signed "Bon pour aval" by Mr. Homa. The bill is payable on the 16th March, 1932.

The Bill was endorsed by Madam Schweid to the Tempelgesellshaft Bank "Value received in cash". It was dishonoured on maturity, hence this action.

We have only two material points raised in defence. The first point is that Plaintiffs accepted in part payment of this bill two bills signed by Raji el Issa to the order of Madam Schweid. The defence alleged that these two bills were actually accepted by

the Bank in part payment of the bill in issue. Their argument is disposed of by a letter dated the 1st April, 1932, signed by Madam Schweid and addressed to the Bank in which she asks them to credit the value of one of these two bills in her current account. The letter goes on to say "after collection of the bill kindly consider the proceeds as an instalment on 'account of the Bill'". It is therefore clear that these two bills were sent to the Bank merely for collection and this fact is strengthened by a letter dated the 2nd April, 1932, sent to Madam Schweid in which the Bank clearly informed her that they were not prepared to accept the proceeds of the bills in part payment of the bill unless on maturity they were paid.

The second point is that the promissory note, not having been protested, Madam Schweid is not liable. Section 49 (2) (b) of the Bills of Exchange Ordinance, 1929, states that notice of dishonour may be dispensed with by waiver. Section 50 (8) of the same Ordinance provides that protest is dispensed with by any circumstances which would dispense with notice of dishonour. The Bank produced a memorandum signed by Madam Schweid in which, inter alia, she undertakes to free the Bank of any obligation to protest the bill for want of payment on maturity. We have no doubt whatever that this constitutes an express waiver of protest.

There is, therefore, no defence.

Judgment must be entered for the Plaintiffs for the sum of £P. 197 with interest from date of maturity, costs, and £P. 3 advocate's fees. Judgment against the three Defendants jointly and severally.

Dated the 15th day of July, 1932.

In the District Court of Jaffa.

C. D. C. Ja. No. 199/32.

IN THE CASE OF:

Shlomo Eliahu Ruben — PLAINTIFF.

vs

Liquidators of Halvaa Vehisachon Petach-Tikva Coop. Society Ltd. in Liquidation — DEFENDANTS.

Acceptance of bill of exchange on behalf of Society—Endorsement "bon pour aval"—Permission obtained to sue liquidators — Rights of holder in good faith against defrauded acceptor — Bill taken at undervalue—Sec. 173 (5), Companies Ordinance, 1929.

JUDGMENT.

The Plaintiff is suing the liquidator of the Halvaa Vehisachon Society on a bill of exchange for £P. 700 accepted by the Society and in respect of which the Plaintiff gave £P. 400 consideration.

The bill in question was drawn on 22nd October, 1930, by E. Levita, payable on 20th December, 1930, to himself or order. It was endorsed on 27th October, 1930, by the drawee to order of the Plaintiff "value received in cash", and by the latter to the Ashrai Bank, "value in account", by an endorsement dated the 2nd November, 1930.

It was accepted by the Society by F. Feinstein and Z. Ben Arieh, two persons who by the rules of the Society were authorised to sign acceptances. Date of acceptance is not shown. It was also endorsed "bon pour aval" on 27th October, 1930, by Z. Ben Arie, who was the manager of the Society. On presentation it was dishonoured and was duly protested on 22nd December, 1930, as against the drawer and Mr. Ben Arie. The Society went into liquidation on 15th December, 1930. No consideration can be traced as having been given to the Society in respect of this bill and no entries regarding this consideration appear in any of the books of the Society.

In these circumstances the liquidators have refused to pay and have left it to the Plaintiff to take proceedings is Court. Permission to sue the liquidators was duly given by the Court in accordance with Section 173 (5) of the Companies Ordinance, 1929.

Now, the first point that strikes one is that £P. 400 only was given by the Plaintiff for this bill of £P. 700. The Plaintiff explains this by saying that at the time he gave his cheque for £P. 400 he sent a letter to the Society promising to pay them the balance of £P. 300 so soon as the bill was paid by them.

It has been laid down following the ruling case of Royal British Bank vs Turquand, which has been applied by this Court in connection with all the Halvaa Vehisachon Society cases that if the holder of a bill is a holder in good faith then he is entitled to succeed against the acceptor even if the consideration in respect of the bill never reached the acceptor, the latter being defrauded.

In this present case we find that the Plaintiff in addition to the acceptance of the Society, took the guarantee of the manager of the Society. Prima facie one would imagine that the Society's acceptance was of more value than the signature of the manager, and the inference which we are entitled to draw is that the

Plaintiff had suspicions that all was not quite right with regard to this bill, and in order to safeguard himself took the manager's guarantee by way of further security.

Another material point is the giving of £P. 400 consideration only in place of the £P. 700 stated in the bill. Lord Blackburn's words in Jones v. Gordon (1877, 2 App. Cases) seem to us exactly to meet the present case: "Though since the repeal of the usury laws, the fact of taking a bill at considerable undervalue is not in itself sufficient to affect the title of the holder, it is an important element in considering whether the man who gave the undervalue was acting bona fide in ignoring an error, or was assisting in committing a fraud, and avoided making enquiries because they might be injurious to him".

The Plaintiff was not prepared to advance more than £P. 400 on this bill. In our opinion on these facts, there is evidence on which we can hold that the Plaintiff is not a bona fide holder, and we find accordingly.

The Plaintiff's claim is therefore dismissed and judgment is entered for the Defendant with costs and £P. 10 advocate's fees.

Dated the 28th day of April, 1933.

In the District Court of Jaffa.

C. D. C. Ja. 231/32.

BEFORE:

Copland, J. and Mani, J.

IN THE CASE OF:

Nathan H. Gordon
Asher Pierce — PLAINTIFFS.

vs

Nissan Aaronovitch
Mrs. Menucha Valero in her personal capacity and as attorney for the heirs of the late Jacob Valero — DEFENDANTS.

Contract for sale of land—Promissory note marked "bon pour aval" given as guarantee for performance of contract—Notarial notice to effect transfer in 48 hours held insufficient—French law of procedure re notarial notice not applied—Right of contracting party to rescind agreement—Return of purchase monies advanced—Proper person to be sued as representing heirs—Guarantor of bill held not to be indorser—Sections 56, 57, 95, Bills of Exchange Ordinance 1929—Liabilities of giver of aval.

JUDGMENT.

This is an action brought by Messrs. Gordon and Pierce against Mr. Nissan Aaronovitch and Mrs. Menucha Valero in her personal capacity and as attorney for the heirs of the late Jacob Valero, on a contract of sale of certain lands.

An agreement was entered into between the Plaintiffs and the first Defendant on the 24th March, 1930, whereby the first Defendant undertook to sell to the Plaintiffs 6000 dunams of land, which was fully described in the argreement. The second Defendant guaranteed in effect the execution of that contract by depositing five bills totalling £P. 3,500 guaranteed by her "Bon pour aval".

By the time fixed for completion, the transfer had not been effected and in fact, it has not been effected to this day and cannot now be effected. The Plaintiffs, therefore, claim from the first Defendant £P. 3,500 being part of the money of the purchase price paid to the first Defendant. This £P. 3,500 is claimed jointly and severally against the two Defendants. The Plaintiffs also claim £P. 5,000 from the first Defendant only being the damages for non-performance of certain conditions stipulated in the contract. They also ask for interest on the full amount of the purchase money and interest on the amount due on the bills from date of maturity.

This claim divides itself into several parts as against the various Defendants.

As regards the claim for damages, the first point to be decided is this: has there been any default by the first Defendant in the performance of this contract? on the expiry of the time fixed for completion, the Plaintiffs served a notarial notice on the first Defendant, calling upon him to effect the transfer and giving him 48 hours notice to do so. The first Defendant has raised this point that the 48 hours was not sufficient and that, therefore, he is not in default.

We have heard lengthy arguments on the subject of the requirements of the Civil Procedure Code regarding the effect of notarial notices. It has been argued before us that the necessity for a notarial notice is to be governed on the lines of the French law by which a notarial notice serves to establish default.

In this country, however, there has been a long series of cases where it has been held that the purpose of a notarial notice here is not the same as in the case under French law. It has been held here over and over again that the purpose of a notarial notice is

to give a person a further chance to perform the terms of the contract which he is engaged to carry out, and on failure to comply with the notice within a reasonable time, default is then established. All depends therefore, on what is a reasonable time. There are many cases, of course, where 48 or 24 hours would be sufficient time, but there are other cases where two or three and even four months could not be held to be reasonable. Every case must be judged on its own merits. In this case, we are opinion that 48 hours was not a reasonable period, and that, therefore, default on the part of the first Defendant in the performance of the contract has not been established.

This disposes of the question of damages. There being no proof of default there are no damages. This also disposes of the question of interest, as under the contract, interest is only payable on the amount of the purchase money if the first Defendant is in default.

We have been asked to hear evidence with regard to the allegation of the Defendants that it was owing to the interference of the Plaintiffs that the first Defendant was unable to fulfil the terms of the contract. We have given careful consideration to this request and we hold this: that whether or not the Defendants' allegations regarding this interference are true, this does not affect the right which the Plaintiffs have to rescind the agreement at any moment before completion, and any evidence, therefore, will not affect our decision on this particular point. There may or may not be a right to damages against the Plaintiffs by the first Defendant, but there is no counter-claim in this action, and the question whether the first Defendant is entitled to damages against the Plaintiffs does not arise at this moment.

We, therefore, find that the Plaintiffs are entitled to the return of the purchase money advanced by them. There was no transfer made and the purchasers were entitled to rescind the agreement.

This disposes of the question as regards the first Defendant.

To turn now to the second Defendant, who is sued in her personal capacity and also as representative of the other heirs of the late Jacob Valero.

It has been argued by counsel appearing for Mrs. Valero that she is not a proper person to be served in respect of the other heirs, though it is not denied that service upon her in her personal capacity was proper. We agree with this contention. In our opinion, the other heirs were not properly served by notice upon Mrs. Valero,

and we therefore strike out the claim as regards the other heirs, leaving the suit agaist Mrs. Valero in her personal capacity only.

Mrs. Valero has guaranteed the five bills in question by the ordinary form of aval. It has been argued by her that a guarantor is an indorser, and that therefore, Sections 56 and 95 of the Bills of Exchange Ordinance apply. We are unable to accept this argument. We are of opinion that a guarantor is not an indorser. There is a special section in the Bills of Exchange Ordinance, namely Sec. 57 which sets out in detail the liabilities of a person who guarantees a bill by aval. The liability of a guarantor under this section is considerably greater than a person who is merely an indorser on the bill.

We hold that the liabilities and duties of a guarantor by aval are governed solely by Section 57 of the Bills of Exchange Ordinance and that such a guarantor cannot avail himself of the provisions of Section 56.

The point is important in this case for this reason, that if Mrs. Valero is held to be an indorser then the claim would be prescribed under Section 95 of the Bills of Exchange Ordinance which limits the liability of an indorser to one year.

We have, therefore, come to this conclusion: that the liability of Mrs. Valero is governed by Section 57 (3) of the Bills of Exchange Ordinance which runs as follows:—

> "The giver of an "aval" is jointly and severally liable with the party whose signature he has guaranteed. He is liable although the engagement of the party whom he has guaranteed is invalid for any reason other than defect of form".

There is no defect of form here, and in fact no defect has been alleged. It is therefore unnecessary to hear evidence with regard to the contention of the second Defendant as to whether or not the Plaintiffs are holders in due course or with respect to the other matters raised in her defence. All the defences of the second Defendant are based on the Bills of Exchange Ordinance and under our ruling she is not entitled to rely on them, being a guarantor.

For these reasons, we find that Mrs. Valero, in her personal capacity only, is liable for the amount of her guarantee.

One other question has been raised and that is the question of securities. These securities were given for two purposes: first, to secure the performance of the contract, and in the second place, to secure the payment of the purchase money which was advanced by the purchaser in case the sale was not completed. This being so,

they must be retained as security for the sum awarded in this judgment.

The result of this action is, therefore, as follows:—

We give judgment against the first Defendant and against the second Defendant in her personal capacity, jointly and severally, for £P. 3,500 with interest from 15th June, 1932, being the date of the institution of this action.

We do not allow the other interest which has been claimed by the Plaintiffs.

We dismiss the claim for damages claimed by the Plaintiffs because in our opinion there is no default.

As regards the costs, we give full costs against both Defendants, jointly and severally, but in view of the fact that Plaintiffs did not succeed on all the issues, we do not allow advocate's fees.

The provisional attachment is confirmed as against Mrs. Valero in her personal capacity, and is rescinded as regards the other heirs of the late Jacob Valero. Notice to issue to the Land Registry accordingly.

Dated the 9th day of December, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 22/33.

BEFORE:

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

IN THE CASE OF:

Burtgosh — APPELLANT.

vs

Abdel Raouf Judeh — RESPONDENT.

Promissory note made and matured before Bills of Exchange Ordinance—Action brought five years after maturity of note—Limitation of actions — Sec. 95, Bills of Exchange Ord., 1929.

Leave to appeal allowed on the following question of law: "Does Section 95 of the Bills of Exchange Ordinance apply in the case of a promissory note which was signed and had matured before the coming into operation of the Ordinance?".

JUDGMENT.

The bill the subject matter of the action is dated 31st March, 1927, and is made payable four months after date.

Present Appellant brought his action before the Magistrate on the 1st August, 1932, and the Magistrate dismissed the same on the grounds that action was prescribed being brought five years after maturity. The decision is obviously wrong, the Appellant having until 2nd of August, 1932, to bring his action. No point of law arises and the District Court judgment on appeal must be set aside, also the Magistrate's judgment and the case must be remitted for the Magistrate to give a fresh judgment. No costs.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 65/33.

IN THE CASE OF:

Dr. George Cornue et al. — APPELLANTS.

VS

Jacob Joseph Nissim — RESPONDENT.

Action against indorsee of promissory note—Presentment by Bank by service through registered post—Photographic copies of documents produced in lieu of originals—Section 44, Sub-Sections 2 (a) and 9, Bills of Exchange Ordinance, 1929.

JUDGMENT.

This appeal arises out of an action brought by the Respondent Jacob Joseph Nissim against the Appellant, Dr. George Cornue and two other persons, Ali Ahmad El Sheikh Ali and Jacob Behor, claiming £P. 1200 upon a promissory note drawn by Ali Sheikh Ali who endorsed it to the Respondent.

Judgment was given by the District Court in favour of Respondent for the amount of the note with costs.

In his appeal Appellant raises only the question of the due presentment of the note.

The note was passed by the Respondent to Barclays Bank (Dominion, Colonial & Overseas) Jaffa Branch for collection. The Bank, in reliance upon Sub-Section 9 of Section 44 of the Bills

of Exchange Ordinance, 1929, presented the bill by service through registered post of a notice demanding payment of the bill at the office of the Bank. The actual notice is not before this Court. In the District Court, a letter dated 1st August, 1932, written by the Respondent to the Appellant, was accepted as proof of presentment. Objection was taken to this course, and the Respondent thereupon filed an application verifying photographic copies of certain documents. The Appellant has not insisted upon the production of the originals as he was entitled to do, and accordingly we hold, upon the evidence submitted, that the notice was delivered to the Appellant on the 21st of July, 1932.

The date of maturity of the bill was the 28th July, 1932, and the Appellant argues that service of a notice seven days before the date of maturity, is not due presentment, in accordance with the terms of Sub-Section 9.

Now, this Court has held in Civil Appeal No. 54/31*, Israel Rosov v. Litvinsky Bros., that where presentment was made under Sub-Section 9 of Section 44, the provisions of Sub-Section 2 (a) do not apply and hence that the notice by the Bank need not be received by the person from whom payment is demanded upon the day that the bill fall due.

The only question, therefore, is whether an interval of seven days between the date of receipt of the notice and maturity is an unreasonably long interval. This is a question of fact dependant upon the circumstances of the parties, and in particular upon the distance between the place of residence of the debtor and the Bank and the nature of the means of communication.

The judgment of the District Court is therefore set aside and the case is remitted for the District Court to determine whether in the circumstances of the case the interval between presentment and maturity was or was not unreasonably long, and give judgment accordingly.

Costs will follow the event.

Delivered the 26th day of April, 1934.

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* See ante page 245.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 116/33.

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

IN THE CASE OF:

Yusuf Da'as	APPELLANT.
vs	
Hanan Blakhard	
Zeev Petakhia	
Yusef Petakhia	RESPONDENTS.

IN THE CASE OF:

Hanan Blakhard	
Zeev Petakhia	
Yusef Petakhia	APPELLANTS.
vs	
Khadra Da'as	RESPONDENT.

Bills of exchange— Breach of contract — Damage clause in contract alleged to be promissory note for purposes of stamp duty— Section 25, Stamp Duty Ordinance, 1927—Secs. 33, 49, English Stamp Act, 1891 — Contract signed by party to be charged — Notarial notice served ex gratia held unnecessary.

JUDGMENT.

In this case there are two appeals, one by Yusuf Da'as against that part of the judgment of the District Court by which he is held liable jointly and severally with Dov Tamari in £P. 30 and costs to Hanan Blakhard and Zeev and Yusef Petakhia and also is held liable for £P. 250 and half the costs to the same three Respondents.

In the second, Hanan Blakhard and Zeev and Yusef Petakhia are appealing against that part of the judgment of the District Court which dismissed their claim against Khadra Da'as.

As to the first case we were asked to hold that the contract of 7th November, 1932, the subject matter of the action was not properly stamped.

In Clause 12 thereof it is provided that on either party failing to carry out their undertaking thereunder, they should be liable to pay £P. 500 as liquidated damages, and it was argued that this attracted to the document the stamps payable on a promissory note under paragraph 6 of the Schedule to the Stamp Duty Ordinance, 1927, inasmuch as Section 25 of the Stamp Duty Ordinance, 1927, provides that "For the purposes of this Ordinance the expression "Promissory Note" includes any document or writing

(except a banknote) containing a promise to pay any sum of money".

This definition is exactly the same as that in Section 33 (1) of the English Stamp Duty Act, 1891, and the definition there is totidem verbis the same as in Section 49 (1) of the English Stamp Act, 1870, and upon the words in that Act the Court of Appeal in England, consisting of Lord Esher M. R., Lindley L. J. and Bowen L. J. delivered concurring judgments in the Mortgage Insurance Corporation Ltd. vs Commissioners of Inland Revenue, (1888) 21 Q.B.D. 352, of which we need only cite the words of Bowen L. J. in which he said that the true interpretation of the words of Section 49 of the Stamp Act is that "They are meant to include documents the contents of which consist substantially of a promise to pay a definite sum of money and of nothing else". This disposes of the Appellant's first point.

As to the second point that he is not liable on the contract, since the copy before the Court is not signed by Zeev and Yusef Petakhia, we need only say that since it is signed by the Appellant, the party in this case to be charged thereunder, and since consideration in the sum of £P. 30 was paid to the Appellant as prescribed by the contract, this argument on his behalf must fail.

The repayment of the £P. 30 under Clause 12 of the contract, was a joint and several liability of the first party that is to say of Yusuf Da'as and his mother Khadra. The judgment against Yusuf Da'as and Dov Tamari must therefore be amended by adding the name of Khadra, and against these three, judgment for £P. 30 jointly and severally with costs and expenses in the proportion to the judgment debt must be entered. Subject to this we dismiss this appeal with costs to include £P. 2 advocate's fees.

As to the second appeal we cannot agree with the Court below that a unilateral act by the Appellants in serving, ex gratia, notarial notices could eliminate from the contract without the consent of either party thereto, the provision therein which dispenses with notarial notice, and this being so, the fact that while a notice on 7th February, 1933 was served on Yusuf Da'as, none was on that day served on his mother, does not enable her to take refuge in that omission to evade liability under the contract, the only agreement by which both parties were bound, in which such notice was expressly declared unnecessary.

We therefore set aside the judgment of the District Court so far as it dismissed the action against Khadra and give judgment against Khadra for £P. 250 with costs here and in the Court below to include £P. 3 advocate's fees.

BROKERS.—

SEE AGENTS.

CALENDAR.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 128/23.

BEFORE:

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

IN THE CASE OF:

Nasser El Ead
Odeh Elias
Abdulla El Jouset
Ayed El Easa — APPELLANTS.

vs

Deeb, Yousef & Mahmud
Sons of Abdul Naheen Rashaid — RESPONDENTS.

Under Article 45 Land Code "year" means "lunar year"—Transfer of land by inhabitant of one village to inhabitant of another—Right of prior purchase between co-villagers to be claimed within one year — Method of calculating time — Court of first instance not to insist on judgment set aside by the Court of Appeal — Renewal of action struck out.

JUDGMENT.

Action under Article 45 of the Land Code. The owner of the land transferred it to an inhabitant of another village. The Plaintiff is an inhabitant of this village and is in need of land. This action must be brought within a year, and the Land Court without taking into account the excuses, dismissed the case on the ground that more than a year had elapsed. Transfers of land were forbidden by a Proclamation of 1918, but the year expired between the date of the transfer and the date of commencement of action. The Plaintiff argued that during the period between the transfer and the Proclamation of 1918, he was unable to take action because of the adverse influence of the Defendant.

In the Court of Appeal this judgment was set aside because the date of 1st June, 1921, of establishment of the Land Court was antedated by the Court and more than a year had not run

between the 1st June, 1921 and the 1st January, 1922. The case was sent back to the Land Court to try the issue of fact raised by the Plaintiff. The Land Court raised a fresh point that a year runs not from the 1st June, 1921, to the 1st June, 1922, but from the first of June to the thirty first of May of one year to the next.

This point is overruled by the Court of Appeal. In calculating time the first day is not, but the last day of the period is counted. Another point raised by the Respondent is, however, a good one and has been overlooked by the Court in the earlier judgment. The year intended by Clause 45 of the Land Code is a lunar year, the application of which would render that action in any case out of time and the judgment of the Land Court must be confirmed on that ground.

The Court of first instance may not insist on a judgment set aside by the Court of Appeal by disputing the grounds of that judgment but if a new point arises which was not before the Court of Appeal in the first appeal, it may rely on such new point in coming to the same result as in the former judgment. In this case the Land Court was wrong in discussing new matters already decided by the Court of Appeal. It was entitled to put forward fresh matters.

It has been argued that the present action brought on 1st June, 1922, was a continuation of an action brought on 5th January, 1922, and struck out of the list in default of appearance on the 27th March, 1922. If that were so this action would date from the 5th January, 1922, and would be in time. In my opinion the present action was begun on the 1st June, 1922, when a fresh petition was filed and fees paid. If the action of 5th January, 1922, was then alive it could have been continued in the usual manner on payment of fees and without fresh pleading and may apparently be now so continued but this action is a fresh proceeding, and is out of time.

The appeal should be dismissed and the judgment of the Land Court continued.

Dated the 17th day of May, 1924.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 13/26.

IN THE CASE OF:

Abraham Leib Atkin — APPELLANT.

vs

Schlusenberg — RESPONDENT.

Interpretation of 'months' used in contract — Question of whether Jewish or Christian calendar month intended — Commencement of period of contract—Public Notary notice to complete sale in Land Registry within three days — Extension of time granted for completion of transaction—Public Notice of 30th April, 1919—Section 11, Land Transfer Ordinance, 1920—Agreement to sell held not to be a disposition.

JUDGMENT.

Does the contract mean to impose a period of three Jewish or three Christian months?

If it means the Christian calendar then the Appellant repudiated before the expiry of the time. If the Jewish calendar is to be regarded, the question will be whether the Appellant repudiated before sunset on the 2nd March.

We assume in the absence of any known law to the contrary that the English rule prevails and that a month begins to run from the end of the day of the contract and ends at the end of the corresponding day of the next month. The Jewish day ends at sunset, the Christian day at midnight.

It is clear that the repudiation must have been before sunset on the 2nd March, because the Notary's office is not open after that time, and we are satisfied that the sale was repudiated by the Respondent before the expiration of the time allowed as fixed in the contract even if we take the Jewish calendar which is the more favourable to the Appellant.

The Appellant having repudiated before the termination of the period he was liable to pay the promissory note according to contract, unless prevented by some rule about Public Notary notice or an objection under the Public Notices of 30th April, 1919, or the Transfer of Land Ordinance 1920, Section 11.

Now the Respondent on the 6th March, sent a Public Notary Notice to the Appellant giving him three days within which to attend at the Land Registry Office and complete the sale. The Appellant failed to do so and the only question remaining on that point

would be whether the Respondent was willing to complete the contract before the end of the period allowed in that document and this is proved to be so as a fact by the District Court.

The fact that the Public Notary notice was given after the expiration of the time fixed in the contract does not affect the case because the Respondent then gave the Appellant a further delay to complete the contract.

Now as to the question of the effect of the Public Notice of the 30th April, 1919, and Section 11 of the Land Transfer Ordinance, 1920. This is not an invalid transaction in immovable property within the meaning of Section 11. It does not pretend to be a sale, but only an agreement to carry out a sale with a provision to damages on failure to carry out the contract.

On the above grounds we dismiss the appeal and confirm the judgment of the Court below.

Costs and advocate's fees assessed at £E. 5.

In the District Court of Jerusalem.

M. D. C. Jm. No. 42/26.

BEFORE:

Copland, J. and Said, J.

IN THE CASE OF:

The Attorney General

vs

Ali Ismail El Najar ACCUSED.

Hejira year presumed unless expressly excluded — Prosecution of misdemeanour after three years according to Hejira calendar — Limitation of actions.

JUDGMENT.

Following the decisions and commentaries given we hold that the Hejira year is the one to be taken in account unless expressly excluded, and no law has been passed since the Occupation to change the old method in force during the Turkish regime.

The period in this case exceeds three years according to the Hejira calendar. The charge, therefore, cannot be heard as it is barred by prescription.

The accused is therefore discharged.

Delivered the 10th day of April, 1926.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 111/31.

BEFORE:

The Chief Justice, the Senior Puisne Judge and Frumkin, J.

IN THE CASE OF:

The Municipality of Jaffa. — APPELLANT.

vs

Mrs. Mary di Cassano in her personal capacity and as guardian of her minor daughter Evon. Mrs. Emili, widow of the late George Musa Sursock, in her personal capacity and as guardian of her minor children, Alexander and Pierre Sursock. Musa Sursock. — RESPONDENTS.

Comparison of dates of Turkish and Gregorian calendars — Postal Convention between Turkey and Bulgaria referred to — Change in numerical designation of fiscal year.

Appeal from the judgment of the District Court of Jaffa, dated the 14th June, 1931.

JUDGMENT.

On the first point raised we hold that this case must be distinguished from that of Dallal, Civil Appeal 92/22, inasmuch as there the Municipality did not enter into an agreement to pay for the property, and further, insofar as in the present case the Municipality has paid instalments of the agreed price to the Respondents. The Appellant therefore fails on this point.

As to the date of the agreement we find that according to the Turkish Treaty with Serbia, March, 1330, was equivalent to March, 1914.

From this we see that —

October, 1330 was equivalent to October, 1914, which accords with dates in the Postal Convention between Turkey and Bulgaria. Therefore:—

October, 1331 was equivalent to October, 1915.

February, 1331 was equivalent to February, 1916.

February, 1332 was equivalent to February, 1917.

For it must be remembered that the change in the numerical designation of the fiscal year was in March.

Now the amount in the agreement was 633,637 Turkish Piastres, which in February, 1917, was equal to something over £P. 1700. The amount paid in instalments was £E. 2090 which equals £P. 2142.250. There was, therefore, in fact a payment of the amount agreed upon with something in addition by the Appellant to Respondents.

The judgment of the District Court for £P. 3557 and costs must therefore be set aside and the Respondents' action dismissed with £P. 3 advocate's fees and costs.

Delivered the 4th day of March, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 112/31.

BEFORE:

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

IN THE CASE OF:

Sons of Mikhail Sabbagh — APPELLANTS.

vs

Zvi Strahilevitz — RESPONDENT.

Gregorian dates employed in documents from which case arose — When calculation of time may be made according to lunar year — Limitation of actions

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Appeal from the judgment of the District Court of Jaffa, dated 29th June, 1931.

JUDGMENT.

The Court holds that as Gregorian dates were employed in the documents upon which this case arose, the District Court erred in holding that it must make calculations, with a view to determining whether there was prescription or not, in accordance with the lunar year. The District Court would have been correct in applying the lunar year only in the event of the documents bearing dates on a lunar basis or no dates at all.

The case must be remitted to the District Court to determine whether in fact there was prescription according to the Gregorian calendar and if not to try the case on its merits.

Judgment for Appellant. Costs to follow the event.

Delivered the 17th day of February, 1932.

CHIEF EXECUTION OFFICER.

In the Supreme Court sitting as a Court of Appeal (in Chambers).

C. A. No. 16/27.

BEFORE:

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

IN THE CASE OF:

Max Benzion
Samuel Benjamin — APPELLANTS.

vs

The American Palestine Bank Ltd. — RESPONDENTS.

Execution of judgment—Discretion and jurisdiction of President, District Court under Section 2, Transfer of Land Ordinance, No. 2 of 1921 to refuse order for sale—Article 22, Proclamation of 24th June, 1918—Allowance by Chief Execution Officer of payment by instalments—No appeal from decision of Chief Execution Officer.

Appeal from the judgment of the District Court of Haifa, dated 12th January, 1927.

JUDGMENT.

Article 22 of the Proclamation of the 24th Juue, 1918, prohibited any sale of land in execution of a judgment or satisfaction of a mortgage.

The Transfer of Land Ordinance, No. 2 of 1921, removed this prohibition, but by Section 2 modified the old law by conferring on the President of the District Court discretion to refuse an order for sale under certain circumstances. This was a discretion similar in character to that which is exercised by the Chief Execution Officer in allowing payment by instalments of a judgment debt; and it would appear that in determining an application under Section 2, the President of the District Court is exercising the functions of a Chief Execution Officer.

It is not for him to decide on an application under that Section such a question as, for example, the amount due on the mortgage; that is a matter which must be decided by the Court before the President of the District Court can be in a position to exercise the discretion conferred upon him by the Section.

It follows that no appeal lies to the Court of Appeal from his decision on an application under the Section.

Delivered in presence of all parties the 11th day of February, 1927.

In the High Court of Justice.

H. C. No. 65/28.

BEFORE:
The Chief Justice and Khayat, J.

IN THE CASE OF:
Samuel Kandinoff — PETITIONER.
vs
The Chief Execution Officer, Jaffa
Isaak Savil Daniels — RESPONDENTS.

Execution of judgment—Stay of execution refused by Chief Execution Officer—Discretion under Section 2, Transfer of Land Ordinance, No. 2 of 1921—Execution debtor to be given time if he has reasonable prospects of payment.

Application for an order to issue to the Chief Execution Officer to show cause why his order for the sale of the properties of the Petitioner should not be stayed.

JUDGMENT.

The Court, after hearing Mr. Eliash for Petitioner and Mr. Papo for Respondents, is of opinion that the Chief Execution Officer in refusing an order on 23rd August, 1928, "unless with the consent of the other party" was not exercising a discretion as required under Section 2 of the Transfer of Land Ordinance, No. 2 of 1921.

The Order must therefore be made absolute and the Chief Execution Officer should hear both parties before making a new Order if applied for, so that he can be in a position to decide whether the debtor has reasonable prospects of payment if given time or not.

£P. 2 advocate's fees and costs to Petitioner.

Delivered in presence the 28th September, 1928.

In the Supreme Court sitting as a Court of Appeal.

H. C. No. 1/29.

BEFORE:
The British Judge, Jarallah, J. and Khayat, J.

IN THE CASE OF:
Samara El Omar Abou Baker
Ahmad Samara El Omar Abou Baker — PETITIONERS.
vs
President, District Court, Nablus
The Magistrate, Tulkarem
Farid Ibn Salem — RESPONDENTS.

Execution of judgment—Refusal of Chief Execution Officer to accept payment of judgment debt in instalments — Discretion of Chief Execution Officer not interfered with by the High Court.

Application for an order to issue to the President of the District Court of Nablus in his capacity as Chief Execution Officer of Tulkarem to show cause why the application of Petitioners for payment of the judgment debt by instalments has been refused.

JUDGMENT.

The question of granting instalments in satisfaction of a judgment debt is purely a discretionary matter for the Chief Execution Officer, and having made an order we cannot interfere with it. The application is therefore dismissed.

Delivered in presence the 4th day of February, 1929.

In the High Court of Justice.

H. C. No. 5/29.

BEFORE:

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

IN THE CASE OF:

Rozel Shahin
Mary Shahin &
Zahyeh Shahin — PETITIONERS.

vs

Chief Execution Officer, Nablus,
Azar Yousof El Hayed — RESPONDENTS

Competency of Chief Execution Officer to rule on question of prescription—Arts. 143, 144, Execution Law—Stay of execution by Chief Execution Officer to allow plea of prescription to be raised before competent Court.

JUDGMENT.

The Court holds that the Chief Execution Officer is not competent to rule on the question of prescription relating to the mortgage in question, inasmuch as this is not a matter covered by Articles 143 and 144 of the Execution Law.

The Court is of the opinian that the Chief Execution Officer should grant a stay of execution for a reasonable period to allow

the Respondent if he chooses to plead prescription before the competent Court.

Delivered the 11th day of March, 1929.

In the High Court of Justice.

H. C. No. 9/29.

BEFORE:

The Acting Chief Justice, and Khayat J.

IN THE CASE OF:

Morris Litwinsky
Emil Litwinsky
Raymond Litwinsky — PETITIONERS.

vs

Chief Execution Officer, Jaffa
Leib Gluckman — RESPONDENTS.

Jurisdiction of Chief Execution Officer — Construction of mortgage deed held to be matter for Court — Interest payable on mortgage debt is preferential debt.

Application for an order to issue to the Chief Execution Officer directing him to grant interest on capital of mortgage at the legal rate.

JUDGMENT.

The Petitioners claim interest at 9% on the mortgage debt from the date of the mortgage, the interest for the first year having been paid in advance. It is clear that if such interest is payable it is a preferential deed.

The second Respondent, however denies that such interest is due under the mortgage deed.

The question at issue is thus one of construction of the mortgage deed, and that is a matter not for the Execution Officer but for the Court. The petition is therefore dismissed with costs including £P. 2 advocate's fees.

Delivered the 11th day of June, 1929.

In the High Court of Justice.

H. C. No. 39/31.

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

IN THE CASE OF:
Eliezer Shpiguel — APPELLANT.
vs
Chief Execution Officer, Jaffa
Mordekhai Freiman
Dov Pasilov — RESPONDENTS.

Jurisdiction of High Court in matters of execution—Only President of District Court to act as Chief Execution Officer.

Application for an order to issue directing the Chief Execution Officer in the District Court of Jaffa to show cause why his orders dated 17th April, 1931 and 25th May, 1931 in File No. 822/30 should not be set aside.

JUDGMENT.

The orders complained of are by Judge Mani. The Court can only take note of an order by the Chief Execution Officer who is the President of the District Court.

The application is struck out.

Delivered the 23rd day of July, 1931.

In the High Court of Justice.

H. C. No. 43/31.

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

IN THE CASE OF:
Baker El Mustafa — PETITIONER.
vs
Chief Execution Officer, Jaffa
Yehoshua Hankin — RESPONDENTS.

Order for imprisonment of judgment debtor made by judge of District Court — Only President of District Court to act as Chief Execution Officer—Delegation by Chief Execution Officer of authority.

Application for an order to issue to the Chief Execution Officer in the District Court of Jaffa to show cause why his order for imprisonment of Petitioner should not be set aside.

JUDGMENT.

The Chief Execution Officer in the District Court is the President of the Court.

He has no power to delegate to any other person the authority to make orders for imprisonment for non-payment of a judgment debt.

Accordingly, Judge Mani had no power to order imprisonment of the Petitioner and the order of this Court, made on the 27th of July, 1931, will be made absolute.

Delivered the 7th day of September, 1931.

In the High Court of Justice.

H. C. No. 50/31.

BEFORE:

The Senior Puisne Judge and Frumkin, J.

IN THE CASE OF:

Ex parte Blum.

Seizure of monies by Chief Execution Officer—Enforcement of payment of road improvement tax levied by Local Council of Tel-Aviv—Application for stay of execution refused after execution had been completed — Setting aside order by Chief Execution Officer for registration—Article 9, Law of Execution—Claim that improvement tax illegally imposed — Refusal by Court to make futile order — Question of res judicata—Decision of Chief Execution Officer not binding on Magistrate.

JUDGMENT.

The Petitioner, Mrs. Rose Blum, is the owner of immovable property in Tel Aviv.

On 7th May, 1931, she was served with a notice from the Execution Office of the District Court of Jaffa calling upon her to pay within 48 hours the sum of £P. 43.510 in respect of a road improvement tax levied by the Local Council of Tel-Aviv.

The Petitioner lodged an objection with the Chief Execution Officer, who, on the 10th July, 1931, decided that the Petitioner's objection was groundless, and ordered that execution should proceed.

On the 15th September, monies belonging to the Petitioner were seized by the Execution Office and were paid over to the Local Council on the following day.

On the 11th September the Petitioner had presented an application to the Chief Execution Officer to stop proceedings upon

the security of a bank guarantee. Owing to an error stated to be due to the fact that the numbers of files in the Jaffa Execution Office are duplicated, this application never came before the Chief Execution Officer. A fresh application was made to the Chief Execution Officer on the 24th September, and was refused on the ground that execution had been completed.

On the 20th July the Petitioner had filed this petition praying that the Chief Execution Officer's order of 10th July be set aside.

The Chief Execution Officer has not appeared to the petition, but the Local Council which was made a Respondent is asking that the petition be dismissed on the ground that the order of the Chief Execution Officer has been carried into effect, and that consequently the Petitioner's proper remedy is by way of action for recovery of the amount paid to the Respondent Council.

The Petitioner relies on the order made by this Court in Ex parte Abdes Salim Awaida (High Court No. 25/27). In that case the order of the Chief Execution Officer for the registration of immovable property in the name of a purchaser at a sale by the Chief Execution Officer was set aside upon a petition filed after registration in the name of the purchaser had actually been effected.

It is however to be noted that in that case the ground of the petition was that Article 9 of the Law of Execution does not allow the sale of immovable properties the annual income of which is sufficient to pay the debt and that the annual income of the properties sold exceeded the balance of the debt remaining due; so that the Chief Execution Officer had no jurisdiction to order the registration and that an application to that effect had been presented to the Chief Execution Officer before the order for registration was made.

From that petition the present case is distinguished by the fact that the petition is not based on an alleged excess of jurisdiction by the Chief Execution Officer but upon a claim that the improvement tax in respect of which execution was levied was imposed by the Local Council illegally.

Further, there seems to be no ground for distinguishing this case from Ex parte Seud Darwish and Others (High Court No. 17/25) in which a petition for an order restraining the District Officer, Jerusalem, from taking the land of the Petitioners for the construction of a public road was dismissed on the ground

> "that the application should have been brought when the land was taken for the road, and not after the road was made".

In the present case the Petitioner has a remedy by way ot action against the Local Council in the competent Court for recovery of the amount alleged to have been wrongfully levied; and the Court will not make an order which cannot be complied with, namely for stay of execution proceedings which have already been completed.

The Petitioner has argued that she is entitled to a decision by this Court on the merits of her petition because, if she is compelled to bring an action against the Local Council, the competent Court, the Magistrate's Court of Tel Aviv, must necessarily hold the decision of the Chief Execution Officer as binding upon it, and treat the matter as *res judicata*.

Such, however, is not the case. The decision of the Chief Execution Officer is not a judgment of a Court and cannot bind the Magistrate's Court.

The petition must be dismissed with costs including £P. 4 advocate's fees and expenses.

Delivered in presence the 24th day of December, 1931.

In the High Court of Justice.

H. C. No. 67/31.

BEFORE:

Baker, J. and Frumkin, J.

IN THE CASE OF:

Hassan Haj Omar ez Zaideh — PETITIONER.

vs

The Chief Execution Officer, Haifa
Nazirah Cook — RESPONDENTS.

Jurisdiction of High Court to restrain Chief Execution Officer — Execution of judgment of Magistrate by Chief Execution Officer limited by High Court.

Application for an order to issue to the first Respondent directing him to show cause why his order dated 8th November, 1931, should not be set aside.

JUDGMENT.

The Order Nisi issued by this Court on the 28th January, 1932, is hereby made absolute.

The Chief Execution Officer in the District Court of Haifa is hereby restrained from ordering or causing the judgment of the Magistrate's Court of Haifa, No. 270, dated 12th April, 1921, to be executed in respect of the whole land, but execution should be confined to such share or shares of the said land as the said Nazirah Cook may be entitled to under the Kushan upon which her claim in the Magistrate's Court of Haifa was based.

The second Respondent is ordered to pay the costs and advocate's fees assessed at £P. 4.

Delivered the 25th day of February, 1932.

In the High Court of Justice.

H. C. No. 75/31.

BEFORE:

The Chief Justice and Baker, J.

IN THE CASE OF:

Khaya Tennenbaum — PETITIONER.

vs

The Chief Execution Officer

Joseph Harris Elkes — RESPONDENTS.

Refusal by Chief Execution Officer to extend period for auction—Article 108, Law of Execution—Refusal by High Court to interfere with discretion of Chief Execution Officer.

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 27th November, 1931, issued in Execution File No. 2158/30, whereby he refused to extend the auction for a further period of one month in accordance with Article 108 of the Law of Execution, should not be set aside.

JUDGMENT.

The Court sees no reason to interfere with the exercise of his discretion by the Chief Execution Officer.

The rule is therefore discharged with £P. 3 advocate's fees and costs.

Delivered the 28th day of January, 1932.

In the High Court of Justice.

H. C. No. 90/32.

BEFORE:

The Senior Puisne Judge and Frumkin, J.

IN THE CASE OF:

Raji Issa and Another — PETITIONERS.

vs

Chief Execution Officer, Haifa and Another — RESPONDENTS.

Sale in satisfaction of mortgage debt—Discretion of President District Court under Transfer of Land Ordinance, No. 2 of 1921—Amount due on mortgage disputed—Jurisdiction of President District Court in execution matters.

JUDGMENT.

The President of the District Court cannot exercise the discretion conferred upon him by the Transfer of Land Ordinance, No. 2 of 1921, with regard to the sale of land in satisfaction of a mortgage debt until the amount due upon the mortgage has been ascertained.

Where, therefore, the President of the District Court finds that the mortgagor has prima facie ground for contesting the amount due on the mortgage, his proper course is to refuse to make an order for sale until the amount due has been ascertained by judgment of a competent Court. It does not follow, however, that the President of the District Court cannot make an order for immediate payment of such part of the amount claimed or admitted by the mortgagor to be due, and postpone making an order for sale with regard to the amount in dispute. Such was the course which the President of the District Court has taken in this case, and we see no ground for setting aside his order.

In the High Court of Justice.

H. C. No. 11/33.

BEFORE:

The Acting Chief Justice and the Acting Senior Puisne Judge.

IN THE CASE OF:

David Moyal — PETITIONER.

vs

The Chief Execution Officer, Jaffa
Ahmed Abou Halaweh — RESPONDENTS.

Chief Execution Officer acting in fulfillment of obligation laid on him by Court — Chief Execution Officer cannot vary his decision once given.

ORDER.

The decision of the Chief Execution Officer was made not in performance of his ordinary duty as Chief Execution Officer but in fulfillment of an obligation expressly laid upon him by the Court.

The Chief Execution Officer having given his decision upon the evidence before him, which evidence this Court has held to be admissible, has discharged the duty imposed upon him, and he has no power to receive further evidence or to vary the decision already given.

The petition is dismissed.

Given the 13th day of October, 1933.

CHIEF EXECUTION OFFICER—

SEE ALSO: ADMINISTRATION OF ESTATES—EXECUTION.

CHILDREN

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 137/24.

BEFORE:

The Chief Justice, the Senior British Judge and Frumkin, J.

IN THE CASE OF:

Mrs. A. Hoisman — APPELLANT.

vs

Simon Hoisman — RESPONDENT.

Custody and maintenance of child—Rights and obligations of grandfather towards grandchild—Circumstances for Court to consider in granting custody—Evidence of foreign law—Inability of mother to support child.

Appeal from the judgment of the District Court of Jerusalem, dated the 12th August, 1924, whereby the Court ordered Appellant to hand over her child to Respondent, his grandfather.

JUDGMENT.

In this case the operative part of the judgment is an order giving the grandfather custody of the child. That order goes beyond the claim, which is for maintenance only and must be set aside.

The claim of the mother for maintenance of the child by means of a monthly cash payment has been refused on the ground that the fact that the grandfather is able to keep the child in comfort while the mother can only keep it in poverty is of itself a special circumstance sufficient to give the grandfather a right to offer hospitality in lieu of a cash payment. We hold that the fact of difference in wealth between the parties is not of itself sufficient to determine the judgment of this Court in the matter. The age of the child and the mother's right to it in nature in infancy are circumstances for the consideration of the Court.

There is not sufficient material before us either as to the Hungarian law or as to the facts of the case for us to give a determining judgment. It should be decided whether or not the inability of the mother to support the child is a condition precedent to her right to claim on its behalf maintenance from his grandfather. Then will come the question as to the meaning of ability or inability. Is the mother to be debarred from claiming maintenance if it can be shown that by doing some kind of work she can keep the child in poverty, or is she entitled to require that the child shall be kept in such a condition as will conform to that of his father or the family to which he belongs? If it comes to a question of the work capable of being performed by the mother for the purpose of getting a livelihood and maintaining the child is she bound to accept work, which is according to the opinion of her class unsuitable, before she can apply to the grandfather for maintenance?

Then again comes the question of law discussed before us but not explained with sufficient definiteness either in the evidence or the judgment. It is this:—when it becomes a question between cash and hospitality, is the woman entitled to cash payment unless the grandfather can show special circumstances entitling him to offer hospitality in lieu of it, or is he in general allowed to offer hospitality in fulfilment of his obligations, if any, for maintenance, unless the woman can prove facts entitling her to receive payment in cash? If the grandfather offers hospitality and is entitled to do so in lieu of a cash payment, then the Court will have to consider whether such offer is made bona fide and its decision will depend on the proved facts of the case and on the conditions, if any,

attached to the offer of the grandfather. It may be that such a course in the case of a very young child would be impracticable or practicable only if the mother were invited to share in the hospitality offered. Again, it might appear on considering the circumstances that such a condition as imposed by the Court and accepted by the grandfather would be unjustifiable interference with her liberty or self respect.

Such points of law and fact require to be more carefully considered by the District Court and the case is sent back for this purpose.

Delivered in presence the 8th day of May, 1925.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 14/28.

BEFORE:

The Chief Justice, the Senior British Judge and Khayat, J.

IN THE CASE OF:

Joseph Calandra — APPELLANT.

vs

Mrs. J. Calandra — RESPONDENT.

Custody and maintenance of child — Access by parent to child — Application of Italian law — Circumstances for Court to consider in granting custody.

Appeal from the judgment of the District Court of Haifa, dated 13th December, 1927, whereby the action of the Appellant for the custody of the child was dismissed, and the child was ordered to remain in the custody of his mother, the Respondent, until he reaches the age of six years.

JUDGMENT.

The Court is of opinion that in view of the authorities cited to it from the Italian Courts, the judgment of the District Court must be set aside, and that the custody of the child should continue to be with the mother until he reaches his fourth birthday which will be on or about the 28th March, 1929, and that thereafter the custody of the child shall be with his father. That the father during the maternal custody and the mother during paternal custody shall be allowed to visit the child for the space of two hours once every month at such place as shall be most convenient to

the person having the custody of the child and not unreasonably inconvenient to the other parent, with liberty to either party to apply to the District Court in the event of disagreement.

The Court has come to this conclusion in view of the fact that there is nothing to satisfy it that the character of the father is such as to make it in the best interests of the child that it should not be in his custody and that the child being an Italian national should as soon as it reaches an impressionable age be in an atmosphere which accords with the social and religious sentiments of its country. So far as material considerations are concerned neither parent appears to be at a serious disadvantage as compared with the other.

The Court orders that the child be not removed out of the jurisdiction without leave of the District Court.

The mother to have leave to apply to the District Court for a variation of the Court's order as to her access to the child after the latter has passed his seventh birthday.

Each party to bear its own costs.

Delivered in presence the 4th day of May, 1928.

In the High Court of Justice.

H. C. No. 36/28.

BEFORE:

The Chief Justice, the Senior British Judge and Khayat, J.

IN THE CASE OF:

Joshua Reichman — PETITIONER.

vs

The Senior Medical Officer of Jaffa
The Jewish Committee of Jaffa
and Tel-Aviv — RESPONDENTS.

Registration of birth of bastard child—Mandatory order issued to Senior Medical Officer and to private person—Notification of births to Public Health Office—Public Health Ordinance, 1920—Functions of Court distinguished from those of Legislature.

Application for an order to issue to the Respondents to show cause why they should not be ordered to cancel the registration of the Petitioner as the father of the male child born on 6th February, 1927, of which Miss Yetta Karnovsky is the mother.

JUDGMENT.

This is an application directed against the Senior Medical Officer of Jaffa and the Committee of the Jewish Community of Jaffa and Tel-Aviv to show cause why they should not be ordered to cancel the registration of the Petitioner as the father of the male child born on 6th February, 1927, of which Miss Yetta Karnovsky is the mother.

Yetta Karnovsky was admittedly the unmarried mother of the child in question. The certificate of registration under the heading "Particulars of Parents" gives below the heading "Father" the name of the Petitioner, viz: Joshua Reichman, and below that of the "Mother" nothing more than the Christian name "Yetta".

On the 16th May, 1918, there were made Public Health Regulations dealing, inter alia, with the registration of births. The penultimate enactment in this regulation viz: Section 8, Sub-Section (2), lays it down that the provisions of this Ordinance shall be substituted for the provisions of the Ottoman Law dealing with matters aforesaid.

This disposes at one stroke of the arguments addressed to us which were based upon the Loi de l'Etat Civil, Chapitre 11, Inscriptions des Naissances, and it is to be regretted that this repealing Section was not included in the compilation of the Laws of Palestine since the Court was unaware of its existence and allowed a good deal of time to be taken up in an argument which assumed that some, at any rate, of the provisions of this Chapter were still in force.

The relevant Sub-Sections of Section 1 of the Public Health Regulations of the 16th May, 1918, are numbered 1, 2, and 4 (6) which run as follows:—

"1. Every birth shall be notified to the Public Health Office within 15 days.

2. The following persons shall be responsible for notifying the birth: the father, the mother, the midwife attending the birth, the Imam and the Mukhtar of the village or quarter.

4. (6) A register of births and deaths shall be kept at the Public Health Office in such form and manner as may be ordered from time to time".

I cannot find that any order has been made as to the form and manner in which registers of births and deaths shall be kept at the Public Health Office.

By Public Health Ordinance, No. 3 of 19th March, 1920, it is provided as follows:—

"1. On the occurrance of a birth or death in a village, the Mukhtar shall enter the particulars, which must be rendered to him by the parent or guardian or next of kin, in the foil and counter-foil of the form O. M. 31 and 32 and shall despatch the foil immediately to the Public Health Office of the district.

2. Births and deaths which do not occur in hospitals or which are not notified by medical practitioners (and licensed midwives in the case of births) shall be notified by the Mukhtars on form O. M. 31 and O. M. 32 and a similar procedure carried out as described above.

3. Hospitals and medical practitioners (and licensed midwives in the case of births) shall continue to render birth certificates on O. M. 146 and death certificates on O. M. 14".

Section 3 appears to involve some confusion of thought, for what the hospital, medical practitioner or licensed midwife renders is not a birth certificate, but a notification of particulars of birth to the Public Health Office which alone can give certificates of birth, and the certificate in this case signed by the Acting Medical Officer of Health is, as a matter of fact, printed on the form O.M. 146. In this certificate the person notifying the birth is the Jewish community of Tel-Aviv. The child in this case was born in the clinic of Dr. Hillelson. The doctor informed the Jewish Committee, which under Section 14 of the Jewish Committee Regulations, 1927, "may keep records of births of Jews supplementary to the records of the Government", and the Jewish Committee notified the Medical Officer of Health.

We may note here in passing that the procedure followed in this case would seem to be the reverse of that contemplated in the Regulations and to make the Government's records supplementary to those of the Jewish Community.

Having now traversed the whole of the relevant law in force in this territory we may point out that there is no provision in Palestine analogous to Section 7 of the Birth and Death Regulation Statute Books of most British possessions, which reads as follows:

"7. In the case of an illegitimate child no person shall as father of such child, be required to give information under this Act concerning the birth of such child, and the Registrar shall not enter in the Register the name of any person as father of such child unless at the joint request of the mother and of the person acknowledging himself to be the father of

such a child and such person shall in such case sign the register together with the mother".

In the absence of such a provision enabling the name of the father of a bastard child to be in certain circumstances placed on the register, what is the law applicable in this case?

The child was born in Dr. Hillelson's clinic, and hence by Section 3 of the Public Health Ordinance No. 3 above quoted, it was the duty of Dr. Hillelson to notify the birth to a Public Health Office and to supply the particulars specified in form O. M. 146. It was not the duty of the Jewish Committee to notify the Public Health Office, and it the law is to be interpreted strictly, it would seem that the Public Health Office should not have accepted a notification from the Jewish Committee.

The particulars necessary for the completion of form O. M. 146 include under the heading "Particulars of Parents" the name, age and religion of the father, and as a separate heading the "Nationality of Father".

We have no doubt that the term "father" is to be limited to the lawful father of a child born in wedlock, and does not include the putative father of an illegitimate child.

In furnishing these particulars, the notifying authority must necessarily rely upon information supplied to him by the mother and other relatives of the child, and can be under no liability to ascertain whether the child was born in wedlock or not, but in any case in which he is aware that the child is illegitimate no particulars should be rendered with regard to the alleged father.

In the case under consideration, the Public Health Office has registered incorrect particulars communicated to it by a body which was not the proper notifying authority.

We hold, therefore, that the Petitioner is entitled to have the register amended by the deletion therefrom of the whole of the entries relating to this child, and we order the Senior Medical Officer of Jaffa to effect this alteration in the register.

We order Dr. Hillelson, who has been cited by us as a Respondent, to notify the birth of this child anew this time to the Public Health Office and, since there is no dispute as to the illegitimacy of the child, to omit in filling up form O. M. 146 any mention of the name, age, religion or nationality of the father and to give the surname as well as the Christian name of the mother.

With reference to the last named matters, we would, in addition to our other comments on the law as it stands, draw the

attention of those responsible to the fact that the form of notification of births might well be amended to meet the case of an illegitimate child by the insertion of a space for the nationality of the mother as well as for that of the father.

Arguments have been put forward in this case which, if adopted by us, would exalt the powers of the High Court beyond any which it can justly claim.

It is not our function to supply any *casus omissus* which the legislature has overlooked. The function of this as every other Court, is *jus dicore* not *jus dare,* to interpret the law, not to make it. The responsibility of the latter function is on the legislature alone, and we hope its attention will be directed to what we consider an unfortunate lacuna in the law and to the fact that, as we have pointed out, it is in general in a very confused state.

Delivered the 10th day of September, 1928.

In the High Court of Justice.

H. C. No. 43/28.

BEFORE :

The Senior British Judge and Frumkin, J.

IN THE CASE OF :

Esther Lévy — PETITIONER.

VS

Mother Superior of St. Joseph's School of Jerusalem — RESPONDENT.

Application by mother to obtain custody of child — Application of personal law—Guardianship of illegitimate child—Effect of agreement relating to custody of child — Child ordered not to be removed from jurisdiction of the Court.

Application for an order to issue to the Respondent to show cause why she should not be ordered to hand over to Petitioner her daughter, Victoria.

ORDER.

To satisfy us that she has any claim to an order for the delivery to her of her child, the Petitioner must first prove that by personal law applicable, which in this case is Jewish Law, the mother of an illegitimate child is either the sole guardian of such child or one of several joint guardians and entitled to custody of

the child. To establish this the Petitioner should present a judgment of a competent Court.

It has been brought to our notice that the Petitioner has entered into an agreement with the Respondent with regard to the custody of the child.

Before any order for delivery of custody can be made, it must be proved that such agreement is not of such a nature as would disentitle the Petitioner to recover custody of the child. The hearing is adjourned for the evidence required to be obtained and submitted. Pending such hearing we order that the child is not to be removed from the jurisdiction of this Court.

Given the 19th day of June, 1928.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 80/31.

BEFORE:

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

IN THE CASE OF:

Marie Grossfeld — APPELLANT.

vs

Abraham Millstein — RESPONDENT.

Claim for maintenance of illegitimate child governed by personal law—Evidence of admission of paternity—Production of letter in Court on payment of Court fee only—Letter undertaking payment of periodical sums of money held liable to stamp duty—Sec. 25 (1) Stamp Duty Ordinance and Item 6 of Schedule thereto.

Appeal from the judgment of the District Court of Jerusalem, dated 10th May, 1929.

JUDGMENT.

The Court holds that the learned District Court was in error in dismissing the Appellant's action solely on the ground of non-production of the child in respect of whom maintenance is claimed. The only purpose of such production would appear to be to ensure that the child is still alive, and this can be proved by other means.

As regards the letter from the Respondent to the Appellant dated 19th April, 1928, the Court holds that while as evidence of admission of paternity by the Respondent the letter can be received in evidence upon payment only of a Court fee, as evidence of an undertaking by the Respondent to pay periodical sums of money

to Appellant it is liable to stamp duty under Section 25 (1) of the Stamp Duty Ordinance, 1927, and Item 6 of the Schedule to that Ordinance.

The letter bears no stamp and has not been denoted by the Commissioners as not being chargeable with any duty; and hence it cannot be received as evidence of an agreement to pay.

As regards the Appellant's claim for maintenance of her child apart from the letter, and for the expenses of confinement: it is for the Appellant to prove that by the personal law of the Respondent, namely Rabbinical Law, liability attaches to the Respondent in these respects.

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

Costs will follow the event.

Delivered the 27th day of January, 1932.

CHILDREN—

SEE ALSO GUARDIANS.

CITIZENSHIP.

In the High Court of Justice.

H. C. No. 68/27.

BEFORE:

The Chief Justice, the Senior British Judge and Frumkin, J.

IN THE CASE OF:

Anton Francis Kattaneh — PETITIONER.

vs

The Chief Immigration Officer — RESPONDENT.

Immigration — "habitually resident" interpreted — Arts. 1, 2, Palestinian Citizenship Order 1925, — Citizenship of Turkish subject — Interpretation of Treaty of Lausanne — Acquisition of Palestinian citizenship — Intention of Treaty on which Order-in-Council based considered by the Court.

In Re Citizenship Ordinance 1925. Application for an order to issue to the Respondent requiring him to refrain from prohibiting Petitioner from entering into Palestine.

JUDGMENT.

In this case we are concerned only with the interpretation of the words "habitually resident" in Article 1 of the Palestinian Citizenship Order 1925. That Article runs as follows:—

> "Turkish subjects habitually resident in the territory of Palestine upon the 1st day of August, 1925, shall become Palestinian citizens".

The Petitioner in this case was born in Jerusalem in 1865. He resided there until 1884 when he went for two years to the United States in the employment of Messrs. Thomas Cook & Sons. He returned to Jerusalem in 1886 and resided there in the same employment until the year 1889. Between 1889 and 1896 he was similarly employed in Jerusalem save for short periods ranging from six months to twelve months when he worked for his firm in London, Lucerne and Cairo. In 1896 he was sent by Messrs. Cook as their manager, to Beirut, Syria, a post which he has held ever since, coming to Palestine for two or three months every year for his holidays.

The provisions of the Palestinian Citizenship Order, 1925, are based upon the Treaty of Lausanne, and on the authority of R. vs Wilson 5 Q. B. D., at page 42, in construing legislation the terms of a Treaty which such legislation is intended to carry into effect should be considered, as the two documents ought not to conflict.

In order to understand the Order-in-Council, therefore, we may turn to the terms of the Treaty of Lausanne and it will be observed that the English text is described as "Translation" and it is therefore the French text from which we must get the intention of the signatory powers. The reason why this is important is that whereas in the English text there is a variation between the term "habitually resident" which occurs in Articles 30 and 34, and "ordinarily resident" which occurs in Article 21, in the French text one and the same term is used, namely "etabli", so that it is impossible to make any distinction between the words "habitually resident" and "ordinarily resident".

Now in the case of Gout and Another vs Gimitian, (Law Reports 1. A.C., 1922), the Court was concerned to give a meaning to the expression "any Ottoman subject who was ordinarily resident and actually present in Cyprus on November 5, 1914" which occurs in a Proclamation dealing with that Island, Lord Carson in giving the judgment of the Privy Council said in that case "the Appellants contended that in construing the order we ought to

apply the same consideration as in determining the case of domicile but their Lordships are of opinion that the words "ordinarily resident" cannot be interpreted by such consideration and must be given their usual ordinary meaning".

This, we think, disposes of the arguments based upon the law of domicile addressed to us by the Petitioner's counsel.

Again, if in fact a person who had lived abroad for many years, but nevertheless, as in the case of the Petitioner, retained the *animus revertendi* to Palestine was "habitually resident" in the territory under Article 1 of the Order-in-Council it appears to us that it would reduce Article 2 of the Order-in-Council to mere surplusage. Under Article 2, persons of Turkish nationality over 18 years of age, who were born within Palestine and are habitually resident abroad, may acquire Palestinian citizenship with the consent of the Government of Palestine, but if the Petitioner's contention as to the meaning of Article 1 is correct, persons conforming with all these conditions, so long as they have the *animus revertendi* automatically become Palestinian citizens without requiring the consent of the Government.

We have to interpret the Order-in-Council so as to give a sensible meaning to all parts of it, and the only way in which to interpret these two Articles when read together appears to me to be by attaching the meaning assigned to them by the Respondent. The rule is therefore discharged with costs.

Delivered the 16th day of December, 1927.

In the High Court of Justice.

H. C. No. 34/33.

BEFORE:

The Acting Chief Justice and the Acting Senior Puisne Judge.

IN THE CASE OF:

Hausdoff — APPELLANT.

vs

The Director of Immigration — RESPONDENT.

Article 1, Palestinian Citizenship Order, 1925 — Acquisition of Ottoman nationality—Article 9, Ottoman Law of Nationality, 1869.

Application for an order to issue to the Director of Immigration to amend the passport of the Applicant so as to describe him as a Palestinian under Article 1 of the Palestinian Citizenship Order,

1925. The Applicant was born a German national in Jerusalem. He lost his German nationality in 1911 and claimed that by Article 9 of the Ottoman Law of Nationality he became an Ottoman subject.

JUDGMENT.

The Petitioner is unable to satisfy us that he has acquired Ottoman nationality either by birth or naturalization; hence he does not come within Article 1 of the Palestinian Citizenship Order-in-Council, 1925, which applies only to Turkish subjects, and not to persons who, under Article 9 of the Law of January 19th, 1869, are to be deemed to be Turkish subjects and treated as such.

CITIZENSHIP—

SEE ALSO IMMIGRATION.

CIVIL CLAIMANT.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 135/29.

BEFORE:
Tute, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:
Hassan Osman El-Kubbaj — APPELLANT.

VS

Suleiman Ibn Hassan Muhain
Taleb Mohamed Nimer
Hassan Abdul Ghani Hur
Abdul Rahim Hassan Hamdallah
Said Surur El-Abed — RESPONDENTS.

Civil claim combined with criminal action—Appeal by civil claimant disallowed where accused acquitted—Section 65, Trial Upon Information Ordinance, 1924.

Appeal from the judgment of the District Court of Nablus, dated the 7th day of August, 1929.

JUDGMENT.

Under Section 65 of the Trial Upon Information Ordinance of 1924, no appeal by the civil claimant lies in a case in which the accused has been acquitted.

Appellant though served is absent. Appeal is rejected, Appellant to pay £P. 3 costs to the former accused who are represented by Mr. Kanaan, plus the ordinary costs of the appeal.

Delivered the 27th day of November, 1929.

In the Supreme Court Sitting as a Court of Appeal.

CR. A. No. 20/33.

BEFORE:

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

IN THE CASE OF:

Ahmed Abdul Kader — APPELLANT.

VS

The Attorney General
Abdullah Mahd. El Da'as — RESPONDENTS.

Application of Article 175, Ottoman Penal Code—Causa Causans—Reduction by Court of Appeal of amount awarded as payable by way of compensation in lieu of diyet.

Appeal from the judgment of the Criminal Court sentencing Appellant to 4 years penal servitude and to payment of £P. 250 compensation in lieu of diyet. Deceased had neglected a wound caused by the accused, and this had resulted in his death.

JUDGMENT.

The Court holds that Article 175 of the Ottoman Penal Code is not applicable, as the septic poisoning which was the cause of the death was not "a cause altogether independent of the act" of the Appellant.

The appeal on this point is therefore dismissed and conviction and sentence affirmed.

With regard to the award of compensation in lieu of diyet, the Court sees no ground for ordering payment of a sum largely in excess of the amount that would be payable if application had been made to the Sharia Court for diyet.

As in Criminal Appeal No. 107/26, Farid Abdul Razzak El Kiblani v. Attorney General, we reduce the amount payable by way of compensation to £P. 175.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 118/33.

BEFORE:

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

IN THE CASE OF:

Guardians of Shlomo Slonim — APPELLANTS.

vs

Issa Arafeh
Khalaf el Khatib — RESPONDENTS.

Claim for compensation in lieu of diyet—Action referred by Assize Court to District Court—Sec. 6, Jurisdiction of Civil and Religious Courts Ordinance, 1925—Application of Sharia law—Art. 3, Criminal Procedure Code — Jurisdiction of District Court to award compensation in lieu of diyet.

JUDGMENT OF THE DISTRICT COURT.

In this action the Plaintiff, Shlomo Slonim, a minor suing by his guardians, is claiming from the Defendants Issa Arafeh and Khalaf el Khatib the sum of £P. 750 being compensation in lieu of diyet in respect of the death of his father Eliezer Dan Slonim, his mother Hanna and his brother Aharon who were murdered in Hebron in August, 1929.

The plaintiff bases his claim on Section 6, Sub-Section 2 of the Jurisdiction of Civil and Religious Courts Ordinance, 1925 (vide Bentwich Vol. 1, p. 484).

In our view the effect of Sub-Section (1) of Section 6 of the said Ordinance is that it confers on a Court of first instance (other than a Religious Court) sitting in its civil jurisdiction the right to try certain actions for diyet which hitherto could be brought before the Sharia Court only.

Sub-Section (2) which we think is unhappily worded empowers a Court sitting in its criminal jurisdiction, if the Court sees fit, at the request of a person entitled to diyet, to award a sum not exceeding £P. 250.— as compensation in lieu of diyet incidental to a conviction. The Court in making such award is not bound by the Rules of the Sharia Law, that is to say that the Criminal Court is not bound to follow the Sharia scale in assessing the compensation but may be guided by its own principles.

However, before the Criminal Court can award compensation it must be satisfied that there is a legal obligation on the accused to pay diyet and that the person claiming is the person to whom

the diyet should be paid. In other words, the aggrieved person must satisfy the Criminal Court that he might recover diyet on proceedings under Sub-Section (1).

The Plaintiff lodged a claim for compensation in lieu of diyet in the Court of Criminal Assize which tried the two Defendants and contends that the Court of Criminal Assize referred the claim to the District Court sitting in its civil capacity in accordance with Section 3 of the Criminal Procedure Code.

As the Court of Criminal Assize did not make an award, we are not interested in the action the Assize Court did take, but we are inclined to think that the Assize Court not seeing fit to entertain the claim, advised Plaintiff to bring a civil action for diyet (not for compensation in lieu of diyet). We are quite satisfied that Plaintiff cannot claim compensation in lieu of diyet under Sub-Section (2) in the District Court sitting in its civil jurisdiction. We will therefore deal with the claim as one for diyet under Sub-Section (1). We have first to decide whether in this particular case a claim for diyet lies. The matter is governed by the Sharia law.

In support of his claim the Plaintiff lodged in Court a copy of a judgment of the Court of Criminal Assize, Case No. 12 of 1930 in which the two Defendants with two other persons were charged with premeditated murder contrary to Article 170 of the Ottoman Penal Code and Section 3 of the Criminal Law Amendment Ordinance No. 2 of 1927. The Assize Court convicted the two Defendants and sentenced them to death. The following findings of fact set out in the judgment of the Assize Court are material in this action.

> "(1) We believe that Mina Orlansky saw the accused (Eissa Arafeh) kill her father.
>
> (2) We find that al least 19 persons were murdered in the building including Eliezer Dan Slonim and his wife and that the first two accused (the two Defendants) were in the building with other persons unknown at the time the murders were commited and that they were both carrying lethal weapons."

The Defendants do not deny that Aharon the brother of the Plaintiff was one of the 19 persons murdered but they resist the claim on a number of grounds.

It is only necessary to deal with one of the contentions of the Defendants. It has been submitted to us that the Plaintiff has not proved that the Defendants were the persons who took

the lives of Eliezer Dan Slonim, his wife Hanna and his son Aharon.

In Christodoulo Haji Loizou and Others v. Naoum Cababe, Administrator of the Estate of Dimitri Tawilo, Cyprus Law Reports Vol. X, p. 85, the nature of a claim for diyet is fully set out. In Philippe Georghi and Others v. Dervish Arif and Others, Cyprus Law Reports Vol. X, p. 118, it was held that persons convicted of being accomplices in homicide are not liable to pay blood money. The Chief Justice in that case stated: "In every case it is the person who has taken the life or committed the injury who has to pay the diyet".

It appears to us that according to Sharia law, Plaintiff must prove that the two Defendants did actually kill his relations. The judgment of the Assize Court in no way helps the Plaintiff. Judgment must therefore be entered for Defendants with cost and advocate's fees of £P. 2.—

Delivered in presence of both parties subject to appeal.

JUDGMENT OF THE COURT OF APPEAL.

This appeal arises out of a claim for £P. 750 for compensation in lieu of diyet brought in the District Court, Jerusalem, under the second part of Section 6 of the Jurisdiction of Civil and Religious Courts Ordinance, 1925, on behalf of Shlomo Slonim, a minor, by his guardians, the present Appellants.

The evidence in support of the claim consisted solely of a copy of the appointment of the guardians and the judgment given on the 15th of May, 1930, by the Court of Criminal Assize case No. 12/30, Attorney-General v. Issa Arafeh and Khalaf el Khatib (the present Respondents) and Others.

The District Court held that it had no jurisdiction to award compensation in lieu of diyet under that part of Section 6; and, treating the claim as being for diyet under the first part of the section, held that the evidence before it did not establish the liability of Respondents, as it was not proved that either of them actually killed any of the persons in respect of whose death the claim was made.

The Appellant argued that the District Court erred in refusing jurisdiction to award compensation in lieu of diyet, and relies upon Article 3 of the Criminal Procedure Code.

We hold that Article 3 is not applicable, as the civil claim to which it relates is a right legally enforceable by the claimant either in the criminal or in the civil Courts, whereas compensation

in lieu of diyet under Section 6 of the Jurisdiction of Civil and Religious Courts Ordinance, 1925, cannot be recovered by a claimant as of right but is awarded solely at the discretion of the Court, and such discretion is vested by the terms of the Section in the Criminal Court alone.

If the Criminal Court does not see fit to exercise this discretion, the alternative is not an application to the Civil Court for compensation but an action in the competent Court, Religious or Civil as the case may be, for diyet.

There is no appeal as against the District Court's findings that on the evidence before it, the Respondents are not liable for diyet. In view, however, of this finding it is clear that even if it were within the competence of the District Court to award compensation the Appellant's claim must fail, as, if the Respondents are not liable to pay diyet, they cannot be liable to pay compensation in lieu.

The appeal is dismissed with costs.

Delivered the 5th day of February, 1935.

CIVIL PROCEDURE.

In the High Court of Justice.

H. C. No. 17/24.

BEFORE:

The Acting Chief Justice, the Acting Senior British Judge and Frumkin, J.

IN THE CASE OF:

Michael Talamas — APPLICANT.

vs

Nakhleh Shahin — RESPONDENT.

Execution of judgment—Sale of immovable property in satisfaction of judgment debt—Right of execution debtor to pay off debt before immovable property sold in execution is registered in name of execution purchaser — Article 107, Law of Execution — Article 33, Law Amending Civil Procedure Code.

Application that order of the Chief Execution Officer dated 4th December, 1924, directing the sale of certain immovable property in satisfaction of a debt to Suleiman Murra and Brothers be set aside, and order given that Petitioner be allowed to pay the judgment debt, the attachment be removed and the sale to the purchaser be annulled.

JUDGMENT.

The Court holds:—

(1) Unanimously, that notification to the Petitioner was not duly made in accordance with Article 33 of the Law Amending the Civil Procedure Code.

(2) By a majority, that under the last paragraph of Article 107 of the Law of Execution, until the immovable property sold is actually registered in the name of the purchaser the debtor is entitled to pay off the debt and retain the immovable property.

It is ordered that upon the payment by the Petitioner of the principal sum with interest and costs the execution proceedings shall no longer remain in force.

Delivered in presence the 19th day of December, 1924.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 35/24.

BEFORE:

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

Legal period for lodging of appeal—Article 8, Rules of Court for the Land Courts held to substitute Article 22 of Appendix to Civil Procedure Code—Procedure on appeal from Land Court.

JUDGMENT.

The Court finds that Article 8 of the Land Courts Procedure Rules published in Official Gazette No. 43 dated 15th May, 1921, substitutes the whole of Article 22 of the Appendix of the Civil Procedure Code insofar as concerns the Land Courts, so that the appeal was lodged after the legal time, and therefore it is decided to set it aside.

Delivered the 22nd day of September, 1922.

In the Supreme Court sitting as a Court of Appeal.

L. A. 61/24.

BEFORE:

Seton, J., Frumkin, J. and Khaldi, J.

Evidence of witnesses heard by Chief Clerk of Court improper—Case remitted to Land Court for evidence to be heard by Court.

JUDGMENT.

The Court finds that a part of the judgment is constructed in accordance with the evidence of witnesses re possession, who were heard in connection with the ownership of the land before the Chief Clerk of the Court, and this is in contradiction to law.

And whereas the Chief Clerk was not permitted to hear the evidence of such witnesses, therefore it is decided to set aside the judgment and to return the documents to the Land Court for completion of the above mentioned faults.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 104/24.

BEFORE:

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

IN THE CASE OF:

George el Khouri, Nazareth — APPELLANT.

vs

Yaqoub Hanna
Labibi Eisa Hanna, Nazareth — RESPONDENTS.

Appeal from injunction order by Land Court—Article 186, Civil Procedure Code — Grounds of appeal filed seven months after expiration of time for appeal.

Appeal from judgment of the Land Court Nablus dated 28th July, 1924, whereby Appellant was ordered not to interfere with Respondent's title to a room which he claimed.

JUDGMENT.

The Court holds that the requirements of Article 186 of the Civil Procedure Code have not been complied with. In particular no grounds of appeal were put in until nearly seven months after the expiration of the period allowed for appeal, and no good cause for his failure to do so has been shown by the Appellant.

The appeal is dismissed with costs, including fees and costs of advocate.

Delivered the 23rd day of March, 1925.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 112/24.

BEFORE:

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

IN THE CASE OF:

Anton Atallah — APPELLANT.

vs

Mrs. Baddis Haddad — RESPONDENT.

Civil Procedure—Service of summons at residence of party—Change of residence for service not notified by party to Court.

JUDGMENT.

The Appellant who commenced this action had then a residence at Haifa. He has not notified the Court of any change of residence for service. Summons has been served at Appellant's residence in Haifa, and we hold that this is due service.

The appeal is struck out with costs.

Judgment subject to opposition.

Delivered in absence of Appellant and in presence of Respondent the 26th day of March, 1926.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 8/25.

BEFORE:

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

IN THE CASE OF:

Masoud Yaish — APPELLANT.

vs

Ibrahim Estolin and his wife Hanna — RESPONDENTS.

Failure of Appellant to file deed of security within time allowed for appeal—Article 186, Civil Procedure Code—Discretion of Court to allow extension of time under Rules of Court, Civil Appeals 1921.

JUDGMENT.

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

No valid reason has been given upon which the Court could exercise in the favour of the Appellant the discretion conferred upon it by Rule 2 of Rules of Court Civil Appeals published in 1921, to allow an extension of time for the defect to be made good.

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

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 214/26.

BEFORE:

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

IN THE CASE OF:

Mayer Liphshitz — APPELLANT.

vs

Hanna Breir — RESPONDENT.

Delay in payment of monies due under contract—Interpretation of contract—Articles 111, 112, Civil Procedure Code.

Appeal from the judgment of the District Court of Haifa, dated the 29th September, 1926.

JUDGMENT.

We are of opinion that the words "after making an account" in Section 4 of the contract must be read with the other part of the Section and do not necessarily mean that accounts should be agreed upon between both parties prior to Respondent suing for the price of the sand unless there was a dispute as to the price. However, both parties, owing to the small nature of the transaction, were fully aware of how much sand had been delivered and how much was owing and it would have been futile and entirely unneceesary to go into accounts. Appellant has at no time disputed the account and we hold the Court below was correct in not considering the clause a condition precedent to suing.

Article 112 of the Code of Civil Procedure undoubtedly applies solely to the payment of a certain sum of money and therefore does not apply to this case which is governed by Article 111 of the Code of Civil Procedure.

The judgment must be amended with regard to the payment of a fine for the non-stamping of the contract. The amount of the fine to be paid equally by both parties. Subject to this amendment

the judgment of the Lower Court is confirmed with costs and advocates' fees and expenses assessed at £P. 3.

Delivered the 1st day of February, 1927.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 22/27.

IN THE CASE OF:

I. & J. Rokach and Others — APPELLANTS.

vs

Sudki Ragheb Kamal and Others — RESPONDENTS.

Provision in contract for payment of liquidated damages — Strict wording of Article 107, Civil Procedure Code held not essential.

JUDGMENT.

The Respondent undertook to complete the sale within seven months beginning 1st July, 1920, and failing to do so to return the money received plus £E. 7000 as liquidated damages.

Another article of the contract stipulated that there be no necessity for notarial protest.

In our opinion the variation in the words used in the contract, namely, this condition to be in lieu of protest, as is the wording in Article 107, is not so important as to render protest necessary.

Delivered the 4th day of July, 1927.

In the High Court of Justice.

H. C. No. 8/28.

IN THE CASE OF:

Issa Mussa — PETITIONER.

vs

The Chief Immigration Officer — RESPONDENT.

Copy of order nisi not served on Respondent — Action not prosecuted for period of six months—Art. 118, Civil Procedure Code.

JUDGMENT.

In this case the Attorney General was of opinion that the Petitioner was habitually resident in Palestine on August 1st, 1925, although he left Palestine in October, 1924, and returned in December, 1927.

Since six months have elapsed without Applicant having taken any further step by paying fees for a copy of the order nisi to be served on Respondent, the application is struck out under Section 118 of the Civil Procedure Code.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 44/28.

BEFORE:

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

IN THE CASE OF:

Asma Bint Selim El Rayes — APPELLANT.

VS

Iskandar Kassab — RESPONDENT.

Entry of cross appeal at hearing of appeal—Art. 185, Civil Procedure Code—Construction of compromise agreement — Absence of clause as to joint and several liability in agreement signed by two partners—Each partner held liable for portion of liability — Claim of portion of liquidated damages—Breach of contract.

Appeal from the judgment of the District Court of Haifa dated January 6th, 1928.

JUDGMENT.

Several points were raised in this appeal, but most of them having been withdrawn, we are left with two points only.

The first one is that part of the judgment ordering Respondent to pay to Appellant £P. 400 as her share in the proceeds of the sale of land sold to the Palestine Land Development Company.

It is common ground that the Appellant is entitled to 10% of the total proceeds of this sale which amounted to £E. 8000. The Court has, however, ordered Respondent to pay only half of Appellant's share, namely £E. 400, leaving her to claim the other half from another partner in the land, her brother Raja Reis. The Appellant alleges that this land was sold by Respondent and that he should be held responsible for the full amount of her share.

On the hearing of this appeal the Respondent stated that he was entering a cross-appeal on the same point. Unsatisfactory as it is to have to consider a cross-appeal at a moment's notice, we are bound to accept it in the face of Article 185 of the Ottoman Code of Civil Procedure of which the relevant part reads as follows:

"provided further that if one party lodged an appeal the Respondent shall have a right to appeal until the appeal so

lodged has been decided even though the period otherwise allowed for this appeal has already expired".

The ground of the cross-appeal is that although under the compromise dated 11th April, 1926, Respondent is entitled to 50% of the proceeds of the sale he only received some 600 Pounds odd out of the total value of 8000 Pounds, the balance having been put to the credit of Raja, and that hence he should only pay 10% of the sum he actually received and no more.

In reading Article 3 of the compromise on which this claim is based, however, it appears clearly that the land in question, among others, was sold by both Respondent and the other partner, and in the absence of any clause as to joint and several liability, each of the partners must be held liable for half the value belonging to Appellant, and we hold that both appeal and cross-appeal on this point must fail.

Now we come to the other point of appeal, namely, the claim for damages. Article 11 of the said compromise provides that in case any party fails to perform his obligations under the contract or tries to annul them he should pay £E. 5000 to the other parties who are not in default. By virtue of that Article Appellant claimed £E. 2500 in the Court below, and the Court, although it referred to that claim in the judgment, omitted to give any decision on it. On appeal, the Appellant asked to amend the judgment ordering Respondent to pay her £E. 2500. At the hearing of the appeal, counsel amended his claim and declared that he would be satisfied with one third of the penalty, his client being only one of the three parties against whom breach has been committed.

The question for us to decide is whether or not there is a breach on the part of the Respondent.

In view of the fact that Respondent has not paid, and moreover, has denied his liability to pay to Appellant the £E. 400 due to her as above, we hold that the Respondent Iskandar Kassab has failed to conform with one of the terms of the agreement, and hence is liable to pay to the Appellant Asma Bint Selim El Rayes the equivalent in Palestinian currency of £E. 1666.666 as her part in the agreed liquidated damages, in addition to the other sums adjudged.

The judgment of the District Court will be amended accordingly.

No order as to costs.

Delivered the 29th day of October, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 81/28.

BEFORE:

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

IN THE CASE OF:

Iskander Kassab — APPELLANT.

vs

Eleasar Eliachar
Zalman White
Toba Rotman — RESPONDENTS.

Judgment given in absence of party— Service of copy of judgment of Land Court on servant held to be invalid—Art. 25, Civil Procedure Code replaced by Art. 33 of Appendix—Commencement of time for appeal—Sec. 7 (2), Land Courts Ordinance, 1921.

Appeal from the judgment of the Land Court of Haifa, dated the 18th day of April, 1928.

JUDGMENT.

The Court holds that though Article 25 of the Code of Civil Procedure has not been repealed expressly, the effect of Article 33 of the Amending Law of 26th March, 1327, is to replace Article 25 of the Code of Civil Procedure in its entirety.

It follows that valid service cannot be made upon a party's servant.

In the present case there has, therefore, been no valid service upon the Appellant of a copy of the judgment of the Land Court given in the absence of the Appellant, consequently, in accordance with Section 7(2) of the Land Courts Ordinance, 1921 and the judgment of this Court in Civil Appeal No. 111/28 (Eleachar vs. Piciotto) the time for appeal has not begun to run.

The appeal is dismissed with costs including £P. 3 advocate's fees and expenses.

Delivered the 18th day of March, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 115/28.

BEFORE:

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

IN THE CASE OF:

Nicola Elias Nasr — APPELLANT.

vs

Haim Brakha
Daud Musa
Abraham David — RESPONDENTS.

Damage clause in contract — Strict wording of Article 107, Civil Procedure Code held not essential — Exclusion of Article 106, Civil Procedure Code.

JUDGMENT.

This Court has held in the case of Joseph Rokach and Others vs Sudki Ragheb Kamal and Others (Civil Appeal 22/1927*) that where the contract stipulates that there shall be no necessity for notarial protest, the fact that the wording of the contract differs from that of Article 107 of the Code of Civil Procedure does not necessarily make the stipulation inoperative.

The only question therefore is whether the wording of the contract between the parties to this case, clearly excludes the operation of Article 106.

The words of Clause 5 of the contract are:

> "If the second party fails to comply with any terms of this contract he will be bound to return all the money which he received and in addition to this he will pay the sum of £E. 40.- as liquidated damages assessed in advance without need for a protest or notice".

We hold that this clause clearly excludes the operation of Article 106.

The appeal is therefore allowed, the judgment of the District Court is set aside and the case remitted for decision upon the merits.

Costs of this appeal will be paid by the Respondent.

Delivered the 20th day of March, 1929.

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* Reported ante page 314.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 96/29.

BEFORE:

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

IN THE CASE OF:

Moshe Daniel Piccioto — APPELLANT.

vs

Jacob Goral

Moshe Goral — RESPONDENTS.

Civil procedure — No stipulation re interest included in mortgage deed — Interest collectible on payment overdue under contract — Article 112, Civil Procedure Code — Protest by creditor for non-payment.

Appeal from the judgment of the District Court of Jerusalem, dated 16th day of May, 1929.

JUDGMENT.

The mortgage contained no stipulation with regard to the payment of interest. It was a mortgage which is prevailing in this country, whereby interest is deducted from the original debt.

In dealing with the question of interest, the Court cannot go beyond the terms of Article 112 of the Code of Civil Procedure, which provides:

> "If the contract be for the payment of a certain sum of money and there be delay in payment, damages may be awarded at the rate of one percent per month (reduced to 9% per annum by the law of the rate of interest) on the principal amount, and the creditor shall not be required to prove that he has suffered any loss. If no stipulation for the payment of interest be included in the contract, it shall be payable from the date of the protest, if it was claimed in the protest, and otherwise from the date of the presentation of the claim".

Accordingly, in the case of an agreement between the parties for the payment of interest, such interest is payable only in respect of the period covered by the contract.

In the absence of either (a) an unlimited undertaking on the part of the debtor to pay interest until full satisfaction of the debt, or (b) a protest by the creditor, a claim for interest beyond the period stipulated in the contract cannot be sustained.

The appeal must therefore be dismissed with costs and advocate's fees assessed at £P. 2.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 128/30.

BEFORE:

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

IN THE CASE OF:

Marianthi, widow of George Matta, on behalf of herself and as guardian of her minor son — APPELLANT.

vs

Izmaraghada bint Matri Matta — RESPONDENT.

Civil procedure — Verification of handwriting — Admission of documents for comparison—Chief Clerk appointed to conduct proceedings of verification—Articles 91 to 105, Civil Procedure Code.

Appeal from the judgment of the District Court of Haifa, dated 30th day of June, 1930.

JUDGMENT.

The verification of the handwriting has been carried out by a committee of three persons, of whom one, the Chief Clerk of the Magistrate's Court of Acre, was appointed also to represent the Court.

As a natural consequence of this irregularity, a difficulty has arisen with regard to admission of documents for comparison, which might have been avoided if the provisions of Article 97 of the Code of Civil Procedure had been observed, and a Judge of the Court had been appointed to conduct the proceedings.

The proceedings are clearly irregular, and a judgment based upon them cannot stand.

The judgment of the District Court is set aside and the case remitted for verification of the handwriting to be carried out in accordance with the provisions of Articles 97 to 105 of the Code of Civil Procedure as amended, and a fresh judgment given.

Costs will be costs in the case.

Delivered the first day of October, 1931.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 5/31.

BEFORE:

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

IN THE CASE OF:

Mariam wife of Ayub Yasin Ayub, et al. APPELLANTS.

VS

Muhammad Shehab ed Din, et al. RESPONDENTS.

Civil procedure—Notification of judgment of Land Court wrongly made—Copy of judgment not served on party—Commencement of period for appeal.

Appeal from the judgment of the Land Court of Jaffa, dated the 30th of November, 1930.

JUDGMENT.

The Court holds that the procedure adopted in this case does not constitute notification of the judgment of the Land Court as required by law.

The parties were never summoned to the Court to hear the judgment delivered, and no copy of the judgment, or of the operative part thereof, has been served upon any of the Appellants.

The procedure adopted appears to have been that the judgment was sent to the Settlement Officer and the parties were summoned to his office and the effect of the judgment was explained to them there. This does not constitute notification in accordance with the law.

It follows that the period for appeal has not begun to run.

There is therefore no appeal before the Court, and this application is dismissed.

Costs will follow the event.

Delivered the 29th day of March, 1932.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 7/31.

BEFORE:

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

IN THE CASE OF:

The Arabs of Infe'at Village Settlement Committee represented by—
Nimr Hassan es Saiyed
Fahim el Ibrahim
Suleiman ed Daud
Muhammad el Muhsin
Ali el Abdallah — APPELLANTS.

vs

The Government of Palestine
Khudeira Village Settlement Committee
Yehoshua Khankin
Abdallah Samara & Partners
Agudath Neta'im
Palestine Jewish Colonization Association — RESPONDENTS.

Civil procedure—Mode of lodging of appeal from judgment of Land Court—Application of rules of civil procedure to Land Settlement Ordinance—Time for lodging of appeal—Section 7(2), Land Courts Ordinance, 1921—Section 57(2), Land Settlement Ordinance, 1928—Article 186, Civil Procedure Code and Article 22 Addendum.

Appeal from the judgment of the Land Court of Haifa, dated the 5th day of December, 1931, delivered on the 3rd day of January, 1932.

JUDGMENT.

Article 186 of the Code of Civil Procedure laid it down that an appeal should be lodged by presenting an application direct to the Court of Appeal.

Article 22 of the Addendum of the Civil Procedure Code provided that a petition for appeal could be made to the Court of Appeal or to the Court of the place in which the Appellant resides.

Section 57(2) of the Land Settlement Ordinance, 1928, expressly prescribes that notice of an appeal from the judgment of a Land Court to the Court of Appeal shall be lodged with the Court of Appeal within a certain time.

The Land Courts Ordinance, 1921, in Section 7(2) expressly imports, subject to any Rules of Court, into the procedure of Land Courts the procedure laid down in the Code of Civil Procedure as amended.

The Land Settlement Ordinance, 1928, does not expressly import this Code or its Addendum.

This Ordinance expressly requires notice of the appeal to be lodged with the Court of Appeal. Can it be said that filing the notice in the Land Court addressed "to the President of the Supreme Court through the Presidency of the Land Court Haifa" is such lodging.

We are bound to hold that it is not and that therefore the appeal which was only forwarded to the Supreme Court on the 21st March has not been lodged with this Court within the prescribed time. Therefore, we are not seised of the appeal.

We must therefore give judgment for the Respondents with £P. 2 advocate's fees and costs.

Delivered the 7th day of March, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 23/31.

BEFORE:

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

IN THE CASE OF:

Gabriel Moshayoff — APPELLANT.

vs

Bakhmal Moshayoff — RESPONDENT.

Failure to serve copy of judgment of Lower Court—Commencement of period for appeal—Article 22, Appendix to Civil Procedure Code.

Appeal from the judgment of the District Court of Jerusalem, dated the 23rd day of October, 1930.

JUDGMENT.

No copy of the judgment of the District Court of 23rd day of October, 1930, having been served in accordance with Article 22 of the Appendix to the Civil Procedure Code, the period of appeal has not commenced and accordingly there is no legal appeal before the Court.

The application is dismissed with costs and advocate's fees assessed at £P. 2.

Delivered the 19th day of October, 1931.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 29/31.

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

IN THE CASE OF:

Village Settlement Committee of Khudeira
Palestine Jewish Colonization Association — APPELLANTS.

vs

Village Settlement Committee of Arab Damayrah
Ahmad Jaber of Arab Damayrah — RESPONDENTS.

Failure to notify judgment before appeal—Commencement of period for appeal.

Appeal from the judgment of the Land Court of Haifa, dated the 14th day of January, 1931.

JUDGMENT

As there has been no notification of the judgment the period in which an appeal can be lodged has not yet begun to run.

The application is therefore dismissed.

Costs to follow the event.

Delivered the 5th day of April, 1932.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 31/31.

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

IN THE CASE OF:

Muhammad Ibrahim el Ayadi
Mahmud Ibrahim el Ayadi
Amneh Ibrahim el Ayadi
Hindah Ibrahim el Ayadi
Abdel Hadi Muhammad el Ayadi — APPELLANTS.

vs

Haj Hassan el Ayadi
Haj Saleh el Ayadi — RESPONDENTS.

Civil procedure—Appeal—Time for filing grounds of appeal.

Appeal from the judgment of the Land Court of Jaffa, dated the 30th day of January, 1931.

JUDGMENT.

The grounds of appeal not having been filed till nearly fifteen months after notice of appeal was lodged, are out of time.

The appeal is therefore dismissed with costs.

Delivered the 5th day of July, 1932.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 33/31.

BEFORE:

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

IN THE CASE OF:

Muhammed Shehab ed Din
Abd er Raouf Shehab ed Din
(on behalf of Khalil Shehab
ed Din's estate)
Ausheh Shehab ed Din — APPELLANTS

vs

Harb Rashid Ayoub
Dib Rashid Ayoub — RESPONDENTS.

Appeal from decision of Land Settlement Officer — Appellants not given opportunity of addressing Land Court in support of appeal— Judgment of Land Court set aside.

Appeal from the judgment of the Land Court of Jaffa, dated 24th day of April, 1931.

JUDGMENT.

The Appellants have not been given an opportunity of addressing the Land Court in support of their appeal against the decision of the Settlement Officer.

In accordance, therefore, with the judgment of this Court in Land Appeal No. 43/31, Shakib el Haj and another v. Rashid Abdel Fattah Mustafa, the judgment of the Land Court must be set aside and the case remitted for the parties to be heard and a fresh judgment given.

Costs will follow the event.

Delivered the 7th day of April, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 75/31.

BEFORE:

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

IN THE CASE OF:

Muhammad Bayaa
Khalil Bayaa — APPELLANTS.

vs

Etablissement Orosdi-Back
of Beyrouth — RESPONDENT.

Application for leave to appeal—Failure to file security as required by law—Section 5 (ii), Magistrates' Courts Jurisdiction Ordinance.

Appeal from the judgment of the District Court of Haifa, dated the 6th day of March, 1931, sitting as a Court of Appeal from the Magistrate's Court of Haifa. Preliminary objection was raised that the Appellant had failed to comply with the provisions of the law as to furnishing security as required by Section 5 (ii) of the Magistrates' Courts Jurisdiction Ordinance, 1924.

JUDGMENT.

The Court, after hearing Mr. Fuad Atallah for the Appellants and Mr. Kitay for the Respondent, orders that the appeal be dismissed with £P. 2 advocate's fees and costs.

Delivered the 25th day of January, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 94/31.

BEFORE:

The Chief Justice, the Senior Puisne Judge and Khayat, J.

IN THE CASE OF:

Shimon Jacob Shimon — APPELLANT.

vs

Barclays Bank (D. C. & O.),
Jerusalem — RESPONDENT.

Failure to serve copy of judgment appealed—Adjournment granted to Appellant to enable him to comply with Article 23, Addendum to Civil Procedure Code—Section 3, District Court Rules of Court, 1931.

Appeal from the judgment of the District Court of Jerusalem, dated the 5th day of August, 1931, declaring the Appellants bankrupt.

JUDGMENT OF PRELIMINARY POINT.

JUDGMENT OF THE SENIOR PUISNE JUDGE.

The District Court Rules of Court, 1930, while amending the period for appeal in contested actions, have not altered the rule laid down in Article 23 of the Appendix to the Code of Civil Procedure requiring that the party appealing shall serve a copy of the judgment under appeal upon the other party.

The Appellant must therefore serve a copy of the judgment of the District Court. An adjournment will be granted for this purpose.

Delivered the 25th day of September, 1931.

JUDGMENT OF THE CHIEF JUSTICE.

The Court holds that the provision as to necessity of Appellant attaching to his petition a copy of the judgment of the lower Court under Article 23 of the Addendum to the Code of Civil Procedure has not been abrogated by Section 3 of the District Courts Rules of Court, 1930, and that an adjournment should be granted for the purpose of this provision being complied with by the Appellant.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 108/31.

BEFORE:

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

IN THE CASE OF:

'Isa Mubarak El Qattan — APPELLANT.

vs

Joseph Elyashar — RESPONDENT.

Civil procedure—Failure to serve copy of judgment appealed from—Attention of Appellant drawn to omission.

Appeal from the judgment of the District Court of Jerusalem, dated the 13th day of August, 1931.

JUDGMENT.

In this case the Appellant did not serve on the Respondent a copy of judgment appealed from. In his rejoinder filed over four

months ago, the Respondent drew attention to this omission. Service of the judgment has still not been effected.

We therefore dismiss the appeal with £P. 2 advocate's fees and costs.

Delivered the 16th day of February, 1932.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 3/32.

BEFORE:

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

IN THE CASE OF:

Fayez Suleiman Es-Sikhtian — APPELLANT.

vs

Rida el Haj Yusef Es-Sikhtian in his capacity as Mutawalli of the waqf of his grandfather — RESPONDENT.

Grant of leave to appeal to Supreme Court on point of law — President to state point of law—General leave to appeal held not to be compliance with Section 4, Magistrates' Courts Jurisdiction Ordinance, 1924.

Appeal from the judgment of the Land Court of Nablus, dated the 28th day of November, 1931.

JUDGMENT.

Section 4 of the Magistrates' Courts Jurisdiction Ordinance, 1924, prescribed inter alia that "the President of the Court may if he considers it proper so to do grant leave to appeal to the Supreme Court on a point of law".

No point of law has been stated by the learned President and the case is returned for the President to state a point of law, the Court holding in conformity with previous judgments that a general leave to appeal is not a compliance with the beforementioned Section 4.

Costs to be costs in the cause.

Delivered the 10th day of May, 1932.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 10/32.

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

IN THE CASE OF:

Ibrahim Said Mustafa Jallad — APPELLANT.

vs

Mahmud Sheikh Qasem Jallad
Khader Yusef Jallad
Yusef Suleiman Jallad — RESPONDENTS.

Extension of legal period for appeal—Civil procedure—Grounds of Appeal lodged six months after Notice of Appeal—Good cause not shown for omission to file Grounds of Appeal in time.

Appeal from the judgment of the Land Court of Nablus, dated the 10th day of September, 1931.

JUDGMENT.

The judgment appealed against was given on the 7th September, 1931. Notice of Appeal was lodged on the 1st October, 1931, and the Grounds of Appeal were lodged on the 6th April, 1932 (six months after Notice of Appeal).

We are of opinion that good cause has not been shown for the omission to file grounds of appeal, and in accordance with the judgment contained in Civil Appeal No. 76/27, the appeal must be dismissed with costs and advocate's fees assessed at £P. 2.

Delivered the 2nd day of June, 1932.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 22/32.

BEFORE:
The Senior Puisne Judge, Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Daoud Abu Sharifeh — APPELLANT.

vs

Khaldi Muhammad Mansur
Aiyash, for the heirs of Haj
Saleh Shaker
Muhammad Sa'id As'ad Haj
Hussein Zaghal — RESPONDENTS.

Summons served on person not named as Defendant — Oral application to be joined as Third Party refused — Necessity of written application—Article 117, Civil Procedure Code.

Appeal from the judgment of the Land Court of Nablus, dated the 10th day of December, 1931.

JUDGMENT.

A summons was wrongly served upon the Appellant calling upon him to appear before the Land Court, although he was not named as a Defendant.

On appearing he applied orally to be admitted as Third Party, and his application was dismissed.

As the Appellant did not submit an application in writing, as required by Article 117 of the Civil Procedure Code, we hold that his application was rightly refused.

The appeal is dismissed with costs including £P. 2.500 advocate's fees and expenses.

Delivered the 29th day of September, 1932.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 47/32.

BEFORE:

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

IN THE CASE OF:

Atef Salim el Far and Others — APPELLANTS.

vs

Haj Ahmed Yasin and Another — RESPONDENTS.

Procedure for lodging of appeal—Copy of judgment appealed against to be attached to appeal and served on Respondent—Discretion of Court of Appeal notwithstanding delay — Good cause not shown for failure to serve judgment—Rules of Court 1st June, 1921.

Appeal from a judgment of the Land Court dated the 30th day of February, 1932.

JUDGMENT.

It is a condition precedent to the hearing of an appeal, that a copy of the judgment appealed against shall be attached to the petition of appeal and a copy served on Respondents. A copy of the judgment in this appeal was not served on the Respondents until 11th February, 1933, and at the same time a copy was lodged in Court.

Respondents have at no time called the attention of the Appellants to the fact that a copy of the judgment had in fact not been served on them or lodged in Court. The Court on good cause being shown may allow a condition precedent to be fulfilled before hearing the appeal notwithstanding the delay (see Rules of Court of 1st June, 1931). In this appeal, however, no good cause has been shown for non-service and lodgment for eleven months.

Accordingly, the appeal must be dismissed with costs and advocate's fees.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 54/32.

BEFORE :

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

IN THE CASE OF :

Fuad Sa'd and Others — APPELLANTS.

vs

The Attorney General — RESPONDENT.

Judgment not served on Respondent until more than one year from delivery — Waiver of right to be served with copy of judgment — No point of law disclosed in appeal — Time for taking preliminary objection — Appointment of person to inspect land in dispute — Rules of Court, November 16th 1926.

JUDGMENT.

The first objection taken by the Respondent is that no copy of the judgment under appeal was served upon him until more than a year after the judgment was delivered. The Respondent relies upon the judgments of this Court, in Zubak v. Glovsky, L. A. 38/31, and Atif Salim el Far and Others v. Haj Yassin and Another, L. A. 47/32.

It is to be noted, however, that the Respondent on November 18th, 1932, filed a reply to the appeal in which he made no reference to the fact that a copy of the judgment had not been served upon him. It is clear that a preliminary objection of this nature should be taken at the earliest opportunity, and as the Respondent did not take this objection in his reply, he must be held to have waived his rights to do so.

The second objection taken by the Respondent, is that the Appellants disclosed no point of law and this objection was taken in Respondent's reply of November 18th, 1932.

For the Appellants, Mr. Abcarius states that the point of law raised is that the third person appointed to inspect the land in dispute was not duly appointed in accordance with the Rules of Court published in O. G. No. 175 dated November 16th, 1926.

This point, however, has not been raised by the Appellants in their appeal, nor indeed was it taken in the Land Court where, in fact, objection to the appointment in questionw as taken by the Respondent.

It is clear that the appeal cannot now be heard on this point. The appeal is dismissed.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 61/32.

BEFORE:

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

IN THE CASE OF:

Jallad — APPELLANT.

vs

Jallad — RESPONDENT.

Insufficient security lodged for costs of appeal — Appellant notified of defect—Dismissal of appeal for failure to comply with provisions of Article 186, Civil Procedure Code.

JUDGMENT.

The guarantee is bad. The Appellant's notice was called to the fact in Respondent's rejoinder of August 29th, 1932, and it was not remedied. Following previous decisions of the Court in similar cases, the application for appeal not fulfilling the conditions laid down in Article 186 of the Code of Civil Procedure, it is hereby dismissed with costs and advocate's fees assessed at £P. 2.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 155/32.

BEFORE:

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

IN THE CASE OF:

Isaac Hos and Co. — APPELLANT.

vs

Yusef Hanun Rushdi — RESPONDENT.

Respondent wrongly named in appeal—Application to amend name—Leave to appeal in wrong name.

Appeal from a judgment of the District Court of Jaffa, dated September, 1932, dismissing an appeal from the judgment of the Magistrate's Court, Tel-Aviv, on the ground that the Appellant was wrongly named.

JUDGMENT.

On June 12th, 1932, the Magistrate of Tel-Aviv dismissed an action against Rushdi Hanun Yusef. On June 16th, 1932, an appeal was lodged against this judgment giving the name of Respondent as Yusef Hanun Rushdi. On September 13th, the before-mentioned decision of the Magistrate of June 12th was confirmed in the name of Yusef Hanun Rushdi.

Leave to appeal against this judgment was applied for and granted in the name of Yusef Hanun Rushdi, and an appeal was lodged in the name of Yusef Hanun Rushdi.

In Respondent's reply of December 16th, 1932, he called the attention of Appellant to the fact that the original decision of the Magistrate was against Rushdi Hanun Yusef and in January of this year Appellant applied to amend the Respondent's name to that of Rushdi Hanun Yusef which was too late.

No leave to appeal has been given in the name of Yusef Hanun Rushdi and this is the only appeal that can possibly be before us; however, the original decision is in the name of Rushdi Hanun Yusef, therefore we cannot be seised with an appeal in the name of Rushdi Hanun Yusef inasmuch as leave has been given in another name i. e. Yusef Hanun Rushdi.

The appeal is therefore dismissed with costs and advocate's fees assessed at £P. 2.

Delivered the 30th day of March, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 8/33.

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

IN THE CASE OF:
Asher Levitsky (as Syndic in the Bankruptcy of H. Lederberg) APPELLANT.

vs

Zalman Corn RESPONDENT.

Civil Procedure—Son-in-law held to be included in persons referred to in Article 82, Civil Procedure Code — Allegation of collusive arrangement between bankrupt and son-in-law — Leave to appeal granted by President of District Court from decision of Magistrate— President not to express opinion on point of law on which leave granted — Article 5, Addendum of 1323 to Commercial Code — Correct Translation of Article 82, Civil Procedure Code.

JUDGMENT.

The President of the District Court gave leave to appeal from the judgment of the Court upholding a decision of the Chief Magistrate of Jerusalem. We wish to say at the outset that the President of the District Court in granting such leave should not express, as he has done in this case, an opinion upon the point of law on which leave is granted by saying that "the District Court is of opinion that it erred in what it held at the trial of the appeal".

As to the merits of the case the matter concerns Article 5 of the Addendum of 1323 to the Commercial Code which was in force in Palestine before November 1st, 1914, as required by Article 46 of the Palestine Order-in-Council.

It runs: "Documents submitted by creditors who are related to the bankrupt within the degrees mentioned in Article 82 of the Code of Civil Procedure shall not be accepted unless they are authenticated by the Notary Public and registered in the bankrupt's books".

The Plaintiff is the son-in-law of the bankrupt and the Magistrate held, and the District Court upheld him in saying that such a relationship did not come within the degrees mentioned in Article 82 of the Civil Code of Procedure. The Magistrate relied on Hooper's translation which we find is totisdem verbis that in the Baghdad translation, viz: "when the contracting parties are husband and wife, or ascendants or descendants in the direct line, or collaterals up to the third degree". We have had the text translated anew and are satisfied that it should run as follows:

> "when the contracting parties are husband and wife, ascendants and descendants, brother and sister or their children or father and mother, his (sic) sister or father-in-law and mother-in-law".

Salim Baz on the Civil Procedure, page 290 of the Second Edition 1911, says: "This article is not altogether free from bad drafting; it however refers to actions arising between husband and

wife... or between a son-in-law and father-in-law, or between him and his mother-in-law".

We agree with Baz that the draftsmanship is obscure but it must be clear that the reference to "father-in-law" and "mother-in-law" cannot relate to contracts between these two relations for they are from the nature of things husband and wife and have already been mentioned in the article.

Hence we hold that in this case the documents were submitted by a creditor who came within one of the degrees of relationship envisaged in Article 82 of the Civil Procedure Code, and for this reason we give judgment for the Appellant and set aside the judgment of the District Court and the Magistrate's Court, and substitute for the latter judgment for the Defendant with costs.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 28/33.

BEFORE:

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

IN THE CASE OF:

Zaki Dajani — APPELLANT.

vs

Mariam Barcho — RESPONDENT.

Action on promissory note—Allegation that bill given without consideration — Evidence of witnesses not heard against promissory note—Evidence of parties heard—Defendant absent on account of illness—Production of medical certificate—Case to be adjourned on production of medical certificate of illness of party.

JUDGMENT.

This is an appeal against the judgment of the Jerusalem District Court whereby judgment was given for the Respondent on a bill drawn by the Appellant in favour of the Respondent for the sum of £P. 500 and expressed to be for value received by the Appellant.

The Appellant in the Lower Court alleged that the bill was given without consideration and dependent on a condition that the Respondent should deliver to the Appellant a motor car which she failed to do and which he desired to prove by the evidence of witnesses as well as that of the parties to the action.

The Lower Court in their judgment dated the 3rd day of January, 1933, stated that:

> "They had decided to reject the application of the attorney for the Defendant for hearing witnesses other than both parties in order to prove facts contrary to the contents of the bill and had decided to summon both Plaintiff and Defendant as witnesses in the case in connection with the Defence put forward by the Defendant and for that purpose adjourned the hearing of the case for that day".

The Lower Court was correct in holding that the parties to the action were the only witnesses which could be heard (See C.A. No. 72/31).

However, it appears that the District Court having decided to hear the evidence of the parties and having notified the parties of their decision, upon the final hearing of the case a medical certificate was produced on behalf of the Appellant to the effect that he was ill and unable to attend.

The Court rejected the certificate and proceeded to give judgment.

Now this Court has on many occasions decided that where a medical certificate is produced the case should be adjourned and we are of opinion that in the present case the Court should have adjourned the hearing for the attendance of the parties.

Accordingly the judgment of the Lower Court must be quashed aud the case remitted for the Court to hear the parties and to give a fresh judgment.

Delivered the 4th day of July, 1934.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 109/33.

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

IN THE CASE OF:

Aharon Chajuss	APPELLANT.
vs	
Hashem Kazzaz	RESPONDENT.
and	
Nimer Doleh	THIRD PARTY.

General average contribution — Jettison of goods — Respondent wrongly named in Appeal.

Appeal from a judgment of the District Court of Jaffa, dated the 28th day of February, 1933, confirming a judgment of the Magistrate's Court Jaffa, for general average contribution for loss caused by the jettison of goods near Jaffa Port.

JUDGMENT.

This is an appeal from the judgment of the District Court in its appellate capacity confirming a judgment of the Magistrate's Court. The action was brought by the present Respondent, a commercial firm, under the name of Hashem and Kazzaz Co., and judgment was given in their favour. The Appellant in his appeals both before this Court and the District Court cited the Respondent as "Hashem Kazzaz" omitting not only the conjunction "and" which connects the two names, but also the description of the nature of the firm viz: "Co." thus substituting for the name of the Plaintiff firm what would appear to be the name of a private individual.

The Respondent asks for the appeal to be dismissed on the ground that the appeal was not lodged against the proper party, relying upon Civil Appeal No. 155/32, Isaac Hos and Co. v. Yusef Hannun Rushdi, in which case this Court dismissed the appeal because the proper party to be cited was not Yusef Hannun Rushdi but Rushdi Hannun Yusef.

This case is distinguishable from Civil Appeal No. 98/32, Abdel Raouf Bitar v. the United German Pumping Manufacturers Borsig-Hall Co. Ltd., in which case the Court, while not satisfied that the company so cited was the same company as the United German Engineering Works Junkers Borsig-Hall Ltd., held that since the advocate for the latter Company who did not represent the former accepted service of the appeal he was not entitled to resist an application by the Appellant to amend his notice of appeal.

We hold that the Respondent is correct in urging that the present case is covered by Civil Appeal No. 155/32, and for this reason the appeal is dismissed with costs and £P. 2.500 advocate's fees for the Respondent and £P. 1 travelling expenses for the Third Party.

Delivered the 4th day of December, 1934.

COMPANIES.

In the District Court of Jerusalem.

C. D. C. Jm. No. 19/24.

BEFORE:

Copland, J. and Valero. J.

IN THE CASE OF:

The Government Advocate — PLAINTIFF.

vs

Portland Cement Co. "Nesher" Ltd. — DEFENDANTS.

Registration of foreign company—Secs. 16, 79-83, 118, Companies Ordinance, 1921—Amount of fee payable for registration—Purchase of land in Palestine by company registered in England — Carrying on business in Palestine—Effect of certificate of incorporation.

JUDGMENT.

This is an action brought by the Government Advocate as representing the Government of Palestine against the Portland Cement Co. "Nesher" Ltd., for the balance of fees alleged to be due on registration of the Company in Palestine.

The facts so far as material are as follows:—

The Company was registered in England on the 31st of August, 1922, with a capital of £. 30,000 sterling, and an application was made to the Registrar of Companies in Palestine on the 25th of October, 1922, to register the Company as a foreign Company under Sections 80 and 81 of the Companies Ordinance, 1921.

On the 30th day of October, 1922, the Company's application was granted and the Company was duly registered as a foreign company paying as such the registration fee of ££. 25 as laid down in Section 81 (2) of the Ordinance.

On the 3rd of November, 1922, the Company purchased three thousand dunams of land at Haifa paying therefor the sum of £E. 19,000, which it may be noted is almost two thirds of their capital and immediately proceeded to erect a cement factory.

The only objects of the Company as defined in their Memorandum of Association which concern us are:—

(a) To carry on business as manufacturers of or dealers in Portland Cement; to construct, erect, equip and operate a factory or factories for the manufacture of Portland Cement.

(b) To do all or any of the above things in any part of the world.

The Government Advocate alleges that this is a Company which has as its principal object or as one of its objects the carrying on of business in Palestine and is therefore liable to pay the same fee as would be payable if the Company had been a Palestinian Company that is, the sum of £. 150 being one half per cent on the original capital of the Company, less the sum of £E. 25 already paid.

The defence is really in two parts: One, that the principal object of the Company is not to carry on business in Palestine and the second is that if it should be held that the first part of the defence is not sound then by Section 16 (2) of the Ordinance, they are not liable to pay any further fees because a certificate of registration is conclusive that all things that should have been done have been done.

Now the Company in erecting this factory in Haifa were clearly acting within the terms of their Memorandum of Association which permits them to operate in any part of the world and I do not see that there would have been any difference if they had placed among their objects the power to erect a factory in Palestine. The phrase "any part of the world" includes Palestine and any other country.

The question, therefore, whether the principal object or one of the leading objects of the Company is the carrying on of business in Palestine is one of fact, and where we have a Company which spends two-thirds of its original capital on buying land in Palestine and then proceeds to erect a factory on this land, I have no hesitation in saying that the time at which they applied for registration their object was to carry on business in Palestine, and though since registration they may have increased their capital and may be contemplating the carrying on of business in other countries, yet this is immaterial. The only point that matters is what was their principal object at the time of registration. It is also worthy to note that the name of the Company is a Hebrew word which affords some slight evidence as to the place of the Company's operation; the use of Hebrew would appear to imply a connection with Palestine. The first ground of defence therefore falls.

With regard to the second line, namely, that Section 16 (2) prevents the Government claiming any balance of fees alleged to

be due after registration has been effected, I do not think that this Section applies to foreign companies but that only local companies come within its scope.

Section 80 of the Ordinance states that a foreign company not previously registered under Ordinance No. 118 shall apply for registration. Sections 81 and 82 lay down the conditions to be complied with in the application for registration and provide that certain information shall be given to the Registrar. Section 83 states the Sections of the Ordinance with which every foreign company shall comply, which would appear to show that it was not intended that the whole Ordinance should apply to such foreign companies but only those parts of it which are specially mentioned. Chapter 8, also, in which Sections 80 to 83 are found is headed "Companies already registered and foreign companies", Section 79 applying to companies already registered.

But supposing that this Section should so apply by analogy and presuming a case of deliberate fraud where a company intends to do business only in Palestine and makes false statements to the Registrar on the strength of which he issues them a certificate of registration as foreign company, could it be successfully contended that the Registrar was estopped by reason of Section 16 (2) from claiming the proper fees when the fraud was discovered? I do not think so. In such a case the company would be already liable. The same would apply supposing the wrong fees had been demanded and paid by mistake.

The certificate of incorporation on registration (I assume for the sake of this argument that they are the same thing, though I do not wish it to be assumed that I agree that they are) is conclusive as regards the validity of the incorporation or registration and as regards a foreign company is conclusive as to the requirements of Section 81 (1) (a) and (c) having been carried out.

Payment or non-payment of the fees cannot affect the validity of a registration.

I am therefore of opinion that the Registrar is entitled to demand that the proper fees should be paid so soon as it is discovered what the principal object or one of the leading objects of the Company is.

Judgment therefore must be entered for the Plaintiff for the sum claimed, —£E. 121.250.

Delivered at Jerusalem the 14th day of July, 1924.

In the District Court of Jerusalem.

C.D.C.Jm. No. 61/25.

BEFORE:

Baker, J. in Chambers.

IN RE:

The Palestine Import and Export Co., Ltd.
The Companies Ordinance 1919—1924.

The Companies Ordinances, 1919—1924 — Failure of Company to comply with provisions of law re annual meetings, etc, due to inadvertence — Just and equitable relief granted under Article 89, Companies Ordinance, 1921 — Publication of order in newspapers.

ORDER.

After hearing the application of the Palestine Import and Export Co. Ltd. and the Registrar of Companies and being satisfied that the failure to hold general meetings, to make annual returns, to appoint auditors, to issue any balance sheets, to serve copies of the register of directors to the Registrar, to file any return of allotments, and to issue or file a prospectus or statement in lieu of prospectus required by the Companies Ordinances 1919 to 1924, was due to inadvertence and that it is just and equitable to grant relief, therefore by virtue and in exercise of the powers vested in me by Article 89 of the Companies Ordinance, 1921,

It is hereby ordered:—

1. That within 80 days from the date of this order the Company hold an annual meeting and make returns embracing the requirements of the Companies Ordinances, 1919 to 1924, in respect of the above mentioned conditions.

2. That a copy of this order be published in the Official Gazette of the Government of Palestine, and two other newspapers published and registered in Palestine,—a copy of such newspapers with the publication therein to be filed in this Court.

3. That any member of the said Company who may desire to show why such extension should not have been granted may petition the Jerusalem District Court within ten days from the date of this publication.

Dated the 31st day of July, 1925.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 140/26.

IN THE CASE OF:

Wolf Chasin, Jaffa — APPELLANT.

vs

Messrs. Muller & Co. on account of N.V. Algemeene Yeer & Stall-maatschappy Ferrostal, The Hague — RESPONDENTS.

Registration of foreign company—Section 80, Companies Ordinance, 1921—Carrying on business in Palestine—Effect of failure to register on right of company to bring bankruptcy proceedings in Palestine.

The Company appointed Chasin its sole representative in Palestine for the sale of iron and steel.

JUDGMENT OF THE DISTRICT COURT.

The Court perused this agreement and is of opinion that it is a mere authorisation appointing Appellant as agent for sale of iron and steel.

Non-registration in Palestine subjects the foreign company in such and similar cases to the payment of the fine prescribed by the law and no more.

JUDGMENT OF THE COURT OF APPEAL.

We hold that if the Respondent, a foreign company, has carried on business in Palestine without being registered under Section 80 and other Sections of the Companies Ordinance, 1921, it was an illegal company and not entitled to bring bankruptcy proceedings in Palestine. And if the Respondent company is found to have been carrying on business in Palestine at the time of the application in bankruptcy without being registered under the law, the application should be dismissed.

Delivered the 9th day of July, 1926.

In the District Court of Jerusalem.

C. D. C. Jm. No. 161/27.

IN THE CASE OF:

Albert Pharaon & Others — APPLICANTS.

vs

Pierre Hallac & Others — RESPONDENTS.

Winding-up of company — Partnership consisting of more than ten persons—Contract for the formation of illegal association—Jurisdiction of Courts in winding-up matters—Article 80, para. 2, Sub-Section (c) Companies Winding-Up Ordinance, 1922.

JUDGMENT.

This is an application under Article 79, Sub-Section 3 of the Companies (Winding-Up) Ordinance, 1922, and by virtue of Article 8, Sub-Sections 2 and 6 of the said Ordinance for the winding-up of a partnership consisting of more than ten members.

The present Respondents originally brought an action in the District Court of Haifa claiming inter alia the rescission of an agreement between the parties to this application dated the 11th of October, 1926, on the grounds of its illegality as a contract for the formation of an illegal association and the delivery up to the Respondents of certain chattels.

In the judgment of the Haifa District Court it was held that the contract constituting the association was illegal and that the association was an illegal one. That the association came within the meaning of Article 80 para. 2, Sub-Section (c), Companies Winding-Up Ordinance and presumably could be wound-up by this Court as the Court having jurisdiction in winding-up matters. The application of the Respondents was dismissed on the grounds that in essence it was one for winding-up and that the Haifa District Court had no jurisdiction. The present Respondents have appealed against this judgment, one of their grounds being that no Court has power to wind-up an illegal association.

It is clear that this Court cannot have a concurrent jurisdiction with the Court of Appeal and until the Court of Appeal has decided the question as to whether the Association is an illegal one and can or cannot be wound-up under Article 80 para. 2 Sub-Section (c) of the Companies Winding up Ordinance, or whether the English law that an illegal company cannot be wound-up applies, this Court cannot entertain the petition for winding-up.

The petition is therefore dismissed.

Judgment in presence subject to appeal.

In the District Court of Jerusalem.

C.D.C.Jm. No 289/27.

BEFORE:

Baker, J. and Valero, J.

Power of Court to arrange compromise between company and creditors — Interpretation of Ordinance by reference to law of England — Right of creditor to winding-up order — Companies (Winding-up) Ordinance, 1922 — Sec. 120, Companies Consolidation Act, 1908 — Application for stay of execution — Liquidator ordered not to proceed with realization of assets.

JUDGMENT.

I am of opinion that Section 84 of the Companies (Winding-up) Ordinance, 1922, does not empower the Court to apply the provisions of Section 120 of the Companies (Consolidation) Act, 1908, the said Section only empowering the Court to interpret the Ordinance as it stands by reference to the law of England and not to introduce an article of the English law not contained in the Ordinance. I am, therefore, of opinion that under the present Ordinance there is no power to compromise with creditors and members as provided for in the English Act. I am also of opinion that a creditor who cannot get paid is entitled to a winding-up order as of right (see Bowes v. Hope Mutual Life Insurance and Guarantee Society (1865), 11 H. L. Cas. (Clark) 389).

We find that the Society is unable to pay its debts within the meaning of Section 9, para (1) of the Companies (Winding-up) Ordinance, and therefore order that the Society be wound-up by virtue of Section 79, para. (1) and Section 8 of the Companies (Winding-up) Ordinance, 1922.

The Court also orders that Mr. Sherley Dale, Chartered Accountant, be appointed liquidator, subject to his giving a guarantee for the sum of £P. 500.

Application has been made by the Society for a stay of execution pending appeal. We do not feel prepared to grant such a stay, but order that the liquidator do not proceed with the realisation of any assets of the Society but proceed only to carry on the business of the Society pending the hearing of the said appeal and judgment, provided always that an appeal is entered within 48 hours from the delivery of this judgment.

Judgment in presence and subject to appeal.

Given at Jerusalem the second day of February, 1928.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 64/28.

BEFORE:

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

IN THE CASE OF:

E. A. S. T. Co. — APPELLANTS.

vs

Elias Khairallah — RESPONDENT.

Principal and agent — Oath tendered to employee of company — Proper person to give evidence on behalf of company — Refusal to take oath—Section 81 (c), Companies Ordinance, 1921 — Warranty as to goods given by employee of company — Authority of agent.

Appeal from the judgment of the District Court of Jaffa sitting in its appellate capacity, dated 3rd day of March, 1928.

JUDGMENT.

With regard to the first point we hold that where a limited liability company is sued there would be no difference between the responsible manager whose name is registered on behalf of the company in Palestine under Section 81 Subsection (c) of the Companies Ordinance and any other employee who enters into a contract at any branch of the company, because by contracting on behalf of the company and disposing of its goods by sale he is regarded as authorised by the company or by the manager to do on his behalf that which insures the work. We also hold that the oath of the contracting employee is binding upon the company.

The court could interpret the non-attendance of the employee when duly notified as a refusal by the company to take the oath inasmuch as the oath of the employee is an establishing oath and not the oath of such evidence which is of no use to the Plaintiff.

The Defendant company cannot insist upon the court to use all the ways of the law to secure the attendance of the employee in the capacity of a witness because he is registered as a contracting representative of the company.

The general accepted rule is that an employee authorised to transact business binds the company by his undertakings which are within the scope of his duties. If he exceeds the instructions given to him by the manager of the company then he will be liable to the company only and the outsider is not bound to bear the consequences of the fact that the employee exceeded the scope of his duties which the outsider does not know.

The Court holds by a majority, Mr. Justice Baker dissenting, that the judgment be confirmed and the appeal dismissed with costs.

Delivered the 24th day of April, 1929.

DISSENTING JUDGMENT OF BAKER, J.

This is an appeal by special leave from a decision of the Jaffa District Court sitting in its appellate jurisdiction.

Leave to appeal to the Supreme Court was granted on the following points of law:

1. When a Defendant is a limited company and is tendered the oath in the absence of documentary proof, has the Plaintiff a right to demand that such oath be given by a specific employee or ex-employee of the Defendant company?

2. If such employee or ex-employee being within the jurisdiction is duly served with a summons to appear and fails to do so:

(a) Is such failure to attend to be construed as a refusal to take the oath on the part of the company?

(b) Can the Defendant company require the Court to insist upon the attendance of such employee or ex-employee so summoned?

3. Is an employee of a Defendant company (who is not registered as authorised to act under Section 81 (c) of the Companies Ordinance, 1921) capable of binding a company by a verbal warranty as to its goods?

I am of opinion that the law on the points raised is as follows:—

1. That when a Defendant is a limited company and is tendered the oath such an oath in order to bind the Company can only be taken by the person or persons authorised to act on behalf of the Company and registered as such under Section 81 (c) of the Companies Ordinance, 1921, and that the oath of an employee cannot bind the company.

2. (a) The failure of an employee of a company to appear when duly summoned cannot be construed by a court as a refusal by the company to take an oath.

(b) The Defendant company can certainly insist upon the Court using all legal methods to ensure the attendance of the employee or ex-employee as a witness.

3. Every agent who is authorised to conduct a particular trade or business or generally to act for his principal in a matter of a particular nature or to do a particular class of acts, has implied authority to do whatever is incidental to the ordinary conduct of such a trade or business, or of matters of that nature, or is within the scope of that class of acts, and whatever is necessary for the

proper and effective performance of his duties, but not to do anything that is outside the ordinary scope of his employment and duties. Accordingly, I am of opinion that it is a question for the lower court to ascertain:—

1) Whether Rosenstein did in fact give a warranty as alleged?

2) Whether the warranty was within the scope of Rosenstein's employment bearing in mind the reply to the third point of law raised by Appellants and whether such warranty binds the Company. To enable the Court to do this, Rosenstein should be heard and any further evidence the parties desire to call.

The Magistrate's judgment is quashed and the case returned for retrial in accordance with the before mentioned rulings.

Costs to follow the event.

Delivered the 24th day of April, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. 93/28.

BEFORE:

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

IN THE CASE OF:

The Anglo-Palestine Co. Ltd., Jaffa APPELLANTS.

vs

Kfar Ganim Co. Ltd. RESPONDENT.

Companies (Winding-up) Ordinance, 1922—Winding-up of Co-operative Society—Right of secured creditor to petition before realiziug his security — Companies Ordinance interpreted by reference to English law.

Appeal from the judgment of the District Court of Jaffa, dated 13th June, 1928.

JUDGMENT OF DISTRICT COURT.

The Anglo-Palestine Bank claim that Kfar Ganim Society borrowed from them on the 15th July, 1925, £E. 340 for the period of three months. It did not pay to the Bank the said sum, but gave a mortgage on a plot of musha a land in the colony. The Bank could not sell the land. On the 10th September, 1927, the Bank specially notified the Society to pay within two weeks otherwise they would ask for its winding-up. It did not pay and the Bank now asks for the winding-up of the Society according to Article 9 of the Companies (Winding-up) Ordinance, 1922.

The lawyer on behalf of the Society proved in open Court that the debt due to the Bank is £E. 200 secured by a mortgage of a piece of land having an area of 550 dunams and that the Society is not failing to pay.

The Court finds that Article 9 upon which the Plaintiff bases his demand, puts a condition upon the creditor to officially notify the debtor and that the debtor has within three weeks from receipt of such notice to satisfactorily secure the creditor, otherwise the Court has power to wind-up the Company.

The debt in this case, as shown by the declaration of the Plaintiff, is secured by a mortgage and it was the duty of the Plaintiff to realise, by selling the mortgaged property first and if such sale did not cover the amount of the debt, then he should ask to be secured for the balance as provided by Article 9. Whereas and until now he did nothing in this respect and at the same time claims that he could not do so, nor did he give any specific reason for this, the Court therefore cannot consider this question.

It is therefore unanimously decided to dismiss the case and to adjudge the Plaintiff to pay all costs and expenses.

Judgment delivered in open Court and liable to appeal, the 13th day of June, 1928.

JUDGMENT OF THE COURT OF APPEAL.

The only question raised in the appeal is whether or not a secured creditor of a Co-operative Society registered under the Co-operative Societies Ordinance, 1920, is entitled to present a petition for the winding-up of the Society.

Section 82 (2) (a) provides that:

> 2. The provisions of the Companies (Winding-up) Ordinance, No. 12 of 1922, "shall also apply, with such modifications as the circumstances may render necessary, to a winding-up by the Court of any of the following associations:—
>
> (a) Co-operative Societies registered under the Co-operative Societies Ordinance, 1920".

The District Court has held that Section 9 of the Companies (Winding-up) Ordinance, 1922, prevents a secured creditor of a company from petitioning for the company to be wound up.

Section 9 (1) is as follows :—

> "If a creditor by assignment or otherwise, to whom the Company is indebted in a sum exceeding fifty Egyptian Pounds then due has served on the Company, by leaving the same at its registered office, a demand under his hand requiring the Company to pay the sums so due, and the Company has for three weeks thereafter neglected to pay the same or to secure or compound for it to the reasonable satisfaction of the creditor....."

The view taken by the District Court is that in the case of a secured creditor, the Company cannot be held to have "neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor".

We do not think that this view can be supported.

Section 84 of the Companies (Winding-up) Ordinance, directs that "This Ordinance shall be interpreted by reference to the law of England relating to Companies". Moreover, except for the substitution of Egyptian Pounds for "Pounds" the Sub-Section is taken verbatim from the Sub-Section (1) of Section 130 of the Companies (Consolidation) Act, 1908, which re-enacted Section 80 of the Act of 1862.

Now it is clear that by the law of England a secured creditor of a Company can petition for the winding-up of the Company even though he may have attempted to recover the amount due to him by the exercise of a remedy conferred upon him by his security (Borough of Portsmouth Tramways Co. (1892) 2 Ch. 362).

Hence we have no doubt that the secured creditor of a Company registered under the Companies Ordinance, 1921, can petition for the Company to be wound-up.

We hold therefore that Section 9 of the Companies (Winding-up) Ordinance, 1922, does not disentitle the Appellant from petitioning for the winding-up of the Respondent Company.

The appeal must be allowed and the case remitted to the District Court for completion.

The costs of this appeal will follow the event.

Delivered the 6th day of March, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 55/29.

BEFORE:

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

IN THE CASE OF:

Haim Rohold on behalf of the Factory "Victoria" — APPELLANT.

vs

Daoud el Khoury — RESPONDENT.

Section 80, Companies Ordinance, 1921—Commission agent appointed in Palestine by foreign firm—"Carrying on business" in Palestine—Necessity of registration as foreign company.

Appeal from the judgment of the District Court of Jaffa, dated the 26th of October, 1928.

JUDGMENT.

The Court holds that acts of forwarding goods by a foreign firm to this country, and of appointing a commission agent here to receive and transmit orders on commission for a foreign firm, when, as in this case, such orders are endorsed "sauf approbation de la Maison", does not constitute the foreign firm one desirous of carrying on business in this country within the meaning of Section 80 of the Companies Ordinance, 1921, and hence subject to registration as a Foreign Company.

The appeal is therefore allowed, the judgments of the District Court and the Magistrate's Court are set aside and the case is remitted for trial accordingly with £P. 2 advocate's fees and costs.

Delivered the 30th day of September, 1930.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 80/29.

BEFORE:

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

IN THE CASE OF:

The Liquidator of the Palestine Company Hiram Ltd. — APPELLANT.

vs

The Ottoman Bank, Haifa — RESPONDENT.

Sec. 36, Companies (Winding-up) Ordinance, 1922 — Merchandise pledged to Bank as security for overdraft—Compulsory winding-up of company—Bankruptcy of company—Duties of Committee of Inspection—Registration of claims of creditor—Secs. 1 (3), 68, 79, 83, 89, Companies Ordinance, 1921 — Pledge distinguished from mortgage of movable property.

Appeal from the judgment of the District Court of Jerusalem dated, 1st day of March, 1929.

JUDGMENT.

This is an appeal by the Liquidator of the Palestine Co. Hiram Ltd. against a judgment of the District Court of Jerusalem refusing to issue an order under Section 36 of the Companies (Winding-up) Ordinance, 1922, directing the Ottoman Bank to pay over to the Liquidator the proceeds of sale of certain goods, the property of the Palestine Co. Hiram Ltd., which had been delivered to the Bank as security for an overdraft.

The facts of the case are as follows:

On the 14th September, 1926, the Palestine Company Hiram Ltd., (hereinafter referred to as "the Company") agreed with the Ottoman Bank, Haifa, (hereinafter referred to as "the Bank") that the Bank should allow the Company an overdraft on its current account with the Bank provided that the Company lodged merchandise with the Bank to cover the overdraft. The full terms of the transaction are set out in an agreement which was signed by Mr. Pevzner on behalf of the Company on the 14th September, 1926.

On the 7th October, 1927, by an order of the District Court of Jerusalem, the Company was wound-up compulsorily and the Official Receiver was appointed Provisional Liquidator.

At that time, the Company's current account with the Bank was overdrawn, and the Bank, in pursuance of the agreement of the 14th September, 1926, held "en gage" a quantity of goods (valued at £P. 694) belonging to the Company (the proceeds of the sale of which goods the Liquidator is now claiming).

On the 20th October, 1927, the Official Receiver called a meeting of creditors. Mr. Kenney, who represented the Ottoman Bank, one of the creditors, took notes of the proceedings, and the notes are signed by Mr. Eliash, Chairman of the meeting.

The following is an extract of the notes of the meeting:

"Assets consist of—

(1) A stock of goods claimed as mortgaged to Barclays.

(2) Immovable goods claimed as mortgaged to Anglo-Palestine.

(3) Various bills.

The question of the mortgage claimed by the Anglo-Palestine is up for decision in Jerusalem Court to-morrow.

A certain group of creditors will contest this, and also the mortgage claimed by Barclays Bank. Perhaps 50% if these claims upset. Otherwise probably nothing for the unsecured creditors".

It is to be noted that the goods held by the Bank were not included as assets.

On the 3rd November, 1927, by order of the District Court, Mr. Rojansky was appointed Liquidator and following persons were appointed a Committee of Inspection :—

1. Mr. Kenney.
2. Mr. Margolin.
3. Mr. Caspi.

The Committee of Inspection held a meeting, the precise date of which has not been determined. Minutes of the meeting were taken down by and initialled by Mr. Kenney. The following is a copy of the minutes :—

"ANGLO PALESTINE MORTGAGE.

Committee decided to request Liquidator to give notice to the A. P. C. of his decision to taken over the property of the Hiram etc.

BANCO DI ROMA.

Committee requested Liquidator to authorise the Banco di Roma to sell the goods at max. 5% below market price, proceeds to be paid into a special account in the name of the Liquidation it remains open to B. R. to bring a case within 15 days to show why the goods should not fall into the hands of the Liquidation.

The Committee authorised the Liquidator to continue negotiating for settlement on the basis of 50% on the debt or the proceeds of the goods whichever is the smaller, without engaging himself for the time being.

Liquidator to discharge clerks as from the end of the month.

Resolved to urge Mr. Rojansky to demand immediately the statement of affairs.

Resolved to request statements of A/cs from all the Banks·

Agreed that Liquidator should sell the office furniture, etc.
Collect outstanding accounts.
Authorise O. B. to sell goods and credit proceeds to the liquidation.
(Initialled) F. C., W. K., R. M.".

The District Court appears to have accepted it as a fact that the Committee meeting was held after the 3rd and before the 9th of November, 1927.

On the 9th of November, 1927, the Bank wrote to the Liquidator asking whether the Bank may accept an offer to purchase the goods of the Company held by the Bank as security. On the 15th of November, 1927, the Liquidator wrote to the Bank asking the Bank:

(1) to sell the goods of the Company held by the Bank;

(2) to consult him about the price before selling;

(3) to pay the proceeds of the sale to the credit of the Liquidation Account.

The Liquidator's letter does not refer to or reply to the Bank's letter of the 9th. Further, the Bank apparently does not reply to the Liquidator's letter. On the 14th of December, 1927, the Bank sold the goods without apparently receiving any reply to its own letter of the 9th of November.

On the 15th of April, 1928, the Liquidator commenced this action against the Bank.

On the 7th day of May 1928, the Bank wrote to the Liquidator:

"Dear Sir,

Kindly register our claim as creditors against the Hiram Company in liquidation for £P. 3243.778 ms. as per note No. 1 attached, giving full details of how this amount is made up.

In addition to the bills negotiated on which this claim is based, the Hiram Co. remains indebted to us in current account advance against bills, for £P. 767.587 ms.

The security which we hold is shown on Note 2 attached. We make no claim against the liquidation in respect of this bills account.

We shall be glad to have your confirmation that our claim is admitted for the amount of £P. 3243.778 ms".

No reference is made to the goods sold by the Bank or the amount realised on their sale.

The first question arising on this appeal is whether the security created by the transaction between the Company and the Bank is, or is not, void against the Liquidator under the provisions of Section 68 (c) of the Companies Ordinance, 1921. This Section declares that:—

> "Every mortgage or charge created under the provisions of this Ordinance by a Company, and being
>
> (c) a mortgage or charge..... on any movable property, shall, so far as any security on the Company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the Company, unless the prescribed particulars of the mortgage or charge, together with the instrument by which the mortgage or charge is created or evidenced, are delivered to the Registrar of Companies for registration in manner required by this Ordinance within twenty-one days after the date of its creation.....".

No particulars of the transaction under consideration have been registered with the Registrar.

On this point, the District Court held that "the transaction between the Company and the Respondents (the Bank) is neither a mortgage of movable property, nor a debenture, but is in the nature of a pledge. We do not agree with Mr. Eliash that there is no difference between a mortgage of movable property and a pledge. The law does not demand that a pledge shall be registered. Thus we rule against the Liquidator".

While agreeing with the District Court that a pledge is a transaction of a particular nature, this Court takes the view that while in its essence a pledge involves delivery of the property pledged, it also involves the creation of a charge upon such property. It follows that a pledge must come within the definition of "a mortgage or charge on any movable property", and therefore requires registration under Section 68 of the Companies Ordinance, 1921, provided that it is "created under the provisions of this Ordinance".

We have thus to determine whether the Bank's security was created under the provisions of the Ordinance of 1921 or not.

On behalf of the Bank, it is argued that Section 68 has no application, in view of the fact that the Company is not a Company registered under the Companies Ordinance, 1921, but is a foreign Company registered under Ordinance No. 118 of the 29th May, 1919.

The draftsman of the Companies Ordinance, 1921, has been at some pains to render obscure the application of that Ordinance to foreign Companies registered under Ordinance No. 118. The relevant passages of the Companies Ordinance, 1921, are as follows:—

(a) Section 1 (3) provides that the requirements of that Section with regard to registration under the Ordinance shall not apply to Companies registered under Ordinance No. 118 of the 29th May, 1919.

(b) Section 79 provides as follows: —

(1) "The provisions of this Ordinance shall, so far as the circumstances admit, apply to every Company registered under Ordinance No. 118, of the 29th May, 1919.

(7) This Section shall not apply to a foreign Company registered under Ordinance No. 118.

(c) Section 83 provides that:—

"Every foreign Company which carries on business in Palestine shall:—

1. Comply with Section 36 of this Ordinance;

2. If it holds meetings, issues a prospectus or allots shares in Palestine, comply with regulations in this Ordinance relating to this particular matter.

3. If it is an Insurance Company, comply with the provisions of Sections 71, 72 and 73 hereof.

(d) Section 89 declares that:—

"In this Ordinance

1. "Company" includes any Association or Partnership registered as a company under Ordinance No. 118 of 29 May, 1919, or under this Ordinance".

It is clear that if the definition of a Company contained in Article 89 is to be given its widest meaning it must apply to a foreign Company registered under Ordinance No. 118, and consequently that all the provisions of the Ordinance are applicable to such a Company unless it is expressly stated to the contrary.

This interpretation, however, would render the whole of Section 83 superfluous. In our view, therefore, the definition of a Company in Section 89 must be read so as to exclude a foreign Company registered under Ordinance No. 118 from the provisions of the Ordinance of 1921, except in so far as those provisions are expressly made applicable to such a Company.

Section 68 is not one of the Sections which are expressly declared to apply to foreign Companies registered under Ordinance

No. 118; and the Court, therefore, holds that the charge created under the agreement of the 14th September, 1926, was not created under the provisions of the Ordinance of 1921, and consequently that there was no obligation upon the Bank to register with the Registrar particulars of the charge.

The next question that arises is whether the signature by Mr. Kenney, the Bank's representative on the Committee of Inspection, of the Committee's minute "Authorise O. B. to sell goods and credit proceeds to the liquidation" operated as a release by the Bank of its charge upon the goods.

Upon this point the District Court has held as follows:—

> "We are of opinion that Mr. Kenney, who, it is not disputed, represented the Respondents (the Bank) at the first meeting of creditors agreed to give up the security the Respondents held. And the Respondents by their letter of the 19th day of November, 1927, ratified Mr. Kenney's action if ratification was really necessary".

It must, however, be observed that the Committee of Inspection in a bankruptcy, while consisting of individual creditors or their representatives, acts on behalf of the general body of creditors, and should be guided in its decisions by the consideration of what is in the best interests of the general body of the creditors rather than of the individual creditors themselves. It was obviously to the interest of the general body of creditors that the Bank should be authorised to sell the goods and credit the proceeds to the Liquidator, if it were prepared to take this course. But we are unable to see how the Bank can be held to be bound to act upon the authority conferred upon it by the Committee of Inspection.

We are equally at a loss to understand how it can be held that the letter written by the Bank on the 9th day of November, 1927, can be regarded as confirming the release of its security. The letter is in the following terms:—

> "Veuillez noter qu'un de nos clients se propose d'acheter les 550 metres de tuyeaux de S" qui se trouvent chez nous en nantissement pour compte de la Palestine Co. Hiram Ltd., au prix de £P. 0.180 mils le metre.
>
> Nous vous serions obligés de nous faire savoir le plus tôt possible si nous pouvons donner suite à cette offre d'achat".

The terms of this letter, in our opinion, make it clear that at the date when it was written the Bank still regarded the goods as being in its possession as security.

The Court holds, therefore, that there is no evidence before it that the Bank ever agreed to give up its rights over the goods pledged with it. It follows that we have not to decide whether after giving up its security, the Bank could return to its original position, and retain its security. It is to be noted that the District Court quotes no authority for its view that the Bank was entitled to do so; and we know of none. If the Bank had actually released its security and had thereby invited others to alter their legal position, we cannot see how it could be possible for the Bank to change its mind and retain its security.

For the reasons stated in this judgment, the appeal must be dismissed with costs including £P. 5 advocate's fees.

Delivered the 10th day of July, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 159/33.

BEFORE:

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

IN THE CASE OF:

The Attorney General on behalf of the Official Receiver — APPELLANT.

vs

Kupat-Am Bank
Nabbash Co. Ltd. — RESPONDENTS.

Appointment by District Court of liquidator other than Official Receiver—Making of winding-up order by Court—Necessity of provisional appointment of liquidator — Effect of winding-up Order as automatic appointment of Official Receiver as liquidator — Sections 162, 167, Companies Ordinance, 1929.

JUDGMENT.

This is an appeal against a judgment given by the District Court of Jaffa whereby that Court decided that on making a winding-up Order it had power under the provisions of the Companies Ordinance, No. 18 of 1929, to appoint a liquidator other than the Official Receiver. The relevant part of the judgment is as follows:

"In our opinion the provisions of Section 162 (2) (b) do not apply to this present case on the ground that sub-section (2) of Section 162 applies only where a provisional appointment is made prior to making a final Order for the winding-up. In our opinion the Court is at liberty in making the appointment to appoint the Official Receiver or anybody else. If the Court makes no appointment then the Official Receiver becomes the liquidator of the Company. As I read the law there is nothing to prevent the Court making a definite appointment in the winding-up Order and the Court is not compelled to make a provisional appointment first.

It appears to us that the District Court has misapprehended the effect of the provisions of Section 162. Section 162 (2) and (2) (a) empower the Court to make a provisional appointment after the presentation of the petition and before the making of the winding-up Order, and provide that such provisional liquidator may be either the Official Receiver or any other fit person.

From Section 162 (2) (b) it is perfectly clear that on a winding-up order being made, the Official Receiver by virtue of his office, becomes the provisional liquidator and continues to act as such until he or any other person becomes liquidator and is capable of acting as such.

In other words the Court may before the making of the winding-up Order make a provisional appointment of a liquidator and may in their discretion decide whether or not such liquidator should be the Official Receiver or any other person. Immediately on the making of the winding-up Order, however, the Official Receiver automatically becomes a liquidator and no order of Court of any kind whatever is required for this.

The next step, under Section 167 (1) is for the Official Receiver to summon the creditors and contributors separately for the purpose of deciding whether or not an application should be made to the Court for the appointment of a liquidator in place of the Official Receiver and therefore the Court has power to order that a person other than the Official Receiver should be the liquidator. But if it does not appoint another person, the Official Receiver remains as liquidator.

For these reasons we give judgment for the Appellant with costs.

CONCESSIONS.

In the District Court of Jerusalem.

C. D. C. Jm. of 1930.

IN THE CASE OF:

The Government of Palestine
The Municipality of Jerusalem
Jerusalem Electric & Public
Service Co. Ltd. — PLAINTIFFS.

vs

Hassolel Partnership — DEFENDANTS.

Injunction restraining generation and sale of electricity — Grant of electricity concession in Jerusalem—Damages suffered to be proved—Electricity Concession (Jerusalem) Ordinance, 1930 — Necessity of license to operate plant—Trespass on public highway—Articles 63, 93 Land Code—Municipal Tax Law, 1290.

JUDGMENT.

The High Commissioner, the Municipality of Jerusalem, and the Jerusalem Electric & Public Service Company Ltd. (hereinafter referred to as the company) filed actions in this Court against the Hassolel Partnership and with the consent of all the parties the three actions were consolidated.

The Defendants in limine contested the right of the High Commissioner to institute proceedings; the Court, however, ruled against them.

The Attorney General on behalf of the High Commissioner claims:

1. An injunction restraining the Defendants from generating producing, distributing, supplying and selling any electrical energy within an area (hereinafter referred to as the Concession area) contained within an imaginary circle of a radius of twenty kilometers having as its centre the central dome of the Church of the Sepulchre in Jerusalem.

2. An order requiring the Defendants to remove from the public roads all poles, standards and other fixtures placed there for the purpose of distributing electrical energy generated by them.

The Municipality of Jerusalem (also represented by the Attorney General) claims an order similar in terms to the Order the High Commissioner is claiming.

The Company claims:

1. An injunction restraining the Defendants from producing, distributing, supplying and selling any electrical energy within the concession area; and

2. Damages.

The claim by the High Commissioner and the Company for an injunction is based on Clause 17 of the schedule to the Electricity Concession (Jerusalem) Ordinance, 1930.

The claim of the High Comissioner for an order requiring the Defendants to remove the poles etc., from the public grounds is based on two grounds:

1. The fact that the Defendants installed their electric plants without obtaining a concession, license or other authority from the Government of Palestine or any other public authority.

2. The erection of the poles etc. on the public roads and the wires across the roads constitute a trespass and is a breach of the terms of Article 93 of the Land Code.

The claim by the Municipality is also based on two grounds:

1. Trespass under Article 63 of the Land Code.

2. The omission by the Defendants to pay the Municipal Tax under Article 10 of the Municipal Tax Law of 1290.

We will deal in the first place with the claim by the Municipality.

The Municipal Tax Law of 1290 is as its title signifies a taxing statute. The translation of Article 10 by the Court Interpreter is as follows:

"There shall be levied once only on a steam engine not exempted by the special Laws and not used for agriculture a licence fee of £2 on a (steam) engine not exceeding five horse power;

£5 on a (steam) engine exceeding five but not exceeding ten horse power, and £10 on an engine exceeding ten horse power".

As far as we are concerned it is immaterial whether the Defendants are liable to pay the tax as alleged by the Municipality for we do not see how the omission to pay the tax in any way supports the claim.

With regard to the allegation by the Municipality, which is supported by the High Commissioner that the erection of poles on the public roads and wires across the public roads constitute a trespass under Article 93 of the Land Law, we are without further

evidence, unable to arrive at a decision as to the circumstances in which the poles were erected and the wires placed across the public roads.

It is, however, admitted that the poles etc. were erected about six years ago and in the circumstances we are not prepared to issue the order sought.

The claim of the Municipality, therefore, fails in toto, and is dismissed with costs and advocate's fees of £5.

The next question to be determined is the contention by the High Commissioner that before installing their plant the Defendants should have obtained permission from a public authority.

This point was not pressed by the Attorney General who during the course of his argument admitted that apart from the licence under Article 10 of the Municipal Tax Law of 1290, which we have already dealt with, no permission was required, so the claim by the High Commissioner for an order to the Defendants requiring them to remove the poles etc. on the grounds submitted, fails. It is to be observed that the Company does not desire the removal of the poles etc. If the High Commissioner and incidentally the Municipality seriously wish the poles etc. to be removed, they can, if they so desire, institute proceedings in the Land Court.

We now come to the principal claims — the claims by the High Commissioner and the Company for an injunction restraining the Defendants from supplying and selling electrical energy. As we have previously stated, both the High Commissioner and the Company base their claim on Section 2 and Clause 17 of the Schedule to the Ordinance of 1930.

Before dealing with the Ordinance of 1930 certain arguments which have been advanced by the Defendants call for observation.

1. The Defendants contend that the Concession of February, 1926, to Mr. Mavromatis is a new concession, and not as the Attorney General contends, a re-adaptation of the old Turkish Concession. We are of opinion that the agreement of 1926 is in effect a re-adaptation of the original Turkish Concession.

Again, the Defendants contend that the Turkish Concession was never issued in the form of a law.

For reasons which we shall endeavour to explain later, we do not consider these two points of any importance.

What in our opinion is of the greatest importance is the correct interpretation of Section 2 of the Ordinance of 1930 vali-

dating the agreement of 1926 and Clause 17 of the Schedule to the said Ordinance; in fact the main arguments of the Applicants and Defendants were centered round the meaning of the first seven lines of Clause 17 of the Schedule.

The Defendants have asked us to hold that the true meaning of the words in Clause 17 "And no other installation for the production, supply, distribution or sale of electrical energy within the Concession area shall be permitted by the High Commissioner..." is "that no permit for any other installation etc... shall be granted by the High Commissioner". And as it is not disputed that the Defendants do not need a permit under the Electricity Ordinance 1926, they are not affected by the obligation undertaken by the High Commissioner towards the Company, an obligation binding the High Commissioner for the future not to grant any permits.

Alternatively, the Defendants contend that if their interpretation of the words "and no other installation... shall be permitted by the High Commissioner" is not accepted, we must hold that the true meaning of the said words is ambiguous. And to arrive at the true meaning, reference must be made to the Electricity Concession Ordinance, 1927, with special reference to Section 4 of the Ordinance and Clauses 18 and 20 of of the Schedule (Part 1) thereto, and further, if referred to the Ordinance 1927, we are still in doubt as to the true meaning of the words, we should construe them in their favour. They argue that the Court must infer that if it was intended to prohibit them from carrying on their business as they had done prior to the Electricity Ordinance, 1926, the Legislature would have given the High Commissioner power to expropriate the installation on payment of compensation.

It appears to us that the fact that provision was made in the Electricity Concessions Ordinance, 1927, for expropriation of certain installations on payment of compensation is against the Defendants, but this point to our mind is also immaterial, for in our judgment the meaning of Section 2 of the Ordinance of 1928 and Clause 17 of the Schedule thereto is clear and we are therefore not justified in referring to any other Ordinance or in assuming that the Legislature did not mean what it said.

By Clause 17 of the agreement of February, 1926, the Company shall, subject to the provisions of Clause 27, have the exclusive right for the production, distribution, supply and sale of electrical energy within the concession Area. There appears to be no ambiguity as

to the meaning of the word "exclusive". In our judgment, the High Commissioner covenanted that no other person other than the Company shall have the right to produce, distribute, supply and sell electrical energy within the concession area.

Further, in our judgment, the words "and no other installation for the production, supply, distribution or sale of electrical energy within the Concession Area shall be permitted by the High Commissioner" are not reasonably capable of having more than one meaning. The word "shall" in our opinion does nor refer to the future, but must be treated as mandatory and the word "permitted" is, in our opinion, equivalent to "allowed".

We read Clause 17 to mean that subject to the proviso and to Clause 27, the High Commissioner covenanted to grant to the Company the exclusive right, that is the right to the exclusion of all other persons, for the production, distribution, supply and sale of electrical energy within the Concession Area, and further covenanted that no other installation shall be allowed. The Ordinance of 1928 has validated the agreement of 1926 and Section 2 empowers the High Commissioner to carry out his obligations under the agreement.

The Ordinance of 1930 does not provide a penalty for contravening the terms of the agreement, thus the only way the High Commissioner can fulfil his obligation is by asking this Court to grant an injunction restraining the Defendants from distributing, supplying, or selling electrical energy within the Concession Area.

We are of opinion that both the High Commissioner and the Company are entitled to the injunction prohibiting the Defendants from distributing, supplying, and selling electrical energy within the Concession area, and we make the order accordingly.

We, however, refuse to issue an Order restraining the Defendants from generating electrical energy for their own use.

Two questions remain: (1) The Company's claim for damages. The Company has not proved to us that it has suffered any damage and the claim fails. (2) The terms of the Order. The Company admits that it is not at present in a position to supply the Defendant's consumers with electrical energy. The injunction, therefore, shall be made effective as from the 7th July next. Formal Order.

No costs.

Delivered in presence the 23rd day of June, 1930.

CONTEMPT OF COURT.

In the High Court of Justice.

H. C. No. 52/28.

BEFORE:

The Chief Justice, the Senior British Judge, and Khayat, J.

IN THE CASE OF:

Nachleh Talamas — PETITIONER.

vs

Kheir El Din Bssosso
Police Officer, Jaffa
Khalil Jalal — RESPONDENTS.

Contempt of Court by Police Officer — Intimidation of witness — Medical certificate as evidence of inability to attend—Disappearance of documentary evidence — Evidence given ex parte not subjected to cross-examination.

Application directed against Respondents to show cause why they should not be punished by fine or imprisonment for contempt of Court committed by them with reference to the case of Attorney General vs. Talamas.

JUDGMENT.

This is an application directed against Kheir El Din Bssosso, a Police Officer of Jaffa, and one Khalil Jalal, who acted as an agent of the Police, to show cause why they should not be committed for contempt under Section 2 of the Contempt of Court Ordinance, 1924, for doing an act in reference to the proceedings in Attorney General vs. Nachleh Talamas intended or calculated to prejudice such proceedings and/or to interrupt or delay the course of justice.

The act alleged was that the two Respondents intimidated Nassif Odeh, a witness for the defence in Attorney General vs. Talamas, into desisting from giving evidence and into leaving Jaffa by train the day before the trial of the case in question.

The hearing has occupied this Court for more than a week, and I do not propose to recapitulate in detail the evidence which we heard, but merely to touch upon these matters which have influenced me in coming to a decision.

So far as I am concerned, the first point to which I wish to draw attention is in connection with the telegrams put in by Khalil Jalal which were received by him at Beyrouth from Kheir

El Din at Jerusalem at the time when he was engaged in trying to bring to Jaffa the two witnesses Hassounoh and Zabtieh. Of these telegrams two were dated the 26th day of February, 1928, and are marked Exhibits H and I. They were put in the order opposite to that of their despatch as is shown by their serial enumeration and by the hours they bear on their faces.

Exhibit H bears the hour 1.46.

Exhibit I bears the hour 12.14.

This latter, therefore, was the first to be despatched.

It runs:—

"Your attendance to-morrow with your companion essential; for absence and sickness necessary doctor's or Mukhtar's certificate and at any rate attendance with the two of them or with certificate tomorrow".

Exhibit H runs:—

"Try to get the two of them from Mersina to Jaffa Tuesday morning otherwise certificate of absence to be certified by Consul or proper authority necessary Tuesday morning".

These telegrams show that so far as the prosecution witnesses were concerned, the two Respondents were acting in concert in securing their attendance at this date, and that as early as February 26th when Hassouneh and Zabitieh were at Mersina in the ordinary course of their business of seamen, Kheir El Din Bey had in mind the possibility of accounting for their absence by production of medical certificates.

We come now to the return to Haifa from Beyrouth of Khalil Jalal and P.C. John Basmajian, and I may say at once that the demeanour of this Respondent and of this witness when giving evidence did not impress me favourably.

I frankly do not believe that arriving at Haifa at 10 or 11 at night John Basmajian, a Jaffa Policeman, was able to obtain for the first time information regarding an alleged smuggler and passport forger in Haifa.

I do not believe that Khalil Jalal was "not interested" to use his own phrase, in the matter, for the impression left on my mind was that he, of the two, was the one who took command.

Again, if the allegation of John Basmajian is true I cannot conceive why Jaffa should be communicated with, why the Haifa Police should not be informed so as to prevent risk of escape or of passing on of hashish en route to Jaffa as in fact is alleged to have been suspected of occuring at Tulkarem.

The telephone message sent in the morning by John Basmajian to Kheir El Din is lost though it was taken down in duplicate. This is the first of several disappearances of important pieces of documentary evidence in the case which, taken separately, might be dismissed from one's mind, but which, when considered in conjunction with each other arouse suspicion.

Later on in the same morning Kheir El Din Bey received a telephone message from Ludd from Khalil Jalal in consequence of which he proceeded to Tel-Aviv station.

There is some conflict between Kheir El Din's evidence and that of Spector and Corporal Ben Zeev as to whether he told them that one of the two men were to be arrested, and upon this stress was laid with a view to discredit Kheir El Din's testimony.

My own view is that the force of Jaffa and Tel-Aviv Police that went to the station that Sunday morning points against there having been only one arrest in anticipation.

According to Kheir El Din the gist of the two telephone messages he had received was that Nassif Odeh, who had entered Palestine with forged documents and was suspected of smuggling, was on the train. He says further that it was not till the train got in to Tel-Aviv that he was told that Samaan Ben Spiro and Nassif had been foregathering in the train and that one of them had handed a parcel out of the train to a fellah at Tulkeram station.

The two men Nassif and Samaan were arrested and placed in adjoining rooms in the railway station. Samaan, it may be noted here, was a leading prosecution witness in Attorney General vs. Talamas, and I should have expected Kheir El Din to ascertain from this witness who had been well in with smugglers what he knew of Nassif.

Far from this, Samaan was ignored by Kheir El Din. Nassif's passport was examined and he was stripped and searched. A signed zapt or record of the proceedings at the search was drawn up; but this document also had disappeared. Samaan was still ignored by Kheir El Din and the party left, some in a car and some on foot, for the Tel-Aviv Police Station, and it was only on the way there that, according to his story, Kheir El Din as an afterthought, asked Spector about Samaan, and found he had not been searched. This was remedied at the Police Station and another zapt was made, but if Kheir El Din Bey is to be believed, he destroyed it

as there was nothing incriminating in it, the first time in his career, he states, in which he has destroyed such a record for this or any other reason.

We may note in passing that in the Tel-Aviv station diary these men are stated to be detained on a suspicion of smuggling hashish and nothing is said about Nassif being charged with entering the country with forged documents.

Kheir El Din went later on from Tel-Aviv station to Jaffa; the two men were still detained at Tel-Aviv and Kheir El Din's reason for this was that he could not release them until he had searched his lists of men concerned in hashish smuggling and seen if they figured therein.

Seeing that Samaan was well known to him as a leading witness for the prosecution in the case of Attorney General vs. Talamas I cannot accept that as a satisfactory reply in explanation of his continued detention and it is difficult in the circumstances to credit the reason for Samaan's release given by Kheir El Din, namely, that Samaan's name was not in the list.

However, later on in the day, both men were released but before giving orders for this, Kheir El Din had sent Khalil Jalal to see Nassif and get in touch with him to try and find out if he was in contact with smugglers and hashish merchants.

According to both Nassif and Khalil Jalal the way in which this instruction was carried out was that they both got into a gharry and drove about Tel-Aviv until they parted at the station some time before the train left for Haifa when Nassif took his departure.

The Respondents, as they are fully entitled, have made much of the fact that Nassif's evidence given *ex-parte* was not subjected to cross-examination.

I quite agree that there are various points in his evidence that call for elucidation, but the fact remains that this Beyrouth barber Nassif who came at a professionally busy season of the year to Jaffa especially to give evidence for the defence in a Police prosecution after having been detained for most of the day by the Police, returned by the afternoon train and thereby stultified for no reason which has been presented to us the whole object of this troublesome and expensive journey. To this is to be added the mysterious disappearance of the telephonic instructions, which set the ball in motion and of the zapt on the search, and the very significant fact that when Superintendent Quigley conducted an enquiry nothing was said to him about a suspicion against Nassif

of smuggling hashish, only of his having a forged passport, in spite of the search even of Nassif's boots in the morning and in spite of Khalil's conversation in the afternoon to ferret out Nassif's associations, if any, with smugglers, matters which extended from the beginning to the end of the detention, while the passport examination was effected in a few minutes.

The Tel-Aviv station diary records, as I have said, suspicion of smuggling hashish with no mention of a passport fraud. Mr. Quigley was told only of a false passport, nothing of smuggling. When Sergeant Charbieh was told by Kheir El Din to search for Nassif neither smuggling nor passports were mentioned, and the zapt of the search which would have elucidated the question had disappeared.

Finally, Kheir El Din Bey in his statement to Mr. Quigley, which purported to give a full account of the proceedings, left the Superintendent under the impression that the arrest at Tel-Aviv arose purely from John Basmajian's message of the night before, and the Superintendent was left entirely in the dark as to the message of John Basmajian from Haifa on the Sunday morning and as to that of Khalil Eff. from Ludd which led to the descent at Tel-Aviv railway station.

I have satisfied myself, in view of all these facts, that Kheir El Din and Khalil Jalal were responsible for the departure from Jaffa from motives of fear or otherwise of Nassif Odeh and that a grave contempt was committed inasmuch as his departure was procured with the intention of prejudicing the proceedings in Attorney General vs. Talamas.

Such a contempt by a Police Officer is a very serious matter and nothing but the good record of Kheir El Din prevents me from sending him to prison without the option of a fine. In view of this, however, I order him to pay a fine of £P. 100 or in default of payment to go to prison for one year.

Khalil Jalal was no doubt used by Kheir El Din and was not an officer in the force. His offence is less grave. On the other hand he has no record of good service on the strength of which we might mitigate the penalty. He, therefore, will also be fined £P. 100 or in default will be imprisoned for one year.

Each Respondent to pay £P. 10 advocate's fee and costs.

Delivered the 13th day of August, 1928.

In the High Court of Justice.

H. C. No. 11/30.

BEFORE:

The Chief Justice and Baker, J.

IN THE CASE OF:

The Attorney General — PETITIONER.

vs

Zalman Rubashoff, sub-editor of the "Davar" newspaper — RESPONDENT.

Contempt of Court by newspaper — Article calculated to prejudce judicial proceedings — Allegations that Court biased — Integrity of Courts of Justice—Section 4, Contempt of Court Ordinance, 1929.

JUDGMENT.

This is a return to a rule nisi calling upon Mr. Zalman Rubashoff, the sub-editor of the Davar newspaper to show cause why he should not be punished under Section 4 (1) of the Contempt of Court Ordinance, No. 12 of 1929, for having published in the Davar newspaper of the 7th February, 1930, and in the issue of its Weekly English Supplement of the 28th January, 1930, articles with reference to judicial proceedings pending in the Courts of Justice calculated to prejudice such proceedings and to bring into contempt the Court before which such proceedings were pending.

The original rule was directed against Mr. B. Kaznelson, the editor of this newspaper, but we were informed that he was temporarily absent from the country and that Rubashoff was responsible for the paper in his absence.

In the original application for a rule nisi the Government Advocate put in a translation of the Hebrew article in the Davar of 7th February, 1930, of which complaint is made, the Court then put into the box its official Hebrew interpreter and made him orally translate the article sentence by sentence, while it checked the written translation put in by the Government Advocate, which subjected to that test, was found to contain only two minor errors irrelevant to the present case. The article is headed "Want of Confidence" and the passages complained of will be dealt with by us later, but we must preface these matters by saying that the contempt alleged is twofold, namely that the observations serve to scandalise, as the phrase is, the Courts concerned, and secondly, that they are of such a nature that they may prejudice proceedings

which are pending before the Courts. The cases referred to in the article are the Makleff case, in which a number of Arabs were acquitted by the Court of Assize, and the Hinkis case, in which one Jew was convicted and sentenced to death by a differently constituted Court of Assize, an appeal from which conviction and sentence is now pending before the Court of Criminal Appeal.

In the typewritten translation of the article which has been put before us by the Respondent occur the following two phrases:—

> "Undoubtedly it would appear as if the judicial investigation in the country had departed from the straight path".

and at the close of the article the phrase:—

> "It is an expression of the serious crisis in the public confidence in the Palestine judicial investigation".

At the opening of the proceedings on the return to the rule nisi Mr. Smoira, for the Respondent, asked that for the words "judicial investigation" in these two phrases should be substituted what he declared was the more correct rendering namely "legal investigation" and he asked us to believe that the criticisms were directed not at the proceedings in Court but at the investigations preliminary to Court proceedings, so that in effect the criticisms were directed only at the fact that the cases were presented by the prosecution to the judges in a biased manner.

In the translation tendered to the Court by the Government Advocate, which as we have said, was carefully checked, the first passage runs:—

> "Undoubtedly the legal investigation in this country would appear to have departed from the right path".

This passage in the Government Advocate's translation is followed by

> "No doubt a hidden hand would appear to arrange the affairs of the Court to the detriment of the Jews. That is why one's complete confidence in the judgment is shaken. One has no more confidence that the offender will be acquitted and the innocent punished".

In the Respondent's translation it runs:—

> "Undoubtedly it would appear as if a hidden hand arranges the affairs of the Court to the detriment of the Jews. This is the reason why full confidence in judgments is shaken. The assurance is gone that the guilty will not be acquitted and the innocent will not be punished."

I will proceed to read the remainder of the article as translated in the Respondent's copy:—

> "This is why in the Hinkis case also, with all our condemnation of the crime and all our grief over it we must ask ourselves: What assurance have we that that hidden hand has not also been active in the collection of the material and mobilization of witnesses and in throwing a strong light on the whole matter which has brought about the death sentence? What assurance have we that Hinkis did commit the terrible deed for which the Court has sentenced him? If it was impossible to find the murderers of Makleff, there is no assurance at all that the murderers of Sheikh Abdel A'an have been discovered. The excitement which has seized the Jewish population is not at all an apology for acts of reprisal. It is an expression of the serious crisis in the public confidence in the Palestine judicial investigation".

The last two words, as I have said, we were asked by Mr. Smoira to replace by "legal investigation". In the other translation we find this final sentence translated thus:—

> "It is an expression of the severe crisis in the confidence of the community in judicial investigation in Palestine".

The Palestine Bulletin in its issue of February 9th translated this phrase:

> "It is but an expression of the complete collapse of the Jewish faith in judicial proceedings in Palestine".

In view of these translations and of the whole context of the observations, we are quite unable to accept the plea supported only by the eleventh hour correction, of the Respondent's own translation, that what was criticised was, not the judicial determination of these cases, but merely the preparation thereof by the police and the Crown Law Office and the presentation of them by the Government Advocate to the Court.

With regard to the contempt alleged in the English Supplement of the Davar of January 28th, it is very significant that Mr. Smoira made no attempt to justify it in his speech showing cause, and that in replying to the Government Advocate all that he could plead was that there was in it no scandalising of the Court though, as he somewhat naively remarked "the text is very unhappy".

In this article reference is made to the Makleff verdict by which a number of Arabs were acquitted, and this part of the article concludes with the words: "Can a more dangerous state of

things be imagined than a widespread despair of attaining justice and security through the Courts".

Dealing with the Orfali case, in which a Jew was convicted by the Court of Assize, but which the Court of Appeal remitted for further evidence, it completely misrepresents a discrepancy between the evidence of prosecution witnesses and that of an Arab doctor, and concludes with these words:

> "The Makleffs were indisputably victims of a murderous gang. The Arab killed in Jaffa was of the assailing crowd. Yet in the former case the Court displayed the most meticulous care in not pronouncing the accused guilty, while in the latter it was ready to send a man to the gallows on the ground of evidence which crumbled before the Court of Appeal".

The conclusion to which we have come is that in both these articles there are libels on the integrity of the Court that in each there is an innuendo that the judges are biased, and that even-handed justice between Jew and Arab has not been dealt out by the judiciary in these trials. We also are satisfied, since these cases are still pending, whether in the Court of Appeal or in the Court of Assize in either of which new witnesses may be called, or witnesses who have already testified may be recalled, that they are calculated to prejudice the proceedings pending in the Courts concerned.

With regard to that part of the contempt which consists in scandalising the Courts, we wish to say more. Mr. Smoira on more than one occasion referred to the "honour of the Court". He said that no phrase in either article was liable to injure the "honour of the Court", and in conclusion stated that if the Court found that there was anything in the articles in the nature of an attack on the "honour of the Court" his clients were prepared to publish an apology.

The use of this phrase shows a complete mis-apprehension of the nature of these proceedings. It is not to salve the wounded amour propre of individual judges—if it can be wounded by attacks in sheets such as these—that proceedings of this nature are taken, but it is to prevent the authority of the law from being weakened in the eyes of the public at large.

In England itself the traditions of centuries have made such proceedings exceedingly rare. In Mcleod vs. St. Aubyn, L.R. (1899) A.C. p. 561, the Judicial Committee stated that they had become obsolete in England. Subsequent legal history shows that that statement went too far, but even in that case, dealing with the

Island of St. Vincent in the West Indies, the Judicial Committee held that in small colonies consisting principally of a coloured population the enforcement in proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court.

In the circumstances of Palestine the legislature has decided that this sanction should be given statutory authority in Ordinance No. 12 of 1929.

Reference has been made to the case of R. vs. Davies L. R. (1906) 1 K. B. p. 34 and J wish to read the following most relevant passage from Wills J.'s judgment:—

> "What then is the principle which is the root of and underlies the cases in which persons have been punished for attacks upon Courts and interferences with the due execution of their orders? It will be found to be, not the purpose of protecting either the Court as a whole or the individual judges of the Court from a repetition of them, but of protecting the public, and especially those, who, either voluntarily or by compulsion, are subject to its jurisdiction, from the mischief they will incur if the authority of the tribunal be undermined or impaired. See the judgment prepared by Wilmot C. J. in Rex v. Almon (1765), but not delivered because the case was allowed to drop; Wilmot's Opinions, p. 256. The word "authority" is used by him to express "the defence and respect which is paid to the judges of a Court and their acts from an opinion of their justice and integrity". These words are apt with respect to the particular case with which he was dealing. But what possible difference in principle can there be in respect of direct attacks upon the Courts or judges, and of writings, the tendency of which is to deprive the inferior Courts beforehand of the possibility of doing even-handed and impartial justice according to the due course of law? To hold that there was a distinction would give colour to the notion, which cannot be too strongly repudiated, that the offended dignity of a particular Court, or of the persons who compose it, is the subject of punishment in such a case. "The object of the discipline enforced by the Court in case of contempt of Court", says Bowen L.J. "is not to vindicate the dignity of the Court or persons of the judges but to prevent undue interference with administration of justice"; Helmore vs. Smith (1886) 35 Ch. K. 449, 455; and a con-

siderable part of the undelivered judgment of Wilmot C. J. to which we have referred is devoted to showing that the real offence is the wrong done to the public by weakening the authority and influence of a tribunal which exists for their good alone. He adds that such conduct is pre-eminently the proper subject of summary jurisdiction. Attacks upon the judges, he says "excite in the minds of the people a general dissatisfaction with all judicial determinations... and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and dangerous obstruction of justice, and in my opinion call out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the judges as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial and to be universally so are both absolutely necessary for giving justice that free, open and unimpaired current which it has for many ages found all over this kingdom".

To undermine and impair the authority of the Court at any time in any place is serious. To do so in a territory of this nature as such a time as this is very much more serious.

The Davar describes itself as a Palestine Labour Daily. The clientèle to which it appeals is a cosmopolitan proletariat coming, it may be, from countries where the confidence in the impartiality and probity of the tribunals is not what it is in territories under British rule.

Special legislation was passed in Ordinance No. 31 of 1929 to enable cases arising out of the riots to be tried by British judges, so as to relieve judges with local affiliations on either side from the invidious duty of trying such charges.

The Courts so constituted have been the object of these attacks.

As is said on p. 49 of the 3rd Edition of Oswald on Contempt, quoting Hawkins Pleas of the Crown and R. v. Staffordshire County Court Judge (1888), 57 L. J. Q. B. 483, "To charge a judge with injustice is a grievous contempt. To accuse him of corruption might be a worse insult; but a charge of injustice is as gross an insult as can be imagined short of that".

These words indicate the gravity of the present contempts.

We make the rule absolute in this case. We order the Respondent to publish within eight days in the Davar and in the

English Supplement thereto the apology which he has offered through his advocate, and in the same issues respectively to publish in the Davar a complete certified copy in English of this judgment.

We further order that Zalman Rubashoff pay a fine of £E. 80 and be detained, and, if necessary, lodged in the Jerusalem Central Prison until this sum be paid.

Delivered the 27th day of Pebruary, 1930.

In the High Court of Justice.

H. C. No. 70/30.

BEFORE:

The Senior Puisne Judge and Frumkin, J.

IN THE CASE OF:

Muhammad Ali Taher — PETITIONER.

vs

Issa el Issa,
Editor of "La Palestine" — RESPONDENT.

Contempt of Court by newspaper — Article calculated to prejudice Court proceedings — Sec. 4, Contempt of Court Ordinance, 1929.

Application for an order to issue to the Respondent directing him to show cause why he should not be convicted under Section 4 of the Contempt of Courts Ordinance, 1929.

JUDGMENT.

The only article which in the opinion of the Court might come within the term of Section 4 of the Contempt of Court Ordinance, 1929, is that published on 10th August, 1932, four days before the proceedings against the Petitioner terminated. The Petitioner does not suggest that the proceedings against him were in any way affected by the article in question and he has waited until six weeks after the termination of the proceedings before applying to this Court.

No order will issue.

Delivered the 26th day of October, 1932.

CONTRACT.

In the Supreme Court Sitting as a Court of Appeal.

L. A. No. 175/23.

BEFORE:

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

Transfer of land—Validity of sale of land—Purchase monies ordered to be refunded by Court trying the issue of sale — Articles 2, 3, Proclamation No. 72, 1918.

JUDGMENT.

The Land Court was right in not considering the verity of the sale which was claimed according to Article 2 of Proclamation No. 72 issued on the 18th November, 1918, but according to Article 3 of the said Proclamation, the judgment given in favour of the Respondents has to provide that the price of the sale has to be returned by the Respondents without the Appellant being obliged to apply to another Court.

The Court had to hear the evidence concerning the buildings which were alleged to be constructed after the purchase.

Therefore it is decided to set aside the judgment and to return the jugdment for the necessary action.

Delivered the 2nd day of April, 1924.

In the District Court of Haifa.

C.A.D.C. Ha. No. 89/24.

IN THE CASE OF:

The Texas Co. — PLAINTIFFS.

vs

Itin, Gafni & Gabriely — DEFENDANTS.

Breach of contract—Compensation not allowed for loss incurred by party's own act — Remote damages — Counterclaim dismissed as frivolous.

JUDGMENT.

The Court holds that the Plaintiffs were fully entitled to cancel the contract when they did as the Defendants admittedly delayed payment of invoices to the Plaintiffs over and above the

period of grace given, and thereby committed a breach of their contract.

The Plaintiffs' case against the Defendants is uncontradicted as regards the value of the 51 dunams not returned. The Plaintiff does not insist on the original claim of P. T. 65 and although he showed the Court the original invoice at P. T. 75 a dunam, he is willing to reduce the price to P. T. 40 a piece, which the Court considers reasonable.

There will, therefore, be judgment for the Plaintiffs for the sum of £E. 1199.626 less £E. 12.750, balance being £E. 1186.876 with costs and interest at 9% as from the date this action was lodged, viz: 5th September, 1924.

As regards the Defendants' counter-claim this merits no consideration. If the Defendants have incurred losses, these losses are due to the fact that they did not carry out their contract with the Plaintiffs by paying their debts when due to the Plaintiffs. A great deal of the damage claimed would in any case be far too remote to be considered. The Court can only think, as it said to start with, that the object of the counter-claim is to delay proceedings for it could not seriously be hoped that it would succeed.

It is therefore dismissed with costs. Judgment given in presence of parties and appealable.

Delivered the 19th day of January, 1925.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 85/26.

IN THE CASE OF:

Ribhi El Yazouri — APPELLANT.

VS

Sheikh Abdul Hamid Abu Ghosh — RESPONDENT.

Damages for breach of contract — Effect of contract which is impossible of performance from its commencement — Relief not granted from reckless agreement.

JUDGMENT.

The Ottoman law allows penalties to be agreed and enforced for breach of contracts. Had it been proved that the Plaintiff had contracted to sell lands that he would be unable to transfer within the period allowed by the contract then it might well be said that the Defendant was not obliged to pay a deposit on a contract

which the Plaintiff had no power to perform. But there is no evidence of this, and the Defendant broke the contract without being able to justify that proceeding.

It is very unfortunate that we should have to confirm the judgment for the Plaintiff on this reckless agreement, but we see no alternative but to dismiss the appeal subject to an amendment that moneys already paid are to be deducted from the £E. 5,000.

Delivered the 15th day of November, 1926.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 147/26.

IN THE CASE OF:

Meir Zeide — APPELLANT.

vs

Salomon Alcalay — RESPONDENT.

Contract of sale of land made after Land Transfer Ordinance, 1920—Sale not registered in Land Registry—Invalid disposition of ownership—Action for return of purchase monies paid—Counterclaim for damages—Measure of damages.

JUDGMENT.

As a disposition of ownership this agreement, if it purports to be a disposition, is void. As an agreement to make a transfer in the Land Registry Office it is a lawful contract and the sort of contract that is generally made by people who contemplate a sale of land. If such a contract is broken, the party, in the absence of an agreement for a penalty imposed, has a right to be compensated in damages, and the measure will be the difference between the agreed price and the estimated market price of the land at the time when the contract was broken. In this case the contract was repudiated by an action being brought for return of the purchase money paid in advance.

The judgment of the District Court is set aside, and the case sent back for the Court to estimate and award damages according to the principle set out above.

Dated the 26th day of October, 1926.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 12/27.

BEFORE:

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

IN THE CASE OF:

Saadia Paz — APPELLANT.

vs

Mahmud El Ihjeir
Hassan Mustapha el Zeidan
Yusef Kamel Masrieh
Selim Mahmoud Masrieh — RESPONDENTS.

Right of action on contract — Effect of delivery of signed copy of contract to signatory.

Appeal from the judgment of the District Court of Haifa, dated the 14th day of April, 1925.

JUDGMENT.

The Appellant alleges that he gave the Respondents a signed copy of the contract but does not appear to have been given an opportunity of proving this. If this is proved to be the case then the Appellant will have a right of action. The case must therefore be returned for this point to be ascertained and for the Court to enter into the merits of the case if it is proved that the Appellant did in fact give Respondents a copy of the contract signed by himself.

The judgment is set aside, the appeal allowed, and the case remitted.

Costs to follow the event.

Delivered in presence the 12th day of May, 1927.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 35/27.

BEFORE:

Baker, J., Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Kupat Am Bank — APPELLANT.

vs

Zeev Shocher
Isaac Izersky — RESPONDENTS.

Action for recovery of debt — Security given by partner ratifying firm debt — Agreement mutually abandoned disallowed as defence by a party to its breach — Estoppel by agreement.

Appeal from the judgment of the District Court of Jaffa, dated the 5th day of January, 1927.

JUDGMENT.

A firm of the name of Shocher and Co. owed to the Appellant firm the sum of £. 1240. The firm and one Z. Shocher entered into an agreement with the Bank dated the 17th June, 1926, whereby he ratified the firm's debt and entered into an agreement to transfer to the Bank by way of sale an orange grove provided that the Bank lends to Mr. Z. Shocher £. 1000. Other provisions were made as to security for the further loan and the debt then existing.

Mr. Z. Shocher assumed the whole responsibility for the payment of the above debts.

The Bank agreed to lend Mr. Z. Shocher a further £. 1000, not the firm, and in the last paragraph of the said agreement it is stated "and in any case the debt has to be covered by Mr. Shocher not later than a year and a half from the date hereunder".

The Bank did not lend to Mr. Shocher the agreed sum; neither did Shocher transfer the land agreed upon as security thereof.

The Appellant then sued the firm of Shocher and Co. for the sum of £. 1240 and the Court below gave a judgment that whereas in the beforementioned agreement of the 17th June, 1926, it was agreed that the said indebtedness should be covered by Mr. Shocher not later than a year and a half from the date of the said agreement, that by virtue of the said clause the Appellants were estopped from suing prior to the expiration of the said eighteen months from the date of the agreement and dismissed the Appellant's action.

It must be remembered that the terms of the agreement were never complied with. We are not asked to determine who was in default as there is no action for breach of the said agreement before us, neither do I consider it necessary for us to decide whether the said Z. Shocher did bind the firm by the said agreement. We only have an action for the recovery of money advanced to Respondents. I am, therefore, of opinion that it is not possible in the case before us for Respondents to set up a defence of estoppel on the grounds that by virtue of an agreement which has not been fulfilled there was a clause preventing the Appellants from suing

for the recovery of their money for a period of eighteen months subsequent to the date of the agreement.

The appeal must therefore be allowed for the action to be decided on its merits and the Defendants allowed to plead any set-off they have against the claim.

Costs to be costs in the cause.

Delivered in presence the 21st day of June, 1927.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 44/27.

BEFORE :

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

IN THE CASE OF :

Shaul Levy	APPELLANT.
vs	
David Moyal	RESPONDENT.
&	
Solomon Jacobson	THIRD PARTY.

Transfer not effected within period limited by contract — Effect of delay due to interference of Land Department—Payment of penalty allowed.

Appeal from the judgment of the District Court of Jaffa, dated 12th January, 1927.

JUDGMENT.

Under Section 3 of the contract the Respondent was under an obligation to effect an official transfer within three months. Section 5 of the contract putting the expenses on the Appellant does not release the Respondent from liability.

The Respondent did not complete the necessary formalities within the period prescribed and is therefore responsible.

The effect of the interference of the Land Department on this contract does not arise, since such interference was not in issue until long after the three months had expired, and would not have affected registration if the Respondent had completed his formalities in time.

The Appellant is therefore entitled to the £E. 100 penalty. The judgment of the lower Court is amended accordingly. Costs and £E. 3 advocate's fee.

Given and delivered in presence the 4th day of July, 1927.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 49/27.

BEFORE:

The Chief Justice, the Senior British Judge and Khayat, J.

IN THE CASE OF:

Elie Eff. Zariffeh APPELLANT and RESPONDENT.

VS

Menahem Samuel Slonim RESPONDENT and APPELLANT.

Transfer of land—Claim and counterclaim for damages—Construction of contract — Waiver of right of action for breach of contract — Contract broken by failure to pay instalment of purchase price due.

Appeal from the judgment of the District Court of Jaffa, dated the 6th day of December, 1926.

JUDGMENT.

This is an action upon a contract for the sale by the Defendant Zariffeh to the Plaintiff Slonim of land near the Jaffa-Jerusalem Road dated the 11th day of June, 1925, the provisions of which are sufficiently set forth in the judgment of the District Court. The Plaintiff claimed repayment of the amount already paid by him on account of the purchase money, — namely £E. 3600 and £E. 6000 damages for breach in accordance with clause 10 of the contract.

The Defendant counter-claimed under the same Clause for £E. 6000 damages for breach (less the amount already paid by the Plaintiff).

The District Court gave judgment in favour of the Plaintiff for repayment of the £E. 3600 but dismissed Plaintiff's claim for damages and Defendant's counter-claim.

Both parties have appealed.

The contract contemplates the transfer of the land at a date not less than six and not exceeding ten months from the date of its execution, that is to say, not earlier than the 11th day of December, 1925, and not later than the 11th day of April, 1926.

The first default appears to have been that of the Plaintiff (Respondent) in failing to pay two bills amounting to £E. 900 due on February 11th, 1926. By Defendant's (Appellant's) Public Notary notice of March 8th, 1926, Plaintiff was called upon to pay this sum and was asked for the confirmation of an oral agreement to postpone the date of completion. The Plaintiff's reply in Public

Notary notice of 10th March, 1926, was with reference to the payment of £E. 900, to cite Clause 9 of the contract, to deny having consented to postpone the transfer and to notify the Defendant that failure to transfer on the date fixed would involve liability for damages under Clause 10 of the contract.

The next step was the Defendant's Public Notary notice dated March, 1926, which from internal evidence must have been issued on the 16th day of March, 1926.

This notice asked for the payment of £E. 900 and for the appointment by mutual agreement of an engineer to survey the land and draw up a plan.

On the 18th of March by a similar notice the Plaintiff named a number of engineers and asked the Defendant to choose one or to nominate others from whom the Plaintiff could choose one.

In his Public Notary notice of the 19th of March, 1926, the Defendant made no reference to any engineer and in his Public Notary notice of the 20th of March, the Defendant stated that he knew none of the Plaintiff's nominees; but himself still failed to nominate anyone in their stead.

On April 6th, 1926, however, in a further Public Notary notice the Defendant nominated three engineers and asked the Plaintiff to choose one from among them.

On April 8th, 1926, the Plaintiff in a Public Notary notice said he would agree to any licensed engineer chosen by the Defendant and gave him eight days in which to perform the contract and he confirmed this in a further notice of April, 11th.

In our opinion Clause 9 of the agreement upon which the Plaintiff relies will not bear the construction which Plaintiff suggests should be put upon it, viz: — that the purchaser can deliberately postpone payment of overdue bills until the day of transfer. It appears to us to be obviously drawn in favour of the vendor who can refuse transfer if due bills are unpaid at the moment when transfer is proposed.

It must be remembered that by Clause 3 of the agreement transfer could be effected at any time between the 11th of December, 1925, and the 11th of April, 1926, and that Clause 2 contemplates payment by instalments by bills payable at future fixed dates in addition to one sum of £E. 1500 payable on the date of transfer whatever the date of that might be.

The Defendant, however, cannot now take advantage of the Plaintiff's breach of contract.

The Defendant, it is true, notified the Plaintiff by a Public Notary notice to pay the overdue instalments, but at the same time he called upon the Plaintiff to appoint an engineer in accordance with the contract, and thereby waived any right he might have had to treat the contract as determined by the Plaintiff's default.

Again we agree with the Court below that on the other hand, in view of the Plaintiff's denial of any variation having been agreed to, we are bound as regard the date of fulfilment of the contract by the express terms thereof. Further, Section 3 of the contract threw certain duties upon the Defendant as vendor as regards the division of the land, and bringing the total area, if necessary, up to a round sum of 3000 dunams and for these purposes the services of an engineer were necessary.

We find that the Defendant did not nominate any engineer until five days before the date of completion, viz. April 6th, 1926, although the Plaintiff on March 18th drew his attention to the need of such appointment and nominated several engineers from amongst whom he, the Defendant, could have chosen one.

Reading Clauses 3 and 6 of the agreement in conjunction, it appears clear that the Defendant did not discharge the onus which was on him under these clauses.

The Defendant's appeal, therefore, fails.

With regard to the Plaintiff's cross-appeal claiming £E. 6000 damages for breach: the Defendant's liability is governed by Clause 10 of the contract which is worded:—

> "Should the vendor not effect the transfer or not deliver the land within the period and in conformity with the conditions above-mentioned, he shall pay to the buyer the sum of £E. 6000 as liquidated damages".

One of the conditions above-mentioned was Clause 9, the meaning of which has already been discussed.

Under this clause, the Defendant could not be in default in effecting the transfer so long as any instalment of purchase money was due and unpaid, and hence any penalty imposed by Clause 10, which is payable only upon default in effecting the transfer or delivery of the land is not recoverable.

For these reasons the judgment of the Court below on both claim and counter-claim, and as to costs, is affirmed.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 108/27.

BEFORE:

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

IN THE CASE OF:

The Anglo-Palestine Co. Ltd. APPELLANT.

vs

Leopold Landau RESPONDENT.

Breach of contract—Effect of acceleration clause in contract—Claim for balance of purchase monies due — General rule as to when purchase price is payable.

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

JUDGMENT.

In the District Court the Appellant Company which is the vendor, claimed the balance of the purchase money which it had been agreed should be paid in instalments, which balance had become due and payable according to the terms of the agreement upon failure by the Respondent to pay one of the instalments.

The Court dismissed the claim because the transfer had not taken place in the Land Registry.

The vendor has appealed from this judgment on the ground that the Court was wrong in dismissing the claim inasmuch as the Defendant had agreed to pay the purchase money in a valid agreement. The vendor also appeals on the ground that he is prepared to effect the transfer.

For the following reasons we see no legal grounds which prevent the Court from giving judgment for the balance of the purchase money.

Although payment of the price was deferred until after the transfer which has not taken place, yet Article 6 of the agreement makes the whole purchase money immediately payable upon default in payment of any instalment and therefore it could be claimed before the transfer.

The vendor considers that the purchaser has not refused the contract. According to this view his claim for the price is good inasmuch as the absence of the Defendant cannot be held to be a refusal of the contract in which case only the purchaser can claim damages.

Article 6 of the contract provides that the part of the price already paid should be deducted from the amount of damages if the purchaser refuse the purchase.

The general rule is that the price is payable at once and is not deferred, the purchaser should pay first and then claim the purchased thing from the vendor.

The judgment, therefore, should be set aside and the case remitted to the District Court to ascertain the balance of the price. Costs to follow the event.

Delivered in absence of the Respondent the 22nd day of May, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 123/27.

BEFORE:

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

IN THE CASE OF:

Iskander Sakaili — APPELLANT.

vs

Tewfiq Zerifeh & others — RESPONDENTS

Breach of contract — Rescission of contract of sale — Conditional waiver of right to damages.

Appeal from the judgment of the District Court of Jaffa dated the 29th November, 1926.

JUDGMENT.

From the recital of the contract it is clear that the Respondents were fully aware of all the facts and circumstances relating to the land in dispute and that there was no misrepresentation on the part of the Appellant who has done all that was stipulated in the contract so far as he is concerned.

Refusal to pay a balance of the purchase price at maturity and in spite of a Notary Public notice without lawful excuse is to our mind sufficient to establish rescission of the sale on the part of the purchasers, and they are therefore liable to pay charges agreed.

The judgment of the District Court is to be set aside and judgment is to be entered for the Appellant for the amount of damages claimed being the equivalent in Palestine currency of £2977, with costs and £P. 3 advocate's fees.

Whereas, however, Appellant has stated in Court that he is prepared to waive his rights for damages on condition that the amount claimed is paid within a reasonable time, in which case he would accept it as balance of the purchase price due, we hold that if the Respondent pay the said sum within three months from this date, it will be considered as settlement of the balance of the purchase price and they will be so entitled to all rights conferred on them under the contract.

Delivered the 7th day of May, 1928.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 25/28.

BEFORE:

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

IN THE CASE OF:

Samuel Blum — APPELLANT.

vs

Schmit and Jaffe — RESPONDENTS.

Agreement of sale cancelled and replaced—"Endeavour" to transfer as early as possible — Damages for breach of contract — Time for effecting transfer fixed by District Court on its own motion.

Appeal from the judgment of the District Court of Jaffa, dated the 2nd day of January, 1928.

JUDGMENT.

On the 28th day of October, 1921, the Plaintiff and Cross-Appellant in this action Benjamin Schmit, bought a plot of land and a house built on it situated in Tel-Aviv from the Defendant and Appellant S. Blum for the amount of £6,300. Some dispute having arisen between the parties, they agreed on the 1st day of February, 1925, to cancel the agreement on the aforementioned date, waiving reciprocally certain rights as to instalments paid and rents collected and agreeing that an amount of £2,000 paid on account of the purchase price, should be entered to the credit of Schmit in a new contract made between the latter and Blum through his agent Schrasbevsky, bearing the same date.

This last contract of the 1st day of February, 1925, is the basis of the present action, and relates to the same property as the first contract of the 28th day of January, 1921, the price however

being £4,500 and not £6,300 as in the first contract. £2,000 having been accounted for as above, the purchaser Schmit undertook to pay the balance of the purchase price plus interest at the rate of 6% in 35 quarterly instalments of £90 each, and one last instalment of £180.

Under Clause "B" of the said contract, the vendor undertook "to give all necessary declarations to enable the purchaser to register the property in his name in the official Land Registry and to appear in person in the Land Registry whenever he will be required to execute the said transfer.

Clause "C" of the contract provides that "the vendor should endeavour that the preparation of the Kushan be as early as possible".

Under Clause "F" the two parties undertook to fulfil the contract in all its details, it being stipulated between them that any party rescinding the contract wholly or in part should pay to the other side £2,000 as damages, and this contract to be null and void.

On the 29th day of March, 1927, Schmit lodged the present action before the Jaffa District Court claiming £2,000 damages plus the refund of the £2,630 paid on account of the purchase price and asked the Court to declare the contract of 1st day of February, 1925, null and void.

Before lodging the action, Plaintiff served a notice on the Defendant to register within three days. The Court below did not believe that such a period was sufficient for the carrying out of the transfer, and although it did not find any breach on the part of the Plaintiff, it considered it its duty to fix a reasonable period to effect the transfer and decided to fix a period of 6 months from the date of judgment (2.1.28) to enable the Defendant to effect the transfer.

Against this judgment both parties appealed.

In order to constitute a breach on the part of the Appellant in this action under clause "C" of the contract, it is not enough to establish that the Kushan was not prepared as early as possible, but that no endeavour has been made for such preparation. The use of the word "endeavour" in this contract was not done without clear deliberation, in view of the fact that the contract was intended to replace one which caused certain difficulties and it would be easily assumed that the time of the second contract by which the purchaser obtained a reduction of £1,800 he was aware of the state of affairs with regard to the state of the property involved.

In view of this fact, the Court held that there was no breach on the part of the vendor. This being the case, it should have dismissed the Plaintiff's action, and not as it did, on its own motion, fix a period for effecting the transfer.

The appeal of the principal Appellant Blum is therefore allowed and the cross appeal of Schmit dismissed.

The judgment of the District Court is set aside and the Plaintiff's action dismissed with costs here and below, and £P. 6 advocate's fees.

Delivered the 9th day of May, 1930.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 101/28.

BEFORE:

Kermack, J., Jarallah, J. and Khaidi, J.

IN THE CASE OF:

Hassan Bader — APPELLANT.

vs

Said Lahham
Mohmoud Haylawi
Yousef Assaf
Tannous Abweh — RESPONDENTS.

Breach of contract to build houses — Termination of contract by conduct of party — Measure of damages — Validity of penalty clause for non-completion in time — Contract under Art. 64, Civil Procedure Code — Waiver of right to claim damages — Liability of guarantors of contract — Liability of heirs of guarantor — Art. 670, Mejelle.

Appeal from the judgment of the District Court of Haifa, dated the 20th day of April, 1928.

JUDGMENT.

A contract for building four houses at Acre in accordance with a plan showing the form and kind of the building was entered into on April 26th, 1926, between Hassan Eff. Bader, as first party, and Said Lahham and Mahmoud Haylawi, as a second party, in consideration of £E. 1700 to be paid at intervals clearly stated in the contract. It was provided that the building should be completed within six and a half months. Both Yousef Eff. Assaf and Tannous Eff. Abweh on the same day guaranteed the performance by the second party of all their obligations under the contract.

The most important terms of the said contract which are relevant to this case are:—

By Clause 20 the second party undertook to pay to the first party £E. 100 damages if the building is not raised within three months to the window sills.

By Clause 26 the second party undertook to pay a further £E. 100 damages without the necessity for a notice if the building is not completed within six and a half months.

By the terms of the addendum to the contract the second party also undertook to pay in addition to the second £E. 100, £E. 1 a day for every day after the expiry of 20 days from the date fixed for completion of the building if the building is not completed within such period.

On October 1st, 1926, a contract was made between the second party and a third person, one Basil Matta, for the erection of the building in accordance with the original plan, at the rate of PT. 25 for every metre of building.

On January 14th, 1927, the first party started an action in the District Court of Haifa against the second party and the two guarantors, after notice, claiming the damages fixed in Clauses 20 and 26 of the contract and in the addendum.

In their defence the Defendants pleaded that the terms of the contract on which the action is based were terminated by the fact of a new contract having been made with other persons; they further pleaded that some alterations were made in the form of the building together with some additions which were not provided for in the original contract; also that the damages provided for by Clause 20 are not payable as the building was raised to the window sills; further that the condition for the payment of £E. 1 a day, as is provided in the addendum, is an invalid condition. Other contentions were put forth in their rejoinder, the summary of which being that it is the Plaintiff who caused the default.

After hearing the case the said Court decided as follows:—

1. That the second party committed a breach of Clause 20 and that Plaintiff did not serve a notice on them but on one of the guarantors Yousef Eff. Assaf; and that the Plaintiff had paid all the money which he is required to pay on the building reaching the window sills thereby waiving his claim to the damages, as he did not apply to the Court at the time.

2. That the second party committed a breach of Clause 26 and that both they and the guarantors the said Yousef Assaf and Tannous Abweh are liable.

3. That the subsequent agreement with Basil Matta for the completion of the building does not cancel the original contract.

4. That the condition embodied in the addendum is illegal and unenforceable.

5. It gave judgment for £E. 100 damages under Clause 26 of the contract against the second party and one of the guarantors, Assaf, only, and held that the heirs of the second guarantor are not liable in view of the death of their ancestor on 20th April, 1928.

Both the first party and the guarantor Assaf have appealed from the said judgment. The grounds of appeal submitted by the Appellant Hassan Bader are summarized as follows:—

That the payment by him of what he was required to pay when the building is raised to the window sills does not destroy his right to claim damages on realising that the building was not raised up to the window sills and that his delay in applying to Court does not exceed the period of prescription and that he is entitled to sue without serving a notice but that he did in fact serve a notice on the guarantor and that he is at liberty to sue the guarantor and not the principal; also that he held that the heirs of the second financial guarantor are not liable for the mere fact of his death is contrary to Article 670 of the Mejelle and that the undertaking to pay £E. 1 a day under the terms of the addendum is not contrary to law, but is in conformity with Article 64 of the Code of the Civil Procedure.

The main grounds of appeal by Assaf are:—

That the renewal of the contract with the consent of the Appellant and the second party and the contractors with another person cancels the terms of the original contract; the cancellation of which puts an end to his liability; also that the Court refuses to hear his claim that he spent £E. 800 on additions requested by the Appellant.

After the hearing and considering the pleadings of both parties the Court holds:—

1. That the grounds upon which the Court based its judgment for not awarding the damages provided for in clause 20 of the contract are not good grounds for refusing judgment when it is ascertained that the building did not reach the window sills.

2. That the death of a financial guarantor does not bar the person in whose favour the guarantee was executed from suing the heirs, as his rights are transferred to the estate according to Article 670 of the Mejelle.

3. That the claim of Appellant Assaf with regard to the additions should be heard and considered.

4. That there is no express provision in law invalidating the condition embodied in the addendum to the contract providing for payment of one pound a day for every day until the building is completed in accordance with provisions of the contract. Such a penalty however can only take effect as long as the contract can be said to be operative. As soon as the contract is to be treated as cancelled, which can be deduced from the acts of either party to the contract, this provision falls along with the rest.

On such cancellation the first party obtains a right to damages instead of to the penalty under the contract itself which was already intended merely to represent the loss of the rent if the builder was behindhand in the work, while now it is not a case of being behindhand but a complete breakdown of the whole contract. This period is to be fixed at the time when the workmen ceased working altogether, and Plaintiff is entitled to the penalty up to that date. Thereafter the Plaintiff is entitled to damages for the period which an ordinary builder would have taken to complete the building and this period must be fixed by experts. For the period which this would take the Plaintiff is entitled to £E. 1 a day as damages, but for no further period.

5. As the Court is of this opinion, it is not necessary to consider the effect of the second contract which is subsequent to that period.

The judgment of the District Court is therefore set aside on the points indicated above and the case remitted. Costs to be costs in the case.

Delivered the 30th day of October, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 105/28.

IN THE CASE OF:

Isaac Gavirelowitz — APPELLANT.

vs

Ali Ibn Hassan Abu Duyuk — RESPONDENT.

Agreement to sell land not consented to by Government—Section 2, Transfer of Land Ordinance, 1920—Recovery of money paid under void disposition — Promissory notes given under void agreement held to be void—All clauses of void agreement also void.

Appeal from the judgment of the District Court of Jaffa dated the 16th day of May, 1928.

JUDGMENT.

An agreement was entered into between the parties to this appeal on the 17th March, 1926, whereby the Appellant agreed to buy and the Respondent agreed to sell a vineyard described as containing 533 dunams of land. Other agreements were contained in the document but the material part for the purpose of the appeal is that the document was an agreement to sell property, an agreement to which the written consent of the Government was not obtained. Now by virtue of Article 11 of the Transfer of Land Ordinance, 1920, it is prescribed 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 Courts. Accordingly the agreement must be held to be null and void in that the consent of the Government was not obtained to it.

The cause of action in this appeal is to obtain a sum of money secured by promissory notes which was part of the purchase price of the property.

The contract being null and void, therefore, any attempt to recover money on promissory notes which emanate from an invalid agreement and are part of the consideration of the said agreement must fail in that it follows that the promissory notes must be void. Respondent argues that by virtue of Clause 1 of the agreement the Appellant agreed not to sue for the recovery of the value of the land and therefore is now estopped from suing. The contract however is void by law and it follows that every clause contained in the contract is void. The cross appeal must automatically fail.

Accordingly the judgment of the lower Court must be quashed and the appeal allowed with costs and advocate's fees assessed at £P. 3.

Given the 28th of March, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 126/28.

BEFORE:

The Acting Chief Justice, The Acting Senior British Judge and Frumkin, J.

IN THE CASE OF:

Adib Asbat
Mohamed Daoud El-Bairakdar — APPELLANTS.

vs

Associated Orange Growers — RESPONDENT.

Conditions typed on back of agreement and referred to in body of agreement — Plea of no knowledge of additional conditions of contract—Witnesses not heard against written agreement.

Appeal from the judgment of the District Court of Jaffa dated the 19th day of July, 1928.

JUDGMENT.

On the 9th day of August, 1927, the Appellants and the Respondent Company entered into an agreement for the shipment of oranges.

The action which gave rise to this appeal was brought by the Respondent Company to recover a sum of £P. 2898.096 mils alleged to be due to it under the agreement.

The copy of the agreement filed by the Respondent Company in support of its claim is a typewritten document of four pages made in two parts, the first part headed "Agreement" containing clauses lettered from A to F occupies the first page and part of the second page, and is sealed by the parties on the second page. Pages 3 and 4 are headed "Conditions of Contract" and contain 21 clauses. The seals of the Appellants are again affixed at the bottom of page 4 and attested by the same two witnesses whose names appear on page 2. The Respondent's action is based upon certain of the conditions appearing on pages 3 and 4.

The Appellant's defence is that they have no knowledge of the "Conditions of Contract" typed on pages 3 and 4, and have never agreed to them.

The District Court refused to believe the story told by the Appellants and gave judgment in favour of the Respondent Company.

On appeal, the Appellants argued that the District Court should have heard the witnesses whose names appear on the

document. The story that the Appellants tell in this Court is that when they affixed their seals on page 2 of the agreement pages 3 and 4 were blank, that they were asked to hand over their seals to the Respondent's agent and did so, and that the seals were returned to them a few days later.

On it being pointed out to the Appellant that the document which they admit having sealed contains the phrase "Now it is hereby agreed (subject to the conditions at the back hereof) as follows:" The Appellants declare that they thought that the "conditions at the back" meant clauses D, E and F of the agreement which are typed on page 2.

This is an explanation which I cannot accept. The Appellants' seals appear at the foot of those clauses, and I cannot believe that they understood them to be "the conditions endorsed hereon". Having regard to the further fact that the Appellants according to their own story for reasons which they are unable to explain, handed over their seals to the Company, it must be inferred that the Appellants knew that conditions were to be written on pages 3 and 4. It was for the Appellants to satisfy themselves as to the nature of such conditions before handing over their seals and in my opinion they must be held to have accepted the terms of these conditions.

In my view, therefore, even if we accept the Appellants story as correct, they are bound by the conditions typed on pages 3 and 4 of the agreement, and the appeal must be dismissed with costs.

Delivered the 23rd day of July, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 17/30.

IN THE CASE OF:

Alfred Rock — APPELLANT.

VS

Joshua Hankin — RESPONDENT.

Purchase of immovable property made in 1919 — Claim for return of purchase monies paid under invalid contract — Judgment against partner produced as evidence against other partner.

JUDGMENT.

This case was brought against the Appellant claiming the return of money paid by the Respondent under a contract for the

sale of immovable property made in 1919. In this contract Appellant and Sheikh Tewfik Dajani were the vendors and Respondent the purchaser. The vendors entered into a joint and several liability under the said contract. Certain sums of money have been paid to the vendors who have transferred certain areas of land, and a balance of money remains still in their possession. The Respondent in a counter-claim in an action brought against him by one of the vendors Dajani, first sued Dajani for the balance and obtained a judgment against him which he was unable to enforce. He then instituted the present action now under appeal to claim the same balance from the present Appellant. In proof of the amount of the balance due he produced the judgment issued against Sheikh Tewfik Dajani as evidence. The District Court without hearing any other evidence gave judgment against the present Appellant for the same amount judged against Dajani.

Against this judgment both parties appeal.

The main grounds of the Appellant-Defendant are that the contract of 1919 was bad in law, that he never received any amounts from Respondent and that the judgment against Dajani in a case to which he was not a party could not be taken as evidence against him inasmuch as the judgment was never served and never became final.

In his cross-appeal Plaintiff states that the last figure arrived at, in the judgment against Dajani as the balance due, was based upon a clerical error and he wants it to be amended.

As to the Appellant, it is true that the original contract of 1919 having been made in the prohibited period is invalid and null and void as a disposition of land, but there is nothing to prevent a party having paid money under such an invalid contract to claim the return of such money.

The present Appellant having jointly and severally with Sheikh Tewfik Dajani assumed responsibility for the contract and in consequence for all monies paid under it, is personally liable not only for monies actually received for him but also for all sums received by his partner Sheikh Tewfik Dajani, under and in consequence of the contract.

The Court, however, were wrong in fixing the liability of Appellant according to the amount adjudged against Dajani. We need not at present enter into the question whether a judgment sued against one partner could be brought as evidence against another partner if they guaranteed one another, inasmuch as in

his case the judgment was not served and was not final. Therefore, the question of the cross-appeal does not arise.

The judgment of the District Court is set aside and the case remitted for the Court to ascertain what amounts were paid by Respondent to either Appellant or Sheikh Tewfik Dajani under the contract of 16th February, 1919, and in consequence thereof to deduct from such amounts the price of land transferred by either of them to Respondent or his nominees and give judgment for the balance against the present Appellant.

Costs to follow the event.

Delivered the 31st day of December, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 24/30.

BEFORE:

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

IN THE CASE OF:

Haj Khalil Muhammad Taha — APPELLANT.

vs

Saleh Muhammad el Shibl — RESPONDENT.

Void contract for sale of land—Provisions for delivery of possession before registration — Sections 2, 11, Transfer of Land Ordinance, 1920—Option to vendor to rescind contract—Contract for sale of land held not to be a disposition — Transaction having effect of mortgage.

Appeal from the judgment of the District Court of Haifa dated the 9th day of October, 1929.

JUDGMENT.

By a contract dated the 9th February, 1929, the Respondent Saleh Muhammad Shibl, agreed to sell to the Appellant, Haj Khalil Muhammad Taha, 7000 dunams of land in Shefa-Adr specified in the agreement for £P. 14,564.103.

By Clause 2 of the contract the Respondent undertook to effect the transfer within 3 years from that date.

Clause 5 declared that the Appellant had paid all the purchase money to the Respondent, partly in cash and partly in bills as specified therein.

Clause 6 declared that the Respondent had delivered to the Appellant possession of all the lands "so that he may cultivate

them as he wishes and pleases in consideration of the interest ot all the sums which have been paid and which will be paid to the first Party (Respondent) at their maturities up till the termination of the three years mentioned in the 22nd Article, hereof."

Clause 10 reads as follows:—

"The 2nd Party (the Appellant) hereby undertakes to restore to the 1st Party the sold properties and to cancel this contract, if the first Party pays to him all the price which amounts to fourteen thousand five hundred sixty four Palestine pounds, one hundred and three mils, together with three thousand five hundred Palestine pounds, that is to say, half a pound in respect of each dunam more than the price agreed upon in the 1st Article hereof, in the nature of a commission within the said three years. The 1st party is entitled to pay this sum in one payment or gradually in several payments against receipts which he will take from the 2nd Party".

By Clause 11 the Appellant was made liable to pay a penalty if he should fail to carry out the terms of Clause 10.

By Clause 12 the Respondent was authorised to sell 3500 dunams in specified localities in one sale and to pay to the Appellant £P. 7564.103 "together with the sum of 1750 pounds which is the fixed commission at the rate of half a pound per dunam as set out under Article 9 hereof".

By Clause 13 the Respondent was authorised to sell the remaining 3500 dunams, either in one sale or by separate transactions, and to pay to the Appellant two and a half pounds for each dunam so sold.

Clause 14 provided that if at the expiry of the period of three years the Respondent did not either repay the whole of the purchase money with commission amounting in all to £P. 18.064.103 or transfer the lands into the name of the Appellant, he should be liable to repay the purchase money and to pay an indemnity of £P. 7.000.

The Appellant is suing the Respondent for damages on the ground that contrary to the terms of Clause 6, he has failed to deliver possession to the Appellant of two plots of land included in the contract known as Beitarieh and Khamseh.

The District Court has held that the provision for delivery or possession before registration was contrary to the Transfer of Land Ordinance, 1920, and that under Section 11 of that Ordinance, the whole contract for sale is null and void; and it therefore dismissed the Plaintiff's action.

This Court has recently held in the case of Yehoshua Hankin vs. Ali Qasem Abdel Kader (Civil Appeal No. 29/30), that a contract for sale of land is not a disposition within the meaning of Section 2 of the Transfer of Land Ordinance, 1920. Hence the contract of sale is not to be regarded as null, merely on the ground that it provides for delivery of possession before registration.

Before this Court, however, it has been argued that the provisions of the contract relating to possession in fact constitute a mortgage of the land, pending registration, by way of security for the purchase money paid in advance. If that view be correct, the transaction effected by those clauses is an unregistered disposition and is therefore null and void under the Transfer of Land Ordinance, 1920.

Clauses, 10, 11, 12 and 13 contain provisions for the rescission of the contract wholly or in part at the option of the vendor. These provisions are unusual in character, and provide that if the vendor exercises his option to rescind, he shall not only repay to the purchaser the whole or a proportionate part of the purchase money, but shall also pay him, by way of commission, a further sum of one half pound for each dunam in respect of which the option is exercised.

These provisions, however, have not, in my view, the effect of creating a mortgage on the property for the amount of the purchase money. For a transaction to take effect as a mortgage, it is, in my view, essential that it should confer upon the person by whom money is paid the right to have the property sold in the event of failure by the other party to make payment.

No such right is conferred upon the Appellant under the contract. We therefore hold the clauses in question do not constitute a mortgage of the property and that they are valid.

The judgment must be set aside and the case remitted to the District Court for completion.

Delivered the 1st day of August, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 30/30.
L. A

BEFORE:

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

IN THE CASE OF:

Abd es Salam Muhamad el Qamhawi — APPELLANT.

vs

Ali Hussein el Bitar
Muhamad Hussein el Bitar — RESPONDENTS.

Failure to produce Kushan as breach of contract—Service of Notarial notice ignored — Fresh condition introduced into transaction by Notarial notice and failure to comply with such notice.

Appeal from the judgment of the District Court of Jaffa, dated the 9th day of January, 1930.

JUDGMENT

The Respondents have failed to comply with the notice served upon them by the Appellant dated the 20th of March, 1929, calling upon them to transfer the house. They have only produced in the Land Registry one of the two Kushans under which the house is registered.

It is true that the Appellant failed to comply with the notice served upon him by the Respondents on the 4th of March, 1929. In that notice however, the Respondents introduced a fresh condition into the transaction, namely, that the Appellant should acknowledge that the original mortgage included usurious interest, and that the balance due to him on the mortgage after completion of the transfer of the house was only £P. 8.

The Appellant, therefore, committed no breach of the contract in ignoring this notice.

In my view, therefore, the Respondents have committed a breach of the contract. The appeal must be allowed and the cross-appeal dismissed. The judgment of the District Court is set aside, and judgment entered for the Appellant for £P. 200, the amount of the penalty due under the contract, with costs including £P. 2. advocate's fees.

Delivered the 14th day of September, 1931.
