ANNOTATED

SUPREME COURT JUDGMENTS

1938

Vol. II

EDITED BY

ARNOLD M. APELBOM
LI. B., BARRISTER AT LAW, ADVOCATE

PUBLISHERS

S. BURSI
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CIVIL APPEAL No. 130/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice and Greene, JJ.

IN THE APPEAL OF :

Meir Moshe Meir. — APPELLANT.

v.

1. Halimeh Ahmad Sheikh Ali,
2. Hussein
3. Hassan
4. Kheirieh
5. Wasfieh
6. Fatmah

Children of Hafez Hussein Sheikh Ali.

7. Fakhrieh Hafez Cheikh Ali represented by her guardian, Ali Ahmad Sheikh Ali,
8. Ali Ahmad Sheikh Ali,
9. Dr. George Cornu. — RESPONDENTS.

Mortgage to order — Transfer of mortgage — Amount of mortgage debt contested — Usurious interest — Fraud — Evidence against admissions in Land Registry — C. A. 2/38 — C. A. 161/32 — Costs of execution.

Appeal from a judgment of the District Court of Jaffa, dated the 3rd May, 1938, dismissed.

Appellant was the assignee of a mortgage "to order" executed by the first seven Respondents and guaranteed by the eighth and ninth Respondents in favour of the Union Geneva Life and Accident Insurance Co.

Upon the Respondents failing to pay the mortgage debt, the Appellant applied to the Chief Execution Officer before whom Respondents contested the amount of the mortgage debt and alleged that part of it represented usurious interest. They paid that part of the amount which they admitted and the Appellant applied to the District Court for the balance of the amount.

The District Court found in favour of the Respondents and held that there had been collusion between the Appellant and the agent of the Respondents and that of the original mortgagee and that the amount of the mortgage had been deliberately wrongly stated. It also held that part of the amount claimed represented usurious interest.

Appellant pleaded that the defence of usurious interest should not have been admitted as it had been raised only at the second hearing ; that evidence to rebut an admission made at the Land Registry was inadmissible ; that the Respondents were estopped from pleading fraud ; that the amount paid by the Appellant in consideration for the mortgage was immaterial in assessing the

interest and that there was no evidence of usurious interest. He also claimed the costs of execution and the costs of the transfer of the mortgage.

HELD : 1. The defence of usurious interest had been first raised in the written defence and was therefore properly considered by the District Court.

2. (Following C. A. 2/38) When fraud is alleged evidence is admissible even against an admission before the Land Registry. Nor did the letter sent by Respondents to Appellant raise an irrebuttable estoppel.

3. (Distinguishing C. A. 161/32) There had been evidence of fraud and the amount paid by the Appellant to the mortgagee was material to the issue.

4. The judgment of the District Court must be varied so as to allow Appellant the amount of collection fees of the Execution Office in respect of that part of the mortgage debt which was admitted by Respondents.

5. Appellant was not entitled to claim the costs of the transfer of the mortgage as the Respondents had not been a party to the assignment and in view of the Appellant's fraud.

Followed : Gaber v. "Migdal" Insurance Company, C. A.. 2/38 (1938, 1 S. C. J. 165).

Distinguished : Dajani v. Shlank, C. A. 161/32.

A report of this case appears on p. 136 of Shems' Manual of Bills of Exchange &c.

ANNOTATIONS : See note 1. to C. A. 2/38 (*supra*).

FOR APPELLANT : Eliash.

FOR RESPFNDENTS : Nos. 1—8 : Cattan.
No. 9 : Nijem.

JUDGMENT:

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

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

to the Insurance Co. and not LP. 7000.—, and thirdly, that the sum of LP. 1985.—, the balance of the LP. 7000.— represented usurious interest, the Chief Execution Officer ordered that payment of the undisputed amount should be made to the Appellant, and told the Appellant that he must institute an action in the appropriate Court for the disputed balance. The Respondents then paid to the Appellant the sum of LP. 5660.840 ml. and deposited the balance of LP. 2390.740 m. with the Execution Office.

The Appellant then entered an action against the Respondents for this latter sum.

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

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

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

With these contentions we cannot agree. In Zvi Gaber *v.* "Migdal"

Insurance Co. (C. A. 2/38) it has been held that, when fraud is alleged, evidence is admissible even against an admission in the Land Registry, and the Usurious Loans Ordinance, 1934, also allows evidence to show the real nature of the transaction, and we do not think that the letter of the 11th September, 1933, makes any difference ; it is of no more value as an estoppel than the admission in the Land Registry. There was ample evidence before the District Court, in particular that of Mr. Aboulafia, the agent of the Insurance Co., to support its finding that there was fraud on the part of the Appellant and that the true nature of the transaction was that it was an attempt to conceal the fact that this sum of LP. 1985, was usurious interest, and to justify the Court in disbelieving the Appellant's claim that he was merely giving the market value of the mortgage. He knew that the capital sum remaining due on the mortgage was only LP. 5015.— The principle laid down in Mohd. Ali *v.* Yonina Shlomo Shlank, (C. A. 161/32) that as between the maker of a negotiable instrument and the assignee, the amount of consideration given by the assignee to the assignor is immaterial, cannot apply in such a case as the present, where fraud has been proved on the part of the assignee, acting in collusion with the agent of the assignor.

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

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

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

Delivered this 4th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 146/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE CASE OF :

1. Salim Najia,
2. Miran Jalal. APPELLANTS.

v.

Abdel Raouf Bitar. RESPONDENT.

Bills of exchange — Case remitted to District Court, struck out and renewed in Chief Magistrate's Court — Magistrates Courts Jurisdiction Ordinance 1935 *— Prescription under sec.* 96(1) *of the Bills of Exchange Ordinance — Test whether action is fresh or renewed action.*

Appeal from a judgment of the District Court of Jaffa, sitting in its appellate capacity, dated the 3rd May, 1938, allowed. Judgments of the District Court and Chief Magistrate set aside and case remitted to the Chief Magistrate to hear on its merits.

Appellant had, in a former action, sued Respondent on a promissory note and the case had been remitted to the District Court on a formal point.

The case was stuck out by the District Court for failure of appearance and, the Magistrates Court Jurisdiction (Amendment) Ordinance, 1935, having in the meantime been enacted and conferring upon the Chief Magistrate's Court jurisdiction to hear the case, Appellants filed the case before the Chief Magistrate's Court, Jaffa.

Respondent relied upon sec. 96(1) of the Bills of Exchange Ordinance and contended that the note was prescibed, more than five years having elapsed since the accrual of the cause of action.

HELD : The case before the Chief Magistrate's Court was not a fresh case but a renewal of the former proceedings and the cause of action was consequently not prescribed.

FOR APPELLANTS : Atalla.

FOR RESPONDENT : Hanna.

JUDGMENT:

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

Originally the Appellants sued the Respondent on a bill of exchange in the District Court, and the said Court found in favour of the

Appellant. An appeal was lodged and the Supreme Court remitted the case on a formal point with certain directions to be followed by the District Court.

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

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

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

The appeal is therefore allowed, the judgments of the District Court and of the Chief Magistrate are set aside and the case is remitted to the Chief Magistrate in order to hear it on the merits. The Appellants will have the costs of this appeal fixed at LP. 10 and LP. 5 hearing fees, in any event.

Delivered this 5th day of July, 1938.

Acting Chief Justice.

HIGH COURT No. 45/38.

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

BEFORE : The Acting Chief Justice and Khayat, J.

IN THE APPLICATION OF :

Issa Ibrahim Sodah. PETITIONER,

v.

1. Chief Execution Officer, Jerusalem,
2. Mustafa el Mowakett. RESPONDENTS.

Execution — Evidence of means.

In making absolute an order to issue to the First Respondent directing him to show cause why his order dated the 4th May, 1938, in execution file No. 1029/38, should not be varied by reducing the instalment to be paid by the Petitioner to the 2nd Respondent from 500 mils to 100 mils per month.

HELD : The case should be sent back to the First Respondent to hear evidence as to the means of the Petitioner..

ANNOTATIONS : The Chief Execution Officer has discretion to order payment of a judgment debt by instalments : *e. g.*, C. A. 16/27 (P. L. R. 126, C. of J. 282) ; H. C. 1/29 (P. L. R. 345, C. of J. 284). He is presumed to have heard evidence to support his order : H. C. 83/35 (2 P. L. R. 287, P. P. 10.1.36, C. of J. 1934-6 90) but his orders are subject to review by the High Court if not based on evidence : H. C. 2/26 (P. L. R. 68, C. of J. 832), or if unreasonable : H. C. 78/33 (C. of J. 873).

FOR PETITIONER : In person.
FOR RESPONDENTS : *Ex parte.*

ORDER :

We have decided to send this case back to the Chief Execution Officer to hear evidence as to the means of the Petitioner. It is difficult for us to say what the means of the Petitioner are.

The rule *nisi* is therefore made absolute.

Given this 6th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 159/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Khaldi and Abdul Hadi, JJ.

IN THE CASE OF :

Miriam Issa el-Jada'. APPELLANT.

V.

Mikhail Sliman Diban. RESPONDENT.

Power of attorney — Construction — No power to sell — Bona fide purchaser.

In dismissing an appeal from a judgment of the Land Court of Jerusalem, dated the 16th May, 1938 :—

HELD : 1. The power of attorney did not include a power to sell the land which Appellant had purchased.

2. There was no *bona fide* purchase as Appellant should have examined the power of attorney and seen that there was no authority to sell.

3. Respondent was not liable for the alleged ambiguity in the power of attorney.

4. Appellant was not entitled to stay of execution pending the recovery of the purchase price as the sale had been effected and the purchase price received by an unauthorised agent.

FOR APPELLANT : Cattan.

FOR RESPONDENT : Hanania.

JUDGMENT:

This appeal must fail.

According to the true construction of the first power of attorney it cannot be taken that it was within the contemplation of the parties to include the power of sale of the land in question among the other authorities conferred therein upon the attorney or agent.

As regards the second point raised by Appellant we are of the opinion that there was no purchase in good faith. The reasonable thing for Appellant, who purchased by virtue of the power of attorney to do was to examine that power of attorney and as a result she would have discovered that there was no authority to sell.

In connection with the third ground of appeal we cannot agree with

the Appellant that the Respondent should be held responsible for the alleged ambiguity of the power of attorney.

As regarde the alternative point raised by Appellant we do not see that the Appellant is entitled to apply for stay of execution pending the refund of the purchase money, for it has been established that the sale was effected and the price was received by an unauthorised agent.

We therefore dismiss the appeal and confirm the judgment of the Land Court with costs fixed at LP. 10.— and LP. 5.— hearing fees.

Delivered this 6th day of July, 1938.

British Puisne Judge.

CIVIL APPEAL No. 160/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE CASE OF :

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

v.

The Motor Trading Co. RESPONDENTS.

Appeal — Appellate court may find there was no evidence to support finding.

In dismissing an appeal from a decree of the District Court of Haifa, sitting in its appellate capacity, dated the 19th May, 1938 :—

HELD : There was nothing in the appeal as an appellate court is always entitled to say that there is no evidence to support a particular contention even if the trial court said that there was such evidence.

ANNOTATIONS : See annotations to C. A. 83/38 (1938, 1 S. C. J. at p. 284), 2nd paragraph.

FOR APPELLANTS : Hakkara — by delegation.

FOR RESPONDENTS : No appearance — duly served.

JUDGMENT:

There is nothing in this appeal.

The point that the Appellate Court made a finding of fact which the Magistrate has not done is of no weight, because an appellate court

is always entitled to say that there is no evidence to support a particular contention, even if the Magistrate said that there was such evidence.

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

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

Delivered this 6th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 154/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Greene and Khayat, JJ.

IN THE APPEAL OF :

1. 'Ata Skeek,
2. Thereet Skeek,
3. Behjet Skeek. — APPELLANTS.

v.

Tewfiq Mohammed es-Sabdek. — RESPONDENT.

Co-ownership — Mejelle 1315 *applies to partial destruction.*

In dismissing an appeal from a decree of the District Court of Jaffa, dated the 15th May, 1938 :—

HELD : The provisions of Art. 1315 of the Mejelle may be invoked even in cases of partial destruction of the property.

FOR APPELLANT : Ibrahim.

FOR RESPONDENT : Tayyeb.

JUDGMENT:

We need not trouble the Respondent.

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

It is clear from the expert's report that the damage was caused not only by water from the upper storey W. C. but also by the

percolation of water from the cesspit and from the rains into the foundations. That being so we think that the District Court fairly apportioned the damage.

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

Delivered this 7th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 156/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Greene and Khayat, JJ.

IN THE APPEAL OF :

Haj Mohammad Ahmed Abu Laban. APPELLANT.

v.

Haj Hamed Ahmed Abu Laban. RESPONDENT.

Appeal — Non-compliance with Rules — Abu Laban litigation.

In dismissing an appeal from a decree of the District Court of Jaffa, dated the 15th May, 1938 :—

HELD : Appellant had not complied with the Rules although he had had ample time to do so.

ANNOTATIONS : Other Abu Laban cases : C. A. 106/36 (1937 S. C. J. 201). C. A. 22/37 (2 Ct. L. R. 145).

FOR APPELLANT : In person.

FOR RESPONDENT : Elia.

JUDGMENT:

The Appellant has not complied with the Rules, although he had ample time — fifteen days — to do so.

The appeal must therefore automaticaly be dismissed.

The only consolation for the Appellant is that had this appeal come for trial, it would equally have been dismissed. I suggest it is high time now that this continuous litigation of Abu Laban *vs.* Abu Laban should be stopped.

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

Delivered this 7th day of July, 1938.

Acting Chief Justice.

HIGH COURT No. 48/38.

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

BEFORE : The Acting Chief Justice and Frumkin, J.

IN THE APPLICATION OF :

1. The Ozar Mif'alei Yam Beeravon Mogbal, The Marine Trust Limited. PETITIONERS.

v.

1. Dr. Moshe Cohen,
2. Mr. Abraham Cahana,
3. Mr. Aaron Rubinstein,
4. Mr. Ishak Kourland,
5. Mr. Joseph Katzenelenson. RESPONDENTS.

Change of venue — Matter of arrangment by local judges — Unusual application for change of venue within the same District — Change of venue inapplicable to civil cases in England — Convenience and public security.

In making absolute an order *nisi* granted on an application for a change of venue and in holding that the locality of the trial should be in Tel Aviv :—

HELD : The application should be granted for the due administration of justice as public security had been urged quite apart from convenience — the locality and not the judges to be changed.

ANNOTATIONS : For other decisions on change of venue see H. C. 33/38 (1938, 1 S. C. J. 326) and annotations thereto.

FOR PETITIONER : Horowitz.
FOR RESPONDENTS : Seligman.

O R D E R.

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

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

application has been made to us and it is therefore our duty to determine it.

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

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

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

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

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

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

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

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

Given this 8th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 163/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Frumkin and Khayat, JJ.

IN THE CASE OF :

1. Ismail Mustafa Shehadeh,
2. Awad Mohammad Suleiman Shehadeh. APPELLANTS.

v.

1. Osman Ahmad Siam,
2. Ahmad Osman Siam. RESPONDENTS.

Inspection — Evidence — Findings of fact.

In dismissing an appeal from a decree of the Land Court of Jerusalem, dated the 27th May, 1938 :—

HELD : There was no necessity to order a second inspection as a first inspection had been carried out and accepted by the Land Court in the earlier proceedings.

ANNOTATIONS : The remitting judgment (C. A. 205/37) is reported in 2 Ct. L. R. 183.

FOR APPELLANTS : Goitein.

FOR RESPONDENTS : Saleh for 1st Respondent — Kamal.

JUDGMENT:

This case comes to this Court for the second time. On the first occasion it was remitted to the Land Court with the direction to hear those witnesses that Appellants may wish to call in support of their claim, and, if necessary, any witnesses whom Respondents may desire to call, and to give judgment according to law.

The Land Court duly heard the witnesses called by both Appellants and Respondents, and, in giving judgment said : "Having heard the witnesses for the Appellants and Respondents we see no reason to alter to vary our previous judgment and we dismiss Plaintiffs' claim with costs and LP. 3.— advocate's fees."

Now an inspection had been carried out when the case was before the Land Court for the first time. The Court accepted that inspection, and it was under no obligation to order a second inspecion, as suggested by the Appellants. In the circumstances we find no reason to interfere with the judgment of the Land Court.

The appeal is therefore dismissed and the decree of the Land Court is confirmed with costs assessed at LP. 10.— and LP. 5.— hearing fees to each of Respondents' Advocates.

Delivered this 11th day of July, 1938.

British Puisne Judge.

CIVIL APPEAL No. 97/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

1. Isaac Zvi Rackovsky,
2. Abraham Epstein. APPELLANTS.

v.

Joseph Danon. RESPONDENT.

Appeal from the judgment of the District Court of Haifa, dated the 24th February, 1938.

Oral evidence — Contract — Extension of time of completion — Oral evidence of the parties cannot be heard in variation of a written document — C. A. 87/37, C. A. 50/26, Civil Procedure Code, Art. 80 — Withdrawal of counterclaim pending determination of appeal — Evidence Ordinance — Proof by admission or books of defendant.

In allowing an appeal from a judgment of the District Court of Haifa, dated the 24th February, 1938, and in remitting the case to the lower Court with directions :—

HELD : 1. The lower Court had been correct in refusing to hear oral evidence other than that of the parties as to the variation of a written agreement.

2. In view of the second part of Art. 80 of the Civil Procedure Code which provides that a defence against a document may be made out through the admission of the opponent or his books and in view of the Evidence Ordinance which enables a party to extract an admission from the other, an opponent may be called as a witness and the case against him proved by his admission.

3. Counterclaims should, as far as possible, be determined together with the claim.

Considered : C. A. 87/37 (Blumenfeld *v.* I. C. I.) (P. P. 2,3.viii.37, Ha. 7,21.x; 4.xi.37, 2 Ct. L. R. 19); C. A. 50/26, P. L. R. 131, C. of J. 29.

ANNOTATIONS : Earlier authorities on the admissibility of the evidence of the parties are collected in C. A. 87/37 (*supra*). See also C. A. 98/38 (1938, 1 S. C. J. 361).

FOR APPELLANTS : Levitsky.

FOR RESPONDENT : Salomon.

JUDGMENT:

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

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

3. The Respondent having denied the extension of time to the 18th of December, the Court below first decided to hear the evidence of the parties as to the alleged extension, but later went back on its ruling in view of the judgment meanwhile issued by the Supreme Court in Civil Appeal 87/37, Israel Blumenfeld *v.* The Imperial Chemical Industries, and left to the Appellant the only remedy of administering the oath on the Respondent that such an extension did not take place, with no right of cross-examining the Respondent. Appellant refused to take the oath, and judgment was given against him both as regards the damages and the refund of the money and promissory notes.

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

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

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

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

6. The main ground of appeal is that the Appellant was entitled to prove by all evidence the extension of the time of transfer to the 18th of December. In order to succeed, the Appellant once alleged that the agreement, fixing the time of transfer to the 14th, was rescinded, and then said that there was a forbearance on the part of the Respondent but what he was, in fact, trying to prove was a variation of the written terms of the contract which could not be proved by all evidence, neither under the English Law, where parol evidence is inadmissible to contradict a document or to vary its terms so as appear on its face, nor under Article 80 of the Ottoman Code of Civil Procedure, where no parol evidence is admissible against a written document. In as far as the Court refused to hear oral evidence other than the parties in the case, the judgment must be upheld.

7. In considering, however, Article 80 of the Ottoman Code of Civil Procedure, it will appear that documentary evidence is not the only way to prove a defence against a document. As more fully pointed out in my judgment in Civil Appeal 87/37, Israel Blumenfeld *v.* The Imperial Chemical Industries, in its second part Article 80 provides two other means to prove such defences, namely the admission of the opponent and his books.

8. On this point the Evidence Ordinance, Chap. 24, is very useful as it gives the party an opportunity to abstract an admission from the other side by calling him as a witness. It is for this reason that this Court was always in favour of giving any opportunity to a party to call the other party as a witness so as to give them a chance of proving their case or defence by admission, in which case judgment would be given based not on all evidence but on the admission of the other side.

9. For this reason we hold that the case must go back to the District Court to allow the Appellant to call the Respondent as a witness, and if, as the result of the evidence given by the Respondent,

it will appear that he consented to the extension of time, the Court will reconsider the case on its merits in the light of what took place on the 18th of December. If, however, no such extension will be proved by the admission of the Respondent, the judgment of the District Court will stand.

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

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

Delivered this 4th of July, 1938.

Puisne Judge.

I concur and have nothing to add

Acting Chief Justice.

I concur.

Puisne Judge.

CIVIL APPEAL No. 137/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Khaldi and Abdul Hadi, JJ.

IN THE CASE OF :

Khalil Hussein Shafi'l. — APPELLANT.

V.

1. Hafez Assad Abu Ja'far,
2. Kamal Rashid Abu Ja'far. — RESPONDENTS.

Waqf sahih — Eviction — Statutory tenant — Cultivators (Protection) Ordinance.

In allowing an appeal from a judgment of the Land Court of Jerusalem, sitting in its appellate capacity, dated the 30th April, 1938, and in setting aside the judgment of the Land Court and remitting the case to the Magistrates Court to hear evidence as to whether the property was *waqf sahih* or not :—

HELD : 1. There had not been sufficient evidence before the Magistrates Court to show that the land was *waqf sahih.*

2. Should it be proved that the land was *Waqf sahih* there would be no necessity for the commission appointed under the Cultivators (Protection) Ordinance to decide whether the Appellant was a statutory tenant or not.

ANNOTATIONS : 1. *Vide* note 1 to C. A. 127/38 (1938, 1 S. C. J. 384), and C. A. 160/38 (*ante*, p. 11).

FOR APPELLANT : Cattan.

FOR RESPONDENTS : Mouaké.

JUDGMENT:

This is an appeal which comes to this Court by way of leave to appeal from the judgment of the Land Court of Jaffa, confirming the judgment of the Magistrate, Ramleh, whereby the Appellant was ordered to evict the property leased from the Respondents.

This appeal must be allowed and the case must be remitted to the Magistrate to hear further evidence that may be adduced by both parties to enquire into the Sharia Judgment and the Tabu extract referred to before us by the Respondents and thereon to decide whether the land in question is *Waqf sahih* or not. The view taken by this Court is that the evidence before the Magistrate is not sufficient to show that the land in question is *Waqf sahih.* If, after hearing further evidence, it is proved to the satisfaction of the Magistrate that the land is *Waqf sahih,* then there will be no necessity for the commission appointed under the cultivators (Protection) Ordinance, to decide whether the Appellant is a statutory Tenant or not.

The Judgments of both the Land Court and the Magistrate are therefore set aside and the case remitted to the Magistrate to comply with the directions stated above.

Costs to abide the event.

Delivered this 4th of July, 1938.

British Puisne Judge.

CIVIL APPEAL No. 150/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE CASE OF :

1. Salomon Salomonovitz,
2. Levik Salomonovitz,
3. Maurice Besser,
4. Shalom Prepert. APPELLANTS.

v.

Ibrahim Issa Sahyoun. RESPONDENT.

Title to land — Possession — Admission.

In dismissing an appeal from a judgment of the Land Court of Haifa, dated the 4th May, 1938 :—

HELD : In view of the admission of the Appellants' advocate that his clients had not been in possession of the land and that he could not prove that their predecessor had been in possession, the appeal must be dismissed.

FOR APPELLANTS : Weinshall.

FOR RESPONDENT : Sahyoun.

JUDGMENT:

We need not trouble you Mr. Sahyoun.

The Appellants' attorney frankly admitted in his arguments before us that his clients had never been in possession of the land in question. He further admitted that he could not prove that his clients' predecessor in title had also been in possession.

We are of the opinion that these two admissions on the part of Appellants' attorney dispose of the appeal, and the appeal is dismissed with costs fixed at LP. 10.— and LP. 5. hearing fees.

Delivered this 4th of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 151/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE CASE OF :

Simha Zeisell Shapira. APPELLANT.

v.

Raphael Yehoshua. RESPONDENT.

Accounts — Manner of taking — Evidence of indebtedness.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 17th May, 1938 :—

HELD : Although the normal way of taking accounts was not adopted in this case there was a witness present when the account was taken and he testified that he had seen the sum of LP. 993 due from Plaintiff to Defendant.

ANNOTATIONS : Earlier proceedings in this case (C. A. 236/37) are reported in 1938, 1 S. C. J. 29.

FOR APPELLANT : Eisenberg.

FOR RESPONDENT : Ben Aron.

JUDGMENT:

The only point raised in this appeal is whether the account was correctly taken.

Of course, the normal way for the taking of accounts was not adopted in this case. There is, however, one witness who was present when an account was taken between the parties and who testifies that he saw a sum of LP. 993.— stated as due by Plaintiff to Defendant. There are also the Kushans, and no useful purpose could, therefore, be served by remitting this case once more to the District Court.

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

Delivered this 4th of July, 1938.

Acting Chief Justice.

HIGH COURT No. 38/38.

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

BEFORE : The Acting Chief Justice and Frumkin, J.

IN THE APPLICATION OF :

The Estate of the late Shaul Levy. PETITIONERS.

v.

1. Chief Execution Officer, Jerusalem,
2. Messrs. Russell and Co., Jerusalem. RESPONDENTS.

Expert's fees — Expert may sue — Evidence on Commission Rules 5(6) — Parties liable to pay — Both to hear parties.

In making absolute an order to issue to the first Respondent calling upon him to show cause why he should not be ordered not to interfere with Petitioner's property attached by him in Execution Office File No. 291/37 and remove the attachment effected by him on the said property in the said file.

HELD : 1. An expert in whose favour a proper order has been made can sue for his fees under Rules 5(6) of the Evidence on Commission Rules.

2. The parties should have been heard as to which of them was to pay for the expert.

FOR PETITIONERS : Olshan.

FOR RESPONDENTS : No. 1 — No appearance.
No. 2 — Gavison.

ORDER:

This is a return to a rule *nisi* directed to the First Respondent calling upon him to show cause why he should not be ordered to interfere with the Petitioner's property attached by him in Execution File No. 2913/37 and why the attachment made by him on the said property in the said file should not be removed.

We think that, unlike the case of an advocate, who cannot sue for his fees because he is not a party, an expert in whose favour a proper order has been made can sue under Rule 5(6) of the Evidence on Commission Rules. By such an order, an expert, in fact, becomes a quasi-party to the proceedings.

The Rule must, however, be made absolute on the ground that

there is nothing on the record to show that the order of the 10th June, 1937, was made in the presence of the parties who were entitled, at least, to argue as to which of them were liable to pay the balance of LP. 55.—. This order, not being regularly issued, is null and void and cannot be executed.

The Petitioner will have his costs fixed at LP. 10.— to include advocate's fees.

Given this 5th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 105/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Emmanuel Vorchheimer. APPELLANT.

v.

Trust and Transfer Office "Haavara" Ltd. RESPONDENT.

"Haavara" contract — Construction — Extraordinary measures, whether warranted — No proof of improper exercise of discretion — Duty to render accounts — No demand for an account.

In dismissing an appeal from a judgment of the District Court at Tel-Aviv, dated the 22nd March, 1938 :—

HELD : 1. The construction put on the agreement by the District Court was correct and it was within the discretion of Respondent to decide if and when a situation occurred necessitating extraordinary measures. No proof of an improper exercise of that discretion had been adduced.

2. Although it was the duty of Respondent to render accounts and account had not been rendered, there had been no request by Appellant for the rendering of an account and it did not seem that Appellant contested the account.

ANNOTATIONS : 2. *Cf.* C. A. 248/37 (1938, 1 S. C. J. 58) and annotation 1; C. A. 90/38 (1938, 1 S. C. J. 286) and annotation 3.

See *per contra* C. A. 236/37 (1938, 1 S. C. J. 29) and *cf.* annotations thereto. See also C. A. 147/26 (P. L. R. 116, C. of J. 378).

FOR APPELLANT : Benjamini, Vorchheimer.

FOR RESPONDENT : Rosenblueth, Smoira.

JUDGMENT:

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

2. The agreement entered into between the Appellant and the "Haavara" on the 14th August, 1934, is one of the typical agreements of this sort and makes it clear that in transfering marks from Germany the "Haavara" were concerned not merely with the transfer of the money of a particular payor but its main object was to accelerate the transfer of the capital of all other payors. The Appellant agreed to these terms.

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

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

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

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

6. We hold that the construction put upon the said clause by the District Court was, in its essence, a proper construction, and it follows that it was within the discretion of the "Haavara" to decide if and when a situation occurred necessitating extraordinary measures, and to take such measures when necessary. It was open to the Appellant

to prove that the "Haavara" did not exercise its discretion properly, or to put it in the words of the District Court, that the "Haavara" exercised its discretion in a fraudulent or arbitrary way, but he did not avail himself of this opportunity. His appeal on this point therefore fails.

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

8. It has first occurred to us that the case would have to go back for that purpose, but after further consideration it appeared that never during all the protracted proceedings before the Court of trial nor before this Court was there any clear and specific demand for the taking of an account. On the contrary the Appellant based his action on the ground that the "Haavara" was not entitled at all to charge the extra expense, but never did he put in an alternative claim that if the "Haavara" was entitled to do so it should render an account how the figure deducted from his account was arrived at. In fact it is our impression that the Appellant does not seriously alleges that there was any over-charge in case the charge was justified. We therefore see no need to remit the case.

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

Delivered this 11th day of July, 1938.

British Puisne Judge.

CIVIL APPEAL No. 161/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Greene and Khayat, JJ.

IN THE APPEAL OF :

Charles Anwar Bekhor. — APPELLANT.

V.

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

Time for appeal — Judgment, whether interlocutory or final — C. A. 149/38 — *C. P. C., Art.* 66, *Civil Procedure Rules,* 1935, *rule* 91 —

Copy of judgment must be accepted under rule 330 — *Decision of Registrar cannot oust jurisdiction of Court — Contract by correspondence — Construction — Principal and agent.*

In allowing an appeal from a decree of the District Court of Jerusalem, dated the 17th May, 1938, and in remitting the case to be heard on the merits :—

HELD : 1. The judgment against second Respondent, although termed "interlocutory judgment" was in its nature a final judgment inasmuch as it was a final determination of all rights between Appellant and second Respondent. The appeal as regards second Respondent was consequently out of time.

2. (Following Misc. Ap. 38/38) As regards first Appellant the Registrar should have accepted the appeal although copy of the judgment and not the decree was attached. The appeal must, therefore, be considered as lodged in time.

The decision of the Registrar cannot oust the jurisdiction of the Court.

3. It was apparent from the correspondence that the first Respondents acted as principals.

Followed : Miscellaneous Application No. 38/38 (P. P. 7.vii.38, 4 Ct. L. R. 20).

ANNOTATIONS :

1. *Cf.* L. A. 88/22 (C. of J. 1054).

See also C. A. 219/26 (C. of J. 147), C. A. 38/33 (P. L. R. 869, P. P. 13.xii.33, C. of J. 169).

2. See also C. A. 149/38 (29.vi.38), C. A. 155/38 (23.vii.38) and *cf.* C. A. 147/38 (30.vi.38).

FOR APPELLANT : Abcarius Bey.

FOR RESPONDENTS : No. 1 — B. Joseph,
No. 2 — Schwartz.

JUDGMENT:

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

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

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

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

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

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

To turn now to the merits of the appeal. This depends entirely upon the construction to be placed upon the voluminous correspondence exchanged between the parties. The first letter which contains any

mention of Zeiss Field Glasses is one of the 5th April, 1936, Exhibit D. 8, in which the Appellant wrote to the first Respondents that he thinks that he can get an order from the Ministry of Defence of Iraq for 100 Zeiss Field Glasses. Negotiations continued and then by a letter dated the 27th July, 1936, Exhibit P. 14, the first Respondents wrote to the Appellant saying that they are in a position to offer 250 Zeiss Field Glasses, and stated as follows :—

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

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

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

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

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

A series of letters follows in September, but it is not necessary to

repeat them all, and there is no mention of the Continental Commercial Corporation in them and their general tenure is that it is the first Respondents who are the persons handling this business. Now, there is a letter of the 6th October, 1936, Exhibit D. 29, which confirms the view that it was the first Respondents who were handling the business themselves, because they say to the Appellant :

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

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

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

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

The position was accepted by the Appellant in his letter of the 18th February, 1936, Exhibit D. 7. The letter from the Appellant of the 5th April, 1936, Exhibit D. 8, again talks about the German correspondents of the first Respondents, but sometime between this letter and the 25th August, 1936, the position would seem to have been altered, because the first Respondents would seem to have made up their minds to take up this business themselves. We quite agree that it is not necessary in every letter to mention the principals, but the wording of the letter of the 25th August, 1936, makes it quite clear that the first Respondents were in fact the principals and there is nothing in all the correspondence to show that the second Respondents were the principals of the first Respondents.

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

first Respondents in their letter of the 25th August, 1936, Exhibit P. 18.

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

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

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

Delivered this 11th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 165/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

Ni'meh Anton Abees. — APPELLANT.

v.

As'ad Mansour Abdel Nour. — RESPONDENT.

Admission — Contradiction of admission by evidence.

In dismissing an appeal from a decree of the Land Court of Jerusalem, dated the 25th May, 1938 :—

HELD : The admission by the document of assessment of *werko* was contradicted by the findings of the Land Court.

ANNOTATIONS : See note 2 to C. A. 90/38 (1938, 1. S. C. J. 286).

FOR APPELLANT : Kehaty.

FOR RESPONDENT : Moghannam.

JUDGMENT:

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

The case was originally in this Court and was sent back to the Land Court to hear evidence that the Appellant had, with the consent

of the Respondent, built this house herself on the land registered in the Respondent's name. The Land Court heard that evidence ; they heard evidence brought by and on behalf of the Appellant they heard evidence tendered by the Respondent and they came to conclusion that they did not believe the Appellant's evidence that he built this house on his property.

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

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

Delivered this 11th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 169/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

1. Mahmoud Atallah Seruri,
2. Khalil Bedr el Ansari. APPELLANTS.

v.

Hajjeh Mahboubeh bint Nur Eddanaf. RESPONDENT.

Judgment — Appeal by Mutawalli — No grounds for judgment.

In allowing an appeal, as to the second Appellant, from a decree of the Land Court of Jerusalem, dated the 28th May, 1938 :—

HELD : 1. The First Appellant's appeal must be dismissed as he had opposed as *Mutawalli* of the property which was not part of the *waqf*.

2. The case must be remitted as the judgment of the lower Court contained no reasons for dismissing the claim of the second Appellant.

ANNOTATIONS : 2. See also L. A. 86/34 (2 Ct. L. R. 67) and *cf.* P. C. 38/28 (P. L. R. 474, C. of J. 1229).

APPELLANTS : In person.

FOR RESPONDENT : Eddanaf.

JUDGMENT:

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

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

"Opposers claim and third party are dismissed with costs."

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

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

Costs to await the result.

Delivered this 11th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 152/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

Naffajeh Mousa el Khalil, on behalf of
the heirs of Khalil Mousa el Ayyoub. APPELLANT.

v.

1. Ahmad el Mohammad el Mahmoud,
2. Mahmoud el Mohammad el Mahmoud. RESPONDENT.

Deposit — Appeal.

In dismissing an appeal from a judgment of the Land Court of Nablus, dated the 14th May, 1938 :—

HELD : The deposit had not been paid and Appellant's counsel was not in a position to pay the amount fixed. The appeal must therefore be dismissed.

ANNOTATIONS : See C. A. 80-81/38 (1938, 1 S. C. J. 271) and annotations and C. A. 120/38 (1938, 1 S. C. J. 364).

FOR APPELLANT : Sa'adeh.

FOR RESPONDENT : Shibl.

JUDGMENT:

The Appellant in this case did not comply with the Rules of Procedure, in that she did not pay the deposit she was ordered to pay. Her counsel was asked whether he was in a position to pay the amount fixed to which he replied in the negative.

That being so, the appeal must be dismissed with costs fixed at LP. 5.— and LP. 5.— hearing fees.

Delivered this 12th day of July, 1938.

British Puisne Judge.

CIVIL APPEAL No. 164/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

King Solomon Bank Ltd. APPELLANTS.

v.

Mizrahi Bank Ltd. RESPONDENTS.

Guarantee — "Consignment" need not be to foreign country — Construction of guarantee.

In dismissing an appeal from the decree of the District Court of Tel-Aviv, dated the 22nd May, 1938 :—

HELD : 1. "Consignment" means the consigning or sending of goods from one place to another, not necessarily from one country to another country.

2. Appellants were not discharged by an internal arrangement

between Respondents and the vendors and all sums, save that which amounted to a payment to self, were properly included in the guarantee.

FOR APPELLANTS : B. Joseph.

FOR RESPONDENTS : Ayon.

JUDGMENT:

In this case, the Respondent Bank sued the Appellant Bank on a letter of guarantee. That letter is in quite clear terms and it is really very difficult to see how its meaning could have been queried in any way whatsoever. Nevertheless, strenuous efforts have been made to convince us that certain meanings should be given to certain words. We do not agree. "Consignment", to our minds, is the consigning or sending of certain goods from one place to another, not necessarily from one country to another country. Further arguments have been advanced that these payments were not made to firms, that the Appellants only guarantee the consideration, that the price of this butter does not include the customs expenses and expenses of getting it to Palestine. In the course of the case we have expressed our opinion as to these arguments and we will leave it there. There is in fact one point, that is, the question of the three sume LP. 85, LP. 294 and LP. 165. Now, with regard to the last two sums, it was argued that because the Mizrahi Bank told the vendors that they would only pay to a certain date, and they paid after that date, the Appellant must therefore be discharged. In our opinion this arrangement was a purely internal arrangement between the Respondent and the person concerned. The guarantee given by the Appellant Bank is a guarantee for a sum not exceeding LP. 500 for any orders or transactions made by Soroker. These two sums therefore were properly included.

As to the sum of LP. 85 this sum should not really have been included in this account, since it was a payment to self. Its deduction, however, will not affect the amount for which judgment was given.

Subject to this variation, the appeal must be dismissed with costs, to include hearing fees, fixed at LP. 15.

Delivered this 12th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 167/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

Hilaneh Saleh Jiries Barakeh. APPELLANT.

v.

Habeebeh Elias Barakeh. RESPONDENT.

Denial of signature — Documents suitable for verification under Art. 99 of the C. P. C. — Application to hear witnesses under Art. 103 C. P. C.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 30th March, 1938 :—

HELD : The District Court was right in considering what documents were suitable for production for verification and in refusing to hear witnesses in accordance with Art. 103 of the Civil Procedure Code.

ANNOTATIONS : On the verification of signatures, see L. A. 100/24 (C. of J. 1288) ; C. A. 107/29 (P. L. R. 519, C. of J. 1559) ; L. A. 42/33 (2 P. L. R. 201, P. P. 14.1.35, C. of J. 813).

FOR APPELLANT : Cattan.

FOR RESPONDENT : Assal.

JUDGMENT:

We do not wish to hear you Mr. Assal.

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

This case was filed in the District Court in 1931 and came up for hearing on the 13th March, 1933. At that hearing the Respondent denied the document and the alleged signature and seal thereon. The Appellant thereupon applied for the appointment of experts to verify the authenticity of the document and added that she will search for

documents with which to make comparison. The Appellant failed to produce any documents and the case was adjourned again to different dates for the same purpose, and finally, in 1937, when the case came before the Court, the Appellant produced all documents which she wished to submit to the experts for verification. The Court held that these documents were not of the class of documents mentioned in Article 99 of the Civil Procedure Code, and refused to refer them to the experts and made an order to that effect.

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

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

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

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

Delivered this 12th day of July, 1938.

British Puisne Judge.

CIVIL APPEAL No. 71/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Bank der Tempelgesellschaft Ltd. Jaffa. APPELLANT.

v.

Halvaa Vehissachon Haklai,

Gedera Cooperative Society Ltd. RESPONDENTS.

Appeal — Application to withdraw — Costs.

Application to withdraw the appeal lodged against the judgment of the District Court sitting at Tel-Aviv in its appellate capacity, dated the 22nd day of February, 1938, granted.

ANNOTATIONS : Earlier proceedings in this case are reported in 1938, 1 S. C. J. p. 382.

FOR APPELLANT : Haaman.
FOR RESPONDENT : Goldberg.

JUDGMENT:

This is an application for withdrawal of the appeal. Appellant had previously lodged an application in this Court under Rule 96 of the Civil Procedure Rules, 1935, asking for an order declaring that the appeal was properly lodged. The said application was refused for the reasons set out in the judgment of this Court dated the 15th June, 1938.

Appellants admits that he does not object on the appeal being dismissed, provided he be not charged with costs.

We dismiss the appeal with costs fixed at LP. 5.

Delivered this 12th day of July, 1938.

Acting Chief Justice.

CRIMINAL APPEAL No. 63/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Greene and Frumkin, JJ.

IN THE APPEAL OF :

1. Hussein Abdel Rahman Es-Sharif,
2. Mohammad Rashid Ahmad Younis. APPELLANTS.

v.

The Attorney General. RESPONDENT.

False pretences — False statement with intent to defraud.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 14th June, 1938, whereby Appellants were convicted of obtaining money by false pretences, contrary to Sections 301 and 23 of the Criminal Code Ordinance, 1936, and sentenced to two years' imprisonment each and to pay compensation of LP. 75.—, jointly and severally, to Khalil Jerius Ganswati.

HELD : There had been a misrepresentation of fact, knowingly made, with intent to defraud. This amounted to false pretences.

ANNOTATIONS : "To support an indictment for false pretences, there must be a knowingly false statement, made with intent to defraud, and an obtaining of money by means of that representation." (*Per* Jervis, C. J. in R. *v.* Welman, *Digest* Vol XV, *p.* 1004, No. 11,256). The elements of the offence are also set out in R. *v.* Aspinall (*ibid. p.* 980, No. 10,976), *per* Brett, J. A.

FOR APPELLANTS : No. 1 — Assal.
No. 2 — Farajallah.

FOR RESPONDENT : Crown Counsel (Hogan).

JUDGMENT:

We need not trouble you, Mr. Hogan.

The two Appellants are appealing against a conviction of obtaining money by false pretences for which they were sentenced each respectively to two years.

The whole gist of the charge is that the second Appellant was represented to be the brother of a murdered man, whereas he knew that he was not the brother, and there was ample evidence to show that the first Appellant knew of this fact. There is therefore a false pretence, and, that it was made with intent to defraud, is clear beyond any doubt.

There is nothing in either of these two appeals and both are therefore dismissed.

Delivered this 13th day of July, 1938.

Acting Chief Justice.

CRIMINAL APPEAL No. 66/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Greene and Frumkin, JJ.

IN THE APPEAL OF :

The Attorney General. RESPONDENT.

v.

Mohammad Mousa Abdallah. RESPONDENT.

Assault — Appeal by A. G. — Sentence.

In allowing an appeal from a judgment of the District Court of Haifa, dated the 11th May, 1938, whereby the Respondent was convicted of attempted murder, contrary to Section 222(a) of the Criminal Code Ordinance, 1936, and sentenced to five years' imprisonment, to run from the 11th December, 1937, and in increasing the sentence :—

HELD : In view of the gravity of the offence, the sentence must be increased.

FOR APPELLANT : Crown Counsel (Hogan).

RESPONDENT : In person.

JUDGMENT:

We agree with the Crown Counsel that the sentence in this case is too lenient.

You assaulted this small boy, beat him on the head thereby causing him seven wounds, because you disapproved of a thing that his father had done.

In our opinion, you are a danger to the community and you must be kept in detention for a longer period.

The appeal is allowed and the sentence is increased to one of eight years.

Delivered this 13th day of July, 1938.

Acting Chief Justice.

CRIMINAL APPEAL No. 68/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Greene and Frumkin, JJ.

IN THE APPEAL OF :

Yehezkiel Khadouri Sourani. APPELLANT.

v.

The Attorney General. RESPONDENT.

Sentence — Deportation — Previous Convictions — Plea of guilty — Record.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 15th June, 1938, whereby Appellant was convicted of : (1) Cheating and (2) Uttering a false document, contrary to Sections 303, 340 and 336 of the Criminal Code Ordinance, 1936, in respect of three offences, and sentenced to five years' imprisonment to run concurrently with any sentence Appellant might be serving at present :—

HELD : 1. It was clear from the record that the Appellant or his advocate had pleaded guilty and that the lower Court had proceeded on that footing.

2. In view of previous convictions against the Appellant the sentence was not excessive.

3. Appellant could not be deported as he was a Palestinian citizen.

FOR APPELLANT : In person.

FOR RESPONDENT : Crown Counsel (Hogan).

JUDGMENT:

It is quite clear from the record, in this case, that the Appellant pleaded guilty in the Court below, or his advocate pleaded guilty on his behalf and the Court proceeded on that footing.

In view of the other convictions — five convictions in cases of forgery or attempting to obtain money by fraud, four in this year and one in 1934 — the sentence of five years is not one day too much.

In view of the fact that you are a Palestinian Citizen and you cannot be deported from this country, the recommendation by the Court below for your deportation will have to go.

With this variation only, the appeal is dismissed and the conviction and sentence confirmed.

Delivered this 13th day of July, 1938.

Acting Chief Justice.

CRIMINAL APPEAL No. 69/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Greene and Frumkin, JJ.

IN THE APPEAL OF :

The Attorney General. APPELLANT.

v.

Rousseau, Ticket Cashier of the Tel-Aviv Service Jerusalem. RESPONDENT.

Road Transport Regulations — Road Transport (Routes and Tariffs) (Admendment) Rules, 1937, whether ultra vires the Road Transport Ordinance — Agreement to accept less than authorised fees — Town Police Clauses Act. sec. 55 — Rules not unreasonable or uncertain or discriminating.

In allowing an appeal from a judgment of the District Court of Jerusalem, dated the 8th June, 1938, whereby Respondent was acquitted of the charge brought against him under Rule 11A of the Road Transport (Routes and Tariffs) (Amendment) Rules, 1937 (Rule 6 thereof), in charging less than the fares laid down thereunder, and in remitting the case to the District Court to try it on the merits :—

HELD : 1. The Rule was not *ultra vires.*
2. The Rule was not unreasonable or uncertain or discriminating. A rule will only be held to be unreasonable in an extreme case.

ANNOTATIONS : For decision on the interpretation of statutes, see annotations to C. A. 234/37 (1938, 1 S. C. J. 26).

On the reasonableness of bye-laws, see *Digest*, Vol. XIII, *pp.* 326 *sqq.* Sub-sec. 2 A. — *Must be reasonable ;* on the certainty, *ibid. p.* 328 — *B. Must be Certain* and on conformity with constating legislation, *ibid. p.* 329 — *D. Must be Intra vires.* See also *op. cit.* Vol XXXVIII, *p.* 163 sub-sec. 5 — *Reasonableness.*

FOR APPELLANT : Crown Counsel (Hogan).

FOR RESPONDENT : Levitsky.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jerusalem by the Attorney General — the Respondent having been acquitted of a charge of having charged less than the fares laid down in the Schedule to Rule 6 of the Road Transport (Routes and Tariffs) (Amendment) Rules, 1937, which is Rule 11A of the principal Rules,

Section 23(s) of the Road Transport Ordinance, amongst other things, gives power to the High Commissioner to make Rules for "regulating, restricting and controlling the tariffs to be charged for journeys made by such public vehicles."

Rule 11A was made under that power conferred by the Odinance. Rule 11A itself lays down :—

> "No passenger travelling on any public vehicle other than an omnibus between the places set out in the second column of schedule V to these rules shall be charged a fare other than that set out opposite the respective places in the third, fourth and fifth columns of such schedule."

The District Court held that Rule 11A is *ultra vires*. It cannot be *ultra vires* because it was made under a definite power given to the High Commissioner by Section 23(s) of the Road Transport Ordinance. The reason given by the District Court for so holding is that there can be no objection to an agreement to accept less than the authorised fare and they refer to English Law on this point. In this view, the District Court were under a misapprehension, because the English Law is contained in the Town Police Clauses Act, section 55 of which definitely authorises less than the authorised fare to be taken.

The only point in this appeal is whether this Rule is unreasonable, and if it is unreasonable, then it must be set aside. It is certainly not uncertain, it is not discriminating, and it is waste of time to argue that it is. It may be difficult to see the reason for it, but that is a matter with which we are not concerned. The rule is not unreasonable so far as we can see either in its operation or in its effect. A rule will only be held to be unreasonable if at all in a very extreme case.

We think that the District Court were wrong anyhow in their reasons and in the result at which they arrived.

The appeal is allowed, the judgment of the District Court is quashed and the case remitted to them to try it on its merits.

Delivered this 13th day of July, 1938.

Acting Chief Justice.

CRIMINAL APPEAL No. 71/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Greene and Frumkin, JJ.

IN THE APPEAL OF :

Mohammad Abdel Ghani Yousef. APPELLANT.

v.

The Attorney General. RESPONDENT.

Early complaint — Sodomy — Corroboration not implicating accused — Difficulty of proof does not dispense with proof.

In allowing an appeal from a judgment of the District Court of Haifa, dated the 18th June, 1938, whereby Appellant was convicted of committing an act of sodomy with a child under the age of 16 years, contrary to Section 152(1)(c) of the Criminal Code Ordinance, 1936, and sentenced to one year and one month's imprisonment, and in quashing the conviction and discharging the accused :—

HELD : 1. The evidence of the child's mother as regards his tale was inadmissible as the tale had been related a month after the commission of the offence.

2. There was corroboration of the fact that an offence had been committed but not that Appellant had committed it.

3. There was no corroboration of the child's tale.

ANNOTATIONS :

1. On the admissibility of early complaints, see annotations to CR. A. 14/38 (1938, 1 S. C. J. 121) — 2nd paragraph and add CR. A. 30/27 (P. L. R. 150, C. of J. 546).

2–3. As regards the requirement for corroboration in the case of prosecutions for sexual offences, see CR. A. 54/38 (1938, 1 S. C. J. 340) — and annotations. Authorities on corroboration are set out in the annotations to CR. A. 160/37 (1938, 1 S. C. J. 103).

FOR APPELLANT : Abcarius Bey.

FOR RESPONDENT : Crown Counsel (Hogan).

JUDGMENT:

The Appellant was convicted by the District Court of Haifa, on a charge of sodomy and was sentenced by a majority — the learned President dissenting — to imprisonment for the space of one year and one month.

The evidence in the case was that of the child, the evidence of the

mother and the evidence of one, Mohammad Ali Khalil, a young fellow, aged 15 years. The evidence of the mother in regard to the tale the child told her about this Appellant, I am afraid, cannot be received, because it was not an immediate statement — the offence was committed in December and the complaint was made in January. The fact that the mother saw bruises on the child is corroboration of an offence having been committed, but not necessarily that the accused had committed the offence. We are left therefore with the evidence of Mohammad Ali with whatever corroboration, in support thereof, may be found in that evidence, and I must say that the evidence of Mohammad Ali does not carry us very much further. All he says is that he used to see accused play with the children, carry them and sometimes alone and sometimes together, take them on his knee, teach them Arabic lessons, and kiss them. He never saw any improper act actually happening. In these circumstances, we do not think that there is corroboration of the child's tale.

It may be that sodomy is one of the cases which are difficult to prove, but difficulty in proof does not dispense with the proof.

We are therefore of opinion that the judgment of the majority of the District Court cannot be upheld. The appeal is therefore allowed, and the judgment of the Court below quashed and the accused is discharged.

Delivered this 13th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 176/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Municipal Corporation of Jaffa. — APPELLANT.

v.

Shlomo Zion. — RESPONDENT.

Power of attorney given by Municipal Council — Establishment of Municipal Corporation — "Instituting" an action means filing the plaint — Ratification.

In dismissing an appeal from a judgment of the District Court of Jaffa,

in its appellate capacity, dated the 7th June, 1938, setting aside the judgment of the Magistrate :—

HELD : 1. The power of attorney given by the Municipal Council of Jaffa lapsed with the establishment of the Municipal Corporation, Jaffa. A fresh power of attorney was therefore required to file the plaint.

2. The new power of attorney did not amount to a ratification of the action.

ANNOTATIONS : Earlier proceedings in this case, C. M. Ja. 2430/37 and C. A. D. C. 38/38 are reported in the *Palestine Post* of the 10th March and 1st July, 1938.

FOR APPELLANT : Cattan.
FOR RESPONDENT : Horowitz.

JUDGMENT:

We need not trouble you Mr. Horowitz.

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

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

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

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

Delivered this 14th day of July, 1938.

Acting Chief Justice.

HIGH COURT No. 49/38.

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

BEFORE : The Acting Chief Justice and Frumkin, J.

IN THE APPLICATION OF :

Sara Belline Litwinsky. — PETITIONER.

v.

The Local Building and Town Planning Commission, Tel-Aviv. — RESPONDENTS.

Expropriation — Consent order.

Application for an order to issue to the Respondents asking them to show cause why they should not refrain from expropriating the land of Petitioner otherwise than in accordance with the provisions of the Land (Expropriation) Ordinance, 1936, struck out by consent with liberty to reinstate.

FOR PETITIONER : Horowitz.

FOR RESPONDENTS : Weisel.

ORDER:

Upon the application of Mr. Horowitz, counsel for the Petitioner, asking for the petition to be struck out, Mr. Weisel, counsel for the Respondents undertaking not to proceed with any of the works complained of in the petition before the 30th September, 1938, and then only after fifteen days' notice to the other side, the Court orders that the case be struck out with liberty to reinstate without payment of further fees at any time within six months. Liberty to apply.

Given this 14th day of July, 1938.

Acting Chief Justice.

HIGH COURT No. 47/38.

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

BEFORE : The Acting Chief Justice and Frumkin, J.

IN THE APPLICATION OF :

Yehoshua Hankin. PETITIONER.

v.

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

Registrar — Registrars Ordinance, Secs. 6, 7, 8 — *Appeals from order of Registrar.*

In discharging an order *nisi* directing the first Respondent to show cause why he should not proceed to deal with the applications of Petitioner dated January 11th, 1938, and March 27th, 1938, in Execution File No. 3389/30, Jaffa.

HELD : Petitioner had a remedy by way of appeal from the Registrar's order and could not, therefore, come to the High Court.

ANNOTATIONS : *Cf.* H. C. 14/38 (1938, 1 S. C. J. 172) and annotations. H. C. 12/38 (1938, 1 S. C. J. 111) is to the same effect. See also annotations thereto and H. C. 20/38 (*ibid.* 226) ; H. C. 27/38 (*ibid.* 256) and H. C. 18/38 (*ibid.* 203).

FOR PETITIONER : Olshan.

FOR RESPONDENTS : No. 2 — Cattan.
No. 3 — in person.

JUDGMENT:

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

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

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

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

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

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

Delivered this 18th day of July, 1938.

Acting Chief Justice.

HIGH COURT No. 50/38.

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

BEFORE : The Acting Chief Justice and Frumkin, J.

IN THE APPLICATION OF :

Szyja Biderman. PETITIONER.

v.

1. Chief Execution Officer, Tel-Aviv,
2. Yehoshua Helligman,
3. Rachel Helligman. RESPONDENTS.

Chief Execution Officer — Discretion not interfered with.

In refusing an application for an order to issue to the First Respondent, directing him to show cause why the order of his Assistant, dated the 21st June, 1938, as more detailed on the 5th July, 1938, and confirmed by the First Respondent on the 1st July, 1938, and on the 11th July, 1938, ordering the extension of the auction for a further period of one month in the sale of the mortgaged property of the 2nd and 3rd Respondents should not be set aside and why the transfer of the mortgaged property should not be effected in favour of the highest bidder.

HELD : The High Court is reluctant to interfere with the orders of the Chief Execution Officers, who know of the conditions in their Districts.

ANNOTATIONS : See note to H. C. 47/38 (18.vii.38).

FOR PETITIONER : Goldberg.
FOR RESPONDENTS : *Ex parte.*

ORDER.

In this case, the application for a rule *nisi* is refused.

This Court is always reluctant to interfere with the orders of the Chief Execution Officers who know much more of the conditions in their Districts than this Court can know.

In this case, the Chief Execution Officer did not act unreasonably. The order *nisi* must be refused.

Given this 18th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 170/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Yehuda Mashat. APPELLANT.

v.

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

Injunction to restrain use of name — Cooperative Societies Ordinance,

sec. 9(2), Companies Ordinance, secs. 22(2), 24 — "Court having jurisdiction to wind up a company" — Court does not include Registrar — Injunction may be granted notwithstanding registration of company.

In allowing an appeal from a decree of the District Court of Haifa dated the 27th May, 1935, and in remitting the case to the lower Court to hear on the merits :—

HELD : 1. The word "Court" as used in sec. 24(4) of the Companies Ordinance does not, when the Section is applied to cooperative societies by virtue of sec. 9(2) of the Cooperative Societies Ordinance, acquire the meaning of "Registrar of Companies" but retains its meaning of District Court.

2. The fact that the company was registered was immaterial, a company being registered subject to the risk of being restrained from using its registered title if its found that somebody else is entitled to it.

ANNOTATIONS : On the interpretation of statutes, see note to CR. A. 69/38, first paragraph.

FOR APPELLANT : P. Joseph.

ROR RESPONDENT : Krongold.

JUDGMENT:

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

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

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

Referring back again to the Cooperative Societies Ordinance, they found that the only person having authority to wind up a cooperative

society is the registrat, and by a process of reasoning, which is a little hard to follow, they then determined that the word 'court' in Section 24(4) of the Companies Ordinance really meant the registrar of Co-operative Societies.

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

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

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

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

Costs to await the result.

Delivered this 19th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 177/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

1. Moses Doukhan,
2. Bernard Joseph.
   Joint Liquidators of the Phenix Life Insurance Company, Vienna. APPELLANTS.

v.

Kurt Drucker. RESPONDENT.

Appeals from District Court sitting in appellate capacity — Palestine Order in Council Art. 43 — Jurisdiction of Supreme Court sitting as a Court of Appeal — Winding Up Rules, rules 87, 90, 93 — Palmer's Company Precedents — "Subject to the provisions of any ordinance".

In dismissing an appeal from a decree of the District Court of Jerusalem, dated the 16th June, 1938 :—

HELD : 1. The judgment of the District Court was not a judgment in first instance but a judgment on appeal and Art. 43 of the Palestine Order in Council gives the Court of Appeal jurisdiction to hear appeals from judgments given by District Courts in first instance.

2. The words "subject to the provisions of any ordinance", appearing in Art. 43, cannot enlarge the jurisdiction of the Court of Appeal to hear appeals from judgments given by the District Court on appeal but refer to the manner in which such appeals should be brought such as by imposing a limit of penalty below which an appeal does not lie, imposing a definite period for appeals, &c.

Considered : A. G. v. B. Joseph, C. A. 71/33 (2 P. L. R. 34, P. P. 2.ii.34, C. of J. 1665).

ANNOTATIONS : The view of the Court in C. A. 71/33 (*supra*) seems to be that an ordinance could enlarge the provisions of Art. 43 : "We know of no Ordinance subject to the provisions of which the terms of Art. 43 of the Order in Council can in this particular be modified". See also the case of Kramer v. Kipnis & an., C. A. 33/36 (P. P. 5, 7.ii.37, 1937 1 S. C. J. 97) (preliminary judgment) where the same point was raised and overruled.

FOR APPELLANTS : B. Joseph.

FOR RESPONDENT : Frank, Goitein.

JUDGMENT:

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

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

In the appeal now before us, the liquidators of the Phoenix Life Insurance Company of Vienna rejected a proof of debt advanced by a creditor. The creditor appealed to the District Court in accordance with Rule 87 of the Companies Winding-Up Rules, 1936, and the District Court reversed the liquidators' decision and admitted the proof. The liquidators, being dissatisfied with that decision, have now sought to appeal to this Court. Now it all depends whether this judgment of the District Court is a judgment given in first instance or not.

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

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

Article 43 of the Order-in-Council gives the Court of Appeal jurisdic-

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

It is perhaps unfortunate this point has not been raised before, but many points have, in English Courts, suddenly come to light. That being so, we are satisfied that we have no jurisdiction to entertain this appeal and it must be dismissed with costs fixed at LP. 10, together with disbursements.

Acting Chief Justice.

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

Delivered this 28th day of July, 1938.

Puisne Judge.

I concur.

Puisne Judge.

CIVIL APPEAL No. 171/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

Beni D. Haddad. APPELLANT.

V.

Elias Wasef Mansour. RESPONDENT.

Consideration — Claim for expenses connected with engagement — Bills of exchange — Defect in title, Bills of Exchange Ordinance, sec. 28(2) *— Shifting of consideration by consent — Estoppel.*

Appeal from a decree of the District Court of Haifa, in is appellate capaciy, dated the 23rd May, 1938, dismissed.

Appellant signed a number of promissory notes to the order of a lady to whom he had been but was no longer engaged, to defray certain expenses incurred by the lady's father in connection with the engagement. The amount of the expenses had been agreed by means of a compromise.

The lady was named as payee of the notes by the consent of both her father and the Appellant.

The notes were subsequently endorsed to Respondent who was aware of all the facts.

On an action upon the notes it was pleaded before the Magistrate that there was no consideration for the notes and that Respondent was a holder with notice and not for value. The Magistrate found that there had been consideration for the notes but gave judgment against Respondent on the ground that he was not a holder for value and that he was aware of the defect in title.

On appeal to the District Court the finding of the Magistrate was reversed on the ground that Appellant was in a similar position to an accomodation party and that the title to the bill was not defective.

HELD : 1. There had been consideration for the notes.

2. The consideration must be deemed to have shifted by mutual consent from between the father and Appellant to Appellant and the daughter.

ANNOTATIONS : On consideration for a promissory note, see C. A. 162/32 (C. of J. 263).

Cf. C. A. 130/38 (*ante*, p. 3).

FOR APPELLANT : Asfour

FOR RESPONDENT : Sahyoun.

JUDGMENT:

We need not trouble you Mr. Sahyoun.

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

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

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

Now, it seems to us that both Courts have wrongly appreciated the essential facts of this case. The fact that these notes were drawn in favour of the daughter at the request of the Appellant himself and at

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

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

Delivered this 20th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 174/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :

1. Eliezer Sirkis,
2. Haim Posnerson. APPELLANTS.

v.

David Moshe Levy. RESPONDENT.

Contract — Extension of time for performance — Waiver of notarial notice clause remains valid — No date fixed for completion.

In allowing an appeal from a judgment of the District Court of Jerusalem, dated the 30th May, 1938, and in remitting the case to the lower Court to deal with the remaining issues :—

HELD : The extension of time for the competition of the contract did not amount to a new contract in the strict sense of the word and the waiver of notarial notice contained in the original contract still applied. It was necessary, however, to give some indication of a definite date on which to comply with the contract.

ANNOTATIONS : See C. A. 42/38 (1938, 1 S. C. J. 185) and annotations. *Cf.* C. A. 118/36 (1937, 1 S. C. J. 211, 2 Ct. L. R. 37).

FOR APPELLANTS : Amdur.

FOR RESPONDENT : Eisenberg.

JUDGMENT:

In this case, by a contract between the parties dated the 20th February, 1936, clause 5 gave the Respondent three days to file a parcellation plan of the property, that is to say, the parcellation plan was due to be filed on the 23rd February, 1936. It was not settled on that date, and it was alleged that an extension of time in respect of the date of filing was given. Evidence was heard on this point — one of the Appellants said that he gave a few days, the attorney for the Appellants, who was attorney for both Appellants and Respondent, says that he gave an extension of three months. That brings the date up to the 23rd May, 1936.

On the 5th April, 1936, however, and again on a later date in April, the Appellants wrote letters to the Respondent giving him in the first case three days to come and settle the matter and in the second case 24 hourse to settle. The matter, needless to say, was not settled. Hence this action.

I should mention that in clause 15 of the contract notarial or any other notices are dispensed with. The first point then arises was a notarial notice necessary ? We are satisfied that it was not, and that here there was an extension of the time of the contract — it was not a new conract in the strict sense of the word, it was a mutual extension of time and therefore no notice was required, but it was nevertheless necessary to give some indication of a definite date on which to comply with the contract. If these letters of April had not been sent, then the three months' period during which the parcellation plan had to be filed would have expired on the 23rd May, 1936. When these letters were sent in April, they introduced a considerable amount of doubt in the mind of anyone as to what the total extension was and what was the last date on which to perform the contract. We therefore think that, from this point of view, the action would be premature, inasmuch as no definite date of completion had been fixed.

This, however, does not dispose of the case. This disposes of the particular point on which this appeal was brought, but there are various other arguments which were raised, such as, the point that it was not necessary to fix any date at all, because there was an anticipatory breach and the contract was impossible of fulfilment and so on.

We think therefore that the best plan would be to allow this appeal and remit the case to the District Court to deal with the various points raised by both parties and to give a fresh judgment.

Costs to await the result of the re-trial.

Delivered this 20th day of July, 1938.

Acting Chief Justice.

HIGH COURT No. 52/38.

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

BEFORE : The Acting Chief Justice and Frumkin, J.

IN THE APPLICATION OF :

Ferdinand Damiani. PETITIONER.

v.

1. Ali Eff. Yunes, Execution Officer, Jerusalem,
2. Bank der Tempel Gesellschaft,
3. Raheb Boulos Halwagi,
4. Greek Orthodox Patriarchte,
5. "Cit" Compagnia Italiana Turismo,
6. Postmaster General,
7. Elia George Elia, advocate for Khedivial Mail Line,
8. Bank Hatya,
9. Barclays Bank,
10. Hanna Jaber, Ramallah. RESPONDENTS.

Chief Execution Officer — Payment of judgment debt by instalments — High Court reluctant to interfere with discretion.

In refusing an application for an order *nisi* to issue to the First Respondent, directing him to show cause why his order dated the 31st May, 1938, in Execution File No. 1631/37, Jerusalem, ordering the Petitioner to pay LP. 5 *per mensem* should not be set aside, and why the Petitioner should not be ordered to pay LP. 1 *per mensem* only.

HELD : 1. The High Court is always reluctant to upset orders given by the Chief Execution Officers.

2. If the creditors would agree to apportion among themselves a monthly payment of LP. 1., Petitioner could always apply to the Chief Execution Officer to vary his order.

ANNOTATIONS :

1. See H. C. 58/38 (3.viii.38) and annotations.
2. See H. C. 36/38 (1938, 1 S. C. J. 343) and annotations

ORDER:

We do not think we ought to grant the order prayed for.

This Court is always reluctant to upset orders given by the Chief Execution Officer, and we do not think that sufficient cause has been shown for granting the order.

In addition, the amount ordered to be paid monthly may be apportioned among the creditors, and if, in fact, as stated by the Petitioner, the creditors do not object to the payment of LP. 1, then he can always apply to the Chief Execution Officer to vary his order.

The application for an order *nisi* must therefore be refused.

Given this 21st day of July, 1938.

Acting Chief Justice.

HIGH COURT CASE No. 53/38.

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

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :

The Arab Alcohol Agency,
(Sahag M. Sahaghian & Khaled
Abdel Latif). PETITIONERS.

v.

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

Customs agreement between Palestine and Syria — Exemption of certain goods from customs duty — Does not affect prohibition to import — Jurisdiction of High Court.

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

HELD : The agreement between Palestine and Syria relating to the exemption from duty of certain goods did not preclude Government from prohibiting such goods from being imported into Palestine.

FOR PETITIONERS : Elia.

RESPONDENTS : *Ex parte.*

ORDER :

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

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

The application is therefore refused.

Given this 23rd day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 155/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

1. Abdel Rahman Ramadan.
2. Philip el Jada'. APPELLANTS.

v.

Jabbour Hanna el Katteh and Bros. RESPONDENTS.

Appeal — Whether on time — Copy of judgment may be filed with appeal, C. A. 149/38 — Ex parte order for extension of time — C. P. R. 324, 306 — Ante dating contract — Effect of cancellation of contract — Effect of retirement of partner on antecedent acts — Non payment of fees, C. A. 20/38.

In dismissing an appeal from a decree of the District Court of Jaffa, dated the 14th May, 1938 : —

HELD : 1. (Following C. A. 149/38). The appeal had been first filed on time as it was properly accompanied by copy of the judgment.

2. An order for extension of time should not be made *ex parte* and without notice to the other side, except in most exceptional circumstances.

3. There is nothing in law which prevents ante-dating an agreement.

4. The cancellation of the agreement did not absolve the Appellants from liability contracted under the agreement while it was in force.

5. The retirement of the second Appellant from the partnership

did not affect his liability to the Respondents for acts done during the existence of the partnership. *Quaere* whether he had a right of recourse against first Appellant.

6. (Following the judgment of the Chief Justice in C. A. 20/38). The non-payment of the fees on renewal of the action in the District Court did not deprive the District Court of its juridiction.

Followed : Abu 'Assi & an. *v.* Abu 'Assi & ors., C. A. 149/38 (1938, 1 S. C. J. 439) ; Akel *v.* Abu Alayyan, C. A. 20/38 (1938, 1 S. C. J. at p. 352).

ANNOTATIONS :

1. See annotations to C. A. 149/38 (*supra*).

2. This principle was first laid down in L. A. 68/27 (P. L. R. 224, C. of J. 148). Earlier proceedings in this case (C. D. C., Ja. 113/37) are reported in 4 Ct. L. R. 109).

FOR APPELLANTS : No. 1— Atalla.
No. 2— Dajani.

FOR RESPONDENTS : Cattan

JUDGMENT:

One preliminary point has been raised to the effect that this appeal is out of time. The grounds of appeal together with certified copies of the judgment were presented on the 13th June, 1938 to the Chief Registrar, who declined to accept them on the ground that certified copies of the decree, and not of the judgment, should be filed. On the following day an application for extension of time was filed in the Supreme Court Registry and an order was made by the Chief Registrar *ex-parte* extending the time for appeal. In view of the recent ruling *) made on this point, we are of opinion that the appeal should have been accepted on the 13th June, and that being so, the appeal was therefore lodged in time. At the same time, we would like to call attention to this fact that when the Chief Registrar is acting under Rule 324 of the Civil Procedure Rules of 1938, he must comply with the provisions of Rule 306. An order for extension of time should not be made *ex-parte* and without notice to the other side, except in most exceptional circumstances. The objection is therefore overruled. In spite of the strenuous efforts of the first and second Appellants to escape liability in respect of this commercial transaction, their appeals fail.

We are in entire agreement with the judgment of the District Court which, in our opinion, correctly states the facts, correctly draws the proper inferences from them and is correct in law. There is very little that one can usefully add to it.

But there are other points which were argued before us and with which we propose to deal.

*) *I. e.*, C. A. 149/38.

It has been argued that the contract was not signed until after the 27th November, 1934, whereas the promissory notes were given on the 19th November. The contract bears date the 17th November, and that must be taken to be the date on which it came into force, and, as I have said in the course of argument, there is nothing in the world which prevents ante-dating an agreement.

With regard to the claim for commission, this is a claim in respect of other cars and for which a fresh action should have been brought.

The cancellation of the agreement does not absolve the Appellants from liability contracted under the agreement whilst it is in force.

The retirement of the second Appellant from the partnership in no way affects his liability to the Respondents for acts done during the existence of the partnership. He may possibly have a right of recourse against the first Appellant, but we should not be taken as an authority on this point.

With regard to the point that the fees were not paid when the action was renewed we think that this does not affect the case. Following the judgment of the Chief Justice in Civil Appeal No. 20 of 1938, the non-payment of the fees does not deprive the District Court from its jurisdiction.

For these reasons and for these given by the District Court, this appeal fails and must be dismissed with costs, to include hearing fees, fixed at LP. 15 together with disbursements.

Delivered this 23rd day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 138/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Zwirnerei & Nachfadenfabrik, A. G. APPELLANT.

v.

Leib Katzman. RESPONDENT.

Bills of Exchange — Bill given in absolute payment prescribed — Action on account cannot be brought — Hearing appeal de novo — Administration of oath in actions barred by limitation.

In dismissing an appeal from the judgment of the District Court sitting in Tel-Aviv, in its appellate capacity, dated the 14th April, 1938 :—

HELD : 1. The invoices were endorsed "payment to be by bill" and this shows that it was the intention of the parties that the bill should be in complete settlement of the accounts.

2. Neither the District Court, on the fourth appeal, nor the Magistrate, whose sole duty was to administer the oath, should have heard the case *de novo*.

3. The defence was absolute payment by bill and that the bill was prescribed. To have allowed the Respondent to be examined on oath would have nullified the plea of prescription.

ANNOTATIONS : *Cf.* C. A. 76/38 (1938, 1 S. C. J. 266) and annotations.

FOR APPELLANT : Linderman.

FOR RESPONDENT : Kadouri.

JUDGMENT:

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

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

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

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

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

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

Dated this 25th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 145/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

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

v.

Muhammad Abdallah. — RESPONDENT.

Exequatur — Action on a judgment — C. D. C., Ja. 239/32 — Necessity for supporting Ordinance — Jurisdiction of Magistrates and District Courts in foreign judgments — P. O. in C. Arts. 39, 40 — Magistrates Court Jurisdiction Ordinance, 1935 — Exclusive jurisdiction of District Court conferred by Foreign Judgment Rules.

In allowing an appeal from a judgment of the District Court of Jaffa, dated the 4th May, 1938, and in remitting the case to the lower Court to be tried on its merits :—

HELD : 1. The Foreign Judgment Rules only lay down a procedure for enforcing a foreign judgment that is enforceable in Palestine and in the absence of a supporting ordinance, treaty, or convention having the force of a treaty, a party cannot apply for an *exequatur* on a foreign judgment. The only case in which *exequatur* can be issued are under the Judgments (Reciprocal Enforcement) Ordinance, for judgments emanating from the United Kingdom or the British Empire, and under the Judgments (Reciprocal Enforcement) (Egypt) Ordinance, for judgments coming from Egypt.

2. The general rule is that a rule cannot amend an ordinance unless specific authority is given. Art. 39 of the Palestine Order in Council gives such authority to amend the jurisdiction of Magistrates Courts, and the Foreign Judgment Rules confer exclusive jurisdiction on the District Court to hear an action on a foreign judgment.

Followed : Katz *v.* Katz, C. D. C. Ja. 239/32 (C. of J. 922, P. P. 27.iv.34).

ANNOTATIONS :

1. Cases on foreign judgments : C. A. 20/31 (P. L. R. 719, C. of J. 919) ; H. C. 31/26 (C. of J. 914) ; C. A. 92/30 (C. of J. 917) ; C. A. 121/30 (P. L. R. 589, C. of J. 918) ; C. A. 22/31 (C. of J. 920) ; C. A. 68/32 (P. L. R. 781, C. of J. 920) ; C.A. 118/32 (P. L. R. 793, C. of J. 921) ; C. A. 65/35 (2 Ct. L. R. 89) ; C. A. 173/38 (26.vii.38).

2. Nor can an ordinance override the provisions of an Order in Council : C. A. 177/38 (*ante*, p. 54) ; C. A. 4/37 (2 Ct. L. R. 146).

In C. A. 68/32 (*supra*) it was held that actions for the enforcement of foreign judgments are not within the jurisdiction of Magistrates Courts.

FOR APPELLANT : Goitein.
FOR RESPONDENT : Papo.

JUDGMENT.

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

As to the first judgment, and in order to allay any doubts which may exist, we are of opinion that the principles laid down in Jaffa Civil Case No. 239/32 — Katz v. Katz, correctly state the law. In that judgment the District Court held that in the absence of a supporting ordinance a party cannot apply in the District Court for an *exequatur* on a foreign judgment. The Foreign Judgment Rules apply

to those foreign judgments which are made enforceable in Palestine by an Ordinance, Treaty or Convention having the force of a Treaty, but in the absence of such Ordinance or Treaty or Convention they have no application and cannot by themselves make a foreign judgment enforceable. Their only function is to lay down a procedure for enforcing a foreign judgment that is enforceable in Palestine. In this present case, the District Court, following the case of Katz v. Katz, came to the same conclusion. In that we think they were right, and that the only case in which *exequatur* can be issued are under the Judgments (Reciprocal Enforcement) Ordinance, for judgments emanating from the United Kingdom or the British Empire, and under the Judgments (Reciprocal Enforcement) Egypt Ordinance, for judgments coming from Egypt.

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

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

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

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

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

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

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

Costs will await the result of the retrial.

Delivered this 25th day of July, 1938.

Acting Chief Justice.

HIGH COURT No. 55/38.

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

BEFORE : The Acting Chief Justice, Khaldi and Abdul Hadi, JJ.

IN THE APPLICATION OF :

Ohanes Markarian — PETITIONER.

v.

1. Chief Execution Officer, Jerusalem,
2. Eliezer Proudovsky. — RESPONDENTS.

Chief Execution Officer — Non interference with discretion — Great care to be exercised before making second order of imprisonment.

In dismissing an application for an order to issue to the First Respondent, directing him to show cause why his order dated the 13th April, 1938 ,in Execution File No. 4150/37, Jerusalem, ordering petitioner to pay LP. 1 per month, should not be set aside and substituted by an order requiring the Petitioner to pay 200 mils per month ; and praying that execution proceedings be stayed pending the determination of this application.

HELD : The discretion of the first Respondent would not be interfered with but he should exercise great care before making a second of imprisonment.

ANNOTATIONS : See H. C. 58/38 (3.viii.38) and annotations.

FOR PETITIONER : In person.
FOR RESPONDENTS : *Ex parte.*

ORDER:

We do not think that we can interfere with the discretion of the Chief Execution Officer before whom the matter was originally dealt with. He examined the judgment-debtor and came to the conclusion that he ought to pay LP. 1 per month. We cannot interfere with this order on this occasion, but if an application for imprisonment of the judgment-debtor is made for the second instalment then we think that the Chief Execution Officer should exercise great care before he makes the second order of imprisonment.

The application on this occasion must therefore be refused.

Given this 26th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 172/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

Nathan Katran. APPELLANT.

v.

1. Shafik Ka'war,
2. Leon Levy,
3. Louis Lebouvier, on behalf of the heirs of the late Paul Revoil. RESPONDENT.

Experts — Inspection — Partition — Manner in which report may be drawn up.

In dismissing an appeal from a judgment of the Land Court of Haifa, in its appellate capacity, dated the 14th April, 1938 :—

HELD : It makes no difference if the expert, upon inspection, gives his opinion orally or in writing or before or after the other persons present.

ANNOTATIONS : Other cases on inspection are collated in the annotations

to C. A. 247/38 (1938, 1 S. C. J. 95). See also C. A. 8/38 (1938, 1 S. C. J. 223). C. A. 134/38 (1938, 1 S. C. J. 403) and annotations.

FOR APPELLANT : Olshan.

FOR RESPONDENTS : No. 1. Atalla

Nos. 2—3 Absent — served.

JUDGMENT:

We need not trouble you Mr. Atalla.

This appeal fails. The point taken is of such extreme technicality that I do not think any Court could ever bring itself to allow it. It concerns the allegation that the Land Registrar, when present at the inspection, did not, before anybody else, say himself "this property is not capable of partition".

The report of inspection was drawn up, which report says that the property is incapable of partition, and is signed, amongst others, by the Registrar, and I cannot think that it makes any difference whether he gives his opinion orally or in writing or before or after the others.

The appeal must therefore be dismissed with costs, to include hearing fees, fixed at LP. 15 together with disbursements to the 1st Respondent.

Delivered this 26th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 173/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Prince George Lotfallah. APPELLANT.

v.

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

In their personal capacity and in their capacity as heirs of the late Hashem Qabbani. RESPONDENTS.

Land Registrar, Tulkarem. THIRD PARTY.

Service of process on Respondents — C. P. R. 326, 330 — Service on advocate — Acceptance of appeal by Registrar — Exequatur is not a foreign judgment — It is a writ of execution.

In dismissing an appeal from a decree of the District of Nablus, dated the 30th May, 1938 :—

HELD : 1. Copies of the grounds of appeal, decree and bond in respect of each of the Respondents were served on their advocate. Moreover, the appeal had been accepted by the Registrar under rule 330. The objection that copies of the decree and bond were not served on each of the Respondents could not, therefore, be entertained.

2. An *exequatur* obtained abroad is not a foreign judgment but a writ of execution. The Beirut *exequatur* on the Cairo judgment could not therefore be sued upon nor an *exequatur* granted thereon.

ANNOTATIONS : For another decision on *exequatur, vide* C. A. 145/38 (25.vii.38).

FOR APPELLANT : Avniel.
FOR RESPONDENTS : Bushnaq.
FOR THIRD PARTY : No appearance.

JUDGMENT:

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

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

The District Court at Nablus dismissed his claim holding that :—

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

and we agree with them. The Appellant's proper course would have been to take the Cairo judgment and execute it in Palestine, but he cannot succeed in enforcing an *exequatur* given on a judgment, as an *exequatur* is a writ of execution.

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

Delivered this 26th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 178/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Yehoshoua Hankin. APPELLANT.

v.

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

Period of appeal from Magistrates Court — Fees for appeal paid to unauthorised clerk — Effect of omission to state time for appeal in Revised Edition of the Laws — Effect of practice over a considerable time.

In dismissing an appeal from a decree of the Land Court of Nablus, in its appellate capacity, dated the 30th May, 1938 :—

HELD : The appeal was out of time as it was filed on the 9th day. The period of appeal was fixed by practice over a period of nearly 20 years and was supported by legislation. The omission to state the period in the Revised Edition of the Laws did not affect it.

ANNOTATIONS : This case was remitted by the Supreme Court in C. A. 36/38 (1938, 1 S. C. J. 246). *Vide* annotations thereto. See C. A. 113/38 (1938, 1 S. C. J. 361) ; C. A. 75/38 (*ibid.* 264) and annotations and L. A. 21/33 (P. P. 25.iii.34, C. of J. 1146).

On the binding force of a long line of decisions see note 1 to C. A. 142/38 (1938, 1 ,S. C. J. 404).

FOR APPELLANT : Kehaty.

FOR RESPONDENTS : Cattan.

JUDGMENT:

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

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

Rules were reproduced in the Laws of Palestine, Drayton, this particular Rule, fixing the time for appeal to equal the time for cassation was not embodied and the Appellant wants us to hold on that ground that there is no period of appeal at all.

With this we cannot agree.

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

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

Delivered this 27th day of July, 1938.

Puisne Judge.

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

Acting Chief Justice.

I concur.

Puisne Judge.

CIVIL APPEAL No. 180/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Salamander Co. Ltd. APPELLANT.

v.

Dan Gabrieli. RESPONDENT.

Interest — No agreement to pay — Lex loci contractus — How determined — Claim for interest cannot lie in absence of notarial notice — Lex Fori.

In dismissing an appeal from a judgment of the District Court of Haifa, in its appellate capacity, dated the 29th April, 1938 :—

HELD : 1. The *lex loci contractus* was Palestinian law as the contract had been made in Palestine. German law governed the payment which was to be made in Germany.

2. There being no agreement, explicit or implied, to pay interest, no interest could be claimed in the absence of a notarial notice.

3. The rule in the Civil Procedure Code relating to notarial notices is a rule of procedure and the *lex fori* is applicable in this respect.

ANNOTATIONS : Other reported proceedings in this case : Misc.. Appl. No. 38/38 (P. P. 7.vii.38, 4 Ct. L. R. 20).

1. See *Digest,* Vol. XI, pp. 388 *sqq.*

2. See also C. A. 10/38 (1938, 1 S. C. J. 182) and annotations, and H. C. 19/38 (*ibid.* p. 239).

3. So is the rule relating to the administration of the oath : C. A. 45/24 (P. L. R. 25, C. of J. 1228). See also *Digest, op.. cit. pp.* 472 *sq.,* Nos. 1273-9.

FOR APPELLANT : Jacobi.

FOR RESPONDENT : No appearance.

JUDGMENT:

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

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

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

Civil Procedure Code dealing with notarial notices is a rule of procedure, and therefore the *lex fori* is applicable.

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

Delivered this 27th day of July, 1938.

Acting Chief Justice.

HIGH COURT No. 51/38.

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

BEFORE : The Acting Chief Justice and Khayat, J.

IN THE APPLICATION OF :

Lingo Rizkallah, as heir
of the late Habib Farah. PETITIONER.

v.

1. Chief Execution Officeh, Jaffa,
2. Abdel Hajid Abu Ramadan, as heir
of the late Himer Abu Ramadan. RESPONDENTS.

Debtor's dwelling house — Law of Execution, Art. 90 — Finding based solely on report supplied to C. E. O. — Ex parte order.

Rule *nisi* made absolute for an order to issue to the First Respondent, directing him to show cause why his orders dated the 21st April, 1938, and the 2nd July, 1938, in Execution File No. 211/24, Gaza, should not be set aside, and orders substituted thereof :—

(a) to determine whether the house in issue was a dwelling house within the meaning of Article 90 of the Execution Law, not merely on the basis of the report furnished by the Magistrate, Gaza.

(b) Alternatively, stay proceedings of sale until a certificate of registration of the house in the name of the Judgment-Debtor be produced.

The report upon which the first Respondent relied did not state whether the property in question was or not a dwelling house, but merely that Petitioner was not living there at the time.

The alternative prayer for stay of execution was based on the fact that no certificate of registration of the house had been produced in accordance with Arts. 89 and 107 of the Law of Execution. Petitioner also relied upon the Transfer

of Land Ordinance and contended that the consent of the Administration could not be obtained as the house was not registered.

ANNOTATIONS : For other decisions on Art. 90 of the Law of Execution, see annotations to H. C. 67/37 (1938, 1 S. C. J. 46).

FOR PETITIONER : Shehadeh.

FOR RESPONDENTS : No appearance — duly served.

JUDGMENT:

This is a return to a rule *nisi* directed to the First Respondent calling upon him to show cause why his orders dated the 21th April, 1938, and the 2nd July, 1938, in Execution File No. 211/24, Gaza, should not be set aside, and why he should not substitute therefor an order to determine whether the house in issue is or is not a dwelling house within the meaning of Article 90 of the Execution Law not merely on the basis of the report furnished by the Magistrate, Gaza, and, alternatively, why he should not order stay of proceedings of sale until a certificate of registration of the house in the name of the judgment-debtor is produced.

The second Respondent was served with a copy of the order of this Court on the 23rd July, 1938, and was ordered to file his reply, if he be so advised, within four days from the date of service, but failed so to do.

In view of the arguments urged by Counsel for the Petitioner, the Court orders that the rule *nisi* be made absolute. The second Respondent to pay to the Petitioner costs fixed at LP. 5.— together with disbursements.

Delivered this 28th day of July, 1938.

Acting Chief Justice.

CRIMINAL APPEAL No. 73/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Edwards (P. D. C.) and Abdul Hadi, JJ.

IN THE APPEAL OF :

The Attorney General. APPELLANT.

v.

Sa'ad Eddin Abdul Wahed el Aghwany. RESPONDENT.

Amount of fine — Stealing power.

Appeal from the judgment of the District Court of Jerusalem, dated the 13th June, 1938, whereby Respondent was convicted of fraudulent appropriation of power, contrary to Section 285(1) of the Criminal Code Ordinance, 1936, and sentenced to two pounds fine or fourteen days imprisonment.

HELD : The amount of the fine should be increased.

FOR APPELLANT : Crown Counsel.
FOR RESPONDENT : In person.

JUDGMENT:

In this case, it seems that your bill for the monthly use should have been approximately LP. 10.— whilst it was actually LP. 1.— only. This means a profit to you of LP. 9.— You already paid LP. 5.—, and this leaves you with LP. 4.— still to be paid. In the circumstances, we propose to increase the fine in your case to one of LP. 5.—. You have paid LP. 2.— and you are still required to pay LP. 3.—. In default you will go to prison for one month.

Delivered this 28th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 179/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Hans Gutmann. APPELLANT.

v.

Palestine Building Syndicate Ltd. RESPONDENT.

C. P. R. 317 — Whether ultra vires Art. 43 of the P. O. in C. — "Judgment" includes interlocutory orders — Construction of statement of claim — Reasonableness of rent.

In allowing an appeal from an order of the District Court of Haifa, dated the 23rd May, 1938, and in remitting the case to the lower Court :—

HELD : 1. The word "judgment" in Art. 43 of the Palestine Order in Council is used in a wide sense and includes an interlorutory order. Rule 317 was therefore not *ultra vires* the Order in Council

2. The statement of claim contained an alternative claim which had not been considered by the District Court.

ANNOTATIONS: 1. *Cf.* C. A. 177/38 (*ante*, p. 54).

Interlocutory orders were subject to appeal even under the Civil Procedure Code, but only together with the final judgment: H. C. 80/27 (P. L. R. 192, C. of J. 1555); H. C. 16/24 (C. of J. 971).

2. *Vide* C. A. 236/37 (1938, 1 S. C. J. 29).

FOR APPELLANT: Frank.

FOR RESPONDENT: Smoira.

JUDGMENT:

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

We now proceed to hear the case on its merits.

In this case, we are of opinion that this appeal must be allowed. I am informed that the Hebrew in which the statement of claim is put is very bad and the English translation thereof is weak, but there was an alternative claim. The main claim was for rent at a certain amount. In the alternative he asked that experts be appointed to find out what the reasonable rent was. That being so, the District Court did not enter into the question of the reasonable rent.

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

Costs to await the result of the retrial.

Delivered this 28th day of July, 1938.

Acting Chief Justice.

HIGH COURT No. 58/38.

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

BEFORE : The Acting Chief Justice and Frumkin, J.

IN THE APPLICATION OF :

Abdel Fattah Abdel Aziz. PETITIONER.

v.

1. Chief Execution Officer, Jerusalem.
2. The Arab Agricultural Bank, Jerusalem. RESPONDENTS.

Chief Execution Officer — Non interference with discretion if not wrongly exercised.

In refusing an application for an order to issue to the First Respondent directing him to show cause why his order dated the 2nd July, 1938, in Execution File No. 1656/38, Jerusalem, should not be set aside and his first order in the same file, dated the 4th June, 1938, restorded. And further that the First Respondent be ordered to apply the provisions of Article 91 of the Execution Law, Section 14 of the Land Transfer (Amendment) Ordinance, 1938, and Section 3 of the Civil Procedure Ordinance, 1938. And further that execution proceedings be stayed pending the determination of this petition.

HELD : Petitioner had not shown that the first Respondent had wrongly exercised his discretion. The High Court will not interfere with the discretion of the Chief Execution Officer unless he has wrongly exercised it or unless he has not directed his mind judicially to the matter before him.

ANNOTATIONS : See also H. C. 50/38 (*ante*, p. 50) ; H. C. 59/37 (2 Ct. L. R. 193) ; H. C. 52/38 (21.vii.38) ; H. C. 55/38 (26.vii.38). & c.

FOR PETITIONER : Abu Ghazaleh.

FOR RESPONDENTS : *Ex parte.*

ORDER :

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

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

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

Given this 3rd day of August, 1938.

Acting Chief Justice.

HIGH COURT No. 56/38.

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

BEFORE : The Acting Chief Justice and Khayat, J.

IN THE APPLICATION OF :

Shabatay Levy. APPLICANT.

v.

1. Chief Execution Officer, Haifa,
2. Nadim Dalal. RESPONDENTS.

C. E. O. — Matters which cannot be decided by C. E. O. cannot be determined by the High Court — Time to apply to competent Court — H. C. 65/37.

In refusing an application for an order to issue to the first Respondent commanding him to cancel the attachment and to stay the sale of Applicant's shares (24/96) in the land seized under Execution File No. 3247/34, Haifa ; but giving the Applicant 14 days within which to apply to the competent Court :—

HELD : This was a matter which the First Respondent was incapable of deciding as Chief Execution Officer and which the High Court was consequently incapable of deciding as a Court of Appeal from him.

CONSIDERED : H. C. 65/37 (1938, 1 S. C. J. 43).

ANNOTATIONS : See annotations to above decision. See also H. C. 59/38 (17.viii.38).

FOR APPLICANT : A. Levin.
FOR RESPONDENTS : *Ex parte.*

ORDER.

In spite of the persuasive eloquence of Mr. Levin, we think that this case is not so simple as he wanted us to believe. It appears to us, after reading the papers and hearing the arguments, that it is an extremely complicated matter, which the Chief Execution Officer was incapable of deciding as Chief Execution Officer. If he was incapable of deciding it as Chief Execution Officer, we are, equally, as a Court of Appeal from him, incapable of deciding it.

The Petitioner must go, as the Chief Execution Officer directed him so to do on the 8th July last, to a competent Court. In view of the circumstances, we refuse to grant an order *nisi,* but grant the Petitioner

14 days during which to apply to a competent Court. We are fortified in this view we take by the judgment of my brother Manning and my brother Khaldi, in High Court Case No. 65 of 1937, Gedaliah Fein *v.* Relieving President, District Court, Jerusalem, and others. Subject to this extension of time the application must be refused.

Given this 17th day of August, 1938.

Acting Chief Justice.

HIGH COURT No. 59/38.

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

BEFORE : The Acting Chief Justice and Khayat, J.

IN THE APPLICATION OF :

Harhavat Hayishuv, Land Co. of Palestine. APPLICANT.

v.

1. Chief Execution Officer, Haifa,
2. Abdul Qader Shibl,
3. Mohammad Shibl,
4. Ahmad Shibl,
5. Mohammad Rajeh Shibl,
6. Fatma Shibl,
7. Maryan Shibl. RESPONDENTS.

C. E. O. — H. C. 35/38 — *Time to apply to competent Court.*

In refusing an application for an order to issue to the First Respondent directing him to show cause why his order dated the 20th June, 1938, in Execution File No. 1680/37, should not be set aside and an order refusing the application of Respondents 2 to 7 for an order of sale should not be entered instead, or alternatively that Applicant be given six months in which to go to a competent Court to establish his right to refuse payment instead of fourteen days and that all execution proceedings be stayed during this period of six months and further praying that execution proceedings in the above Execution File be stayed pending the determination of this application, and in allowing the Petitioner 14 days to apply to the competent Court :—

HELD : The application must be refused on the same grounds as in H. C. 35/38. Petitioner would be given fourteen days to apply to the competent Court to prove his allegations.

FOLLOWED : H. C. 35/38 (1938, 1 S. C. J. 296).

ANNOTATIONS : *Vide* H. C. 35/38 (*supra*) and annotations ; H. C. 56/38 (17.viii.38).

FOR APPLICANT : Machlis.
FOR RESPONDENT : *Ex parte.*

ORDER :

We feel that we must refuse this application on the same grounds which we stated in High Court Case No. 35/38, Kamel Diab Hassan and another *v.* Chief Execution Officer, Tel-Aviv and others, but in the circumstances, we will give the Petitioner another 14 days from to-day to do what the Chief Execution Officer told him to do, namely, to go to a competent Court to prove his allegations. Subject to this extension of time, the application for an order *nisi* is refused.

Given this 17th day of August, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 187/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :

Mohammad Ali Asa'ad Dajani. APPELLANT.

v.

Rateb el Ja'ouni — deceased, represented by his widow,
Nazha, bint Ali Shaker Dajani, on behalf of the estate. RESPONDENTS.

Appeal — Point not raised in statement — No good cause shown.

In dismissing an appeal from a judgment of the Land Court of Jerusalem, dated the 10th June, 1938 :—

HELD : The point that the Court below was *functus officio* was not raised in the statement of appeal and, no good cause having been shown, could not be considered.

ANNOTATIONS : See also H. C. 60/38 (5.ix.38).

FOR APPELLANT : Goitein.
FOR RESPONDENTS : Atalla.

JUDGMENT:

We need not trouble you Mr. Atallah.

This appeal fails on the ground that the Appellant has got his quarter of the estate — and is not entitled to more than his quarter. If his sister likes to give away a part of her quarter, it is her concern, and her concern only. The Appellant is not representing his sister nor is he representing any of the heirs.

As regards the last point, namely, that the Court below was *functus officio*, this point was not raised in the statement of appeal, and it can only be raised on appeal on good cause being shown. No good cause having been shown this point also fails.

The appeal is therefore dismissed with costs fixed at LP. 15 together with disbursements.

Delivered this 12th day of September, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 210/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Abdul Hadi, JJ.

IN THE CASE OF :

Hussein Mohammad Ed-Dakka. APPELLANT.

v.

1. Salimeh, bint Sheikh Mohammad Soufan,
2. Khadijeh, bint Sheikh Mohammad Soufan. RESPONDENTS.

Appeal based on evidence — Loss of file of lower Court.

In allowing an appeal from a judgment of the Land Court of Nablus and in remitting the case for evidence to be re-heard and a fresh judgment to be given :—

HELD : The appeal turned entirely on the evidence laid before the Court below and as the file was lost the Appellate Court could not deal with the appeal.

The appeal would therefore have to be formally allowed and the case remitted to the Court below for the evidence to be reheard and a fresh judgment to be given.

FOR APPELLANT : Salah.

FOR RESPONDENTS : Bushnaq.

JUDGMENT:

This appeal entirely turns on the evidence laid before the Court below. As the file of the Court below has been lost, this Court cannot deal with the appeal.

The appeal is therefore formally allowed and the case remitted to the Court below for the evidence to be re-heard and a fresh judgment to be given.

No costs for this appeal.

Delivered this 12th day of September, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 189/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :

1. Bahiya el Khazindar,
2. Zakiya Minawi,
3. Salem Lulu,
4. Ibrahim Lulu,
5. Zaki Abu Marak. — APPELLANTS.

v.

Waqf Administration of Gaza. — RESPONDENT.

Action by Waqf Department — Appeal on finding of fact — Right of Waqf Department to sue for recovery of possession.

In dismissing an appeal from a judgment of the Land Court of Jaffa, in its appellate capacity, dated the 26th June, 1938 :—

HELD : A *waqf* department could bring an action for a claim to possession of land. There was no difference in this connection between a *waqf* department and a private individual.

FOR APPELLANTS : Shehadeh.

FOR RESPONDENT : Mallah.

JUDGMENT:

We need not trouble Sheikh Muhiddin Eff.

This appeal fails. This is a possessory action and the only question

for us to determine is that of possession — the question of ownership does not arise in these proceedings.

The Magistrate heard evidence. He had before him oral evidence and documentary evidence and he came to the conclusion that the present Respondent had made out his claim and gave judgment accordingly. There was ample evidence to support that finding, and it is not for a Court of Appeal to interfere with it.

We are unable to understand the point that a *Waqf* Department, for some reason or other, cannot bring an action for a claim to possession of land. We can see no difference in this connection between a *Waqf* Department and a private individual.

The appeal must therefore be dismissed with costs fixed at LP. 15, together with disbursements.

Delivered this 13th day of September, 1938.

British Puisne Judge.

CIVIL APPEAL No. 193/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Ibrahim El-Natour. APPELLANT.

v.

Mohammad El-Husseini. RESPONDENT.

Appeals from District Courts sitting in appellate capacity — P. O. in C., Art. 43 — Application for leave to appeal, whether out of time — Magistrates Courts Jurisdiction Ordinance, secs. 5, 6, 7.

In dismissing an appeal from a judgment of the District Court of Jaffa, in its appellate capacity, dated the 11th June, 1938 :—

HELD : Leave to appeal had wrongly been granted as the application for leave to appeal had been made more than ten days after delivery of judgment.

ANNOTATIONS : The first question raised by the Respondent and with which the Court refused to deal, *viz.* whether an appeal can lie to the Supreme Court from a judgment of a District Court sitting in an appellate capacity, was decided in the negative by the Supreme Court, similarly constituted, in C. A. 177/38 (*ante*, p. 54). It is now under reconsideration.

EOR APPELLANT : Muwaqqi.
FOR RESPONDENT : Shehadeh.

JUDGMENT:

Two preliminary points have been raised in this appeal. The first point is that the Supreme Court, sitting as a Court of Appeal has no jurisdiction to hear appeals from judgments of a District Court sitting in its appellate capacity. It has only jurisdiction to hear appeals from judgments of a District Court in first instance, as is provided under Article 43 of the Palestine Order in Council, 1922. The second point is that the application for leave to appeal to the Supreme Court is out of time, in that the judgment of the District Court was delivered in the presence of the Appellant on the 11th June, 1938, and that the application for leave to appeal was filed in the District Court on the 22nd June, 1938.

As regards the second objection, Section 7 of the Magistrates' Courts Jurisdiction Ordinance, 1935, lays down that application for leave to appeal against a judgment under Sections 5 and 6 of this Ordinance, shall be made in writing within ten days of the delivery of the judgment if in presence. Judgment in this case was delivered in presence on the 11th June, 1938, the application for leave to appeal was not filed in the District Court until the 22nd June, 1938. The application for leave to appeal was therefore clearly out of time and leave to appeal was therefore wrongly granted.

There is no need for us in these circumstances to discuss the first point as on the second point the appeal is dismissed.

The appeal must therefore be dismissed with costs fixed at LP. 15 together with disbursements.

Delivered this 14th day of September, 1938.

British Puisne Judge.

CRIMINAL APPEAL No. 77/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Copland and Frumkin, JJ.

IN THE APPEAL OF :

The Attorney General. APPELLANT.

v.

'Atef Kamel Irani. RESPONDENT.

Stealing electric current — Gravity of the offence — Appeal against sentence only — No injustice if appeal heard in absence of Respondent — Sentence.

In allowing an appeal from a judgment of the District Court of Jerusalem, dated the 11th July, 1938, whereby Respondent was convicted of Conversion of power, contrary to Sections 285(i) and 23 of the Criminal Code Ordinance, 1936, and sentenced to one pound fine or, in default, ten days' imprisonment, and in increasing the amount of the fine :—

HELD : 1. The appeal was against sentence only and no question arose as to the facts or the guilt of the Respondent. No injustice would therefore be caused to the Respondent by proceeding to hear the appeal in his absence.

2. The sentence was too lenient and would have to be increased.

ANNOTATIONS : But an appeal cannot be heard in the absence of the appellant : CR. A. 56/38 (1938, 1 S. C. J. 418 and annotation).

For another decision on theft of electricity, see CR. A. 73/38 (*ante*, p. 79).

FOR APPELLANT : Crown Counsel (Hogan).
FOR RESPONDENT : No appearance.

JUDGMENT:

This is an appeal by the Attorney General against a conviction for stealing electric current. It was before this Court on an earlier occassion and was adjourned at the request of the Respondent who was not present in Court on that occasion. He is again absent and requests a further adjournment. We see no reason why a further adjournment should be granted. The appeal by the Attorney General is against sentence only and in the circumstances no question arises as to the facts or the guilt of the Respondent — these questions having been decided by the District Court, and as a result of the conviction a penalty of LP. 1 or, in default, ten days' imprisonment was imposed. We are therefore of opinion that no injustice would be caused to the Respondent in proceeding to hear the appeal in his absence. His argument would be that the Court below considered the evidence and came to the conclusion to which it came. If the Respondent desired to have his case put fully before us, he should have appeared, or as he is a man of position — a director of a school — he could have obtained the services of an advocate to represent him.

Mr. Hogan has indicated the serious nature of this offence and the serious view of it taken by the legislator and he submits that the punishment should be a deterrent one.

Having regard to all the circumstances of the case and to the position occupied by the Respondent, we feel that the sentence was too lenient. We propose to increase it to a fine of LP. 3.

It certainly should be made known that stealing electricity in this country is more serious than ordinary stealing and persons stealing electricity may find themselves condemned to imprisonment.

Delivered this 15th day of September, 1938.

Chief Justice.

HIGH COURT No. 57/38.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :

Abraham Teicher. — PETITIONER.

v.

1. Registrar of Partnerships, Jerusalem. — RESPONDENT.

1. Pessah Bonstein,
2. David Bigar,
3. Leib Moses,
4. Yona Moses,
5. Shalom Lucacz. — THIRD PARTIES.

Partnerships — Registration of changes — Jurisdiction of High Court.

In dismissing an application for an order directing the Registrar of Partnerships to remove from the register "of change in particulars" of the partnership published in the Palestine Gazette No. 792 dated 30.6.1938 p. 744 relating to the Partnership Botmol (Bonstein, Teicher and Co., Moses Bros. & Lucacz), to restore the original registration and to cause a notice to that effect to be published in the Palestine Gazette.

HELD : The High Court could not order the first Respondent to do something which he was under no obligation to do. The effect of the application would be to make the first Respondent refrain from doing something which he had already done.

ANNOTATIONS : See also H. C. 5/38 (1938, 1 S. C. J. 135).

FOR PETITIONER : Weinshall, Toister.

FOR RESPONDENT : *Ex parte.*

ORDER:

We both agree that the present application must be refused. We cannot order the Registrar of the Partnerships to do something which he is under no legal obligation to do. The effect of this application is to make the Registrar of Partnerships refrain from doing something which he has already done.

The application is therefore dismissed.

Delivered this 19th day of September, 1938.

British Puisne Judge.

HIGH COURT No. 62/38.

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

BEFORE: Copland and Frumkin, JJ.

IN THE APPLICATION OF:

1. Tawfik Abdel Rahman Abu Ghaidah,
2. Mohammad Ahmad Shiblac. APPLICANTS.

v.

1. Attorney General of the Government of Palestine,
2. District Commissioner, Haifa and Samaria Districts,
3. The Superintendent of the Central Prison, Acre. RESPONDENTS.

Emergency Regulations, 15(b)(1), — Palestine (Defence) Order in Council, Sec. 12 — Act done under the authority of the Emergency Regulations — Renewal of order of detention.

In dismissing an application for a writ of *Habeas Corpus.*

HELD: 1. There is nothing in sec. 15(b)(1) of the Emergency Regulations which prevents a District Commissioner from renewing an order of detention make thereunder.

2. Under sec. 12 of the Palestine (Defence) Order in Council the Civil Courts are denied the right of enquiring into the validity of acts or documents done or purporting to be done under the authority of the Emergency Regulations.

ANNOTATIONS: See also H. C. 46/38 (1938, 1 S. C. J. 423).

FOR APPLICANTS: Asfour, Cattan.

FOR RESPONDENTS: *Ex parte.*

ORDER:

There is nothing in Regulation 15(b)(1) which prevents a District Commissioner from renewing any such warrant at the expiry of the period prescribed therein. This warrant is certainly an instrument which purports to be an executive act made under the Emergency Regulations. Under Section 12 of the Palestine (Defence) Order in Council, 1937, the Civil Courts are denied the right of enquiring into the validity of any act or document which is, or purports to be, made under the authority of the Emergency Regulations.

The application is therefore refused.

Delivered this 19th day of September, 1938.

British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 11/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Khayat, JJ.

IN THE APPLICATION OF:

The Palestine Building Syndicate Ltd., Tel-Aviv. APPLICANT.

v.

Hans Gutman. RESPONDENT.

Privy Council — Application for leave to appeal — Appeal from interlocutory order — No point of vital public importance.

In refusing an application for leave to appeal to His Majesty in Council from the judgment of the Supreme Court, sitting as a Court of Appeal, delivered on the 28th day of July, 1938, in Civil Appeal No. 179/38:—

HELD: 1. The judgment of the Supreme Court in respect of which leave to appeal to the Privy Council was sought was not final, the order of the District Court being merely an introductory order.

2. There was no point of vital public importance involved.

ANNOTATIONS: The proceedings in the Supreme Court are reported *ante*, at pp. 80—81. *Cf.* annotations thereto.

For decisions on Privy Council practice, see annotations to P. C. L. A. 171/37 (1938, 1 S. C. J. 399); C. A. 71/38 (*ante*, p. 39); P. C. L. A. 5/36 (12.ix.38).

FOR APPLICANT: Smoira.

FOR RESPONDENT: Frank.

ORDER:

We unanimously agree that this application should fail. In the first place the judgment or the Supreme Court in respect of which leave to appeal to the Privy Council is sought is not final, the order of the District Court being merely an interlocutory one, and most of the points in the case have not yet been decided. In the second place we cannot find, even with the most powerful microscope, a point of vital public importance in this case on which an appeal should lie to His Majesty in Council.

The application is therefore refused with costs assessed at LP. 10 and disbursements.

Delivered this 19th day of September, 1938.

British Puisne Judge.

CIVIL APPEAL No. 196/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin, and Khayat, JJ.

IN THE APPEAL OF:

Sara Michael Yeffet. — APPELLANT.

v.

1. E. Massouda,
2. Rosa Levy. — RESPONDENTS.

Appeal on findings of fact — Conflicting evidence a matter for trial Court.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 30th June, 1938:—

HELD: The appeal rested entirely on questions of fact. Although the evidence before the Court below was conflicting, it is for the trial Court to say which of such evidence it believes.

ANNOTATIONS: *Vide* annotations to C. A. 83/38 (1938, 1 S. C. J. 283) and *cf.* C. A. 127/38 (*ante*, p. 20) and C. A. 160/38 (*ante*, p. 11).

FOR APPELLANT: Ben Aaron.

FOR RESPONDENTS: Budeiri.

JUDGMENT:

In the judgment of the District Court the facts of the case are dealt with carefully and at considerable length. The Court below

have prepared a very careful, elaborate and detailed judgment, and we have nothing to add thereto. We do not propose to interfere with the said judgment in view of the fact that the appeal entirely rests on questions of fact. It is true that the evidence before the Court was conflicting, but in such circumstances it is for the trial Court to say which of such evidence it chooses to believe. The District Court has done so, and there is ample evidence to support the findings reached by the said Court.

The appeal is therefore dismissed with costs fixed at LP. 10, together with disbursements to be paid out of the *Wakf* funds.

Delivered this 20th day of September, 1938.

British Puisne Judge.

CIVIL APPEAL No. 207/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :

Mansour Abu Is'eilik. APPELLANT.

v.

Abdallah Hassan Abu Mughannam. RESPONDENT.

Appeal on findings of fact — Non-conformity of judgment with C. P. R.

In dismissing an appeal from a judgment of the Land Court of Jerusalem, sitting at Beersheba, dated the 19th of July, 1938 :—

HELD : Although the judgment of the lower Court was not wholly in conformity with the Civil Procedure Rules, it clearly settled the question in issue on the evidence.

FOR APPELLANT : Farajallah.

FOR RESPONDENT : Mallah.

JUDGMENT:

The question involved in this appeal depends entirely on fact. There was evidence before the Court below and it appears that they have believed it.

It is true that the judgment is not in a very satisfactory form, in that it is not wholly in conformity with the Civil Procedure Rules, 1938, but it clearly settles the question in issue on the evidence and

we feel that by reason of its want of form we need not interfere with it. The appeal must therefore be dismissed with costs fixed at LP. 10.

Delivered this 26th day of September, 1938.

Chief Justice.

HIGH COURT No. 60/38.

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

BEFORE : The Acting Chief Justice and Khayat, J.

IN THE APPLICATION OF :

Isaac Elyashar. PETITIONER.

v.

1. Chief Execution Officer, Jerusalem,
2. Sudky el Daoudi, on his own behalf and on behalf of the heirs of Abdel Muhsen el Daoudi. RESPONDENTS.

Execution — Laches — Jurisdiction of High Court — Point not raised in application.

In refusing an application for an order to issue to the First Respondent, directing him to show cause why his orders dated the 29th and 31st August, 1938, respectively, in Execution File, Jerusalem, No. 2435/35, ordering final sale of immovable property in execution of a judgment in a partition case in favour of the Second Respondent and ordering that a certain sum of money should be accounted against the Petitioner should not be set aside, further praying that an interim stay of execution be granted pending the final determination of this application.

ANNOTATIONS :

1. On the effect of laches, *vide* H. C. 57/32 (C. of J. 1000) ; H. C. 80/33 (C. of J.. 874) ; H. C. 69/33 (2 P. L. R. 30, P. P. 21.1.34, C. of J. 870) ; H. C. 96/36 (1937, 1 S. C. J. 395).

2–3. *Vide* annotations to H. C. 12//38 (1938, 1 S. C. J. 111) and H. C. 20/38 (*ibid.* p. 226) ; H. C. 27/38 (*ibid.* p. 256) ; H. C. 18/38 (*ibid.* p. 203) and H. C. 47/38 (*ante* p. 49).

4. *Vide* note 1 to H. C. 32/38 (1938, 1 S. C. J. 331) ; H. C. 39/38 (*ibid.* p. 378).

HELD : 1. The application was made too late.

2. If the judgment of the Magistrate was wrong it should have been appealed to the District Court.

3. As regards the apportionment of the sum of LP. 470, Petitioner had his remedy in the appropriate Court.

4. The last point could not be considered as it had not been mentioned in the petition.

FOR PETITIONER : Levitsky.
FOR RESPONDENTS : *Ex parte.*

ORDER:

We think that this application fails on the following (*sic*) :—

(1) because it was made too late ;

(2) because, if the judgment of the Magistrate was wrong, it should have been appealed to the District Court ; and

(3) with regard to the point that the Petitioner should not bear the whole sum of LP. 470, we think that if he feels that he should not do so, he has his remedy by suing the second Respondent in the proper Court.

One point which unfortunately was not made in the petition is, that he should not have been called upon to pay the difference between the highest bid and the bid he offered, namely LP. 470, and that he should only be called upon to pay the difference between the sum of LP. 7,460 the offer just before his offer, and the sum of LP. 7,470 offered by the Petitioner. It seems that this point occurred to the Petitioner when he came into Court this morning — it does not appear in the petition to this Court.

The application for a rule *nisi* is therefore refused.

Given this 5th day of September, 1938.

Acting Chief Justice.

PRIVY COUNCIL LEAVE APPLICATION No. 5/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Abdul Hadi, JJ.

IN THE APPLICATION OF :

1. Sheikh Abdel Hafiz,
2. Hussein el Haj Hassan Az-Zuhd,
3. Salim el Haj Hassan Az-Zuhd,
4. Mohammad el Haj Hassan Az-Zuhd. APPELLANTS.

v.

Ahmad Mahmoud Snober. RESPONDENT.

Privy Council Practice — Certificate of non-prosecution.

Application for the issue of a certificate of non-prosecution under Article 24 of the Palestine (Appeal to Privy Council) Order in Council 1924 granted.

ANNOTATIONS : Previous proceedings in this case are reported in P. P. 27.viii.37, 2 Ct. L. R. 70.

For other decisions on Privy Council practice see annotations to P. C. L. A. 11/38 (*ante* at p. 68).

FOR APPELLANTS : Nos. 1 & 3, in person.
No. 2, served — no appearance.
No. 4, does not exist.

RESPONDENT : In person.

CERTIFICATE.

WHEREAS under Article 24 of the Palestine (Appeal to Privy Council) Order in Council it is provided that where an Appellant, having obtained final leave to appeal, fails to show due diligence in taking all necessary steps for the purpose of procuring the despatch of the Record to England, the Respondent may, after giving the Appellant due notice of his intended application, apply to the Court for a certificate that the appeal has not been effectually prosecuted by the Appellant, and if the Court sees fit to grant such a certificate the appeal shall be deemed, as from the date of such certificate to stand dismissed for non-prosecution without express Order of His Majesty in Council, and the costs of the appeal and the security entered into by the Appellant shall be dealt with in such manner as the Court may think fit to direct ; and

WHEREAS an application has been submitted to the Court by the Respondent for the issue of the said certificate ; and

WHEREAS the application was heard by the Court on the 12th day of September, 1938, and it was decided by the Court that a certificate should issue.

NOW THEREFORE this is to certify that the appeal has not been effectually prosecuted by the Appellants, and the appeal shall consequently be deemed to stand dismissed as from this date. And it is further ordered that the Appellants do pay to the Respondent any costs incurred by the Respondent with respect to the appeal, and that when such costs are paid, the security provided by the Appellants may be returned to them.

Given under my hand and the seal of this court, this 12th day of September, 1938.

By order of the Court

Chief Registrar.

CIVIL APPEAL No. 203/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :

El Haj Ahmad Khalil Hussein Mutter. APPELLANT.

V.

1. Ismail Hassan el Ashqar,
2. Ahmad Hassan el Ashqar,
3. Selim Hassan el Ashqar,
4. Nejiba bint Hassan el Ashqar. RESPONDENTS.

Proof of admission made in another court — Transaction of sale outside Land Registry void — Finding of lower Court.

In dismissing an appeal from a judgment of the Land Court of Jaffa, dated the 12th of July, 1938 :—

HELD : 1. Appellant had failed to prove that the signature on the deed produced before the Magistrate's Court was that of the first Respondent as no certified copy of the admission had been produced in the Land Court.

2. The deed produced by Appellant was in any event void as it was a transaction of sale outside the Land Registry.

ANNOTATIONS : 2. See cases at the end of the annotations to C. A. 253/37 (1938, 1 S. C. J. 67).

FOR APPELLANT : Muhtadi.

RESPONDENTS : In person.

JUDGMENT.

We are of opinion that this appeal fails.

With regard to the signature, is appears that no certified copy of the admission in the Magistrate's Court that the signature on the deed produced to that Court is that of the first Respondent was ever produced before the Court below,and even if the Appellant could prove the signatures of the Respondents or one of them, the deed of 1921 produced by the Appellant is void, as it is a transaction of sale outside the Land Registry. Moreover it seems clear that the Land Court was not satisfied that there was a transaction of sale between the Appellant and his sister, the testator of the present Respondents, during the war.

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For these reasons, the appeal must be dismissed. Each of the Respondents will have 500 mils costs.

Delivered this 26th day of September, 1938.

Chief Justice.

CIVIL APPEAL No. 214/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

BEFORE : The Chief Justice, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :

The Attorney General on behalf of the Department of Customs Excise and Trade, Jerusalem. APPELLANT.

v.

1. Suleiman el Burqan,
2. Hilal el Obeid,
3. Zaal es Salman,
4. Salman ar Rahil. RESPONDENTS.

Crown actions — Whether fresh consent of High Commissioner required for renewing action — Object of provision regarding consent of High Commissioner — Confiscation of property for alleged offence against Salt Ordinance — No evidence of offence.

In dismissing an appeal from a judgment of the District Court of Nablus, dated the 20th of July, 1938 :—

HELD : 1. The object of the Crown Actions Ordinance is not to prevent people from bringing actions against the Government, but to prevent vexations or frivolous actions being brought. Respondents having first obtained the *fiat* of the High Commissioner to file action, it was not necessary for them to obtain a fresh consent to renew the action after it had been struck out for failure to appear.

2. In order to resist a claim for the return of the camels detained by the Customs Officials for an alleged offence against the Salt Ordinance, it was incumbent upon Appellant to show that an offence had been committed. There had been no proof, at any stage of the proceedings, that an offence had been committed.

ANNOTATIONS : 1. See *per contra* C. A. 79/38 (1938, 1 S. C. J. 370) but *cf.* C. A. 12/36 (P. P. 5.viii.37, 1 Ct. L. R. 47, 1937, 1 S. C. J. 89, C. of J. 1934—6, 752) and C. A. 206/35 (2 Ct. L. R. 89).

Authorities on crown actions:

L. A. 48/33 (P. P. 17.xii.35, C. of J. 644) ; L. A. 54/30 (C. of J. 641) ; L. A. 134/23 (C. of J. 640) ; C. A. 158/32 (C. of J. 643) ; M. A. 15/31 (P. L. R. 646, C. of J. 642).

FOR APPELLANT : Toukan.

FOR RESPONDENTS : Sheikh Musa Omran Dajani.

JUDGMENT.

This case has been well argued by Na'im Eff. Toukan on behalf of the Attorney General, but he finds himself in considerable difficulty. We are of opinion that the appeal cannot succeed.

The first point raised on appeal is that the consent of the High Commissioner which was necessary to the Plaintiffs' action under the Crown Actions Ordinance was not obtained. The Plaintiffs (Respondents here) sued for the return of their camels which were detained by the Customs Officials who suspected the Plaintiffs of using them in the smuggling of salt. The action was brought in the District Court, Nablus, with the consent of His Excellency. On the day fixed for the hearing, the Plaintiffs did not appear and the case was struck out. Later they renewed it without fresh consent from the High Commissioner, and it is now contended before us that the second action is not the same as the original action.

We are of opinion that the claim in the second action was substantially the same as in the original action, and as I have already said, the object of the Crown Actions Ordinance is not to prevent people from bringing actions against the Government — the High Commissioner would be the last person to wish to do so — but its object is to prevent vexatious or frivolous actions being brought. We think that the requisite consent was obtained and this point fails.

As I have stated the camels were being detained by reason of some offence alleged to have been committed contrary to the Salt Ordinance. It seems to me, that although by the law a Plaintiff may be called upon to sue for the return of the means of conveyance, confiscated in connection with an offence, the Defendants to succeed must show that an offence has been committed. It is quite clear that at no stage of these proceedings was there any proof that an offence against the Salt Ordinance had been committed. Unless some offence had been committed connected with their use, there was no lawful justification for detaining the camels. It is not suggested that any proceedings in connection with this offence had been taken in any Court, except these proceedings. The Attorney

General, against whom the action was brought, could have taken steps to bring an officer of the Customs Department, to give evidence or taken steps to obtain the presence of some members of the Trans-Jordan Frontier Force if they were required, but no evidence of an offence was produced.

In the circumstances, we think that this appeal should be dismissed with costs fixed at LP. 5.—.

Delivered this 27th day of September, 1938.

Chief Justice.

CIVIL APPEAL No. 209/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :

1. El Haj Odeh Abu Hidaiweh,
2. Jaddouh Abu Hidaiweh,
3. Salem el Tawabteh. APPELLANTS.

V.

1. El Haj Gaith Ibn Haj Mukait,
2. Suleiman Ibn Haj Mukait. RESPONDENTS.

Form of judgment — Object of C. P. R. rule 205 — Public right of way — Right to use way as adjacent owner.

In dismissing an appeal from a judgment of the Land Court of Jerusalem, sitting at Beersheba, dated the 21st of June, 1938 :—

HELD : 1. The object of rule 205 of the Civil Procedure Rules, 1938, is that the parties and the appellate court should be in a position to know precisely what the court decided and why it so decided. District and Land Courts should comply with the provisions of the rule.

2. The Land Court was justified on the facts, in finding that Appellants had no right of way.

ANNOTATIONS : Non conformity of the judgment with the rules is not sufficient to set it aside : C. A. 207/38 (*ante*, p. 95).

FOR APPELLANTS : Shehadeh.

FOR RESPONDENTS : Zein El Din.

JUDGMENT:

It is clear that the judgment of the Land Court is not very satisfactory in form, particularly having regard to Rule 205 of the Civil Procedure Rules, 1938, which indicates what judgments should contain. The object of that Rule is that the parties and this Court should be in a position to know precisely what the Court decided and why it so decided. I would call the attention of District Courts and Land Courts to this Rule.

The Land Court made it clear in effect from their judgment, that there is no public way. In their judgment they stated as follows :—

> "Defendant must refrain from using Plaintiffs' land as a public way".

If the Appellants (Defendants in the Court below) cannot use the land as a public way, no one else can so use it ; moreover, it is not contended before us that there is a public way.

The question therefore is not whether one party is entitled to pass through the land of another in his capacity as a member of the public, but whether he is entitled to pass through the land of another in his capacity as an adjacent owner. The Court below found :—

> "That there may be a private occasional track, which the Plaintiff is entitled to control and Defendant cannot use this without permission of Plaintiffs".

This we take to mean that the Defendants have no right to pass through the Plaintiffs' land without permission of the Plaintiffs, and on the facts we think the Court was justified in so finding.

The appeal will be dismissed with costs fixed at LP. 10.—.

Delivered this 27th day of September, 1938.

Chief Justice.

CIVIL APPEAL No. 194/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE CASE OF :

Anna Zaboura. — APPELLANT.

v.

1. Aniseh Zaboura,
2. Tawfiq Zaboura. — RESPONDENTS.

Possession — Forceful obtaining of possession whilst action for ownership pending — Magistrates Law, Arts. 24, 26.

In dismissing by a majority (Khayat, J. *dissentiente*) an appeal from a decree of the District Court of Jaffa, dated the 6th of July, 1938 :—

HELD : The lower Courts had rightly found against the Appellant as she had taken the law into her own hands and taken possession of the property whilst an action for ownership was pending in the Land Court.

FOR APPELLANT : Goitein.
FOR RESPONDENTS : Machlis.

JUDGMENT:

Frumkin, J. : While proceedings were pending before the Land Court of Jaffa, in an action for ownership between the parties to this appeal, relating to a certain house in Jaffa, the Appellant, who was never in possession of the house before, purporting to be a co-owner of the said house, without awaiting the result of the action before the Land Court — took possession of a part of the said house, to say the least, without the knowledge and consent of her opponents.

The Respondents then instituted an action before the Magistrate for the recovery of possession, and succeeded. The Appellant appealed to the Land Court and failed. She got leave to appeal to this Court, and hence this appeal.

The Appellant relied originally on Article 24 of the Ottoman Magistrate's Law, and as an after-thought on Article 26 of the said Law, being, as she alleges, a co-owner.

It is true that there are cases under the articles of the Magistrates' Law quoted whereby a person can, in certain circumstances, remain in possession of land, occupied without the consent of the person previously in possession.

This was allowed in order to provide a temporary remedy to a party, pending the determination by a proper Court of the ownership of the property in dispute. The grant of such remedy was warranted by the fact that the party might otherwise have to wait years before his action for ownership would be determined. Nowadays, when one can have a case of ownership heard and determined by a Land Court within a reasonable time, the Courts should not, to my mind encourage applications for temporary relief, which relief does not determine the matter disputed between the parties, and means therefor only duplication of litigation.

But apart from this, in the present case the matter was before a

Court competent to deal with and decide, once and for all, the rights of the parties. The Appellant, instead of awaiting the result of such proceedings, took the law in her own hands, and took possession of property *pendente lite*. Such steps should certainly not be tolerated, and the person taking this course cannot expect any relief from the Court.

On this ground alone the Judgments of both the Magistrate's and District Courts must be affirmed and the Appeal dismissed with costs to include LP. 15.— Advocates fees and disbursements.

Delivered this 28th day of September, 1938.

Puisne Judge.

I agree and have nothing to add.

British Puisne Judge.

Khayat, J. : This is an appeal from the judgment of the Land Court of Jaffa, in its appellate capacity, confirming the judgment of the Magistrate whereby the Appellant was dispossessed of part of the house she co-owns with the Respondents.

In my opinion, the Magistrate has no power to dispossess a co-owner who holds a title-deed, unless and until it is established before a Land Court that that title-deed is a nullity. Accordingly, the dispossession proceedings in the Magistrate's Court should, either have been postponed until the question of ownership of the Respondents (Plaintiffs in the Land Court) to the house in dispute has been determined by the Court and then the provisions of Article 24 of the Ottoman Magistrates' Law could be applied, or that the Appellant and the Respondents should have remained in joint-possession in accordance with the provisions of Article 26 of the said Law which Article can only be applied in cases of this sort, as it is clear from the provisions of the previous Articles that is, Articles 24 and 25.

The appeal must therefore be allowed, the judgments of both the Land Court and the Magistrate set aside, and Respondents' action for dispossession dismissed.

Delivered this 28th day of September, 1938.

Puisne Judge.

Mr. Goitein asked this judgment to remain in the office for 6 weeks as case in Jaffa would not be heard before then.

Mr. Machlis undertook not to take steps in execution before the expiration of 30 days.

Noted accordingly.

CIVIL APPEAL No. 208/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :

L'Union Fire, Accident and General Insurance Co. Ltd. of Paris. APPLICANTS.

v.

1. J. Pravda,
2. Aron Rojansky. RESPONDENTS.

Arbitration — Application to state a case — Arbitrator functus officio after delivering his award — Arbitration and assessment — Costs.

Application for leave to appeal against a judgment of the District Court of Tel-Aviv, dated the 11th May, 1938, dismissed.

During the course of an arbitration between Appellants and the first Respondent, conducted before the second Respondent as single arbitrator, Appellants applied to the District Court, Tel-Aviv, under sec. 8 of the Arbitration Ordinance, for an order against the second Respondent to state a case to the District Court on certain points of law.

The District Court refused the application on the ground that the proceedings before the second Respondent did not amount to an arbitration but were in the nature of a valuation and that the provisions of the Arbitration Ordinance did not apply.

The Appellants then applied to the District Court for leave to appeal and this was refused. Immediately after hearing of the refusal by the District Court to grant leave to appeal, the second Respondent made his award.

On an application to the Supreme Court for leave to appeal —

HELD : The Arbitrator was now *functus officio* and the Court could not interfere.

ANNOTATIONS : *Cf.* the following decisions : C. A. 45/32 (C. of J. 35) — — *Court functus officio after dismissing action* : C. A. 141/31 (at C. of J. 1070) — — *or after delivering judgment* ; L. A. 4/33 (P. L. R. 854, C. of J. 168) — — *President District Court functus officio after refusing application for leave to appeal*; & c.

FOR APPLICANTS : Aboulafia.

FOR RESPONDENTS : Levitsky.

JUDGMENT:

This application for leave to appeal from the judgment of the District Court of Tel-Aviv must be dismissed. It originates from an application to that Court for an order to an arbitrator to state a case, and we are

told that the said arbitrator has already given his decision, and therefore this Court cannot now interfere. The arbitrator would now be *functus officio*.

But we wish to make it quite clear that we do not express any opinion on the question whether it is a mater of arbitration or assessment. This question is entirely left for future discussion and decision.

Leave to appeal is refused, but we think that in the circumstances of this case no costs should be allowed.

Delivered this 7th day of September, 1938.

British Puisne Judge.

HIGH COURT No. 61/38.

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

BEFORE : The Chief Justice and Frumkin, J.

IN THE APPLICATION OF :

Keren Kayemeth Leisrael, Ltd. — PETITIONERS.

v.

1. The members of the Arab Mazareeb,
2. The Villagers of Ma'lul. — RESPONDENTS.

Change of venue — Public security.

In making absolute a rule *nisi* in an application for change of venue from the Land Court of Nablus, to the Land Court of Jerusalem, or failing that, to the Land Court of Haifa, in Land Appeal No. 37/37 :—

HELD : The application should be granted and the case heard in the Land Court of Haifa.

ANNOTATIONS : For a change of venue granted on the ground of public security *vide* H. C. 48/38 (*ante* p. 14). For other decisions on change of venue, *vide* H. C. 33/38 (1938 1 S. C. J. 326) and annotations thereto.

FOR PETITIONERS : Horowitz.

FOR RESPONDENTS : 1. Mohammad Hussein Khalaf, Mukhtar of Mazareeb.
2. Awad Elias El Khalil, Mukhtar of Ma'lul.

ORDER :

This is a return to a rule *nisi* issued by this Court on the 13th September, 1938, calling upon the Respondents to show cause why the

hearing of Land Appeal No. 37 of 1937 pending in the Land Court of Nablus should not be transferred to the Land Court of Jerusalem, or failing that, to the Land Court of Haifa.

After hearing the Mukhtars of the Arab Mazareeb and the village of Ma'lul the Court is of opinion that the application should be granted and the case heard in the Land Court of Haifa, and orders accordingly.

Given this 29th day of September, 1938.

Chief Justice.

HIGH COURT No. 63/38.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :

Moshe Joseph Flint. PETITIONER.

v.

1. The A/Chief Execution Officer of the District Court, Jerusalem,
2. Shifra Flint. RESPONDENTS.

Rabbinical Courts — Judgment delivered by the "Great Rabbinical Court of the Ashkenazi Community of Jerusalem", authenticated by Chief Rabbinate — Proper constitution of Rabbinical Court under the Religious Communities (Organisation) Ordinance, 1926 — C. E. O. need not inquire into the warrants of appointment of rabbis — Authentication of judgment by Chief Rabbinate sufficient authority for C. E. O. to enforce the judgment.

In dismissing an application for an order to issue to the first Respondent directing him to show cause why his order dated the 12th July, 1938, in execution file No. 955/38 should not be set aside :—

HELD : 1. It is not the duty of the Chief Execution Officer to enquire into the warrants of appointment of Rabbis.

2. There is no authority conferring upon the Chief Rabbinate any notarial powers. This body is under no obligation to authenticate instruments which, in their view, have been improperly issued.

3. If the Chief Rabbinate chooses to authenticate the signatures of persons holding themselves out to be members of a religious

Court and further endorses a judgment signed by such persons with the official seal of the Chief Rabbinate, this must be considered sufficient authority for the Chief Execution Officer to act upon it and accept that instrument as a judgment of a Court of one of the authorised Religious Communities.

FOR PETITIONER : Levitsky.

FOR RESPONDENTS : *Ex parte.*

ORDER.

Frumkin, J. : This is an application for an order to issue to the Chief Execution Officer directing him not to execute a judgment purporting to have been given by the "Great Rabbinical Court of the Ashkenazi Community" of Jerusalem, signed by three Rabbis whose signatures have been authenticated by the Chief Rabbinate of Palestine, the General Secretary to the Chief Rabbinate and endorsed with the seal of the Chief Rabbinate.

It has been argued on behalf of the Petitioner that the three Rabbis who have signed this judgment do not constitute a proper Court under the Religious Community (Organisation) Ordinance, 1926.

We do not think that it is the duty of the Chief Execution Officer to enquire into the warrants of appointment of Rabbis.

There is no body more concerned with disallowing the function of unauthorised Rabbinical Courts than the Supreme Rabbinical authority of the country. We know of no authority conferring upon the Chief Rabbinate any notarial power. This body is certainly under no obligation to authenticate instruments which in their view have been improperty issued. So that if the Chief Rabbinate chooses to authenticate the signatures of persons holding themselves out to be members of a religious Court and further endorses a judgment signed by such persons with the official seal of the Chief Rabbinate, this must be considered sufficient authority for the Chief Execution Officer to act upon it and accept that instrument as a judgment of a Court of one of the authorised Religious Communities.

For this reason we are not prepared to grant the order.

Given this 7th day of October, 1937.

Puisne Judge.

I agree and have nothing to add.

British Puisne Judge.

CIVIL APPEAL No. 204/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE CASE OF :

Asher Kaplan. APPELLANT.

v.

1. Rivka Maisnik,
2. Shifra Chertok,
3. Moses Kaplan. RESPONDENTS.

Land settlement — No power to amend register after completion of settlement — Object of land settlement — Completion of settlement — Land (Settlement of Title) Ordinance, sec. 65.

In allowing an appeal from a judgment of the Land Court sitting at Tel-Aviv, dated the 7th day of July, 1938, and in setting aside the judgment of the Land Court and dismissing the application for leave to appeal :—

HELD : 1. Once settlement is completed the Settlement Officer has no power to amend the register, except for clerical alterations.

2. Sec. 65 of the Land (Settlement of Title) Ordinance is only available to a claimant before the new register is completed.

ANNOTATIONS : *Cf.* L. A. 92/34 (C. of J. 1934-6 850, 2 P. L. R. 471).

FOR APPELLANT : Eliash.

FOR RESPONDENTS : S. Gratch and Elkayam.

JUDGMENT:

We are unanimously of opinion that this appeal must be allowed for the simple reason that once settlement is completed the Settlement Officer has no power to amend the register, except to order correction of clerical errors in the register and to introduce clerical amendments or additions thereto.

Section 65 of the Land (Settlement of Title) Ordinance Cap. 80 is only available to a claimant before the new register is completed.

The whole object of land settlement is to settle land as quickly as possible, and settlement is completed when the necessary schedule of rights is incorporated in the new register. Then the function of the

Settlement Officer ceases and he has no more power to amend the registration.

The appeal is therefore allowed with LP. 15.— costs and disbursements, the judgment of the Land Court is set aside and the application for leave to appeal to (*sic*) the Settlement Officer made by the Respondents is dismissed.

Delivered this 6th day of October, 1938.

British Puisne Judge.

CRIMINAL APPEAL No. 81/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Plunkett (P. D. C.), and Khayatt, JJ.

IN THE APPEAL OF :

Muhammad Ibrahim Jabr. APPELLANT.

v.

The Attorney General. RESPONDENT.

Advocate — Application for Advocate to be assigned to accused by the Court — Should be made to President of the Court of Trial — Evidence to justify finding.

In dismissing an appeal from a judgment of the Criminal Assize Court sitting at Jaffa, dated 21st September, 1938, whereby Appellant was convicted of manslaughter, contrary to section 212 of the Criminal Code Ordinance, 1936, and sentenced to 12 years' imprisonment.

HELD : 1. Application for an advocate to be assigned to the accused cannot be made on appeal but should be made to the President of the Court of Trial.

2. There had been evidence to justify the finding of the lower Court.

ANNOTATIONS : *Cf.* CR. A. 52/38 (1938, 1 S. C. J. 322).

APPELLANT : in person.

FOR RESPONDENT : Crown Counsel (Hogan).

JUDGMENT:

The Appellant in this case has applied that an advocate be assigned by this Court to defend him on appeal. Such an application should

have been made to the President of the Court of Trial and not to this Court.

We have read the proceedings in this case. The Court below dealt with the facts, and there was evidence to justify it in coming to the findings to which it came.

That being so, we are satisfied that there are no grounds on which we can interfere.

The appeal must be dismissed and the conviction and sentence confirmed.

Delivered this 13th day of October, 1938.

Chief Justice.

CRIMINAL APPEAL No. 78/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Copland and Frumkin, JJ.

IN THE APPEAL OF :

Hussein Hassan Harb El 'Aneed. APPELLANT.

v.

The Attorney General. RESPONDENT.

Failure by court of trial to indicate to accused his right of appeal — Provisions of the law to be complied with — Adequate representation by advocate — Findings of lower Court.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 13th day of September, 1938, whereby Appellant was convicted of manslaughter contrary to Sections 212 & 213 of the Criminal Code Ordinance, 1936, and sentenced to 8 years imprisonment :—

HELD : There was no record that the lower Court had indicated to the accused his right to appeal. The provisions of the law must be complied with by the courts. No injustice had, however, been done to the accused as his case had been adequately presented by his advocate.

ANNOTATIONS : *Vide* CR. A. 5/38 (1938, 1 S. C. J. 64) and annotations.

FOR APPELLANT : Hassan Sidqi Dajani.

FOR RESPONDENT : Crown Counsel (Hogan).

JUDGMENT:

I can find no record in the proceedings that the Court below indicated to the convicted person his right to appeal. I have said in this Court before *) and I say again that the provisions of the law are to be complied with and that Courts should be first to comply with such provisions.

So far as this particular case is concerned no injustice has been done to the Appellant as his case has been presented to this Court adequately by Hassan Sidqi Dajani. As to the facts the same argument which is put before us was put before the Court below and they rejected it. It appears that there was evidence on which they convicted and we cannot intervene.

As to the sentence we see no reason to interfere.

The appeal must be dismissed.

Delivered this 11th day of October, 1938.

Chief Justice.

CRIMINAL APPEAL No. 79/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: The Chief Justeice, Copland and Frumkin, JJ.

IN THE APPEAL OF:

Mahmoud Odeh Esh-Sheikh Khalil. APPELLANT.

v.

The Attorney General. RESPONDENT.

Corroboration in sexual offences — Unsworn evidence of children — Criminal procedure (Trial Upon Information) Ordinance, sec. 51.

In allowing an appeal from a judgment of the District Court of Haifa, dated the 19th day of September, 1938, whereby Appellant was convicted of having unlawful sexual intercourse with a girl under the age of sixteen years, contrary to Section 152(i)(c) of the Criminal Code Ordinance, 1936, and sentenced to seven years' imprisonment; and in discharging the Appellant:—

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*) *E. g.* in C. A. 209/38 (27.ix.38).

Ed.

HELD : 1. The conviction could not be supported as it was based upon the evidence of two unsworn children.

2. It was to be regretted that the Court of trial did not comply more fully with sec. 51 of the Criminal Procedure (Trial Upon Information) Ordinance.

ANNOTATIONS :

1. On the requirement for corroboration in the case of sexual offences, *vide* CR. A. 34/38 (1938, 1 S. C. J. 340) and annotations, and C. R. A. 71/38 (*ante* p. 45).

2. *Vide* A. A. 4/33 (P. P. 29.iii.34, C. of J. 805); M. A. 16/32 (C. of J. 630) ; 59/33 (C. of J. 638).

FOR APPELLANT : Atalla.

FOR RESPONDENT : Crown Counsel (Hogan).

JUDGMENT:

The Appellant was convicted by the District Court, Haifa, of having unlawful sexual intercourse with a child aged seven years.

The evidence of that child, which was given unsworn, was corroborated only by the evidence of another unsworn child. On this becoming clear the Crown Counsel rightly stated that he could not support the conviction.

The appeal therefore is allowed and the Appellant discharged — unless he is detained on any other charge.

It is a matter of regret that the Court of trial did not comply more fully with section 51 of the Criminal Procedure (Trial Upon Information) Ordinance, Cap. 36.

Delivered this 11th day of October, 1938.

Chief Justice.

CIVIL APPEAL No. 216/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Copland and Khayat, JJ.

IN THE APPEAL OF :

Jonina Shlank. APPELLANT.

V.

Mahmoud Muhammad Abu Namous. RESPONDENT.

Onus of Proof — Allegation of fraud — Land (Settlement of Title) Ordinance sec. 66 — Unwarranted shifting of onus of proof — Identification.

In allowing an appeal from a judgment of the Land Court of Jaffa, dated the 30th July, 1938, and in remitting the case for retrial :—

HELD : 1. The onus of proof, which rested upon Respondent, who alleged fraud, was wrongly shifted to Appellant during the course of the trial.

2. It was to be regretted that the Assistant Settlement Officer had not been asked to identify Respondent in the lower Court.

ANNOTATIONS : On onus of proof in cases of fraud see *Digest*, Vol. xii, p. 36, Nos, 126 *Sgg.*

FOR APPELLANT : Eliash.

FOR RESPONDENT : Ayoubi.

JUDGMENT.

Copland, J. We think that this appeal will have to be allowed. The essence of the Respondent's case in the Court below was that there was fraud on the part of the Appellant. The onus of proof was therefore on the Respondent who was the then Plaintiff to prove his allegation, since, for proceedings under Section 66 of the Land (Settlement of Title) Ordinance Cap. 80, fraud is one of the grounds upon which a settlement registration may be upset. It seems to us that at the sitting of the Land Court on 14th April, 1937, this point was appreciated but that it was lost sight of by the reconstituted Court when proceedings were resumed and the interlocutory ruling given on 24th March, 1938 that the onus of proof had shifted to the Defendant (now Appellant) was not right.

The Respondent has stated that he had further witnesses available, but that in view of the ruling of 24th March, 1938 he did not call them.

We think that the most satisfactory course will be to allow this

appeal and set aside the judgment of the Court below, and remit the case to it to hear such further evidence on the issue of fraud as may be tendered by the parties. We think that it is a matter of regret that at the trial when the Assistant Settlement Officer gave evidence he was not asked if he could recognise the Plaintiff — the latter should certainly have been produced for identification if possible.

Costs to await result of retrial.

Delivered this 24th day of October, 1938.

British Puisne Judge.

CIVIL APPEAL No. 224/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :

1. Sheikh Abdul Rahman Yacoub Kassem,
2. Abdul Kader Ez-Zein Ahmad,
3. Khalil Hamad Muhammad Kassem,
4. Msuelh Khalil Ahmad Akfeh. APPELLANTS. (RESPONDENTS).

v.

Sheikh Muhammad Salah. RESPONDENT. (APPELLANT).

Mugharasah agreement — A void disposition — Land (Settlement of Title) Ordinance, secs. 10, 54(*b*) *— Land Settlement Officers to have regard to equitable rights — Possessory title.*

In allowing an appeal from a judgment of the District Court of Nablus, (Appellate Capacity), dated the 30th of June, 1938, and in restoring the judgment of the Settlement Officer and dismissing the cross appeal :—

HELD : (*Per* Copland, J.). A *Mugharasah* agreement is a void disposition but it could support, in the present case, a claim for a possessory title in view of sec. 10 of the Land (Settlement of Title) Ordinance which directs Settlement Officers to have regard to equitable as well as to legal rights.

(*Per* Khayat, J.). The judgment of the Land Settlement Officer should be restored in virtue of sec. 54(b) of the Ordinance.

ANNOTATIONS : For the effect of void dispositions *vide* C. A. 203/38 (26.ix.38) and note ; for equitable rights *vide* C. A. 218/37 (1938, 1 S. C. J. 19) and annotations.

APPELLANTS : In person.

FOR RESPONDENT : Salah.

JUDGMENT:

This appeal depends on the value, if any, to be given to an alleged *Mugharasah* *) agreement entered into between the parties. We are agreed that there was evidence to support the findings of fact made by the Settlement Officer that there was a *Mugharasah* agreement which was in force for a period about fifteen years. It is true that a *Mugharasah* agreement is a disposition within the meaning of the Land Transfer Ordinance, but that does not altogether dispose of the question because by Section 10 of the Land (Settlement of Title) Ordinance, a Land Settlement Officer is to apply the Land Law in force at the date of the hearing of the action and, at the same time, he is directed to have regard to equitable as well as to legal rights.

Now it is true, as I have said, that a *Mugharasah* agreement is void in law, but in our opinion, it will none the less support an equitable title to the land as between the present parties and we therefore think that the Land Court went wrong in their appeal judgment. As the Settlement Officer remarked, this land was cultivated by the Plaintiffs (Appellants here) under conditions that would *prima facie* support a claim for a possessory title to the whole land in their favour, had they so claimed.

That being so, the appeal must be allowed, the judgment of the Land Court is set aside, and the judgment of the Settlement Officer restored. The Appellant will have their costs together with LP. 4.— travelling expenses.

It follows, of course, that the cross-appeal is dismissed with costs.

Delivered this 10th day of October, 1938.

British Puisne Judge.

Khayat, J.: I agree with the result of this judgment by virtue of the provisions of Section 54(b) of the Land (Settlement of Title) Ordinance, Drayton, Vol. II., Cap. 80.

Puisne Judge.

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*) Cultivation.

CIVIL APPEAL No. 211/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice and Abdul Hadi, J.

IN THE CASE OF :

Khalil Mustafa Abu Sirriya. APPELLANT.

v.

1. Sakina Hassan Warrad El Ghazawi,
2. Halima Hassan Warrad El Ghazawi,
3. El'Azar Eliashar,
4. Ali Mohammad Mustaqim,
5. Mustafa Mohammad Abu Sa'ad,
6. Mohammad Hussein Abu 'Eita,
7. Sa'ad Mohammad Al Khuzundar. RESPONDENTS.

Land Court Appeal — Application by party to be heard in open Court — Failure to hear Appellant — C. P. R. rule 348.

In allowing an appeal from a judgment of the Land Court of Jaffa, sitting as a Court of Appeal, dated the 30th day of July, 1938, and in setting aside the judgment and returning the case to the lower Court to hear the parties if they wanted to be heard :—

HELD : Appellant had not been given an opportunity of being heard. The case should be returned to the Land Court for the parties to be heard, if they so wanted, and for judgment to be given in accordance with rule 348.

FOR APPELLANT : Cattan.

FOR RESPONDENTS : Nos. 1 & 2 — Machlis.
Nos. 3 — 7 — No appearance — duly served.

JUDGMENT:

This is an appeal from the Land Court, Jaffa, sitting as an appellate Court from the Land Settlement Officer. Unfortunately, it is by no means clear what took place before the Land Court.

It seems that the Appellants before us asked that the appeal should be heard in open Court, and that the Court sat and indicated that there was only one point on which it wished to hear Counsel, and that His Honour Judge Said Bey Tuqan would ask Counsel to elucidate that point.

Unfortunately, we can find no trace in the record as to what that point was. It seems that various submissions were made to the Court

by Mr. Moyal, representing the Respondents, but it is not clear that the Appellant was ever given an opportunity of putting forward his case. The Court eventually, on the 30th July, 1938, gave judgment dismissing the appeal, stating it to be unanimously agreed upon, but not going into the matter in any further detail.

A suggestion was made before us, although the advocates appearing do not agree as to what was done, that the Land Court, some time before the date of its judgment, pronounced another different judgment, and to some extent that suggestion seems to be borne out by an application by the Respondent for a copy of the judgment and the record, dated three days after the termination of the hearing and same considerable time before the date of the judgment. If no judgment had been given it certainly seems strange that this application should have been made, but we are not in a position to express any opinion on this point.

In the circumstances we feel that we have no alternative but to set aside the judgment and return the case to the Land Court with an intimation that the parties should be heard if they wish, and that judgment in accordance with Rule 348 of the Civil Procedure Rules should be given.

We desire to make it clear that we express no opinion as to the judgment of the Land Court which has already been given or the judgment of the Settlement Officer, but that we remit this case in order that it may be more fully inquired into by the Land Court.

Costs to abide the event.

Delivered this 11th day of October, 1938.

Chief Justice.

HIGH COURT No. 54/38.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPLICATION OF :

Michel Jarjuy'i. PETITIONER.

V.

1. Chief Execution Officer, Jerusalem,
2. Najibeh Jarjuy'i. RESPONDENTS.

Judgments of religious courts — Practice of Orthodox Ecclesiastical Court in Jerusalem to sit without lay assessors — Jurisdiction of

Ecclesiastical appellate court — Arts. 333, 344 of the Byzantine Law, H. C. 55/38, Palestine Order in Council, Art. 57.

In discharging a rule *nisi* in an application for an order to issue to the first Respondent, directing him to show cause why he should not be ordered to refrain from executing the two judgments produced in Execution File No. 1716/37, Jerusalem, the first dated the 13/26th March, 1937, purporting to be a judgment of the Orthodox Ecclesiastical Court of Jerusalem, and the second dated the 9th October, 1937, purporting to be a judgment of the Orthodox Ecclesiastical Court of Appeal, and praying that execution proceedings be stayed pending the final determination of the petition and that the Execution File No. 1716/37 be produced at the hearing of the petition.

HELD: 1. The fact that vacancies in the Ecclesiastical Court had been filled from time to time did not amount to a change in the constitution of the Court.

2. (Following H. C. 55/33). By Art. 344 of the Byzantine Law, the Ecclesiastical Courts of Patriarchates other than that of Constantinople are constituted in accordance with the special regulations of the Holy Synod and the Ecclesiastical Courts were, therefore, properly constituted in this case.

3. Art. 57 of the Palestine Order in Council is merely permissive and does not have the effect of repealing Art. 344 of the Byzantine Law.

FOLLOWED: H. C. 55/33 (P. L. R. 873, C. of J. 1613, P. P. 20.xii.33).

FOR PETITIONER: Cattan.

FOR RESPONDENTS: No. 1 — No appearance.
No. 2 — Assal.

ORDER:

This is an application for an order to issue to the Chief Execution Officer, Jerusalem, to refrain from executing two judgments of the Orthodox Ecclesiastical Court and of the Orthodox Ecclesiastical Court of Appeal.

In a detailed and very able judgment the Assistant Chief Execution Officer ordered execution. With the major part of that order and of the reasons given in support by the Assistant Chief Execution Officer we find ourselves in entire agreement. With regard to the Court of First Instance there was evidence that the Court in Jerusalem, as distinct from the Courts in other places such as Jaffa and Haifa, sat without lay assessors and was composed of clerical members only, the quorum being three, and that this had been the practice from before the date when the Palestine Order-in-Council 1922 came into force. The fact that the Patriarch in Synod has from time to time filled vacancies in the membership caused by death or otherwise is not, as the Assistant Chief Execution Officer rightly held, a change in the constitution of the Court.

With regard to the Ecclesiastical Court of Appeal, there was equally evidence that from time immemorial the Holy Synod did exercise jurisdiction as a Court of Appeal from judgments of Courts of First Instance, in accordance with established practice and custom, and this was in tune with the practice and rules of other Orthodox Patriarchates. On the 23rd November, 1923 (10th November, 1923, Old Style) the Holy Synod passed a resolution or regulation constituting a Court of Appeal to be composed of five members by name of the Holy Synod, and at intervals, as occasion required, other names have been substituted for those of the original members. All members of the Court though have been or are members of the Holy Synod.

It seems to us that this question is disposed of by the judgment of this Court in Jahshan *v.* Chief Execution Officer, Jerusalem and another. H. C. 55/33, where the very same question was raised, namely that this Ecclesiastical Court of Appeal was not constituted in accordance with the Law of the Orthodox Church. It was pointed out then by this Court, that Art. 333 of the Byzantine Law only applied to the Patriarchate of Constantinople, and that Art. 344 was the one applicable to the Patriarchate of Jerusalem. That Article provides that the Ecclesiastical Courts of Patriarchates other than that of Constantinople "are constituted conformably to their special regulations and customs". Special regulations of whom ? Obviously of the Holy Synod of the Jerusalem Patriarchate in this instance.

Under Art. 344 of the Byzantine Law the Holy Synod was entitled to issue its regulation of the 23rd November, 1923, and the present Ecclesiastical Court of Appeal is constituted in accordance with that regulation. We do not think that any question of delegation arises in reality for in our view the Ecclesiastical Court of Appeal is one constituted in accordance with the special regulation of the Patriarchate of Jerusalem.

We agree with the Assistant Chief Execution Officer that Article 57 of the Palestine Order-in-Council, 1922, is merely permissive, — it does not have the effect of repealing Art. 344 of the Byzantine Law. It may well have been thought that there might be difficulties in the Palestine Government altering the Byzantine Law if it wished to do so without some such provision in the Order-in-Council.

For these reasons we order that the rule *nisi* be discharged with costs fixed at LP. 10 plus disbursements.

Dated this 12th day of October, 1938.

British Puisne Judge.

CIVIL APPEAL No. 201/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Copland and Khayat, JJ.

IN THE APPEAL OF :

Stawri Sliheit. APPELLANT.

v.

The Orthodox Patriarchate, Jerusalem. RESPONDENTS.

Admission — Estoppel by deed — Jurisdiction of Chief Magistrate in eviction claims — Form of judgment of ownership — Description of Respondent — Dissolution of the Commission on the Finance of the Orthodox Patriarchate — C. P. R. 230.

In dismissing an appeal from a judgment of the Land Court of Jerusalem, dated the 21st day of July, 1938 :—

HELD : 1. Appellant was bound by the admission in the lease that the lands including the parcel in dispute belonged to Respondent.

2. In the claim for eviction the Chief Magistrate had no power to decide any question of ownership or of prescriptive possession. His finding that the Appellant had been in possession of the land for 18 years was surplusage.

3. The judgment of the Land Court was not wrong in form by ordering Appellant to refrain from interfering with Respondent's enjoyment of the land in dispute.

4. *Quaere* whether the Respondents were correctly described in the appeal. In cases of doubt application should be made to Court under rule 230 for amendment.

ANNOTATIONS : 1. For estoppel by deed *vide Digest*, Vol. XXI, pp. 242 *sqq.* and for estoppel by recitals, *ibid.*, pp. 252 *sqq.*, sub-sec. 3—*Recitals.*

FOR APPELLANT : Kehaty.

FOR RESPONDENTS : Goitein.

JUDGMENT:

Copland, J. : We have already intimated that in our opinions this appeal failed, and the following are our reasons for so holding.

Apart from a preliminary point taken by the Respondents with which we will deal later, three points were taken in this appeal by the Appellant.

The Appellant was the lessee of certain land belonging to the Respondents. In the contracts by which this land was leased, (Ex. A. W. 2 and A. W. 12) it was recited that the area leased was bounded on three sides by lands of the Respondents. The Land Court held that

this operated as an admission by the Appellant that these lands belonged to the Respondents, and that he could not claim now that a part of these lands was his because he had been in possession of them for a period exceeding the period of prescription, and the Court therefore refused to hear evidence of possession. The Appellant contends that the statement in the contracts is not an admission by him. We think that the Land Court was right in holding hat it was an admission, and, having admitted in 1925 and 1933 that the Respondents were owners of the land which he is now claiming, the Appellant cannot now go back on that admission.

The second point is that in a possessory action regarding the land now in dispute brought by the present Respondents against the present Appellant, the Chief Magistrate made a finding that the Appellant had been in possession of it for a period of 18 years. The only question before the Chief Magistrate was who was entitled to possession of the land, and whether the possession of the Respondents had been interfered with by the Appellant. The Chief Magistrate had no power to decide any question of ownership or of prescriptive possession, and his finding that the Appellant had been in possession of the land in dispute for 18 years was not necessary for his judgment, and was superfluous. That finding can in no way bind the Land Court in an action for ownership. Only the Land Court can make a finding of that nature in such an action.

The third point is regarding the form of the judgment. It is said that it was wrong to order the Appellant to refrain from interfering with the Respondents' enjoyment of the land in dispute. We can see nothing in this point, and the form of words cited in the judgment is a very common one. The appeal therefore fails on the merits.

The preliminary point taken by the Respondents was that the appeal was wrongly headed in that the Respondents were wrongly described therein.

The action was correctly brought by the commission on the Finances of the Orthodox Patriarchate, Jerusalem. Judgment was given by the Land Court on the 12th July, 1938. The Commission was dissolved by order of the High Commissioner on the 14th July, 1938, and the present appeal was entered on the 1st August, 1938, citing the Patriarchate as Respondents. On that date the Commission was no longer in existence.

Since the appeal in any case has failed on its merits we do not think that any useful purpose would be served by deciding this somewhat intricate question. It may however be that there are or will be appeals

now pending or to be filed in which the Commission on the Finances of the Orthodox Patriarchate were or may be named as one of the parties. It may possibly be that the Order of the 14th July, 1938 does give power for an action to be continued without change of name, but parties cannot at any rate be wrong in following the provisions of the Civil Procedure Rules, and if there be any such appeals, parties would do well to follow those Rules, and if necessary to apply to this Court under Rule 230 for the necessary amendment, in order that they may not be prejudiced.

For the above reasons we think that this appeal fails, and must be dismissed with costs fixed at LP. 15.— to include advocates' fees.

Dated this 20th day of October 1938.

British Puisne Judge.

I concur.

Chief Justice.

I concur.

Puisne Judge.

CIVIL APPEAL No. 218/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Frumkin, JJ.

IN THE APPEAL OF :

1. Joseph Rubinstein,
2. Zeev Turner,
3. Jona Hurwitz. APPELLANTS.

v.

1. Karolina Weinberg,
2. Regina Herman. RESPONDENTS.

Right of way — Equitable title — Purchaser without notice of barrani sale — Prescription — Ab antiquo right of way — Necessity — Failure to raise point in notice of appeal.

In dismissing an appeal from a decree of the Land Court, Tel-Aviv, dated the 29th July, 1938 :—

HELD : 1. The alleged purchase of the strip of land by Appellants had been made outside the Land Registry and Respondents had had no notice thereof. It was therefore unnecessary to discuss the question of equitable title.

2. Appellants' alternative plea of acquired right of way, though not contradictory, could be supported neither on the ground of prescription — as the land was *Mulk* and Appellants had had possesion only for twelve years — nor by use from time immemorial.

3. The plea of necessity could not be considered as it had been raised only in the final address of counsel. As the Land Court had inspected the land it was, in any event, unnecessary to remit the case on this issue.

ANNOTATIONS :

1. *Vide* annotation to C. A. 224/34 (10.x.38).
2. See also C. A. 42/31 (PL. R. 577, C. of J. 1005).
3. *Vide* C. A. 187/38 (*ante*, p. 85) and annotations.

FOR APPELLANTS : I. Levin.

FOR RESPONDENTS : Bachrach.

JUDGMENT.

Frumkin, J. : Some time in 1923 the Respondents had, by registered title, acquired a plot of land with given boundaries and a given area. They later discovered that a part of their plot forming a strip of land to the width of one metre and separated from the plot by a fence, was occupied by the Appellants and used by them as a passage giving access to their respective houses.

The Respondent then lodged the present action asking for an order directing the Appellants not to interfere with what they considered to be their property, and succeeded in their action. Hence this appeal by the Appellants.

The Appellants do not contest the fact that the strip of land forms part of the registered title of the Respondents. They maintain, however, that many years ago, in 1921, they purchased that strip from the predecessors in title of the Respondents by unregistered sale, and whereas the Respondents, on purchasing their plot, had notice of their rights over that strip of land, they had, as against the Respondents, acquired an equitable right.

The Appellants having failed to prove that the Respondents had notice of their rights over the strip of land, it is not necessary to discuss the question of equitable title, nor is it necessary to deal with the purchase of the strip, which, if at all, took place outside the Land Registry at a time when such transactions were of no legal effect.

The Appellants alternatively claimed that even if they are not entitled to continue to use the strip of land by ownership they are entitled to use it by an acquired right of way.

We do not agree with the Respondents that such a plea is contra-

dictory to the original plea of ownership, but the Appellants failed to prove also the existence of such right. In so far as they can rely on prescription, they used the passage only for twelve years, and the land is *Mulk*. Furthermore this period is certainly insufficient to establish a right of way by time immemorial.

The Appellants further claimed that they should be granted relief on the ground of necessity, as they had no other houses. This point, however, was not taken in the written pleadings but only mentioned in the final address of Counsel for Appellant, while we think that nevertheless the Court should have made a finding on that point, we are not prepared to remit the case on that ground, especially as the Court has itself inspected the place, and we assume that it did not think that such necessity existed. In fact there was evidence that the Appellants had other access to their houses.

The appeal must therefore fail. The Respondents will have their costs to include LP. 15 advocate's fees.

Delivered this 26th day of October, 1938.

Puisne Judge.

I concur.

Senior Puisne Judge.

I concur.

British Puisne Judge.

CIVIL APPEAL No. 158/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Copland and Abdul Hadi, JJ.

IN THE CASE OF :

The Municipal Corporation of Jerusalem. APPELLANT.

v.

Nakleh Cattan. RESPONDENT.

Appeals from District Courts in appellate capacity — P. O. in C., Part V. Art. 43 *— Magistrates Court Jurisdiction Ordinance, sec.* 6 *— C. A.* 71/33, *C. A.* 33/36, *C. A.* 177/38 *— Meaning of "subject to the provisions of any ordinance" —Magistrates Courts Jurisdiction Ordinance,* 1924, *secs.* 4, 1935, *sec.* 6 ; *Palestine (Amendment) Order in Council,* 1935, *The Anna — How far Court of Appeal bound by its own judgments.*

In overruling by a majority (Copland and Khayat, JJ. *dissentiente*) a preliminary objection to an appeal from the judgment of the District Court of Jerusalem, dated the 19th day of May, 1938 :—

HELD : (By the Chief Justice, Abdul Hadi and Frumkin, JJ) :—

1. The words "subject to the provisions of any ordinance" do not apply to matters of practice and procedure and under them an ordinance may limit and also enlarge the jurisdiction of the Court of Appeal.

2. The meaning of the Article is not free from doubt and the Court is entitled to take into consideration the interpretation which has been given to these words over a long period of time and to the fact that during that period the Order in Council has been amended.

3. *Quaere* how far, if at all, the provisions of the Order in Council generally can be varied by Ordinance, having regard to the provisions of Art. 17 of the Order in Council, 1922, as amended 1923.

4. Courts of Appeal should generally follow their own precedents and those of other divisions of the same Court. Where, however, despite this principle, there are, or may be thought to be, conflicting judgments, they must enquire into the whole question, and are not necessarily bound by the latest judgment.

Considered in majority judgment : C. A. 71/33 (2 P. L. R. 34, P. P. 6.vi.34, C. of J. 1678) ; C. A. 33/36 (1937, 1 S. C. J. 97, P. P. 5, 7.ii — 7, 8.iv.37, C. of J. 1934—6, 928) ; C. A. 177/38 (*ante*, p. 54). The Anna, 1 Probate, p. 295.

Considered in judgment of Copland, J. : Velazquez Ltd. *v.* Commissioner of Inland Revenue (1914) 3 K. B. at p. 461—111 L. T. Rep. at p. 384 ; Kelly & Co. *v.* Kellond (1888) 20 Q. B. D. 569 — 58 L. T. Rep. N. S. at p. 264 ; James *v.* Common-Wealth of Australia, 155 L. T. Rep. 393. C. A. 177/38 (*supra*) ; L. A. 52/35, (P. P. 9, 10.iii.37, C. of J. 1934—6, 740) ; C. A. 33/36 (*supra*) ; C. A. 71/33 (*supra*).

ANNOTATIONS : See annotations to C. A. 177/38 (*supra*).

2. *Vide* C. A. 178/34 (*ante*, p. 74) and last paragraph of annotations thereto.

FOR APPELLANTS : Said.

FOR RESPONDENT : Cattan.

JUDGMENT:

Trusted, C. J. : This is an appeal from a judgment of the District Court, Jerusalem, given in its capacity as an appelate Court from the Chief Magistrate, Jerusalem.

The Respondent submits that this Court has no jurisdiction to hear this appeal. The question turns on the interpretation of Part V. of the Palestine Order-in-Council, 1922, particularly Article 43, the first part of which provides :—

> "The supreme Court, sitting as a Court of Appeal shall have jurisdiction, subject to the provisions of any ordinance to hear appeals from

> all judgments given by a District Court in first instance, or by the Court of Criminal Assize, or by a Land Court".

The material words being "subject to the provisions of any Ordinance", and whether section 6 of the Magistrates Courts Jurisdiction Ordinance, 1935 — which provides :—

> "The decision of the District or Land Court in any appeal from a Magistrate's Court shall be final, but the presiding judge of the court may, if he considers it proper so to do, grant leave to appeal to the Supreme Court on a point of law".

is validly enacted thereunder, I am of opinion that this submission is not well founded for the following reasons.

How far, if at all, the jurisdiction of this Court, as laid down in the Article, can be restricted or enlarged by Ordinance, has been considered by this Court in three cases.

In Civil Appeal No. 71/33 it was decided that there was no appeal to this Court from a decision of the District Court given under Section 15(1) of the Stamp Duty Ordinance, No. 31 of 1927, now Chapter 133, but it should be noted that that section provides for an appeal to the District Court, Jerusalem, but makes no further provision for an appeal to this Court.

In Civil Appeal No. 33/36 it was held that an appeal lay to this Court from a decision of the President of a District Court exercising the special jurisdiction conferred upon him by the third Schedule to the Workmen's Compensation Ordinance, now chapter 154. It should be noted that the third paragraph of that schedule expressly provides for such an appeal.

In Civil Appeal No. 177/38, the question arose whether an appeal lay to this Court from the decision of a District Court exercising its jurisdiction under Section 195 of the Companies Ordinance, Chapter 22 which also provides for an appeal to this Court. In that case this Court held :—

> "The words 'subject to the provisions of any ordinance', in our opinion, refer to the manner in which such appeals shall be brought, such as imposing a limit of penalty below which an appeal does not lie, imposing a definite period for appealing, ordering that in any particular class of cases appeals shall only be by leave, and such like matters, but cannot extend the jurisdiction of the Supreme Court to allow it to hear appeals from the District Court in its appellate capacity".

It is clear from the Article that the words "subject to the provisions of any ordinance" do not apply to the constitution of the Court, as that is dealt with earlier in the Article. They do not, in my opinion, apply to matters of practice and procedure, as there are special pro-

visions in Article 49 of the Order-in-Council for Rules of Court to deal with these matters. I can see no distinction between enlarging the jurisdiction generally so as to give this Court jurisdiction to hear appeals from Courts other than the three mentioned in the Article, and enlarging the jurisdiction of this Court to hear an appeal from the District Court not sitting in first instance. I see no reason why the words should apply only to limit the jurisdiction of this Court, and in my opinion under them an ordinance may limit and also enlarge that jurisdiction.

If, however, I am wrong as to this, it cannot be said that the meaning of the Article is free from doubt. That being so, in my opinion this Court is entitled to take into consideration the interpretation which has been given to these words over a long period of time and the fact that during that period the Order-in-Council has been amended. The dates are as folows :—

In 1924 the Magistrates Courts Jurisdiction Ordinance was passed, section 4 of which provided that an appeal should lie from the decision of a District Court, sitting in its appellate capacity, by leave to the Supreme Court on a point of law.

So far as I am aware that provision was frequently acted upon until 1935, when the Order-in-Council was amended by the Palestine (Amendment) Order-in-Council, 1935. That amending Order-in-Council mainly dealt with the jurisdiction of the Courts but it did not amend Article 43.

In 1935, the Magistrates' Courts Jurisdiction Ordinance was re-enacted, and the old section 4 became the new section 6 in substantially the same form. From that date until now, so far as I am aware, the provision has been acted upon, and its legality has not been challenged.

The matter appears to me to come within the principle upon which the judgment of James, L. J., in the Anna, I. Probate, page 295, was based, and I think that it is too late to raise this question of jurisdiction after such lapse of time.

I desire expressly to reserve my views as to how far, if at all, the provisions of the Order-in-Council generally, in the absence of such words as we are here considering, can be varied by Ordinance, having regard to the provisions of Article 17 of the Order-in-Council, as amended by the Palestine (Amendment) Order-in-Council, 1923.

I have had the advantage of reading the judgment which my brother Copland is about to deliver. I agree with him that Courts of Appeal should generally follow their own precedents and those of other divisions of the same Court. Where, however, despite this principle, there are,

or may be thought to be, conflicting judgments, they must enquire into the whole question, and in my view are not necessarily bound by the latest judgment.

Delivered this 27th day of October, 1938.

Chief Justice.

Abdul Hadi, J.: I concur in the conclusion arrived at by His Honour the Chief Justice.

Puisne Judge.

Frumkin, J.: The Magistrates' Courts (Jurisdiction) Ordinance, 1935, regulating the jurisdiction of Magistrates' Courts and appeals from judgments of such Courts, lays down in Section 6 that :—

> "The decision of the District or Land Court in any appeal from a Magistrate's Court shall be final, but the Presiding Judge of the Court may, if he considers it proper so to do, grant leave to appeal to the Supreme Court on a point of law".

The original Magistrate's Courts Jurisdiction Ordinance, 1924 (Cap. 87) contained a similar provision in Section 5 which reads as follows :—

> "The decision of the District of Land Court in any appeal from a Magistrate's Court shall be final, but the President of the Court may, if he considers it proper so to do, grant leave to appeal on a point of law to the Supreme Court sitting as a Court of Appeal".

2. Since the first promulgation of this Ordinance in 1924, it has been the invariable practice of this Court to hear appeals on leave granted, from the judgments of the District Court in its appellate capacity issued on appeal from Magistrates' Courts. Leave to appeal may have been too frequently and generously granted, but the fact remains that hardly a week passed without this Court having to deal with one or more appeals of this nature.

3. The present appeal is such a case, and Mr. Cattan, for the Respondent, took the preliminary point that under Article 43 of the Palestine Order-in-Council, 1922, this Court has no jurisdiction to hear such appeals. The relevant part of the Article reads as follows :—

> The Supreme Court, sitting as a Court of Appeal shall have jurisdiction, subject to the provisions of any Ordinance to hear appeals from all judgments given by a District Court in first instance or by the Court of Criminal Assize or by a Land Court.

It would follow as a result of this argument that as this appeal is an appeal from a judgment of the District Court given not in 1st instance but in its appelate capacity, that part of the Magistrates' Court Jurisdiction Ordinance allowing such an appeal, is *ultra vires* the Order-in-Council.

4. Mr. Cattan further relies on a recent judgment of this Court in the Liquidators of the Phoenix Life Insurance Co. *v.* Kurt Drucke (Civil Appeal 177/38) wherein it was held that a judgment issued by the District Court on appeal from an order of a liquidator, cannot be heard by this Court.

5. Against the aforementioned decision another case — Kramer *v.* Kipnis and Others (Civil Appeal 33/36), has been cited. In that case this Court overruled the preliminary objection taken, also under Article 43 of the Order-in-Council, that this Court has no jurisdiction to entertain an appeal from an order of the President of the District Court under the Workmen's Compensation Ordinance, although that Ordinance conferred a right of appeal.

6. I was myself a party to the judgment in the Phoenix case, but already upon the delivery of my judgment in that case I expressed my reluctance in arriving at that conclusion, bearing in mind the effect that decision might have on the long established practice to hear appeals from judgments of the District Court in its appellate capacity, especially in matters within the Magistrates' Courts Jurisdiction, which form quite a considerable proportion of the number of appeals heard by this Court. Since then my attention was called to the Kramer *v.* Kipnis case, and I am glad the matter came up for further discussion. After giving it further consideration I am now inclined to take the broader view in interpreting Article 43 of the Order-in-Council.

7. This case in its essence is indistinguishable from the Kramer case. There was an appeal not contemplated by Article 43 of the Order-in-Council, so that if that Article were to be considered in a restrictive sense, limiting the right of the Supreme Court to hear appeals to such cases only as are specifically mentioned in the Article that appeal could not have been entertained. Yet the Court relying on Article 17 of the Palestine Order-in-Council, which gives the High Commissioner power to promulgate ordinances, took the view that such power includes the promulgation of ordinances extending the jurisdiction of this Court. If that is the case with regard to a Tribunal not mentioned at all in the Order-in-Council, *a fortiori,* this principle must apply to a Court mentioned in the Article as one of the Courts from which this Court has power to hear appeals.

8. The words "in first instance", after the "District Court", should not, to my mind, be taken as restrictive. It would be so if not for an ordinance extending the right to hear appeals from judgments other than those given in first instance. It is not necessary to discuss any further the question as to whether or not the power granted to the

High Commissioner under Article 17 of the Order-in-Council goes so far as to empower the High Commissioner to issue ordinances repugnant to or inconsistent with the Order-in-Council. As justly stated in the Kramer case is cannot be suggested that an ordinance extending the jurisdiction of this Court is in any way repugnant to or inconsistent with the Order-in-Council. To my mind it makes little difference whether the extension is with regard to the tribunal from which appeals may be heard or as to the types of appeals which can be heard.

9. Mr. Levin who very ably represented a Respondent in another case in which a similar preliminary objection was taken, referred to Article 38 of the Order-in-Council as amended. In view of the conclusion I arrived at it is not, however, necessary for me to say anything on this point.

10. Unfortunate as it may be for me to have to vary my opinion, I am doing so without hesitation on the grounds stated above and with the view of upholding a long established practice well supported by law and justified on its merits. It follows that section 6 of the Magistrates' Courts Jurisdiction Ordinance is not *ultra vires* Article 43 of the Order-in-Council, and the preliminary objection should be overruled.

On the question as to how far this Court is bound by its previous decision I associate myself with the view expressed by the learned Chief Justice.

Delivered this 27th day of October, 1938.

Puisne Judge.

Copland, J.: This is an appeal by leave of the President, from a judgment of the District Court of Jerusalem, in its appellate capacity, confirming a judgment of the Chief Magistrate. Another appeal case of a similar nature, namely — The Administrators of the Estate of the late J. L. Goldberg *v.* Itin (C. A. 206/38) has been argued at the same time, and I propose to deal with the arguments in both cases in this judgment, since in each case the same preliminary point has been taken. This point, which is of great constitutional and legal importance, is whether there can be any appeal to the Supreme Court, by leave, from a judgment of a District Court given in its appellate capacity, and to determine this it has to be decided whether an Order-in-Council can be amended by Ordinance, and if so, whether an ordinance which is repugnant to or inconsistent with the Order-in-Council is valid, and if not, whether Section 6 of the Magistrates' Courts Jurisdiction Ordinance 1935 is so repugnant or inconsistent.

But before dealing with these points, I think that it is necessary to consider another point, of equally great importance, and I do so with great reluctance, for up to now I have always considered that the matter needed no argument. The question is whether and if so how far the Court of Appeal is bound by its own previous decisions.

The English law is perfectly clear, and is to be found in Halsbury's Laws of England, Hailsham Edition, vol. XIX. p. 254. Decisions of the Court of Appeal in England upon questions of law are, as a general rule, binding on the Court of Appeal itself, until a contrary determination has been arrived at by the House of Lords. A decision of the Court of Appeal occasioned by the members of the Court, being equally divided is not binding on the Court of Appeal ; and although a Court consisting of three Lords Justices is not entitled to overrule a decision of a great Court of Appeal expressed by two Lord Justices, where a Court of Appeal has before it a series of judgments of the Court of Appeal, which do not appear to be consistent with each other, and one judgment was given when the Lords Justices were not aware of some of the previous decisions, in such circumstances, as a matter of judicial comity, it is open to the Court of Appeal to consider all the previous decisions and to form its own view as to which is the more accurate and shall be followed.

A large number of cases are cited in the note — all of them support the above proposition that the Court of Appeal is bound by its own decisions, whatever the opinions of individual numbers might have been, if there had been no authority. For example, in Velazquez Limited *v.* Commissioner of Inland Revenue, (1914) 3 K. B. at p. 461 — III L. T. Rep. at p. 420, Cozens—Hardy M. R. said that if the matter had come before them for the first time he would certainly have thought that the arguments deserved mature consideration. He goes on to say : "But there is one rule which of course we are bound to abide by, and that is that when there has been a decision of this Court upon a question of principle it is not right for this Court, whatever its own views may be, to depart from that decision. There would otherwise be no finality in the law. If the decision is contended to be wrong, then the proper course is to go to the ultimate tribunal — namely the House of Lords, who have power to settle the law and to hold that the decision which is binding upon us is not good law." Swinfen Eady L. J. and Pickford L. J. concurred. Again in Consett Industrial and Provident Society *v.* Consett Iron Co. (1922) 2 Ch. at p. 172—127 L. T. Rep. at p. 384) Lord Sterndale M. R. said "In my opinion we are not at liberty to form our own opinion on the

matter as the case is governed by authority," and later he says : "It was a decision of the identical question arising upon the construction of the identical Act. It is therefore binding upon us unless it has been overruled or unless it was given in circumstances different from those of the case before us," and he goes on to explain this last sentence as circumstances which could alter the construction of the Act.

There is one other case which I think perhaps I ought to mention, Kelly and Co. *v.* Kellond (1888) 20 Q. B. D. 569 — 58 L. T. Rep. N. S. at p. 264, where Lord Esher M. R. expressed the view that the decision of a question in a particular way by one of the divisions of the Court of Appeal was not binding upon the full Court, but Fry L. J. and Lopes L. J. both expressly said that they did not desire to say anything as to the power of the full Court to disregard the previous decisions of one of its divisions, and this proposition apparently did not commend itself to the majority of the members of the Court. They decided the question before them on other grounds.

It is on the ground of judicial comity that an Appellate Court bows to its own decision. If it does not, then the impossible situation arises, where the decision of the Court depends upon the individual views of the constituent judges, and one gets a series of conflicting decisions which bring the Court into disrepute. Without judicial comity, the law would become completely chaotic.

I have gone into this question in detail, because a decision of this Court in Dukhan and another *v.* Drucker — C. A. 177/38, given on 28th July, 1938, has been called in question in this present appeal, and the correctness of that decision has been challenged. In that case, the identical question was raised which is now before us in this present case, and the three judges of this Court came to an unanimous decision that no appeal lay from a judgment of a District Court given in its appellate capacity.

The case was very fully argued by two of the leading advocates of the Palestine Bar, and the judgment was given in full knowledge of the fact that is would upset a practice that had been considered legal for many years, but the Court saw no alternative. In fact the Court stated that it came to the conclusion with regret.

I am very far from saying that this Court can never over-rule its own decisions. There are certain cases where it undoubtedly can and should do so. One such instance I have already mentioned, namely, where one decision appears to be inconsistent with previous decisions on the same point. Another instance, which would never occur in the English Courts, and is therefore not to be found in any of the text-

books, but of which there are certain unhappy examples to be found in the past in the records of this Court,is where no reason are given in the previous judgment. It is then impossible to know upon what principle or principles the case has been decided : one cannot be certain if the facts or the circumstances are reasonably the same, and the matter must then be considered on its own merits. Another example would be where it was obvious that the decision was wrong, as where the law had been completely disregarded and it was generally agreed that this was so.

But such cases are exceptional, and none of the above conditions are present in this case, so far as I can see.

A certain amount of uncertainty has, I am afraid, been caused by a somewhat unfortunately worded remark, if I may so term is with respect of Manning, J. in Raja el Issa and another *v.* Khammar L. A. 52/35. In the course of this judgment he said : "Hassan Eff. Hawa has urged that this decision (*i. e.* a previous judgment on an identical point) is binding on this Court. A perusal of decided cases shows that this Court has not always regarded itself as bound by its own decisions. I agree in principle that this Court ought to follow its own decisions, but the Law of Palestine may be said to be still in its infancy, and I think that this Court is not precluded from over-ruling its own decisions, unless they have remained unchallenged for a considerable length of time."

If he meant by this, that this Court can form its own opinion on any case which comes before it, irrespective of previous decisions on the same point, then I must respectfully but expressly dissociate myself from such a principle, which is contrary to the English Law as established for many years in a long series of decisions and which would render judicial comity in this country non-existent. It would mean that the Law of Palestine would continue to remain in the stage of infancy for ever.

It has been argued that the decision in Dounkhan *v.* Drucker (*supra*) is inconsistent with that in Kramer *v.* Kipnis and another, C. A. 33/36. I do not think that this is so, because that latter case was an appeal by leave of the President, District Court from his decision on certain points of law stated by an arbitrator under the Workmen's Compensation Ordinance. It was not an appeal from a District Court sitting in its appellate capacity, nor in fact was it an appeal from a judgment of a District Court. The question as to whether an appeal could lie from a judgment of a District Court given in its appellate capacity was never argued, and was not present in the mind of the Court. All that Kramer *v.* Kipnis decided was that if an ordinance grants

special jurisdiction to a President of a District Court, and nominates an already existing Court to which an appeal may be made, this is not repugnant to or inconsistent with the provisions of the Order-in-Council. The Order-in-Council was silent on this point, and I think that in such a case there can be no objection to provisions being made for appeals to this Court. The further question whether the High Commissioner has power to promulgate an ordinance repugnant to or inconsistent with the Order-in-Council was not decided, the Court stating that it was unnecessary to consider it. That as I read it, and I was a member of the Court, is the effect of the decision in Kramer *v.* Kipnis (*supra*).

Another case which came before this Court in 1934 was — The Attorney General on behalf of the Commissioners of Stamps *v.* Joseph, C. A. 71/33 (P. L. R. II. 34). This was an appeal from the judgment of a District Court on an appeal from an adjudication by the Stamp Duty Commissioners. This Court, in dismissing the appeal said : "It cannot therefore be said that the District Court's determination of the question submitted to it on a case stated is a judgment given by the District Court in first instance, and we know of no ordinance subject to the provisions of which the terms of Art. 43 of the Order-in-Council can in this particular case be modified." I do not think that this case is of very much importance, since it does not determine the point which has arisen in this present appeal, namely, whether an ordinance can modify the terms of the Order-in-Council. It merely says that there is no ordinance, so the present point did not really arise.

For the above reasons, therefore, and with the greatest respect to those who may differ from me, I think that this Court is bound by the decision in Doukhan and another *v.* Drucker (*supra*), and that it is not open to us to disregard it.

That as I see it, should dispose of this present appeal, but I may perhaps add a few words in elaboration of the judgment given by me in Doukhan and another *v.* Drucker, bearing in mind the arguments addressed to us on the hearing of these two appeals.

The principal Articles of the Palestine Order-in-Council 1922 to which reference must be made, are the following :—

Art. 38. Subject to the provisions of this part of this order and any ordinance or rules, the civil courts hereinafter described, and any other courts or tribunals constituted by or under any of the provisions of any ordinance shall exercise jurisdiction in all matters and over all persons in Palestine.

Art. 40. District Courts shall be established in such Districts as may be prescribed from time to time by Order under the hand of the High

Commissioner, and every such Court shall exercise jurisdiction :—

(1) As a Court of First Instance :—

(a) In all civil matters not within the jurisdiction of the Magistrates' Courts in and for that District.

(b) In all criminal matters which are not within the jurisdiction of the Court of Criminal Assize.

(2) As an Appellate Court from the said Magistrates' Courts subject to the provisions of any Ordinances or Rules.

Art. 41. There shall be a Court of Criminal Assize which shall have exclusive jurisdiction with regard to offences punishable with death and such jurisdiction with regard to other offences as may be prescribed by Ordinance.

Art. 42. The High Commissioner may by Order establish Land Courts as may be required from time to time for the hearing of such questions concerning the title to immovable property as may be prescribed.

Art. 43. There shall be established a Court to be called the Supreme Court of which the constitution shall be prescribed by Ordinance. The Supreme Court, sitting as a Court of Appeal, shall have jurisdiction subject to the provisions of any Ordinance to hear appeals from all judgments given by a District Court in first instance or by the Court of Criminal Assize or by a Land Court.

These articles define the jurisdiction of the various Civil Courts established by the Order-in-Council or to be established by or under the provisions of any Ordinance. The original Art. 38 of the Order-in-Council of 1922 was amended in its present form in order to overcome certain doubts which had been expressed as to the validity of Land Settlement Courts. It should be noted that both Arts. 40 and 43 show a distinction between a District Court as a Court of First Instance and as an appellate Court.

Then there is Art. 64 which defines the powers of a District Court in matters of personal status of foreigners and provides that the Courts shall have no jurisdiction to pronounce a decree of dissolution of marriage until an Ordinance is passed conferring such jurisdiction.

The powers of the High Commissioner in regard to legislation are contained in Art. 17 as amended. He may promulgate such ordinances as may be necessary for the peace, order and good government of Palestine, subject to certain conditions and limitations, which do not concern us in this case.

By Art. 87 power was given to the High Commissioner to vary, annul or add to any of the provisions of the Order by Proclamation in the Gazette within one year from the date of the commencement of the Order, and by Art. 88 power was reserved to His Majesty in Council at any time to revoke, alter or amend the Order.

Finally there is Section 6 of the Magistrates Courts Jurisdiction Ordinance 1935 which says :—

> "The decision of the District or Land Court in any appeal from a Magistrate's Court shall be final but the Presiding Judge of the Court may, if he considers it proper so to do, grant leave to appeal to the Supreme Court on a point of law."

The question then is one of construction, and in the ultimate resort must be determined upon the actual words used, read not *"in vacuo"* but as occurring in a single instrument in which one part may throw light on another. The true test, (see the words of Lord Wright M. R. in delivering the judgment of the Judicial Committees in James *v.* Common-Wealth of Australia, 155 L. T. Rep. 393), must, as always, be the actual language used.

I will now examine the actual language of the Order-in-Council so far as relevant, in order to ascertain its true construction.

It is clear from the wording of Art. 40 that the framers of the Order intended to draw a distinction between the jurisdiction of a District Court in first instance and as an appellate court. It is equally clear that they originally intended that an appeal should lie to the Supreme Court from those judgments only of a District Court in first instance, and that judgments of a District Court in its appellate capacity should be final. Those were the provisions in the Order.

The crucial words which have to be construed are "subject to the provisions of any Ordinance or Rules" occurring in Arts. 38 and 40(2) and the words "subject to the provisions of any ordinance" which are to be found in Art. 43.

The words in Art. 40(2) are clearly restrictive, for the District Court exercises jurisdiction as an appellate Court from the Magistrates Courts, that is from all judgments of the Magistrates. There is no actual jurisdiction to extend, and the words "subject to the provisions of any Ordinances or Rules", therefore, can only limit the otherwise complete jurisdiction in respect of appeals from Magistrates' Courts.

Art. 38 must I think be divided into two parts — it provides for existing Courts and for other courts to be constituted by or under the provisions of any ordinances.

It begins — "Subject to the provisions of this part (*i. e.* Part V.) of this Order...". Pausing here for a moment, these words again are words of limitation — they restrict the otherwise complete jurisdiction which is given to Civil Courts by the general words at the end *i. e.*, "in all matters and over persons in Palestine." For the other Articles in Part V. assign certain limited jurisdictions to the various courts constituted by these Articles. For example, Art. 39 limits the jurisdiction of Magistrates' Courts to that assigned to them by the Ottoman Magistrates Law as amended, altered or extended by any law

and so on. Art. 40 similarly limits the jurisdiction of District Courts in first instance to matters not within the jurisdiction of certain other Courts. The Courts of the Religious Communities also have certain jurisdiction assigned to them, which but for this assigning would be within the jurisdiction of the Civil Courts. Can the further words "and any Ordinance or Rules" which follow on after the commencing words of this Article be read in a different sense ?

It is useful to note that Art. 41 contemplates a possible extension to the jurisdiction of the Court of Criminal Assize by providing that it shall have "such jurisdiction with regard to other offences (*i. e.* other than offences punishable with death) as may be prescribed by ordinance". Art. 64 again makes provision for giving jurisdiction to District Courts in matters of Divorce by Ordinance. The wording of both these Articles, where an extension of jurisdiction is definitely contemplated, is very different from the wording of Art. 38 and also of Art. 43. This latter Article limits the jurisdiction of this Court, subject to the provisions of any Ordinance, to appeals from those judgments of a District Court given in first instance, and excludes by implication those judgments of a District Court given as an appellate Court. If an extension of this Court's jurisdiction to hear appeals from the appellate judgments of the District Courts had been contemplated then instead of the words "subject to the provision of any Ordinance" one would have expected to find some words such as, "and such other jurisdiction as to appeals from judgments given by a District Court as an Appellate Court as may be prescribed by Ordinance". It seems to me, therefore, that the words "and any Ordinance or Rules" in Art. 38 must be read with the words "Subject to the provisions of this part of this Order", and from the wording of Arts. 40, 41 and 64 and the fact that in Art. 40 the words are undoubtedly used in a restrictive sense, and are limited in their application to matters of practice and procedure, the words "subject to the provisions of any Ordinance of Rules" occurring in Art. 38 and the words "subject to the provisions of any Ordinance" in Art. 43 must equally be restricted to matters of practice and procedure and are words of limitation, and cannot extend the jurisdiction of this Court in regard to matters for which special provision has already been made in the Order-in-Council.

It is beyond argument that Rules cannot extend the provisions of an Order-in-Council — they refer solely to practice and procedure — and can only regulate the manner in which appeals shall be brought and such like matters. The words "subject to the provisions of this part of this Order" are also words of limitation, and these words and

the words "and any Ordinance or Rules" appearing immediately after them are in the same condition and must all be read together, and cannot in my opinion extend the jurisdiction in the sense contended for by the Appellants.

The powers of amendment of the Order are to be found in Arts. 87 an 88. Wide as are the powers of the High Commissioner under Art. 17 in regard to the promulgating of Ordinances for peace, order and good government, yet they cannot be extended to cover an extension of the jurisdiction of this Court which is in my opinion, to say the least, inconsistent with the clear provisions of the Order-in-Council itself.

The legislature of Palestine is not a sovereign legislative — it is bound by its written Constitution, namely, the Order-in-Council. They Law Reports of the Privy Council are full of cases the British North America Act and the Commonwealth of Australia Act where Acts of the Dominion and Commonwealth legislatures have been declared invalid, because Acts of those legislatures have exceeded the powers conferred upon them by their respective Constitutions, even though those Acts had received the Royal Assent.

The same rules of construction must I think apply in Palestine.

For these reasons I am of opinion that the High Commissioner has no power to promulgate an Ordinance which is inconsistent with the provisions of the Order-in-Counsil, and *a fortiori* which is repugnant to those provisions. On that footing it seems to follow necessarily that Section 6 of the Magistrates' Courts Jurisdiction Ordinance 1935, in so far as it purpots to give power to appeal by leave to the Supreme Court, must be held to be invalid. I think that the judgment of this Court in Doukhan and another *v.* Drucker (*supra*) correctly stated the law.

Such a result cannot fail to cause regrets. But these inconveniences are liable to flow from a written constitution. With the deepest respect to those who have formed a contrary opinion, I cannot arrive at any conclusion save that I cannot give effect to the Appellants' contentions consistently with any construction of the Order-in-Council which is in accord, as I see them, with sound principles of interpretation.

To give that effect would amount to rewriting, not to construing, the Order-in-Council, and that is not the function of this Court.

In the result, I for my part would dismiss these appeals.

Delivered this 27th day of October, 1938.

British Puisne Judge.

I concur.

Puisne Judge.

CIVIL APPEAL No. 191/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Karl Rubin. APPELLANT.

v.

Alexander Kaufmann. RESPONDENT.

Application for leave to appeal made ex parte — C. P. R. 306, 307, 311 — *Leave to appeal granted generally — C. A.* 109/36, *C. A.* 87/37, *C. A.* 29/31 — *Means on all points of law.*

In dismissing an appeal from a judgment of the District Court, sitting at Tel-Aviv, dated the 12th day of April, 1938 :—

HELD : 1. (Following C. A. 109/36, C. A. 29/31 and not following C. A. 87/37) Appeals by leave from the District Courts to the Supreme Court must be on a point of law to be stated by the President of the District Court. In the present case leave to appeal had been granted "generally" which meant on all the four points of law set out in the application.

2. Under the Civil Procedure Rules an application for leave to appeal must be made by motion with notice to the other side. No notice having been given the present case, the appeal must be dismissed.

FOLLOWED : C. A. 109/36 (1 Ct. L. R. 33).

NOT FOLLOWED : C. A. 29/31 (P. L. R. 599, C. of J. 512). C. A. 87/37 (P. P. 2,3.viii.37, 2 Ct. L. R. 19, Ha. 7,21.x—4.xi.37).

ANNOTATIONS :

1. It was held in the following cases that point of law on which leave to appeal is granted should be clearly set out by the President : C. A. 48/27 (P. L. R. 254 C. of J. 1798) ; C. A. 26/28 (C. of J. 151) and that "a general leave to appeal is not a compliance with the... section" — L. A. 3/32 (C. of J. 328).

But in C. A. 44/36 (2 Ch. 1. R. 49, C. of J. 1934—6 462) Trusted (*C. J.*) stated as follows : "I do not think that the President of the District Court should formulate such propositions as may appear to him to be involved". "The duty of the Presiding judge is to satisfy himself that there is... a question of law" — C. A. 55/36 (1937, 1 S. C. J. 108, 1 Ct. L. R. 19). See also C. A. 109/36, C. A. 29/31 and C. A. 87/37 (*Supra*).

2. Under the old procedure no notice to the other party was required : C. A. 144/31 (P. L. R. 704, P. P. 21.xi.34, C. of J. 160).

FOR APPELLANT : Turtledove.

FOR RESPONDENT : Smoira.

JUDGMENT:

In this case two preliminary points were raised by the Respondent.

Put shortly, the first point is that no appeal proper lies before this Court because the application for leave to appeal to the presiding judge who was the President of the District Court was made *ex-parte* and not by motion with notice as is provided by Rules 306, 307 and 311 of the Civil Procedure Rules, 1938.

The second point is that the presiding Judge of the Court below granted leave to appeal generally and that according to the decision in Alter Gross *v.* Marcus Feitelson and another (C. A. 109/36) that is not sufficient.

I will deal first with the second point. The application for leave to appeal contains four points which are stated to be points of law. On the original application for leave Presiding Judge made the following endorsement : "Leave to appeal generally to the Supreme Court granted". The Presiding Judge makes reference to the Judgment in Israel Blumenfeld and another *v.* Imperial Chemical Works (Levant) Ltd., (C. A. 87/37).

In Alter Gross *v.* Marcus Feitelson and another where the Court was constituted similarly to its constitution in the present appeal it was said :—

> "Appeals by leave from District Courts to the Supreme Court must be on a point of law. It has been held on several occasions by this Court that the point or points of law must be clearly stated by the President of the District Court".

It is the Presiding Judge of the Court who gives leave, and he is either the President or the Relieving President.

In the second case, *i. e.* Israel Blumenfel *v.* Imperial Chemical Industries (C. A. 87/37), the learned Chief Justice made the following remarks :—

> "Despite the efforts made by this Court to make clear the provisions of Section 6 of the Magistrates' Courts Jurisdiction Ordinance, leave to appeal was granted on certain points of law which were set out."
> "As I have said before, in my opinion, when application is made for leave to appeal the presiding judge (not president of the Court) must satisfy himself that the case involves a point of law of sufficient novelty or complexity to warrant an appeal and if it does leave should be granted and this Court will then deal with the rights of the parties."
> "This Court cannot be bound by a number of questions, some possibly theoretical, often the fruits of the ingenuity of counsel, or to some of which may not decide the rights of the parties. The law does not provide in this instance for an appeal by way of case stated."

At first sight there appears to be a contradiction, but it should be noted that the observations of the learned Chief Justice were in the nature of comment on the manner in which leave to appeal had been granted and were not necessary for the decision of the Court in that case and are therefore *obiter,* and though naturally they are entitled to be treated with respect, they are not binding upon us. With that part of his observations which are to the effect that, when an application is made for leave to appeal, the Presiding Judge should satisfy himself that there is a point of law of sufficient novelty or complexity to warrant an appeal, and that, if that is so, leave should be granted and the Court of Appeal will then deal with the rights of the parties, we are in agreement. But if it was meant to lay down the principle that the points of law on which leave was granted should not be stated by the Presiding Judge in his order granting leave, we are respectfully unable to agree since such a principle is contrary to the long established practice laid down by this Court, and is contrary to the judgment of this Court in Alter Gross *v.* Marcus Feitelson (C. A. 109/36 (*supra*). See also Ka'war *v.* El Taha and others C. A. 29/31 (1 P. L. R. 599).

The order granting leave consist in this case of the application setting out the points of law and also the endorsement of the Presiding Judge — the points of law are embodied in the order.

In this particular case we think that leave to appeal was granted in correct form, the points of law being duly set out. "Generally" does not mean here that leave is granted in general terms without having regard to the points of law, but that leave is granted generally on all the four points set out, and not merely on some of them.

This objection is, therefore, overruled.

As to the other point, Rule 305 of the Civil Procedure Rules, 1938, reads as follows :—

> "Save where otherwise expressly provided for under these or any other rules relating to civil procedure, all applications shall be by motion with or without notice as the circumstances may require. Applications to the Court shall be heard in open Court and applications to the Judge or Registrar shall be heard in Chambers."

Rule 306 says :—

> "No motion shall be made without notice to any parties affected thereby : Provided that the Court, Judge or Registrar, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious harm, may make any order ex-parte upon such terms as to costs or otherwise, and subject to such undertaking, if any, as to the Court, Judge or Registrar

may seem just and any party affected by such order may move to set it aside."

These rules appear to be, in a sense, in conflict, since Rule 305 states the "all applications shall be by motion with or without notice" while Rule 306 says that "no motion shall be made without notice to any parties affected thereby".

The Rules must however be read together and we think that the words "with or without notice as the circumstances may require" in Rule 305 must be read with Rule 306, the proviso of which states that delay is a circumstance which would entitle the applicant to make an application without notice.

There is no doubt that an application for leave to appeal is an application as contemplated by Rule 305, and we think that such an application must comply with Rules 305 and 306, that is to say, that it must be made by motion with notice, unless the delay caused by notice being given would cause serious damage, which is not the case here.

It is unfortunate that this case could not be dealt with on its merits, but we have no alternative. Under the old civil procedure rules such applications could be made without notice to the other party if made to a judge. Since the new Civil Procedure Rules have come into force there are no decided cases on this point, this being the first case where such a question has arisen. The law however has been altered by the new Civil Procedure Rules 1938 which must be observed.

That being so the appeal must be dismissed with costs assessed at LP. 10 to include advocate's fees.

Delivered this 28th day of October, 1938.

British Puisne Judge.

CIVIL APPEAL No. 192/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khaldi, JJ.

IN THE APPEAL OF :

Dr. Paul Berg. APPELLANT.

v.

1. Dr. Itshak Karokes,
2. Israel Avivi. RESPONDENTS.

Appeal — Failure of Appellant to appear — Hearing appeal in absence of Appellant.

In dismissing an appeal from a judgment of the District Court of Tel-Aviv, dated the 8th July, 1938 :—

HELD : Appellant's advocate having failed to appear Respondents' advocates would be heard on the written grounds of appeal.

FOR APPELLANT : No appearance.

FOR RESPONDENTS : No. 1. — Zeiger.

No 2. — Goddard.

JUDGMENT:

The Appellant in this case had claimed before the District Court of Tel-Aviv a sum of LP. 320, a deposit which he had advanced in connection with the purchase of land. The District Court decided against the Appellant, giving reasons for its decision. The Appellant appealed to this Court. The appeal was fixed for hearing to-day, but, when the case was called there was no appearance on behalf of the Appellant. A telephone message had been received stating that the Appellant's advocate was prevented from being present in Jerusalem to argue the appeal, because the road from Tel-Aviv to Jerusalem had been stopped by orders of the military. The two advocates for the Respondents appeared in Court and both objected to an adjournment of the appeal. They said that they both had left Tel-Aviv this morning for the purpose of attending this hearing and neither of them had experienced any difficulty in travelling from Tel-Aviv to Jerusalem. The Court decided to refuse any adjournment. Later in the hearing a Mr. Launar made an appearance on behalf of the Appelant to make a similar application for an adjournment on similar grounds. He was not prepared to argue the appeal and the Court decided that it would not alter its previous decision to refuse an adjournment. In accordance with the Rules of Court, the Court then heard the advocates for the Respondents on the written grounds of appeal which had been filed by the Appellant. The Court saw no reason to assume otherwise than that the judgment of the Court Below was correct. The appeal is therefore dismissed and the Respondents will have the costs to include LP. 10 advocate's fees for each advocate.

Delivered this 31st day of October, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 200/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :

Meshek Gesher, Kvutzat Poalim Lehityashvut Shetufit, Beeravon Mugbal. APPELLANTS.

v.

The General Manager of the Palestine Railways, Haifa. RESPONDENT.

Claim against Palestine Railways — Liability of carriers — Railway by-laws sec. 25 — May be relied upon even in case of negligence of Railway — By-Law not unreasonable — Ottoman Commercial Code superseded by Railways Ordinance.

In dismissing an appeal from a judgment of the District Court of Haifa, dated the 17th day of July, 1938 :—

HELD : 1. The claim was not and could not have been based upon negligence and no authority had been cited for the proposition that negligence on the part of the Respondents precluded them from relying upon by-law 25 of the Railway By-laws.

2. The by-law was not *ultra vires* for unreasonableness.

3. So far as the Railway Ordinance and the By-laws made there - under are inconsistent with the Ottoman Commercial Code, they must prevail.

ANNOTATIONS :

1. Earlier proceedings in this case (C. A. 163/37) are reported in 2 Ct. L. R. 115. For other recent cases against the Palestine Railways, *vide* C. A. 221/37 (1938, 1 S. C. J. 57) and annotations.

2. *Vide* CR. A. 69/38 (*ante*, p. 43).

FOR APPELLANTS : Bar-Shira.

FOR RESPONDENT : Salant — J. G. A.

JUDGMENT:

Trusted, C. J. : This is an appeal from the decision of the District Court of Haifa, whereby, owing to a difference of opinion between the Judges, the Plaintiff's claim was dismissed. The Plaintiff in consequence appealed to this Court, and I am of opinion that his appeal fails.

The case has taken an unfortunate course, and, I fear, partly owing to the view which the Courts have taken, this litigation has been unnecessarily prolonged.

The Plaintiff's claim was against the Palestine Railways for damages for breach of contract for carrying a threshing-machine by rail, and

the Planitiff was given leave by the High Commissioner to sue under the provisions of the Crown Actions Ordinance. It should be noted that his claim was not, and could not have been, based upon negligence.

At the first hearing before the District Court the Defendants relied upon by-law 25 of the Railway By-laws which they claimed exempted them from liability, as the goods in question had been destroyed by fire. The Court disagreed and the matter came before this Court which held — "we do not express any final opinion on this point (*i. e.* whether the Railways were relieved of liability by by-law 25) but we both think there is a good deal to be said for the contention that the Railways may be liable if the fire arises owing to the negligence of the Railway or its servants."

As I have already said, the action was not framed, and could not have been framed, in negligence. I can only assume therefore that this judgment contemplated the possibility of some principle whereby the Railway would not be entitled to rely on by-law 25, if it or its servants had been guilty of negligence. The case was sent back to the District Court with directions to hear evidence and to "set out in its judgment the findings of fact deduced therefrom and the conclusions of law."

The case was re-heard, and one Judge held that the Plaintiff had failed to prove the wilful misconduct of the Defendant, and the other Judge held, as I understand his judgment, that, in the absence of Judges evidence as to how the fire occurred, negligence on the part of the Railway should be assumed. In the result the Judges in the District Court again disagreed and the case came before us. No authority has been cited to us by the Appellant for the proposition that negligence on the part of the Respondent might preclude the Railway from relying upon by-law 25, and with all respect to the earlier decision of this Court, I know of no such principle. In my opinion, therefore, it is immaterial whether there was negligence.

It has been argued before us that By-law 25 is so unreasonable that we should declare it *ultra vires*. I do not agree with that contention. It has further been argued before us that the matter fails to be dealt with under the Ottoman Commercial Code. In my opinion it is not necessary to consider in detail the application of that Code, as I am of opinion that in so far as the Railways Ordinance and the By-laws made thereunder are inconsistent with it they should prevail.

The appeal is therefore dismissed with costs fixed at LP. 2.

Delivered this 31st day of October, 1938.

Chief Justice.

Translation of Judgment of Abdul Hadi, J.: I agree with His Honour the Chief Justice in the conclusion he arrived at in his judgment dismissing this appeal. In my view, if By-law 25 of the Railway By-laws does not absolutely exempt the Railways Administration from liability as a result of fire, the negligence referred to by this Court in its previous judgment, that there was good deal to be said for the contention that the Railway may be liable if the fire arose owing to the negligence of the Railway or its servants, was not established before the District Court.

I do not agree with the arguments urged by Counsel for the Appellant in his other grounds of appeal, that the General Manager of the Palestine Railways has no power to make such a By-law, that such By-law is unreasonable, and that the District Court should have applied the Ottoman Commercial Law.

For these reasons, I am of the opinion that the appeal should be dismissed.

Delivered this 31st day of October, 1938.

Puisne Judge.

CIVIL APPEAL No.. 219/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin, and Khayat, JJ.

IN THE APPEAL OF:

The Administrators of the late Shaul Levy. APPELLANTS.

v.

Nathan Levy. RESPONDENT.

Executors — Balance sheet as admission in writing under Art. 1609 of the Mejelle — Executors suing co-executor — Jenkins v. Jenkins — What amounts to undue influence or constraint — No evidence to justify finding of fact.

In allowing an appeal from a judgment of the District Court of Tel-Aviv, dated the 29t9h day of July, 1938, and in entering judgment for the Appellants:—

HELD: 1. There was nothing in English law to prevent executors from suing a co-executor in respect of a debt owing by him to the estate. Jewish law did not apply as there was no question of personal status.

2. Neither under the *Mejelle* nor in English Law can the supplications of the mother and sisters of the Appellant, who is a grown

the Planitiff was given leave by the High Commissioner to sue under the provisions of the Crown Actions Ordinance. It should be noted that his claim was not, and could not have been, based upon negligence.

At the first hearing before the District Court the Defendants relied upon by-law 25 of the Railway By-laws which they claimed exempted them from liability, as the goods in question had been destroyed by fire. The Court disagreed and the matter came before this Court which held — "we do not express any final opinion on this point (*i. e.* whether the Railways were relieved of liability by by-law 25) but we both think there is a good deal to be said for the contention that the Railways may be liable if the fire arises owing to the negligence of the Railway or its servants."

As I have already said, the action was not framed, and could not have been framed, in negligence. I can only assume therefore that this judgment contemplated the possibility of some principle whereby the Railway would not be entitled to rely on by-law 25, if it or its servants had been guilty of negligence. The case was sent back to the District Court with directions to hear evidence and to "set out in its judgment the findings of fact deduced therefrom and the conclusions of law."

The case was re-heard, and one Judge held that the Plaintiff had failed to prove the wilful misconduct of the Defendant, and the other Judge held, as I understand his judgment, that, in the absence of Judges evidence as to how the fire occurred, negligence on the part of the Railway should be assumed. In the result the Judges in the District Court again disagreed and the case came before us. No authority has been cited to us by the Appellant for the proposition that negligence on the part of the Respondent might preclude the Railway from relying upon by-law 25, and with all respect to the earlier decision of this Court, I know of no such principle. In my opinion, therefore, it is immaterial whether there was negligence.

It has been argued before us that By-law 25 is so unreasonable that we should declare it *ultra vires*. I do not agree with that contention. It has further been argued before us that the matter fails to be dealt with under the Ottoman Commercial Code. In my opinion it is not necessary to consider in detail the application of that Code, as I am of opinion that in so far as the Railways Ordinance and the By-laws made thereunder are inconsistent with it they should prevail.

The appeal is therefore dismissed with costs fixed at LP. 2.

Delivered this 31st day of October, 1938.

Chief Justice.

Translation of Judgment of Abdul Hadi, J.: I agree with His Honour the Chief Justice in the conclusion he arrived at in his judgment dismissing this appeal. In my view, if By-law 25 of the Railway By-laws does not absolutely exempt the Railways Administration from liability as a result of fire, the negligence referred to by this Court in its previous judgment, that there was good deal to be said for the contention that the Railway may be liable if the fire arose owing to the negligence of the Railway or its servants, was not established before the District Court.

I do not agree with the arguments urged by Counsel for the Appellant in his other grounds of appeal, that the General Manager of the Palestine Railways has no power to make such a By-law, that such By-law is unreasonable, and that the District Court should have applied the Ottoman Commercial Law.

For these reasons, I am of the opinion that the appeal should be dismissed.

Delivered this 31st day of October, 1938.

Puisne Judge.

CIVIL APPEAL No.. 219/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin, and Khayat, JJ.

IN THE APPEAL OF:

The Administrators of the late Shaul Levy. APPELLANTS.

v.

Nathan Levy. RESPONDENT.

Executors — Balance sheet as admission in writing under Art. 1609 of the Mejelle — Executors suing co-executor — Jenkins v. Jenkins — What amounts to undue influence or constraint — No evidence to justify finding of fact.

In allowing an appeal from a judgment of the District Court of Tel-Aviv, dated the 29t9h day of July, 1938, and in entering judgment for the Appellants:—

HELD: 1. There was nothing in English law to prevent executors from suing a co-executor in respect of a debt owing by him to the estate. Jewish law did not apply as there was no question of personal status.

2. Neither under the *Mejelle* nor in English Law can the supplications of the mother and sisters of the Appellant, who is a grown

man, be held to be pressure amounting to undue influence or constraint.

3. The balance sheet which was proceeded in legal proceedings, and as to whose accuracy Respondent had sworn, was made unconditionally and constituted an admission of indebtedness by Respondent. This admission was corroborated by the books of the deceased.

4. There was no evidence to support the finding of the District Court that the deceased "probably" did not mean to claim back the amount in dispute from the Respondent.

Distinguished : Jenkins *v.* Jenkins ,155 T. Rep. p. 119 ; *Digest Supp.* 23, 154a.

FOR APPELLANTS : Olshan and King.

FOR RESPONDENT : Fellman.

JUDGMENT:

Copland, J. The Appellants and the Respondent are the three executors of the will of the late Shaul Levy. The claim was made by the Appellants against the Respondent for the sum of LP. 1292.250 said to be owing by the Respondent to the estate. In support of that claim the Appellants produced a balance sheet signed by themselves and the Respondent and sworn to by all three executors, which was filed in the District Court of Jaffa, together with an application for probate of the will. In that statement of account this item of LP. 1292.250 is shown as a debt due by the Respondent to the estate.

The Appellants further produced the books of the deceased, which show in the account of the Respondent this sum, and the manner in which it is made up. The Respondent argued in the District Court that the balance sheet is not an admission of a debt due by him — that he signed solely as an executor and did so only for the purposes of obtaining probate — He denied that in fact he owed any money to the estate, and that he only signed under pressure of his aged mother and other relative.

The District Court found that the Respondent categorically refused to acknowledge the debt and that he signed the balance sheet as executor and not as a debtor, owing to pressure exercised upon him by his mother and other heirs for the purpose of obtaining probate and distributing the estate, and that being so they held that the balance sheet was not an admission in writing within the meaning of Art. 1609 of the Mejelle, and could not be a basis for an action. It also held that since this debt was not mentioned in the will, it was probable that the deceased did not mean to claim back this sum from the Respondent.

It therefore dismissed the claim. Hence this appeal.

Before us it has been argued that two executors cannot sue a third executor. From the authorities in English Law which have been cited to us, we are satisfied that this argument is wrong, and that there is nothing to prevent an executor being sued by his co-executors in respect of a debt owing by him to the estate, especially here where any two executors are empowered by the will, after taking the opinion of the remeining two brothers, to act by themselves.

We also think that Jenkins *v.* Jenkins, 155 L. T. Rep. p. 119, has no application here, since it really is in regard to procedure. In law, when a debtor to an estate is made executor the debt is deemed to be extinguished, but in equity the executor is deemed to hold the money as executor on behalf of the estate, and can be sued in an administration action in the Chancery Division ; in this country there is no separate chancery division. We therefore think that the action was properly brought. But the District Court held that there was nothing in Jewish Law which prevented one executor from suing another executor. In this it was clearly wrong, for Jewish Law has nothing whatever to do with it, since no matter of personal status is involved.

We are unable to support the finding of the District Court on the question of undue influence of constraint. Neither under the *Mejelle* nor in English Law is such a contention proved in this case. The Respondent is a grown man, and the supplications of his mother and sisters cannot possibly be held to be pressure amounting to undue influence or constraint, in this case, which concerns a debt owing by him to his late father's estate.

We also cannot support the District Court's finding that the balance sheet does not constitute an admission. That finding is contrary to the weight of the evidence. The balance sheet containing this statement that this sum was a debt due by Respondent to the estate was produced in legal proceedings and its accuracy was duly sworn to by the Respondent and the Appellants. There is no qualification in it by the Respondent. The existence of the debt is also proved by the books of the deceased which corroborate the balance sheet. And lastly, there is nothing to support the expression of opinion by the District Court that the deceased "probably" did not mean to claim back this sum, from the Respondent, his son. If it were a gift, then it was for the Respondent to prove it — there is not a scrap of evidence in this regard.

In the result, the appeal must be allowed, the judgment of the District Court set aside, and judgment entered for the Appellants against the Respondent in the sum of LP. 1292.250 m. together with

man, be held to be pressure amounting to undue influence or constraint.

3. The balance sheet which was proceeded in legal proceedings, and as to whose accuracy Respondent had sworn, was made unconditionally and constituted an admission of indebtedness by Respondent. This admission was corroborated by the books of the deceased.

4. There was no evidence to support the finding of the District Court that the deceased "probably" did not mean to claim back the amount in dispute from the Respondent.

Distinguished : Jenkins *v.* Jenkins ,155 T. Rep. p. 119 ; *Digest Supp.* 23, 154a.

FOR APPELLANTS : Olshan and King.

FOR RESPONDENT : Fellman.

JUDGMENT:

Copland, J. The Appellants and the Respondent are the three executors of the will of the late Shaul Levy. The claim was made by the Appellants against the Respondent for the sum of LP. 1292.250 said to be owing by the Respondent to the estate. In support of that claim the Appellants produced a balance sheet signed by themselves and the Respondent and sworn to by all three executors, which was filed in the District Court of Jaffa, together with an application for probate of the will. In that statement of account this item of LP. 1292.250 is shown as a debt due by the Respondent to the estate.

The Appellants further produced the books of the deceased, which show in the account of the Respondent this sum, and the manner in which it is made up. The Respondent argued in the District Court that the balance sheet is not an admission of a debt due by him — that he signed solely as an executor and did so only for the purposes of obtaining probate — He denied that in fact he owed any money to the estate, and that he only signed under pressure of his aged mother and other relative.

The District Court found that the Respondent categorically refused to acknowledge the debt and that he signed the balance sheet as executor and not as a debtor, owing to pressure exercised upon him by his mother and other heirs for the purpose of obtaining probate and distributing the estate, and that being so they held that the balance sheet was not an admission in writing within the meaning of Art. 1609 of the Mejelle, and could not be a basis for an action. It also held that since this debt was not mentioned in the will, it was probable that the deceased did not mean to claim back this sum from the Respondent.

It therefore dismissed the claim. Hence this appeal.

Before us it has been argued that two executors cannot sue a third executor. From the authorities in English Law which have been cited to us, we are satisfied that this argument is wrong, and that there is nothing to prevent an executor being sued by his co-executors in respect of a debt owing by him to the estate, especially here where any two executors are empowered by the will, after taking the opinion of the remeining two brothers, to act by themselves.

We also think that Jenkins *v.* Jenkins, 155 L. T. Rep. p. 119, has no application here, since it really is in regard to procedure. In law, when a debtor to an estate is made executor the debt is deemed to be extinguished, but in equity the executor is deemed to hold the money as executor on behalf of the estate, and can be sued in an administration action in the Chancery Division ; in this country there is no separate chancery division. We therefore think that the action was properly brought. But the District Court held that there was nothing in Jewish Law which prevented one executor from suing another executor. In this it was clearly wrong, for Jewish Law has nothing whatever to do with it, since no matter of personal status is involved.

We are unable to support the finding of the District Court on the question of undue influence of constraint. Neither under the *Mejelle* nor in English Law is such a contention proved in this case. The Respondent is a grown man, and the supplications of his mother and sisters cannot possibly be held to be pressure amounting to undue influence or constraint, in this case, which concerns a debt owing by him to his late father's estate.

We also cannot support the District Court's finding that the balance sheet does not constitute an admission. That finding is contrary to the weight of the evidence. The balance sheet containing this statement that this sum was a debt due by Respondent to the estate was produced in legal proceedings and its accuracy was duly sworn to by the Respondent and the Appellants. There is no qualification in it by the Respondent. The existence of the debt is also proved by the books of the deceased which corroborate the balance sheet. And lastly, there is nothing to support the expression of opinion by the District Court that the deceased "probably" did not mean to claim back this sum, from the Respondent, his son. If it were a gift, then it was for the Respondent to prove it — there is not a scrap of evidence in this regard.

In the result, the appeal must be allowed, the judgment of the District Court set aside, and judgment entered for the Appellants against the Respondent in the sum of LP. 1292.250 m. together with

interest at nine per cent per annum from date of action.

The Appellants will have their costs of this appeal assessed at LP. 15 (to include advocate's fees) and their costs in the District Court assessed at LP. 10 (to include advocate's fees) together with disbursements.

Delivered this 31st day of October, 1938.

British Puisne Judge.

I concur.

Puisne Judge.

I concur.

Puisne Judge.

CIVIL APPEAL No. 220/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khaldi, JJ.

IN THE APPEAL OF :

Katr Bint Jiryis Nahas. APPELLANT.

v.

Jaber Elias Kotia and
Sami Elias Kotia. RESPONDENTS.

Succession — Law applicable — Distribution of mulk property — Arts. 59, 64 P. O. in C. — Renvoi — Succession Ordinance, secs. 2 and 4(iii) (c) Meaning of "foreigner" in the Succession Ordinance — P. (A) O. in C. 1935 — Interpretation of Statutes.

In allowing an appeal from a judgment of the District Court of Jaffa, dated the 31st day of July, 1938, and in setting aside the order of the District Court and substituting an order for a new certificate of succession to be granted :—

HELD : 1. The law applicable in the present case under Art. 64 of the Palestine Order in Council and sec. 4(iii) (c) of the Succesion Ordinance was the national law of the deceased — Lebanese law — which imported the *lex situs* — Palestine law.

2. The word "foreigner" in sec. 2 of the Succession Ordinance has the same meaning as in sec. 59 of the Palestine Order in Council, 1922, as amended by the Palestine Order in Council, 1935.

ANNOTATIONS : But where a provision of a statute is *incorporated* in another statute and the former statute is repealed, it does not affect the latter statute : *Digest* Vol. XXXXII, p. 766 seq. D. — *Repeal of Provisions Incorporated in Another Statute.*

On interpretation of statutes, see note to C. A. 232/38 (*post*, p. 163).

FOR APPELLANT : Goitein.

FOR RESPONDENTS : Cattan.

JUDGMENT:

This appeal is concerned with the distribution of part of the estate of one Ibrahim Kotia who died intestate at Tripoli in the Lebanon on the 7th December, 1937. At the time of his death he was possessed of *mulk* property situated in Palestine within the jurisdiction of the District Court of Jaffa, and the Appellant, his widow, applied to that Court for an order determining her share in that property. The only other parties concerned in the distribution were two brothers of the deceased and on the 9th of December, 1937, the Civil Magistrate at Tripoli had made an order that the widow was entitled to a quarter share in the succession and that each of the brothers was entitled to three-eights. I am satisfied, however, that this order did not purport to deal with any immovable property of the deceased situated outside the Lebanon.

2. It fell therefore to the District Court of Jaffa to decide as to the succession to the *mulk* property of the deceased which was situated within its jurisdiction. A question arose as to what law should be applied and on the evidence the Court decided that the law applicable was the Lebanese Law. The evidence showed that in the case of immovable property situated outside the Lebanon, the Lebanese Courts would apply the law of the country where the immovable property was situated, that is, in this case the Law of Palestine. This evidence was ignored by the District Court, with the consequence that the Appellant was decreed a quarter share only of the said immovable property.

3. The question at issue is governed by Article 64 of the Palestine Order-in-Council, 1922. The deceased was a foreigner and the article enacts that the law to be applied in his case is to be the law of his nationality unless that law imported the law of the domicile. There was no evidence that the law of the domicile is imported in the Lebanon, nor was there any evidence as to the domicile of the deceased being elsewhere than in the Lebanon. As has been seen, the evidence showed that the law of the deceased's nationality imports the law of the situation of an immovable. Section 4(iii)(c) of the Succession Ordinance enacts that in such a case the imported law is to be applied. The result is that the law applicable to the succession to this immovable property

is the Law of Palestine, and in accordance with that law it is not disputed that the Appellant is entitled to a half share.

4. There was a lengthy argument from Mr. Goitein on behalf of the Appellant, that the word "foreigner" in the Succession Ordinance bears a different meaning to that which it has in the Order-in-Council. When the Order-in-Council was made in 1922, Article 59 contained a lenghty definition of the word, into the details of which it is not necessary now to enter. In the following year the Succession Ordinance was enacted and by Section 2 "foreigner" was given the same meaning as in Article 59 of the Order-in-Council. In 1935 there was an amending Order-in-Council and a new Article 59 was substituted for the old one. "Foreigner" was defined in a simple manner to include all persons who were not Palestinian citizens. Mr. Goitein argued that this new definition could not affect the old definition embodied by reference in the Succession Ordinance and adduced authorities in support of his contention.

5. These authorities are not in point — the cardinal rule of interpretation must be the intention of the Legislature which in this case is very clear. The word "foreigner" was defined in the Order-in-Council for several purposes. These included matters of personal status which in their turn include successions, wills and legacies. The Succession Ordinance was enacted to deal with these matters in greater detail, but it could not enact anything inconsistent with the Order-in-Council, or be at any subsequent time inconsistent with the Order-in-Council. Consequently its definition of the word "foreigner" must always coincide with the definition in the Order-in-Council. There cannot be two codes for succession where foreigners are concerned. Consequently when the Succession Ordinance defined "foreigner" as having the same meaning as in the Order-in-Council, it clearly inferred that that meaning was to be such meaning as it bore from time to time.

6. This argument of Mr. Goitein's fails, but it does not affect the position of his client, who is entitled to succeed in her appeal. The order of the District Court must be set aside and an order substituted ordering a certificate of succession to issue giving to the Appellant twelve shares out of twenty-four in the *mulk* property in Jaffa and six shares to each of the two brothers. The costs here and below to include LP. 15 advocate's fees for each advocate on his appeal will be paid out of the property concerned. Appellant's deposit to be returned.

Delivered this 31st day of October, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 198/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Frumkin, JJ.

IN THE APPEAL OF :

Szymon Furstenberg — APPELLANT.

v.

Mendel Birenzweig. — RESPONDENT.

Evidence — Action for money lent — No evidence beyond that of payment — Loan to be proved — Onus of proof — Prima facie case to be made out by plaintiff.

In dismissing an appeal from a decree of the District Court of Haifa, dated 3rd July, 1938 :—

HELD : The lower Court had been correct in demanding from the Appellant that he should make out a *prima facie* case of his contention that he had lent money to the Respondent ; nor was it bound to decide otherwise than that the Appellant had failed to prove his case.

ANNOTATIONS : A finding of fact will not normally be set aside if there was evidence to support it : *Vide* CR. A. 2/38 (1938, 1 S. C. J. 60) and annotations to CR. A. 6/38 (*ibid.* p. 65) — 1st paragraph. See also C. A. 225/38, C. A. 232/38 (*post*).

As regards onus of proof, *vide* C. A. 206/38 (14.vi.38). See also C. A. 216/38 (*ante*, p. 115) and C. A. 215/38 (*post*).

FOR APPELLANT : Margolith.

FOR RESPONDENT : Shapiro & Amikam.

JUDGMENT:

We need not trouble you Mr. Shapiro. In this case the Appellant sued the Respondent for a sum of LE. 291, alleged to have been a loan from the Appellant to the Respondent. The Appellant alleged that the money had been sent to a man named Tamarkan and that Tamarkan had paid the amount by cheque to the Respondent. Before the District Court, Haifa, the evidence on behalf of the Appellant was an affidavit made by the Appellant himself in Poland, a copy of the Cheque already referred to, and a copy of some previous proceedings before a District Court sitting at Tel-Aviv. The Respondent in his reply had denied that this amount was a loan ; and

before the Court below had given evidence on oath denying that the sum had been given to him as a loan. There was thus a conflict of evidence before the District Court, and, looking at it as a whole, it came to the conclusion that the evidence was not sufficiently cogent to satisfy it that the claim of the Appellant was justified. There was a great deal of argument by the advocates on both sides as to the onus of proof, but we have no doubt that the Court below was correct in demanding from the Appellant that he should make out a *prima facie* case on behalf of his contention that he had lent this money to the Respondents.

The Court decided that the Appellant had failed to prove his case and on a perusal of the record and the argument, we are unable to say that it was bound to decide otherwise. The appeal will therefore be dismissed with costs. We certify a sum of LP. 15.— as fee for attendance at the hearing.

Delivered this 3rd day of November, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 206/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khayat, JJ.

IN THE APPEAL OF :

The Administration of the Estate of the late J. L. Goldberg. — APPELLANTS.

v.

Yehuda Itin. — RESPONDENT.

Claim on promissory note — Onus of proving consideration wrongly placed on plaintiff — Importance of onus of proof in claims on promissory notes — Material error in procedure.

In allowing an appeal from the decree of the District Court of Haifa, sitting as a Court of Appeal, dated 8th July, 1938, and setting aside the judgments of the lower Courts, and remitting the case to the Magistrate's Court for a retrial :—

HELD : 1. The onus of proving that no consideration had been given for the notes lay on Respondent.

2. The error of procedure made by the Magistrate in placing the onus of proof upon Appellant was sufficiently serious to justify a reversal of judgment.

ANNOTATIONS :

1. On the onus of proof see also C. A. 198/38 (*supra*), and note.

2. The preliminary point of the competency of the Supreme Court to deal with appeals from District Courts in their appellate capacity, raised in this case, was dealt with in C. A. 158/38 (*ante*, p. 126).

FOR APPELLANTS : A. Levin.
FOR RESPONDENTS : Margolin.

JUDGMENT.

This appeal arises out of a claim made before the Magistrate's Court at Haifa by the administrators of one Goldberg deceased, against the Defendant, for the value of ten promissory notes of LP. 10 each. The learned Magistrate, in dealing with the case, decided that the onus of proving consideration was on the administrators and held that they failed to prove that issue and the case was subsequently dismissed. On appeal to the District Court, the District Court disagreed with the finding of the Magistrate that the onus of proving consideration was on the administrators, but at the same time held that the error in procedure was not of sufficient importance to justify them in reversing the judgment of the learned Magistrate. Without going into the merits of the case in any way, we are of opinion that in a case arising out of a bill of exchange or a promissory note, the question on whom the burden of proof lies may be very important, and that if a wrong decision is made it may gravely prejudice one of the parties. We are therefore not in agreement with the District Court, that the error of procedure made by the learned Magistrate was not serious enough to justify a reversal of the judgment. For these reasons we are of opinion that the judgment both of the Magistrate and District Court must be set aside, and that the action must be remitted to the Magistrate's Court for a retrial. The Appellants will have the costs of this appeal and the fee for attendance at the hearing is certified at LP. 10.

Delivered this 14th day of November, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 195/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khayat, JJ.

IN THE APPEAL OF :

Mohammad Hassan el Budeiri. APPELLANT.

v.

Ibrahim Ali el Budeiri. RESPONDENT.

Appeal from District Court by leave — No point of law set out in order granting leave — Claim in connection with wakf — Judgment based on refusal to take the oath — Contradictory judgments of Magistrate's and Sharia courts on matter of wakf — Application for review — Res judicata — Jurisdiction of courts to set aside judgments obtained by fraud or where party obtains fresh evidence — P. O. in C. art. 46 — Application for return of money obtained by fraud or under pressure of legal process — Mejelle 1840 — Jurisdiction of Special Tribunal.

Appeal from a judgment of the District Court of Jaffa, sitting as a Court of Appeal, dated the 28th day of April, 1938, dismissed.

In the year 1931 Respondent brought an action for money against Appellant in the Magistrate's Court of Jerusalem, basing his claim on the ground that he was a beneficiary in a certain *wakf*. The Magistrate made an order that Appellant should take the oath and, upon refusal by Appellant to take the oath, judgment was given in favour of Respondent.

After appeal to the District Court, and subsequently to the Supreme Court, the case was remitted to the Magistrate who again gave judgment in favour of Respondent upon the refusal of Appellant to take the oath. This judgment was confirmed on appeal.

In 1936 Appellant obtained a judgment from the *Sharia* Court to the effect that Respondent was not a beneficiary of the wakf. In reliance upon this judgment Appellant applied to the Magistrate for review of the earlier judgment and his application was refused, such refusal being subsequently confirmed on appeal by the District Court.

Appellant then started the same action before the Magistrate's Court, Ramleh, and the Magistrate held that the matter was *res judicata*. Appellant appealed to the District Court which dismissed the appeal.

Upon appeal to the Supreme Court by leave :—

HELD : 1. Appellant had stated the grounds on which he desired leave to appeal, and as the District Court said nothing further except that leave was granted, it should be presumed that these were the points on which leave was granted.

2. The Magistrate at Ramleh had been correct in his ruling that the matter was *res judicata*. He had not before him an action to set aside a previous judgment either on the ground of fraud or on the ground of fresh material evidence.

3. The money was received in this case by virtue of a judgment of a competent court and could not be said to have been received either without right or by fraud. Neither could it be said to be money paid under pressure of legal process.

4. Art. 1840 of the *Mejelle* is governed by the rules in the Ottoman Code of Civil Procedure dealing with review.

5. The Special Tribunal may be constituted to declare whether a case is within the exclusive jurisdiction of a Religious Court or not. It is not set up in order to say what action should be taken when there are two contradictory judgments, one of a Religious, and one of a Civil Court.

ANNOTATIONS: On *res judicata,* see also C. A. 79/38 (1938, 1 S. C. J. 370) and note, and C. A. 214/38 (*ante,* p. 100) and note.

Cases on review are collected in the annotations to C. A. 203/37 (1938, 1 S. C. J. 13).

On leave to appeal *vide* C. A. 191/38 (*ante,* p. 141) and annotations.

FOR APPELLANT: Cattan.

FOR RESPONDENT: Kamal.

JUDGMENT:

Ibrahim Eff. Kamal, counsel for the Respondent, raised a preliminary objection that the order granting leave to appeal does not state on what points of law leave to appeal is granted. He also argued that the order does not state that leave to appeal is granted generally. The Court overrules this objection. The Appellant stated the grounds on which he desired leave to apeal, and as the District Court said nothing further except that leave was granted, we presume that these are the points on which leave is granted.

There is an unusual history in connection with the circumstances leading up to this appeal. In the year 1931 the Respondent brought an action for money against the Appellant in the Magistrate's Court of Jerusalem, basing his claim on the ground that he was a beneficiary in a certain *wakf*. At the outset of the poceedings before him, the learned Magistrate made an order that the Respondent should go to the *Sharia* Court and that there was no necessity for the Appellant to take the oath. Afterwards, at the beginning of the year 1932, the learned Magistrate revised this order and ordered the Appellant to take the oath. The Appellant refused, and as a consequence judgment was given against him on the 31st February, 1932.

The Appellant appealed to the District Court and succeeded in getting an order from that Court that the Respondent's action should be dismissed. The Respondent then in turn appealed to this Court and on the 20th April, 1933, this Court referred the case back to the District Court. On the 9th of January, 1934, the District Court referred the case back to the Magistrate with specific directions that the Appellant was to take a certain oath. The case came before the Magistrate on the 24th April, 1934. The Appellant again refused to take any oath except an oath of his own choosing, and as a consequence judgment was given against him for the amount claimed. This judgment was confirmed on appeal on the 10th January, 1935.

It is very important to consider the nature of these proceedings and the grounds on which the present Respondent succeeded in obtaining judgment. Up to this point there is not the slightest indication that the Respondent was guilty of any fraud in obtaining this judgment. The Respondent succeeded because the Appellant refused to obey the order of the Court to take the oath as prescribed by it.

The second part of the history of the case begins with a judgment of the *Sharia* Court dated the 5th May, 1936. This judgment declared that the Respondent was not a beneficiary of the *wakf*.

So far then there are the judgment of two Courts, one of the Magistrate's Court of Jerusalem, confirmed on appeal by the District Court given on the ground that the Appellant refused to take the oath, but of course impliedly declaring that the Respondent was one of the beneficiaries of this *wakf*. On the other hand there was the judgment of the *Sharia* Court giving a contrary decision.

Armed with this judgment of the *Sharia* Court, the Appellant took the course that was open to him under the Ottoman Code of Civil Procedure *i. e.* he applied for a review of the judgment of the Magistrate's Court of Jerusalem. The review was refused and this decision was upheld on appeal to the District Court. The Appellant then took the course of starting the same action all over again before the Magistrate's Court of Ramleh and the learned Magistrate at Ramleh came to the conclusion, which we consider is correct, that the matter was *res judicata*. The Appellant appealed to the District Court. His appeal was dismissed and he has now appealed to this Court by leave.

Mr. Cattan, who appeared on his behalf, submitted three grounds on which he challenged the decisions of the learned Magistrate and the District Court. His first ground was that in accordance with Art. 46 of the Order-in-Council the Courts in Palestine have the

same power as the English Courts to set aside a judgment obtained by fraud, and that this power may also be exercised if a party obtains fresh material evidence. We do not think that this jurisdiction of the English Courts is in point in this case. What the learned Magistrate at Ramleh had before him, was an action on a subject matter which had been already decided by a competent Court between the same parties. He had not before him any action to set aside a previous judgment either on the ground of fraud or on the ground of fresh material evidence.

The second ground put forward by Mr. Cattan is that money received without right and by fraud may be recovered. The money in this case which was received by the Respondent was received by virtue of a judgment of a competent Court and is cannot be said to have been received either without right or by fraud. Neither can it be said to be money paid under pressure of legal process, which means that a party reluctantly yields up money when threatened with legal proceedings.

M. Cattan's third ground is that the Appellant was entitled to bring this action in accordance with Article 1840 of the *Mejelle*. Article 1840 of the *Mejelle* is the last article in Section 3 of Cap. 2 on page 305 of Tyser's Translation. Section 3 is headed as relating to the review of a claim after judgment. Special rules are laid down in the Ottoman Code of Civil Procedure for dealing with the review of a case after a judgment, and we think that Article 1840 must be governed by these rules. The Appellant has already applied for a review of the judgment given in 1932 and has failed to obtain that review.

Another matter referred to by Mr. Cattan was that there being contradictory judgments of a British (Civil) Court and a *Sharia* Court, the matter is one which should be referred to the Special Tribunal. The Special Tribunal may be constituted to declare whether a case is within the exclusive jurisdiction of a Religious Court or not. It is not set up in order to say what action should be taken when there are two contradictory judgments, one of a Religious, and one of a Civil, Court.

For these reasons we think that this appeal must be dismissed. The Respondent will have the costs and the fee for attendance at the hearing is fixed at LP. 15.

Delivered this 21st day of November, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 221/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Frumkin, JJ.

IN THE APPEAL OF :

Yacov Periman. APPELLANT.

v.

Mordechai Turkiyeh. RESPONDENT.

Eviction — Purchaser remaining in possession after abortive sale until repayment of purchase price — Mejelle 373 — Dispositions and voidable contracts of sale — Equitable rights to land — Equitable lien coupled with possession.

In dismissing an appeal from the decree of the Land Court, sitting at Tel-Aviv (Appellate Capacity), dated the 20th June, 1938 :—

HELD : 1. Although the Respondent could not obtain a good legal title except in the Land Registry, when the provisions of the Land Transfer Ordinance had been complied with, this did not mean that the contract was voidable. A voidable contract is one which may be either affirmed or repudiated at the option of one of the parties but not of the other, and the agreement in this case was not of this description.

2. Article 373 of the *Mejelle* which refers to voidable sales had consequently no application.

3. Land Courts are bound to give effect to equitable rights in that he had been let into possession by the Appellant and had paid part of the purchase money. He therefore had an equitable lien on the land for this purchase money and this lien was coupled with possession which had been originally obtained with the consent of the Appellant.

ANNOTATIONS :

1. On the question of agreements to sell *vide* C. A. 108/38 (1938, 1 S. C. J. 345) and cases referred to in annotations, together with the notes to such cases. See also C. A. 203/38 (*ante*, p. 99) and note, and C. A. 224/38 (*ante*, p. 116) and annotations.

3. On equitable title *vide* C. A. 224/38 (*supra*) and annotations.

FOR APPELLANT : Olshan (by delegation).

FOR RESPONDENT : Ben Ami.

JUDGMENT:

The facts out of which this appeal arises are that there had been an agreement between the parties under which the Appellant agreed to sell certain premises to the Respondent for LP. 300. The Respondent paid part of the price and was let into possession, but the sale was not registered, and after some time the Respondent started an action in the District Court for the return of the money he had paid and for damages for breach of contract. He continued in occupation of the premises and the Appellant took action before the Magistrate for his eviction. The learned Magistrate ordered his eviction but on appeal was reserved by a Land Court, leave being granted to this Court to appeal.

2. The learned Magistrate based his decision on the ground that the Respondent could not claim to remain in possession of the property in order to ensure the return of the money which he had paid, and that as this was the only ground on which he based his claim an order for eviction must be made. The Land Court, relying on Article 373 of the *Mejelle,* decided that the learned Magistrate had erred in so deciding. Article 373 of the *Mejelle* is as follows :—

> "In the case of cancellation of a voidable sale, if the price has been received, the purchaser has the right of retaining the thing sold until the vendor has returned the price."

3. I do not see how this article can apply as there is no question of a voidable agreement here. The agreement between the parties was valid and legally binding on both. The Respondent could not obtain a good legal title until the provisions of the Land Transfer Ordinance had been complied with, but this does not mean that the contract was voidable. A voidable contract is one which may be either affirmed or repudiated at the option of one of the parties but not of the other, and the agreement in this case was not of this description.

4. Land Courts are bound to give effect to equitable rights in land and I think that the true principle on which this case must be decided will be found by examining the equitable rights of the Respondent. He had been led into possession and had paid part of the purchase money. I shall leave out of consideration his right to sue for specific performance because he has started an action in the District Court for damages for breach of contract and the return of the purchase money he has paid ; but he has an equitable lien on the land for this purchase money and this lien is coupled with possession which

was originally obtained with the consent of the Appellant. The Appellant has the legal estate ; but the Respondent's equitable lien coupled with possession enables him to resist any attempt by the Appellant to eject him.

5. What I have said applies to the position as it is in the present action and will not prejudice in any way the decision of the issue at present pending before the District Court.

6. Before us it was said by Mr. Olshan, on behalf of the Appellant, that the Respondent's possession of the premises was not the result of the agreement for sale but was simply due to an act of kindness by the Appellant. The Land Court was satisfied that it was agreed between the parties that the possession was the result of the agreement. However this may be, it cannot alter the facts that the Respondent is actually in possession with an equitable lien and that this possession was obtained with the consent of the Appellant.

7. For this reason the appeal must be dismissed and the Respondent will have the costs. Fee for attendance at the hearing is certified at LP. 15.—.

Delivered this 21st day of November, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 232/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khaldi, JJ.

IN THE APPEAL OF :

I. 1. Muhammed Haj Khalil Muhammed Taha,
2. Omar Haj Khalil Muhammed Taha,
on behalf of the estate of their late father. APPELLANTS.

v.

1. Ali Hassan Skeirik,
2. Mustafa, son of Haj Khalil Mohammed Taha, on behalf of the estate of his late father. RESPONDENTS.

— and —

IN THE APPEAL OF :

II. Muhammed Haj Khalil Muhammed Taha,
in his capacity as heir of his
late father. APPELLANT.

v.

1. Ali Hassan Skeirik,
2. Muhammed Haj Khalil Muhammed Taha
3. Omar Haj Khalil Muhammed Taha,
(the latter two in their capacity
as heirs of their late father). RESPONDENTS.

I. FOR APPELLANTS : Elia.
FOR RESPONDENTS : No. 1 — Cattan.
No. 2 — Attalla.

II. FOR APPELLANT : Attalla.
FOR RESPONDENTS : No. 1 — Cattan.
No. 2 —) Elia.
No. 3 —) Elia.

Constitution of Court — Test to determine proper constitution is the amount of the claim — Failure to raise point of law in grounds of appeal — Disputed signature — Civil Procedure Code, Arts. 56, 97 — *Interpretation Ordinance — Construction of Statutes — Weight of evidence — Proof of signature — Discretion of Court in refusing to hear further witnesses.*

In dismissing appeals from a decree of the District Court of Haifa, dated the 29th day of September, 1938 :—

HELD : 1. The first point *viz.*, that the District Court was wrongly constituted, would be rejected as it was not raised in the grounds of appeal. The essential thing to remember, when considering the question of jurisdiction, is the actual amount of the claim.

2. The intention of the new Civil Procedure Rules is that the Ottoman Code of Civil Procedure should be repealed. The Interpretation Ordinance did not have the effect of reviving Art. 97 of the Civil Procedure Code ; that article is a rule of procedure and it is the general rule that measures affecting procedure are retrospective unless the contrary intention should appear.

3. There was evidence to justify the finding of the District Court that the disputed signatures were genuine.

4. The District Court had exercised their discretion perfectly properly in refusing to hear further witnesses.

ANNOTATIONS :

1. *Vide* C. A. 218/38 and note 3 thereto.

2. On the interpretation of statutes, *vide* C. A. 170/38 (*ante*, p. 51) and note. See also C. A. 220/38 (*ante*, p. 151).

On the verification of signatures *vide* C. A. 64/38 (1938, 1 S. C. J. 241) and annotations.

3. *Vide* note to C. A. 198/38 (*ante*).

JUDGMENT:

Copland, J. : The first point taken in this appeal is that the District Court which tried this case was wrongly constituted. The Court was composed of two judges and it is said that as the subject matter of the claim involved a sum of LP. 1000 the case should have been tried by the President and one judge. This point is one which is continually coming before us, but the essential thing to remember, when considering the question of jurisdiction, is the actual amount of the claim. According to the statement of claim the amount in dispute was the sum of 250 French gold pounds. That sum does not exceed LP. 500 ; it was more than LP. 250, at any rate, at the time when the claim was entered ; and therefore we think that the Court which tried this action was properly constituted.

This point, at any rate, will be rejected because it was not raised in the grounds of appeal and we see no reason to grant permission to raise it now. In any case we think that it is a point which should have been raised in the Court below.

The next point is with regard to the method of proof adopted by the Court as to the genuineness or otherwise of the disputed signatures of Haj Khalil Mohammed Taha. It was argued by the Appellants that the provisions of Art. 97 of the Civil Procedure Code were applicable. The new Civil Procedure Rules of 1938 came into force on the 5th of May of this year, that is to say after this particular action had been entered in the District Court. It is true that on the 7th of November, 1937, in the course of one of the many hearings of this case, the Appellants did ask that the provisions of Art. 97 should be applied. The Court, as appears from the order on the record, never refused at that particular moment to apply Art. 97 but ordered the Defendants, that is to say, the present Appellants, applying Art. 56, to go to the Examining Magistrate and prove the forgery. There is no doubt that the intention of the new Civil Procedure Rules is that the Ottoman Civil Procedure Code should be repealed, and that intention is quite clear from the proviso to Rule 1. When this case came up fo trial after the Examining Magistrate had found there was no

charge of forgery for which Respondent should be committed for trial, the new rules of Procedure were then in force. We do not think that the Interpretation Ordinance has the effect of reviving this particular Art. 97 of the Civil Procedure Code. That Article is a rule of procedure and it is the general rule that measures affecting procedure are retrospective unless the contrary intention should appear, and we think that Art. 97 was not in force in July, 1938, and was not revived for the purposes of this particular action.

The rest of the appeal was largely concerned with the weight of the evidence. It is said that there was no proper proof of the handwriting and no proper proof of the documents which were produced. We think that these arguments fail. Photographic copies of signatures of the late Haj Khalil Mohammed Taha were made of the undisputed signatures appearing in the Land Registry books and in the Notary Public's books. These photographic copies were properly proved, they were produced to the Court and were before the Court, and we must presume that the Court looked at them and considered them before coming to a conclusion. These photographic copies were supported by the testimony of witnesses. The question as to whether one set of witnesses should have been believed in preference to another set of witnesses is a matter entirely left for the Court which heard those witnesses. The Court came to the conclusion that the disputed signatures were genuine signatures and undoubtedly there was evidence to support that finding. It is not therefore for us to interfere.

Finally the Appellants complain that they asked the District Court to allow them to produce further evidence and the District Court refused. We think that the District Court came to a perfectly correct decision on this matter. After many hearings and after many witnesses had been heard, and when the Court had intimated that the parties could put in pleadings summing up their arguments, it was not the correct time to make an application for further evidence. The District Court exercised their discretion in this matter perfectly properly. In the result all the Appellants' arguments fail. Both appeals should be dismissed with costs, assessed to be LP. 15 for each appeal.

Delivered this 22nd day of November, 1938.

British Puisne Judge.

I concur.

Senior Puisne Judge.

I concur.

Puisne Judge.

CIVIL APPEAL No. 225/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Frumkin and Khayat, JJ.

IN THE CASE OF :

Nimer Ahmad Hinawy. APPELLANT.

v.

Subhi Ass'ad Shahruri. RESPONDENT.

Prior purchase — Land Code, art. 41 — Verbal renunciation of rights — Tabou Regulations, art. 11 L. A. 5/27 — Land Courts not bound by rules of evidence — Land Courts Ordinance — C. P. R. 342, 346.

In allowing an appeal from a decree of the Land Court of Nablus, dated the 12th September, 1938, and in remitting the case to the Land Court under the provisions of rules 342 and 346 of the Civil Procedure Rules to determine an issue of fact :—

HELD : 1. The finding of the Land Court relating to the extent of the land involved and the *bedl misl* was based upon evidence and would not be upset.

2. A right of preference under Art. 41 of the Ottoman Land Code may be waived orally.

FOLLOWED : L. A. 5/27 (C. of J. 1530).

ANNOTATIONS :

1. See note to C. A. 198/38 (*ante*).

2. For preference under Art. 41 of the Land Code, *vide* C. A. 122/38 (1938, 1 S. C. J. 381) and annotations, L. A. 36/36 (C. of J. 1934—6, 487).

FOR APPELLANT : Assal.

FOR RESPONDENT : Khammash.

JUDGMENT:

This is an appeal from the Land Court of Nablus. In my opinion the case should be remitted to that Court for a further finding.

The Plaintiff, as co-owner of certain shares in land in which other shares has been sold by another owner, claimed from the transferee the restoration of his shares under the provisions of Article 41 of the Ottoman Land Court (as amended).

The Defendant asserted that the Plaintiff had, by word of mouth, renounced his rights, and that in consequence no written renunciation

had been taken. Upon this the Court gave a preliminary judgment as follows :—

> "The Tabou Registers have been regarded as having the force of law, and the provisions of Art. 11 are clear and reasonable. They require a renunciation of the right of priority such as Defendant pleads that Plaintiff gave to be in writing. Defendant admits he has no written renunciation, and it therefore follows that he cannot prove a binding renunciation. This being Defendant's only plea, we find that Plaintiff is entitled to priority in respect of the sale of 21/120 and 21/480 shares in the land referred to in the Statement of Claim."

The Court then went on to enquire into and decide certain questions as to the extent of the land involved and the amount of the *Bedl Misl.*

The Defendant appeals to this Court and objects both to the preliminary judgment and the decision upon the facts.

As to the facts, the Court heard evidence, and I am of opinion that it was entitled to came to the conclusions to which it did.

The preliminary judgment raises a point of interest and importance. Article 11 is clear, but it is doubtful to what extent parties have availed themselves of it in Palestine, and in practice I believe it is usual for written renunciations to be taken before a Notary Public.

Before the occupation, I believe that the Court of Cassation held that renunciations should be evidenced by writing, but the matter was considered by this Court in Land Appeal No. 5/27, which is reported in Rotenberg's "Collection of Judgments", vol. IV, page 1530. In that case the Court of Trial had held, on the strength of "personal" evidence (presumably oral evidence) that the right had been effectively abandoned, and this Court held :—

> "The Court holds that the intention of Section 7 of the Land Courts' Ordinance and all the rules thereof is to the effect that the Land Court is not at all bound by the rules of evidence. The Law has conferred on it an absolute discretion, and, consequently, the first objection of Appellant fails (falls ?) to the ground."

The general proposition may appear to be too widely stated, but, in so far as the point in issue was concerned, I think that the decision should be followed.

It is for the legislature to consider whether any change should be made.

As I have stated, I see no reason to interfere with the findings of the Court upon the other issues, and, in my opinion, this is a case

in which the provisions of Rules 342 and 346 of the Civil Procedure Rules can usefully be applied.

The case will therefore be remitted to the Land Court to determine the issue whether the Appellant (Plaintiff) orally refused to take his share of the land in question, and when this has been done, to return to this Court the record of the evidence, together with the findings thereon and the reasons therefor.

The question of costs will be reserved.

Delivered this 23rd day of November, 1938.

Chief Justice.

HIGH COURT No. 64/38.

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

BEFORE : The Senior Puisne Judge and Khaldi, J.

IN THE APPLICATION OF :

Fahima Fakhri Bey. PETITIONER.

v.

1. The President, District Court, Haifa, acting as Chief Execution Officer,
2. Guiseppe Sinigaglia,
3. Guillermo Feldman. RESPONDENTS.

Sale of mortgage — Amendment of application for order of foreclosure — Assignment of mortgage not made out "to order" — Construction of documents — Lands Transfer Ordinance, sec. 14 — Powers of C. E. O. — Special circumstances applying to forced sales in Palestine — Postponement of Sale — Costs.

In discharging an order *nisi* in an application for an order to issue to the first Respondent directing him to show cause why all proceedings in satisfaction of a mortgage should not be annulled on the ground that he is not empowered to order foreclosure, or, that the assignment is bad in law, and, alternatively, why the sale proceedings should not be stayed for a period of three years as may seem to the Court just and equitable ; and in directing that the first Respondent should postpone the sale for a period of six months :—

HELD : 1. Sec. 14 of the Land Transfer Ordinance, as reenacted, while clearing up certain other points on which doubts existed, does not alter in any way the judicial interpretation of the old section as regards the functions of a President of a District Court and his inability to determine any issues of law or fact which might seem to be involved in the matter before him.

2. The first Respondent was debarred, in view of the limited scope of his jurisdiction, from enquiring into the validity of the assignment of the mortgage which was valid on the face of it.

3. In view of the special circumstances now applying in the case of forced sales, and in order to give to the Petitioner an opportunity of testing before a Court his contention that the assignment of the mortgage was invalid, the sale should be postponed for six months.

ANNOTATIONS: The functions of a President, District Court, acting under sec. 14 of the Land Transfer Ordinance, have been considered in the following recent decisions: H. C. 66/37 (1938, 1 S. C. J. 15); H. C. 65/37 (*ibid.* p. 43) — and *vide* annotations thereto; H. C. 35/38 (*ibid.* p. 296) — and *vide* annotations thereto; H. C. 56/38 (*ante*, p. 83).

FOR PETITIONER: Cattan (by delegation).

FOR RESPONDENT No. 1. — No appearance.
No. 2. —)
No. 3. —) A. Levin.

JUDGMENT:

The facts out of which this petition arises are as follows: The Petitioner is a widow and after the death of her husband she sold certain property left by the deceased. Part of the proceeds belonged to her children, but the Petitioner spent the money and then in order to put matters right with her children, she executed a mortgage to them of certain immovable property which she possessed in her own right. The children assigned the mortgage to the Second and Third Respondents.

2. The mortgage debt fell due on December the 8th 1937. The debt was not paid and the Second and Third Respondents then applied to the Relieving President of the District Court of Haifa for foreclosure. The application was subsequently amended by the Relieving President to an application for sale.

3. The Petitioner applied to the Relieving President for relief. She asked that the proceedings for sale be set aside as the assignment to the Respondents was bad in law. A mortgage cannot be assigned without the consent of the mortgagor unless the sum secured has been made payable to the mortgagee or order. The Petitioner did not consent to the assignment nor was the sum made payable to the mortgagees or order. The words "or order" did however appear in the mortgage in the sentence "the receipt of which sum the mortgagor or order hereby acknowledges", and the Relieving President, in construing the document, held that it was obvious that the words "or

order" had been put in the wrong place and that it was therefore the intention of the parties that the mortgage should be assignable. He accordingly rejected the application of the Petitioner but granted a short postponement of the sale.

4. The Petitioner has applied to this Court for an order either to restrain the sale or to grant a long postponement. Both parties rely on the construction placed on Section 14 of the Land Transfer Ordinance, which empowers a President of the District Court to order the sale of immovable property in execution of a judgment or in satisfaction of a mortgage, and to order postponement of the sale in certain circumstances. This section was enacted on the 5th of May last and replaced a previous Section 14. The previous section had always been interpreted by judicial decision to mean that in exercising the powers conferred upon him, a President of a District Court was not a judicial officer and had not any jurisdiction to determine any issues of fact or law which might seem to be involved in the matter before him. In the case of a mortgage of immovable property for instance, he has simply to see that the mortgage or any assignment thereof is apparently valid and that there has been a default in payment of principal or interest entitling the mortgagee to an order for sale. The new section, while clearing up certain other points on which doubt existed, does not alter in any way the judicial interpretation of the old section as regards the functions of a President of a District Court.

5. Both sides, as I have said, say that this judicial interpretation is in their favour. Mr. Cattan for the Petitioner argues that the Relieving President had no jurisdiction to construe the mortgage deed, and to determine the issue as to whether it was the intention of the parties that it should be assignable. He says that as the sum secured was not expressly made payable to the mortgagees or order, the Relieving President should have treated the mortgage as not being assignable, and should have refused an order for sale. Mr. Levin for the Second and Third Respondents argues that the Relieving President had before him an assignment of the mortgage, valid according to the Land Transfer Ordinance, and that it was not within the province of the Relieving President to enquire whether the assignment should be made or not. He says that this latter question was one solely for the Land Registry at the time of the assignment, that the Land Registry satisfied itself that the mortgage was assignable and that if the Petitioner wishes to contest the validity of the assignment she must take the matter to the proper Court for a judicial decision on the issue.

6. I am in agreement with the argument of Mr. Levin. The Re-

lieving President had before him an assignment valid on its face, and the limited scope of his jurisdiction debarred him from going into questions contesting its validity. Taking, as I do, this view of the matter I think it would be incorrect for us at this stage. to come to any decision as to the construction of the mortgage deed.

7. There remains the question of postponement. Section 14 of the Land Transfer Ordinance to which I have already referred, allows a Relieving President to grant a postponement if he is satisfied that the debtor has reasonable prospects of payment if given time, or that, having regard to all the circumstances of the case, including the needs of the creditor, it would involve undue hardship to sell the property of the debtor. The Relieving President granted a short postponement but it seems to me that he did this merely as an Execution Officer and that he did not direct his mind to the discretion vested in him under Section 14. Mr. Cattan argues that we should take into consideration the present circumstances in Palestine. I agree that these circumstances are relevant and without going into detail it may be granted that at present it is more difficult for mortgagors to raise money in order to save their property from sale and that property at a forced sale is likely to be sold at a price very much below its value. There is also the further consideration that the Petitioner, though she mistook her remedy, may be given the opportunity of testing before a Court her contention that the assignment of the mortgage was invalid. I think that a reasonable postponement of the sale will not prejudice in any way the mortgagees, seeing that they bought for LP. 4,000 a mortgage on a property which had been originally mortgaged for over LP. 6,000 and that they will receive in the meantime interest at 9% on the original mortgage deed.

8. For these reasons I think that we should make an Order as follows :—

a) That the oder *nisi* to annul the sale should be discharged.

b) That the order to stay the proceedings for sale for three years should be discharged.

c) That the President of the District Court of Haifa be directed to postpone the sale for six months from this date.

As each side has succeeded in part, I think that the Respondents should have half the costs of resisting this application and that the fee for attendance at the hearing should be fixed at LP. 7.500.—

Delivered this 29th day of November, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 205/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khaldi, JJ.

IN THE APPEAL OF :

1. Yehoshua Kamoni,
2. Yehuda Kimel. APPELLANTS.

v.

Hugo Bach. RESPONDENT.

Claim for return of deposit in sale of land — Action on breach of contract — Court cannot adjudicate on different cause of action — Failure to hear evidence on breach of contract — Test to determine jurisdiction of Magistrate's Court.

In allowing an appeal from a decree of the District Court of Haifa, sitting as a Court of Appeal, dated the 13th July, 1938, and in setting aside the judgments of the District Court and Magistrate's Court and remitting the case to the Magistrate for rehearing :—

HELD : 1. The decision of the District Court, in giving judgment on a cause of action other than that set out in the claim could not be supported.

2. The Magistrate had dealt with the case in too summary a manner, and should have heard evidence as to whether a breach of contract had been committed.

3. Whether Respondent could sue for damages was a question which would arise only if and when he sued for damages, but could not be dealt with either by the Magistrate or by the District Court.

ANNOTATIONS : *Vide* cases set out in annotation 1 to C. A. 221/38 (*ante*, p. 161).

FOR APPELLANTS : A. Levin.

FOR RESONDENT : Hoter Ishay.

JUDGMENT:

In this case the Respondent sued the Appellants in the Magistrate's Court, Haifa, for LP. 100, being part of the purchase money which he had paid as the result of an agreement to buy land. His claim before the Magistrate was based on an alleged breach of contract and the learned Magistrate, having perused the statement of claim and the contract, and heard argument on each side, decided that there had been no breach of contract and dismissed the claim of the Respondent.

The Respondent appealed to the District Court. The District Court did not consider the question as to whether the learned Magistrate was right in the decision to which he had come. It considered the claim as if it had been based on an entirely different cause of action and decided that the Respondent was entitled to the refund of his LP. 100. We think that the District Court erred in dealing with the appeal in this manner. The sole question before it was whether the learned Magistrate was right in his decision that there had been no breach of contract, and for this reason we think that the decision of the District Court cannot be supported.

We have listened to argument as to whether the decision of the learned Magistrate was correct, and we have come to the conclusion that he dealt with the issues in too summary a manner. He confined himself entirely to a perusal of relevant documents and to the argument of counsel, and we think that he ought to have heard evidence on the point as to whether a breach of contract had been committed.

In his statement of claim before the Magistrate the Respondent in suing for his LP. 100 stated that he reserved the right to bring a separate action for damages. Whether he has the right to bring a separate action for damages was not a question to be dealt with either by the learned Magistrate or by the District Court. That question would arise only if and when he brings a second action for damages under this contract. All that the learned Magistrate had to consider was that he had a claim before him for LP. 100 only and that this was a matter within his jurisdiction.

For these reasons stated in the first part of this judgment, we order that the judgments of the District Court and of the learned Magistrate be set aside, and that the case be remitted to the Magistrate to give an opportunity to the Respondent to call such evidence as he desires in support of his claim, and that the Appellants be allowed to call such evidence as they desire in rebuttal. The Appellant will have the costs of this appeal, and the fee fixed for attendance at the hearing is LP. 15.

Delivered this 16th day of November, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 197/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Frumkin, JJ.

IN THE APPEAL OF :

"Hamalchim" Workers' Group. APPELLANTS.

v.

Maximilian Feldschreiber. RESPONDENT.

Failure of appearance in appeal — C. P. R. 337 — Doubt whether Respondent properly served — Appeal struck out with liberty to apply for reinstatement.

In striking out an appeal from a judgment of the District Court of Jaffa, sitting at Tel-Aviv, in its appellate capacity, dated the 25th April, 1938 :—

HELD : There being no appearance by Appellants or Respondent, but there being some doubt as to whether the Respondent was properly served, the appeal would be struck out with liberty to apply within fifteen days to reinstate it.

FOR APPELLANTS : No appearance.

FOR RESPONDENT : No appearance.

JUDGMENT:

There being no appearance by or on behalf of either the Appellants or the Respondent, but there being some doubt as to whether the Respondent is properly served, therefore, in virtue of the provisions of Rule 337 of the Civil Procedure Rules, 1938, this appeal is struck out, with liberty to Appellants to apply within fifteen days to reinstate it.

Delivered this 17th day of November, 1938.

Chief Justice.

CIVIL APPEAL No. 227/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Frumkin, JJ.

IN THE APPEAL OF :

Leon Levy. APPELLANT.

v.

1. Dr. Hanna Khoury,
2. Amin Khoury. RESPONDENTS.

Failure to comply with order of Chief Registrar regarding security for appeal — Appeal listed for dismissal — Application for extension of time — Application should be made by motion — C. P. R. 327, 333.

In refusing an application for adjournment of an appeal from a decree of the Land Court of Haifa, sitting as a Court of Appeal, dated the 29th July, 1938, and in dismissing the appeal :—

HELD : 1. Failure to comply with the Chief Registrar's order regarding payment of security for costs did not, of itself, dismiss the appeal.

2. Application for extension of time in this case came under rule 333.

3. Any application should be made by way of motion. Appellant did not move the Court by notice but merely appeared on the notice for dismissal. He also admitted that he had not applied to the Chief Registrar for an extension of time under rule 333. There was no adequate excuse for so failing.

ANNOTATIONS : The above decision was followed in C. A. 228/38.

FOR APPELLANT : A. Levin.

FOR RESPONDENTS : No appearance.

JUDGMENT.

This application raises an important point of practice.

It appears that the Chief Registrar ordered payment into Court by the Appellant as security for the costs of the appeal under rule 327 (as amended). The Appelant failed to comply with the order and the appeal was listed for dismissal. The Appellant now appears before us and invites us under rule 333 to extend the period for payment.

It is clear that failure to comply with the order does not of itself dismiss the appeal and that until this Court dismisses it, it is before the Court and the parties may be heard therein. Any application should however be made by motion.

In my judgment this is a matter within the scope of rule 333 in that a condition precedent to the hearing of an appeal — other than filing a notice of appeal or payment of the prescribed fees — has not been complied with.

In this application the Appellant does not move the Court by notice but merely appears on the notice for dismissal. It is admitted that the Appellant did not apply to the Chief Registrar to extend the time under the rule and we do not think that he had any adequate excuse for so failing.

In the circumstances I do not think he could hope to succeed and it would appear to be useless therefore to grant an adjournment. The appeal is dismissed.

Delivered this 17th day of November, 1938.

Chief Justice.

CIVIL APPEAL No. 215/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khaldi, JJ.

IN THE APPEAL OF :

Yehoshua Hankin. — APPELLANT.

v.

1. Zaki Rashid Ash Shanti,
2. Muhammad Amin Rashid Ash Shanti,
3. Farid Rashid Ash Shanti,
4. 'Abd Ar Rauf Rashid Ash Shanti,
5. Ribhi Rashid Ash Shanti,
6. Fauzi Rashid Ash Shanti,
7. Zarifa Rashid Ash Shanti,
8. Fatma Mahmud Al Hassan. — RESPONDENTS.

Sale of land in execution — Claim by alleged co-owners — Admission shifting the burden of proof — Purchaser's title invalid against owners other than mortgagors — Mortgage Law (Amendment) Ordinance, sec. 8 — Whether purchaser bona fide without notice — C. A. 48/38, C. A. 94/38.

In dismissing an appeal from a judgment of the Land Court of Nablus, sitting as a Court of Appeal, dated the 2nd day of March, 1938 :—

HELD : 1. The admission of the predecessors in title of Appellant, during the hearing of the previous land case, shifted the burden of proof upon Appellant to show that their title was valid. If this could not be established his title would be invalid against any other persons.

2. (Distinguishing C. A. 48/38) Appellant was not protected by mortgage and sale through the Execution Office as he was not a *bona fide* purchaser without notice and as he had acquired the interest of the mortgagors, not of the mortgagees, in the land.

3. (Considering C. A. 94/38). The Execution Law does not protect a prospective purchaser who has notice of an adverse claim to the property being sold.

DISTINGUISHED : C. A. 48/38 (1938, 1 S. C. J. 327).

CONSIDERED : C. A. 94/38 (1938, 1 S. C. J. 335).

ANNOTATIONS :

1. On onus of proof see second paragraph of note to C. A. 198/38 (*ante*, p. 154).

2. See annotations to C. A. 48/38 (*supra*).

3. See annotations to C. A. 94/38 (*supra*).

FOR APPELLANTT : Eliash.

FOR RESPONDENTS : Cattan.

JUDGMENT.

Copland, J. : In the year 1926 Hussein and Kamil, two of the heirs of Rashid el Shanti, who had died in 1925, had the property in dispute registered in their names in equal shares as *Miri* land planted with oranges and containing certain buildings. In 1926 and 1928, subsequently to this registration, five mortgages were executed by Hussein and Kamil on this property. The mortgage moneys not being repaid, on the 1st August, 1930, the share of Hussein was sold by public auction at the instance of the mortgagees and was bought by Mr. Y. Hankin, the present Appellant, and registered in his name. On the 19th May, 1931, the share of Kamil was similarly sold, was also bought by the Appellant and duly registered in his name, but before registration, the present Respondents obtained, on the 5th May, 1931, an order of stay from the Land Court, until the present Appellant should give a guarantee for any damage that the Respondents might sustain by the sale — this guarantee was duly given and the sale was completed.

The Respondents to this appeal are the other heirs of Rashid al Shanti, and in June 1930 they had entered an action in the Land

Court Nablus against Hussein and Kamil, claiming that the property now in dispute had devolved upon all the heirs of Rashid al Shanti by inheritance, that in 1926 two of the heirs, Hussein and Kamil, illegally had the parcel registered in their names to the exclusion of the Respondents, and they claimed their shares. In the course of the proceedings before the Land Court Hussein and Kamil both stated that originally their father Rashid al Shanti had purchased the land, built on it and planted it, and that after the death of Rashid they had come to a settlement with the other heirs of their father, whereby they, Hussein and Kamil, had obtained this parcel as their share in the inheritance. The present Appellant was cited as a third party to these proceedings. After long delays this Land Court case was eventually transferred to the Settlement Officer, who proceeded to hear it.

The Settlement Officer, in his judgment, came to the conclusion that the registration of this property was legally carried out in 1926, that he was not satisfied that an old registration for this land, as claimed by the Respondents, ever existed, that the subsequent mortgages were legally raised, and that as the land was sold by public auction, the Appellant had acquired a good title, since a public auction exonerates a purchaser from every responsibility, and since the mortgages were valid, any subsequent sale must also be valid. He also held that the question of good faith on the part of the Appellant did not arise. He therefore dismissed the Respondents' claim. On appeal to the Land Court, that Court set aside he Settlement Officer's decision and remitted the case to him to determine the rights of the Respondents in this land, as in May, 1931, the date when the order of registration in the Appellant's name was made. The Appellant has now come to this Court.

Before this Court the Appellant has argued, first, that since the Settlement Officer had found that an alleged old registration of this land did not in fact refer to this land at all, the whole of the Respondents' case collapsed ,and should have been dismissed on that ground alone, and the admissions of Hussein and Kamil could not affect this conclusion. Secondly he has urged that a title obtained by a sale through the Execution Office in unassailable and a complete protection, and that, the morgages having been validly created, any subsequent sale must also be valid, and no question of good faith can arise.

With regard to the first point, I think that the Land Court was right. The admissions by Hussein and Kamil, during the hearing of the previous Land Case, that their father Rashid had purchased the Land before his death, coupled with their statements that they had obtained

this parcel as their share of the inheritance by reason of a settlement with the other heirs, the Respondents, undoubtedly shifted the burden of proof, and since the Appellant was claiming through the title of Hussein and Kamil, his immediate predecessors, the onus of proving that Hussein's and Kamil's title was a valid one was on him. What the Appellant was purchasing was all the estate and title of the mortgagors, Hussein and Kamil, in the property mortgaged. See Section 8 of the Mortgage Law (Amendment) Ordinance Cap. 95. It is true that as against the mortgagors he acquired an indefeasible title, but he only acquired their title, and he must prove that that title was a valid one, otherwise his title by purchase would be invalid as against any person other than the mortgagors. Everything depends upon whether the registration in Hussein's and Kamil's names in 1926 was a legal registration or not. The alleged settlement by Hussein and Kamil with the Respondents must be proved by the Appellant. As the Land Court remarked, if this point is determined in favour of the Appellant, the matter will be ended, and his title will be a good one.

As to the second point, namely, whether the Appellant is protected by reason of the mortgages, and the sale through the Execution Office. Before registration of the land was effected in his name, the Appellant had notice of the adverse claim of the Respondents. He had been joined as a third party in the action brought by the Respondents against Hussein and Kamil. He had been served also by the Respondents with notarial notices, informing him of their claim to the land before the registration of each share was perfected. He himself only obtained registration of Kamil's share in his own name, on giving a guarantee to the Respondents for any damages they might suffer. In the light of these facts, it seems to me impossible to argue that he had no notice of any adverse claim to the land. He therefore was not a *bona fide* purchaser without notice. And it seems to me that this is fatal to his claim that he is protected. He knew that there was an adverse claim which could only be settled by the competent Court, he nevertheless proceeded to complete the purchase — and he must now take the consequences. The case of Daoud *v.* Zakay C. A. 48/38, P.L.R. Vol. 5, p. 313, is of no help to the Appellant. What that case decided was that if a *bona fide* purchaser with notice could show that his predecessor in title was a *bona fide* purchaser without notice, he would not be affected, but would take his predecessor's title.

Following the principle there laid down, the Appellant must prove that his predecessors' title was a valid one, and it makes no difference that the mortgagees acted in good faith — he is not purchasing their interest, but the interest of the mortgagors in the land.

The Execution Law gives, it is true, a certain amount of protection to purchasers. If no claim to the property to be sold has been made, they are entitled to assume that there is no claim, and if the sale has been carried out properly in accordance with the provisions of the Execution Law, then a purchaser will acquire a good title. (See Weniger *v.* Carasso and another — C. A. 94/38, P.L.R. Vol. 5, p. 334). But the Execution Law does not protect a prospective purchaser who has notice of an adverse claim to the property being sold.

I think that the judgment of the Land Court is right, and that this appeal should be dismissed, and the case remitted to the Settlement Officer to determine on the lines suggested by the Land Court, and in the light of these observations in this judgment.

The Respondents will have the costs of this appeal in any event, assessed at LP. 15 to include advocate's fees.

Delivered this 24th day of November, 1938.

British Puisne Judge.

I concur.

Senior Puisne Judge.

I concur.

Puisne Judge.

CIVIL APPEAL No. 229/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khaldi, JJ.

IN THE APPEAL OF :

1. Ayed Ibn Hilou el Nusayrat,
2. Muhammad Ibkheet,
3. Risek el Mansour,
4. Shoubash Ibn Nasrallah,
5. Zeim Ibn Saleh el Attiyat. — APPELLANTS.

v.

1. Haj Saad Ibn Hussein el Nejoum,
2. Ibrahim el Saleh,
3. Subhi Abdallah el Dajani,
4. Fuad Yehia Inseibeh. — RESPONDENTS.

Appeal from Land Court on points of law — Trial Court to weigh evidence — Representative action — Remedy granted in excess of claim.

In dismissing an appeal from a judgment of the Land Court of Jerusalem, dated the 30th day of September, 1938, and in amending the judgment of the Land Court :—

HELD : 1. In an appeal from the Land Court the Appellant is confined to arguing questions of law. The evidence before the Land Court had been of a contradictory nature and it was the province of the Land Court to say on which side the balance of probability lay.

2. There was no reason to think, that the Court below erred in overruling the contention that the Third and Fourth Respondents had no right to represent the people of Auja.

3. The order of demolition made by the Land Court should have been confined to the four houses mentioned in the statement of claim.

FOR APPELLANTS : Farajallah.

FOR RESPONDENTS : Kamal.

JUDGMENT:

In this case the Respondents took action against the Appellants before the Land Court of Jerusalem. The statement of claim showed that they took the action on behalf of the inhabitants of El Auja and they claimed that the inhabitants had been using these lands from time immemorial for the purposes of pasture, cutting wood, camping and planting, and they complained that the Appellants had built certain houses on the land and were claiming the right of possession to part of the land without any legal justification.

The Appellants made a general denial of the claim of the Respondents alleging that they had a right to the part of the land on which they built the houses, and the Land Court having heard a large number of witnesses and perused certain documentary evidence found that the disputed plot of land was land used for grazing and wood collecting on which the Ka'abne Arabs, together with the owners and cultivators and other Arabs living in the vicinity including the present Appellants, were entitled to graze cattle and gather wood, and also found that the land was not capable of cultivation with the exception of a few parts. The Land Court also came to the conclusion that the Appellants had no legal right to erect any buildings on the land. Having come to this conclusion the Land Court ordered the Appellants to refrain from interfering with the rights of the Respondents which

have been described above and made a further order that any private buildings erected by the Appellants on the land should be demolished.

The Appellants have appealed and Mr. Farajallah on their behalf has attacked the findings of fact made by the Court below. In an appeal from a Land Court to this Court the Appellant is confined to arguing questions of law. When Mr. Farajallah's attention was called to this, he argued that there was no evidence before the Court below to justify its conclusions. A perusal of the record shows that there was evidence before the Court below. This evidence was of a contradictory nature, some on one side some on the other ; it was the province of the Court below to say on which side the balance of probability lay. As far as this ground is concerned the appeal must fail.

Another ground of appeal was that the Third and Fourth Respondents who were among the Plaintiffs in the Court below had no right to represent the people of Auja. This objection was overruled in the Court below, and we see no reason now to think that the Court below erred in overruling this objection.

A third ground of appeal was that the Court below should not have ordered the demolition of all the private houses erected on the land by the Appellants because the statement of claim mentioned four houses only. We agree with this point and think that the order of the Court below should have been confined to the four houses mentioned in the statement of claim.

For these reasons we think that this appeal must be dismissed but the order of the Court below must be varied to the extent that instead of all private buildings having to be demolished there will be substituted an order that the four houses mentioned in the statement of claim shall be demolished. The Respondents will have the costs of this appeal and the fee for the attendance of the hearing is fixed at LP. 15.—

Delivered this 29th day of November, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 222/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

1. Isaac Zvi Rackovsky,
2. Abraham Epstein. APPELLANTS.

v.

Joseph Danon. RESPONDENT.

Application for adjournment — C. P. R. 183 — Reasonable exercise of discretion not interfered with — Maxwell v. Keun — Judgment not in accordance with directions of Appellate Court — Reinstatement of counter-claim without notice to Plaintiffs.

In dismissing an appeal from a judgment of the District Court of Haifa, dated the 27th day of July, 1938, as regards the judgment of the District Court on the main claim, and in allowing the appeal against the judgment on the counter-claim and returning the case to the District Court for the determination of the counter-claim :—

HELD : 1. The refusal by the lower Court to adjourn the hearing of the action had been made after due consideration of the facts, and there was no reason to interfere with this exercise of discretion.

2. Although not in strict accordance with the directions of the Appellate Court, the District Court was correct in dismissing Appellants' action.

3. No notice that the counter-claim had been reinstated having been served upon Appellants, the case would have to be sent back for the determination of the counter-claim.

FOLLOWED : Maxwell *v.* Keun (1928) 1 K. B. 645.

ANNOTATIONS : A report of the former proceedings (C. A. 97/38) referred to in the judgment appears *ante*, p. 17.

1. See the following cases and their annotations : C. A. 235/37 (1938, 1 S. C. J. 49) ; C. A. 28/38 (*ibid.*, p. 109) ; C. A. 68/38 (*ibid.*, p. 261). See also C. A. 230/38 (*post*).

2. *Cf.* C. A. 109/38 (1938, 1 S. C. J. 311) and annotations.

FOR APPELLANTS : King, Abramovsky.

FOR RESPONDENT : A. Levin.

JUDGMENT.

The Chief Justice : This is an appeal from a decision of the District Court of Haifa involving a claim and a counter-claim. In my judg-

ment, the appeal on the claim fails, and on the counter-claim succeeds.

This Court, in an earlier appeal (C. A. 97/38) in which the same parties were involved, (the present Appellants then being Appellants) held :—

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

With all respect to this Court this decision appears to be in an unhappy form.

The matter came before the District Court again on 27.7.38. It seems that the Plaintiffs' advocate, some days before the date fixed for hearing, tried, without success, to have the case adjourned. A later application for an adjournment was made on the ground that in the then conditions it was unsafe to travel to Haifa. The Court considered the question and refused an adjournment, and that refusal is one of the grounds of the present appeal.

Rule 183 of the Civil Procedure Rules gives a Court a discretion to adjourn a trial. Generally speaking, this Court, if it is satisfied that the discretion has been exercised on proper grounds, except in exceptional circumstances, will not interfere (see Maxwell *v.* Keun, 1928, 1 K. B. D., 645). In this case it appears that the Court gave its decision after due consideration of the facts, and I see no reason to interfere, and on this point the appeal fails.

Despite the application for an adjournment, an advocate attempted to appear for the Plaintiffs, but the Court held that he was not authorised, so that in the result the Plaintiffs were neither present nor represented.

The Defendant appeared and gave evidence denying the extension of time to which this Court, in the first appeal, had referred, and the Court gave judgment dismissing the Plaintiffs' claim.

In the circumstances, despite the wording of the judgment of this Court, I think that the District Court was justified in so doing, and that it was bound to make an Order in this form, although, if the earlier judgment of this Court was taken literally, it was for the Appellants to call the Respondent as a witness, and there was a direction that if the extension was not proved the original judgment of the District Court would stand.

The Appellants, in their grounds of appeal, now complain that they had no opportunity to cross-examine the Respondent in order to obtain an admission from him, but that would appear to be their own fault for not attending the hearing, and on this point the appeal fails.

In addition to giving judgment for the Defendant the District Court went on to hear a counter-claim, and gave judgment for the Defendant (Plaintiff on the counter-claim) against the Appellants.

At the first hearing before the District Court, that Court advised the Defendant to withdraw his counter-claim and made an order allowing it to be reinstated, without the payment of fees, after the determination of the first appeal. The result is unfortunate. When the action was for the second time before the District Court the Defendant (Plaintiff on the counter-claim) applied, on the 6th of July, 1938, for the restoration of the counter-claim without the payment of fees, and the Court, at the hearing, treated it as having been reinstated, and gave judgment for the Defendant (Plaintiff on the counter-claim) for the balance of a sum of LP. 2,500 as damages.

No notice that the counter-claim had been reinstated was served upon the Plaintiffs (Defendants to the counter-claim) and as I have stated, they were not present at the hearing. It is a matter of regret that the District Court did not satisfy itself that the Plaintiffs had been informed that the counter-claim had been reinstated before proceeding to adjucate upon it.

Mr. Levin, on behalf of the Respondent, with that fairness which we have learned to expect from him, agrees that the appeal on the counter-claim must be allowed, and the case again remitted to the District Court to adjudicate thereon after the Appelants have been properly notified.

In the result, the appeal in the action will be dismissed, but that in the counter-claim allowed, and the judgment of the District Court on the counter-claim set aside, and the case remitted to the District Court to hear and determine the counter-claim.

No order as to costs.

Delivered this 17th day of November, 1938.

Chief Justice.

Frumkin, J.: The action of the present Appellants against the Respondent for damages and refund of moneys and promissory notes was based upon an alleged breach by the Respondent of a contract whereby

the latter undertook to transfer a house to the Appellants. During the first trial before the District Court the case of the Appellants has boiled down to one main point namely whether or not the Respondent in fact consented to extend the time fixed for transfer to a later date. The Appellants maintained that at that later date they were willing to accept the transfer but the Respondent did not turn up to effect it. The Appellants failed to prove this point and their action was dismissed. On appeal the case was remitted to the District Court to give Appellants a further opportunity to prove their allegation by the evidence of the Respondent.

On the date fixed for hearing before the District Court the Appellants did not turn up, nor did counsel who represented them previously. On behalf of the Appellants another advocate appeared asking to adjourn the case on the ground of the unsafety of the roads preventing the Appelants and their Jerusalem advocate to travel from Jerusalem to Haifa. The District Court refused to grant the adjournment, proceeded with the case, heard the evidence of the Respondent who categorically denied that he ever consented to extend the time for transfer. The Court for the second time then dismissed the action, and for the second time the Appellants now appeal.

The first ground of appeal is that the Court was not justified in refusing the adjournment, owing to the particular unrest in the country for the day or two preceding the hearing. In my view this is a matter which must be left for the consideration of the Court of Trial. It may be that the Court was to some extent influenced by numerous previous attempts on behalf of the Appellants to have the case adjourned. But they also received official information from which they could judge that travelling was not impossible. In any event the Appellants having known beforehand that their advocate is not willing to proceed to Haifa they could have taken timely steps to brief another advocate to represent them. In these circumstances I am not inclined to interfere with the exercise of the discretion of the Court below, and the appeal on this ground must fail.

The second ground of appeal is that in the absence of the Appellants, the Court should not have proceeded to hear the evidence of the Respondent, who was in fact their witness. But even apart from the evidence of the Respondent the Court was justified in arriving at the conclusion they did. An opportunity was offered to them to prove their case, they did not avail themselves of that opportunity. The Court had therefore no alternative than again dismissing the action. The appeal on this point must also fail.

Where the District Court erred was in proceeding to deal with the counter-claim of the Respondent and giving judgment thereon.

In the first trial the Respondent, upon the advice of the Court, withdrew the counter-claim with leave to reinstate it without fees. This Court in its first judgment commented on this procedure and directed that in the event the case will have to be re-opened upon the Appellants proving the extension of time, a very relevant fact bearing on their allegation of breach, the Court should then simultaneously deal with the counter-claim.

The Court could not rely on this direction because the fact was not proved, and the case was not re-opened. The Court could further not rely on the application of the Respondent to have the counter-claim reinstated, because no notice of it was given to the Appellants who rightly say that they were not supposed to know that the counter-claim will be considered on the date fixed for the re-hearing of their claim.

The Appellants therefore succeed on this point and that part of the judgment dealing with the counter-claim is set aside.

The District Court will now in due course have to deal with the counter-claim of the Respondent as an independent claim. The Appellants will then or on another occasion be entitled to raise their claims for the refund of moneys paid and promissory notes given insofar as such claims are not based on the breach of the contract.

The result is that as regards the Appellants' claim for damages the appeal is dismissed and the judgment of the District Court confirmed ; but the other part of the judgment dealing with the claim of the Respondent is set aside.

In the circumstances there should be no order as to costs.

Delivered this 17th day of November, 1938.

Puisne Judge.

I concur.

Puisne Judge.

HIGH COURT No. 65/38.

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

BEFORE : The Chief Justice and Greene, J.

IN THE APPLICATION OF :

Manneh Hanna Karra'a. PETITIONER.

v.

1. Chief Execution Officer, in the District Court, Jerusalem,
2. Mikhail Odeh Sansour. RESPONDENTS.

Execution of ecclesiastical judgment — Guarantor of monthly payments — Amendment of judgment for alimony by Ecclesiastical Court — Whether new judgment.

In dismissing an application for an order to issue to the First Respondent directing him to show cause why his orders dated the 16th May, 1938, and the 13th July, 1938, in Execution File No. 268/30, Bethlehem, whereby the Second Respondent was released of his guarantee made on the 14th February, 1931, in the said Execution File, should not be set aside.

HELD : The amendment of the judgment by the Ecclesiastical Court did not amount to a new judgment and the second Respondent was, therefore, not relieved of his guarantee.

FOR PETITIONER : Hazou.

FOR RESPONDENTS : No. 1, not present.
No. 2, Amon and Bruchstein.

JUDGMENT:

This application arises out of proceedings before an Ecclesiastical Court wherein the Applicant obtained an order for the payment of alimony. This order was lodged for execution in the Execution Office of the Bethlehem Court, and in the execution proceedings, for considerations therein stated, before the Execution Officer the Second Respondent guaranteed the payment of a monthly sum in respect thereof.

It seems that the Second Respondent applied to the Execution Officer to relieve him of his obligations on the grounds of (*inter alia*) lack of means, but that application was refused, and we are not concerned with it.

On 20.11.37 the principal debtor petitioned the Ecclesiastical Court to reduce the amount of the monthly payments, and that Court "decided to amend the said judgment and reduce the adjudged alimony".

Thereupon the Second Respondent applied to the Execution Officer to be relieved of his guarantee on the ground that his undertaking became void because of the new judgment, and the First Respondent ordered :—

> "I consider the guarantee made by the guarantor to have come to an end since the issue of the Second Judgment of the Ecclesiastical Court, *i. e.* as from the 20th of November, 1937".

In our opinion this was not a new judgment, and the First Respondent was wrong in the view which he took.

The Rule will therefore be made absolute, with costs against the Second Respondent, being disbursements and advocate's fee LP. 2.

Delivered this 28th day of November, 1938.

Chief Justice.

CIVIL APPEAL No. 230/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khayat, JJ.

IN THE APPEAL OF :

Aniseh Hassan Hamideh. APPELLANT.

v.

1. The Chief Execution Officer, Haifa,
2. Muhammad Baradey Abbasi,
3. Muhammed el Kalla,
4. Shehadeh Assa'd El Khoury. RESPONDENTS.

Dismissal of action for failure of plaintiff to appear — C. P. R. 187, 213, 317 — Alternative remedies open to plaintiff — Medical certificate of inability to attend — Non conformity with form under Medical Practitioners Rules — Interests of justice — Costs.

In allowing an appeal from a judgment of the Land Court of Jerusalem, dated the 27th day of September, 1938, and in remitting the case to the Land Court for rehearing :—

HELD : 1. The Appellant had the choice of two remedies against the dismissal of his action for non appearance : either to apply to the Court below, under rule 213, to set aside its decree, or to proceed by way of appeal under rule 317.

2. Although the medical certificate produced by Appelant was not in the form laid down by the rules made under the Medical Practitioners Ordinance it was not alleged that the facts laid down in the certificate were untrue and the defect in form was immaterial.

3. The Appellant therefore had a reasonable excuse for failing to appear before the Land Court.

ANNOTATIONS : For earlier proceedings in this case *vide* C. A. 17/38 (1938, 1 S. C. J. 208) and H. C. 33/38 (*ibid.* 326).

See note 1 to C. A. 222/38 (*ante*).

FOR APPELLANT : Budeiri.

FOR RESPONDENTS : Cattan.

JUDGMENT:

When this came on for hearing before the Land Court of Jerusalem on the 27th September last, the Plaintiff, the present Appellant, failed to appear, and the Court in the exercise of its powers under Rule 187 of the Civil Procedure Rules, 1938, dismissed the action.

The Plaintiff appealed to this Court. A preliminary objection was taken by Mr. Cattan on behalf of the Respondents that the Plaintiff had mistaken her remedy which should have been under Rule 213. Rule 213 states that when a decree or order has been given in default of appearance or pleading, the party against whom the decree or order was made may apply to the Court, that is the Court which made the order, and that Court has jurisdiction to set aside the decree or order. This remedy was apparently open to the Appellant in the present case. As the same time under Rule 317 it is laid down that an appeal lies to this Court from any decree of a District Court or a Land Court. It seems then that under the rules the Plaintiff had the choice of two remedies, either to apply to the Court below to set aside its decree or to proceed by way of appeal before this Court.

The only point with which we are concerned in this appeal is whether the Appellant had a reasonable excuse for failing to appear before the Land Court of Jerusalem on the 27th September last. The explanation given is that she was ill and that a telegram notifying that fact had been sent to the Land Court. A medical certificate has been produced before us to the effect that she was ill on the 25th September and that the illness was likely to last for ten days. It is objected by Mr. Cattan on behalf of the Respondents that this certificate is not in the form as laid down by the rules made under the Medical Practitioners Ordinance. That of course is so, but as it is

not alleged that the facts as stated in the certificate are untrue, the defect in form may be regarded as immaterial. We think that in the interests of justice the proper course for us is to accept the medical certificate as being a statement of the genuine circumstnces existing at the time and to conclude that the Appellant had a reasonable excuse for failing to appear before the Land Court.

Taking this view of the matter we order that the appeal be allowed, that the decree of the Court below be set aside and that the action be remitted to the Land Court for re-hearing. In the circumstances the Appellant will pay to the Respondents their costs of this appeal not to include any advocates fees.

Delivered this 29th day of November, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 233/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khayat, JJ.

IN THE APPEAL OF :

Banco di Roma. APPELLANT.

v.

Madame Marie Michel Morcos. RESPONDENT.

Banker and customer — Negligent payment by Bank to unauthorised persons on forged receipts — Adoption and estoppel — Mejelle, Arts. 1647, 1657 — English law inapplicable where Ottoman Law extends — English law of estoppel — Greenwood v. Martins Bank, Ltd.

In allowing an appeal from a decree of the District Court of Jerusalem, dated 21st September, 1937, in Civil Case No. 149/37, and in setting aside the judgment of the lower Court :—

HELD : 1. Under the Ottoman Law (Mejelle, Arts. 1647, 1657) Respondent was estopped from claiming the amount of the claim from the Appellant.

2. As there are provisions in the Ottoman Law for dealing with the facts English law should not be applied ; but even under English law the Appellant was entitled to succeed.

CONSIDERED : Greenwood *v.* Martins Bank, Ltd. 1933 A. C. 51.

ANNOTATIONS : *Vide* also C. A. 89/26 (C. of J. 225).

2. *Vide,* to the same effect, C. A. 240/37 (1938, 1 S. C. J. 148) and *cf.* C. A.

87/37 (2 Ct. L. R. 19, P. P. 2—3.8.37, Ha. 7.21.x — 4.xi.37) ; C. A. 138/37 (2 Ct. L. R. 73, P. P. 5—8, 10.x.37, Ha. 4.xi.37).

FOR APPELLANT : Horowitz.
FOR RESPONDENT : Kamal.

JUDGMENT:

The facts as found by the Court below were as follows :— The Respondent was a customer of the Appellant Bank (hereinafter referred to as the Bank), and on the 31st of December, 1934, had a balance on current account of LP. 2,408.340 mils. Drawings on this account were not made by cheques but by receipts signed by the Respondent. During the year 1935 17 sums amounting in all to LP. 650 were drawn out on receipts which purported to be signed by the Respondent but were not signed by her or by any person with her authority. It is not known who signed these receipts but the bodies of the receipts were written in by one Lorenzo Anton, an employee of the Bank and a cousin of the Respondent, and a certain number of the payments were made to him.

2. At the beginning of 1936 the Bank sent to the Respondent a statement of her account showing the balance to her credit at the end of 1935. Owing to the forged receipts this amount was LP. 650 less than it ought to have been. The Respondent went to the Bank to complain about the shortage. The Bank offered to investigate her complaint but the Respondent decided to withdraw her complaint and to decline any investigation. She signed an acknowledgment that the correct balance of her account on the 31st December, 1935, was LP. 1,479.500 mils that is LP. 650 less than it ought to have been.

3. No sums were drawn out or paid into the account during 1936 and at the end of that year the Bank sent to the Respondent a statement of her balance on the 31st of December, 1936. This balance was LP. 1,523.855 mils, that is the balance as it stood 12 months previously, plus interest. The balance was still LP. 650 less than it ought to have been, but the Respondent again signed an acknowledgment that it was correct.

4. In April or May 1937, Lorenzo Anton, the cousin of the Respondent already referred to, retired from the service of the Bank with a gratuity. The Respondent then began a correspondence with the Bank claiming that her account was short. The Bank investigated the matter. The various receipts were produced and it was found

that 17 of them to a total value of LP. 650 had been forged. The Bank refused to credit this amount to the Respondent. She then took action in the District Court.

5. The District Court found that the Bank had been negligent in paying on the forged receipts. It found further that the Bank had been negligent in paying some of the receipts to an unauthorised person, that is Lorenzo Anton. The Bank sought to evade liability by pleading adoption and estoppel. The District Court considered these defences ; rejected them, and entered judgment for the Respondent.

6. In the appeal before us, Mr. Horowitz, for the Bank, abandoned the argument on the question of adoption. He relied solely on estoppel. Before dealing with the argument, I wish to refer to the finding of the District Court that the Respondent was not aware of any forgery until the 17 receipts were produced. It was this finding which led the District Court to pronounce against an estoppel. In my opinion this finding was a misdirection. It is true that the Respondent was not aware of the details of the forgeries until the forged receipts were produced, but when the Respondent saw her balance at the beginning of 1936, she knew well that a large sum had been drawn out on a receipt or receipts which she had not signed. It could not have entered her head that the reduced balance was due to faulty accounting or a mistake on the part of the Bank, as if this had been her impression, she would have insisted on an investigation. She was aware that someone had forged her name, she declined any investigation and she certified her balance as correct. It is implicit in the findings of facts as found by the District Court that she was trying to shield some person from the effect of an investigation and the facts point to the probability that that person was her cousin Lorenzo Anton. Some of the money payable on the forged receipts was paid to him ; the bodies of these receipts were filled in by him ; as long as he was in the employ of the Bank she was willing to certify her balance as correct ; and she refused any investigation into the shortage in her account. She did not challenge the correctness of her balance until her cousin had retired from the Bank with his gratuity.

7. The ruling of the District Court on the question of estoppel was based on a misdirection. It is necessary for us to examine the facts to see whether the Bank in entitled to succeed in its defence. The Ottoman Law contains provisions dealing with estoppel in Book 14, Section IV, of the Mejelle. Art. 1647, (I am using Tyser's trans-

lation) lays down that an antecedent statement of the plaintiff contradicting his claim, prevents an action for ownership. One of the examples given is, "after someone has said 'I have no claim against such a person' if he brings an action claiming something from that person, it is not heard". This principle covers the facts of this case. The Respondent by signing her balance as correct at the end of 1935 acknowledged that she had no claim against the Bank other than for the balance as set out in the acknowledgment. She in fact said she had no claim against the Bank for whatever shortage there was in her account. A year afterwards she made the same acknowledgment. She now seeks to repudiate that acknowledgment. Under Art. 1657 of the same section of the Mejelle she can only do so if she can give some satisfactory explanation of the contradiction involved between her previous statements and her present claim. Her explanation was that she paid no attention to the contents of the statements. That is obviously untrue; it is entirely inconsistent with the facts that before signing the first acknowledgment she went to the Bank and complained of a shortage, that the Bank then and there promised an investigation, that she then declined any investigation and decided to sign the acknowledgment. Under the Ottoman Law the Respondent is estopped from claiming the amount from the Bank, and the Bank is entitled to succeed in this appeal.

8. The Court below dealt with the question of estoppel on the lines of English Law; and Mr. Horowitz cited before us certain cases decided in England. As there are provisions in the Ottoman Law for dealing with the facts I do not think English Law should be applied. In deference however to the judgment of the Court below and to the argument of Mr. Horowitz, I propose to deal briefly with the case from the standpoint of English Law. The only case to which I need refer is the last one cited by Mr. Horowitz, namely, Greenwood *v.* Martins Bank Ltd., 1933 A. C. 51. In that case Greenwood's wife had forged his name to a large number of cheques. Greenwood found out the forgery but deliberately abstained from informing the bank until after the death of his wife. The bank refused to credit Greenwood with the amount of the forged cheques and Greenwood succeeded in an action against it, tried before a Commissioner of Assize sitting at Manchester. The Bank succeeded in having this decision reversed both before the Court of Appeal and the House of Lords. The leading speech in the House of Lords was delivered by Lord Tomlin. He analysed the essentials of estoppel and came to three important conclusions. Firstly that the deliberate abstention of Green-

wood from informing the bank of the forgeries amounted to a representation that the forged cheques were in order ; secondly, that detriment was caused to the bank because if it had known of the forgeries before the wife's death it might, under the law as it then stood, have sued her in tort and joined her husband as a defendant ; and thirdly, that it was no answer for Greenwood to say that the detriment would not have occurred unless the bank had been initially negligent. The present case differs from Greenwood's case in that the Bank here has been guilty of a further act of negligence by paying amounts to an unauthorised person, and in that the identity of the forger is so far unknown. I do not think that the degree of negligence is relevant. The facts show that the Respondent must have been aware that some receipts were forged, and that she deliberately abstained from having the matter sifted. Her signature of her two acknowledgments of her balance amounted to a representation to the Bank that the forged receipts were in order. The question is what was the detriment to the Bank ? Some of the forged receipts were paid to the cousin of the Respondent already mentioned. The bodies of these receipts were in his handwriting. He was an employee of the Bank. In 1937 he was able to retire from the Bank with a gratuity. If the Respondent had refused to acknowledge her balance either at the end of 1935 or 1936 there must have been an enquiry. Whether the Respondent's cousin was the actual forger or not, facts would have been revealed connecting him with the forgeries in so intimate a manner that one can have little doubt that instead of being able to retire with a gratuity, he would in the end have been dismissed, and would have had to disclose facts which might have identified the forger. He is, of course, still alive and may be sued by the Bank, but so much time has been allowed to elapse that it is not certain how much money he received on some of the forged receipts. Grave doubt may also reasonably exist on the part of the Bank's advisers as to what form the cause of action should take and even as to the possibility of success in any proceedings. The detriment to the Bank may be found, in my opinion, in the fact that by the conduct of the Respondent, in acknowledging her balance and refusing an investigation, the Bank lost any chance it had of discovering the forger and of recovering the sums paid on the forged receipts and also lost the gratuity paid to Lorenzo. I think is is entitled to succeed in this appeal if the matter falls to be decided according to English Law.

9. In my opinion the appeal should be allowed and the judgment of the District Court should be set aside. The Bank should have

its costs here and below. The fee for attendance at the hearing in the Court below if fixed at LP. 5.— and before us at LP. 15.—.

Delivered this 29th day of November, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 183/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Copland and Khayat, JJ.

IN THE APPEAL OF :

1. Saleem Cotran,
2. Dr. Naim Cotran,
3. Nahil Cotran. — APPELLANTS.

v.

Iskandar Cotran. — RESPONDENT.

Trustees — Liability of trustees for wrongful appropriation is the value of the property as entered at the Land Registry — Liability of co-heirs as trustees is not joint and several, each being liable in respect of his share — Statement not amounting to waiver — Land Courts Ordinance, sec. 8(1).

In dismissing, by a majority, an appeal and cross-appeal from a decree of the District Court of Jerusalem, dated the 8th day of June, 1938, and in varying the judgment of the lower Court :—

HELD : (Trusted, *C. J., dissentiente*).

1. The land had not been in possession of Appellants for the period of prescription and the documents produced by the Respondent were sufficient to convey ownership.

2. The Appellants were in the position of trustees. The question of damages, therefore, did not arise and Appellants, as trustees, were responsible for the value of the properties wrongfully appropriated and disposed of by them, and that value could not be better assessed than by the amount entered in the Land Registry as the amount of the consideration obtained from the sale by Appellants.

3. Appellants could not be held as trustees of each others' shares, but were trustees of their individual shares and their liability was therefore not joint and several.

4. The decision of the District Court, who had heard him, that Respondent had not intended to waive his rights against the third Appellant could not be interfered with.

REFERRED TO: (In dissenting judgment) C. A. 136/33 (2 P. L. R. 114, C. of J. 1415, P. P. 5.vi.34. L. A. 88/25 (C. of J. 1777) ; Lysaght *v.* Edwards, 2 Ch. D. 499 ; Beckford *v.* Wade ; Soar *v.* Ashwell (1893) 2 Q. B. D. 461 ; Taylor *v.* Davies (1920) A. C. 61.

ANNOTATIONS: The earlier proceedings (L. A. 74/32) are reported in P. P. 16.vii.33, C. of J. 1752.

FOR APPELLANTS: No. 1 — In person.
No. 2 — Eliash.
No. 3 — Assal.

FOR RESPONDENT: Horowitz.

JUDGMENT:

Copland, J.: In the action before the District Court, out of which this present appeal arises, the Respondent (then Plaintiff) claimed from the Appellants (then Defendants) together with another brother Tewfik Cotran, who is not a party to this appeal, the sum of LP. 1589.640 mils, being the value of 8 shares out of 24 in certain lands which he alleged had been wrongfully appropriated and disposed of by the Defendants.

The facts of this case and of a previous action, No. 27/29 in the Land Court of Haifa, out of which this present case arises, are set out in great detail in the judgment under appeal and in the judgment of the learned Chief Justice which I have had the privilege of reading. They are not seriously disputed and it is not necessary for me to repeat them here. The District Court, from the evidence before it, was satisfied that this land was not in possession of the Appellants for a period of prescription as claimed by them — and in this it confirmed the previous finding on this point by the Haifa Land Court — and that the documents produced by the present Respondent were in its opinion sufficient to convey ownership. In spite of the very able and lengthy arguments addressed to us on behalf of the Appelants, I think that the District Court was right, except in regard to one minor point with which I will deal later, and I also think that it was right in holding that the Appellants in the circumstances of this case were in the position of trustees. That being so, no question of damages arises — as trustees they are responsible for the value of the properties wrongfully appropriated and disposed of by them, and that value cannot be better assessed than by the amount entered in the Land Registry as the amount of the consideration obtained from the sale by the Appellants.

But I think that the District Court went wrong in finding the Appellants jointly and severally liable. I do not think that they can

possibly be held to be trustees in respect of each other's shares, merely because they are heirs of their late father — they can only be trustees each in respect of his or her individual share, and the liability therefore is not joint and several.

As to the third Appellant, Nahil Cotran, there is one further point, namely, whether the Respondent in the course of the trial before the District Court waived his claim against her. It is stated on the record that the Respondent at the close of his evidence, said — "I don't claim anything from Nahil". The District Court, however, made a remark on the record, that the Respondent was obviously incoherent in all his answers, and it seems that they came to the conclusion that the Respondent did not mean to waive his claim against Nahil. The District Court saw this witness, and were in a position to determine what value had to be attached to his evidence and I do not think that this appreciation can be interfered with now on appeal.

In the result, I think that the appeal should be dismissed, but that the judgment of the District Court should be varied and judgment entered against each of the Appellants severally for the sum of LP. 397.410 mils, together with legal interest from the date of entry of the action in the District Court, and together with one fourth of the costs and advocate's fees as awarded by the District Court. The Respondent should have costs of this appeal assessed at LP. 10, to include advocate's fees.

The cross appeal must be dismissed with no costs to either side. Interest is properly payable from the date of entry of the action in the District Court. There is no basis for the claim for interest from the date of entry of the original Land Court action in 1929.

Delivered this 30th day of November, 1938.

British Puisne Judge.

Khayat, J.: The Plaintiff (the Respondent here), Iskander Cotran, brought an action before the District Court, Jerusalem, claiming from the Defendants, Tewfiq, Selim, Nahim and Nahil Cotran, his cousins, the price of 8 *kirats* out of 24 *kirats* in a plot of land, situated in the vicinity of Haifa. He alleged that the aforementioned persons had sold to him their shares in the said land, which devolved on them from their father, as per two deeds, the first being an Arbitration Deed, dated the 20th of *Kanun Thani*, 1304, the second a Power-of-Attorney made before the *Sharia* Court, dated the 16th of *Ramadan*, 1314 ; and as the aforementioned persons had sold what he owned, as per the

said two documents, to Kaiserman, for the sum of LP. 1589.640 mils, he therefore prayed that a judgment be given against them, jointly and severally, in the said sum, with interest, as they held the said sum by way of trust for him.

On the transfer being effected in the Land Registry, in the year 1929, the Plaintiff brought an action in the Land Court, Haifa, against the aforementioned Defendants, Mr. Kaiserman and Lord Melchett, claiming ownership on the strength of the said two documents, and asking for the cancellation of the registration in the name of Kaiserman and that of Lord Melchett after him. As a result of the trial the case was dismissed, as it was not proved to the Court that the purchasers had bought *mala fide*. The right of the Plaintiff, however, to claim by legal means the value of the land, was recognised in principle. The Defendants (Appellants now) appealed against the said judgment, and the appeal was dismissed by the Court of Appeal, on the ground that it had no connection with the ownership of the land in dispute, but allowed Defendants the right to submit any objection they desired when the Civil Case came up for hearing, *viz.*, the present case, which is now before us on appeal.

The District Court in its judgment dated the 8th of June, 1938, found — (1) that the *Hijjeh* was sufficient to establish ownership ; (2) that there was an excuse that interrupted prescription ; (3) that the value of the land coincided with the sale price registered at the Land Registry ; (4) that the Defendants were jointly and severally liable : and (5) that the Defendants had not possessed the land for the period of prescription.

The summary of the appeal submitted by the Defendants Selim and Naim is :—

(1) that the deeds were prescribed ;
(2) that a Power-of-Attorney does not transfer ownership ;
(3) that the Respondent is entitled to damages only ;
(4) that there was no joint and several liability ;
(5) that the value mentioned in the *Tabu* Deed does not represent the real price.

Attorney for the Appellant, Nahil, relied on Plaintiff's admission (Respondent here) before the Court below in that he waived his right against her. As the District Court before which the Plaintiff was a witness weighed this evidence and refused to accept it as an admission, owing to his condition before it, I see no reason to interfere with such finding.

The Respondent submitted a cross-appeal, claiming interest from the date of the action in the Land Court.

As to the appeal I hold that the District Court had before it the two documents, executed before the war, and was right in accordance with Section 8(1) of the Land Courts Ordinance, in considering such documents as capable of transferring ownership, and that there was no need to deal with the question of prescription under such circumstances after it was established as a fact that the Appellants had not possessed the land for the period of prescription.

As to the price of the land registered in the Land Registry, the Appellants are not entitled, after their clear admission as to the amount they received, to ask to prove the contrary.

With regard to joint and several liability I am of opinion that no such liability exists, for even if we adopt the principle of trust then there is no trusteeship in the price between the co-owners, for the one is considered as a stranger to the other in respect of his share.

As to the point that Respondent is entitled to damages only and not to the price received, I do not think it necessary to deal with it after the ownership to the land was established, the price fixed, and the transaction considered a sale and not an agreement to sell.

As to the cross-appeal there is no claim for interest prior to filing the present action in the District Court, and the case before the Land Court cannot be considered as being connected with a claim for interest. Wherefore it should be dismissed.

I am therefore of opinion that the appeal should be dismissed, and a judgment be given against each of the Appellants — Selim, Naim and Nahil — in one-fourth of the amount of LP. 1589.640 mils, with legal interest from date of filing the action in the District Court.

As regards costs, I agree with my brother Copland on this point.

Delivered this 30th day of November, 1938.

Puisne Judge.

Trusted, C. J.: This is an appeal from the District Court, Jerusalem, and there is a cross- appeal. In my judgment the appeal should be allowed and the cross-appeal dismissed.

It seems that many years ago three brothers — Jirius, Suleiman and Nasr Katran — were the joint owners of a piece of land situated at Haifa. In 1877, Suleiman, the second brother, died, and by operation of law his share of one-third passed to his heirs — Tewfiq, Saleem, Naim and Nahil. By a family arrangement made in 1889, which took

the form of an award by arbitrators, these heirs, for the considerations therein stated, agreed to transfer half their shares in the land to their uncles — Jirius and Nasr. If the original holding is regarded as being divided into twenty-four shares, these heirs, by inheritance, acquired between them eight shares, and by the arbitration agreed to transfer four shares. In 1896 the heirs entered into a further agreement to transfer four shares to their uncles, and executed an irrevocable power-of-attorney for this purpose. It is said, and presumably the District Court was satisfied as to this, that the right, subject to the matters discussed in this action, to these eight shares became vested by purchase in Iskander (Nasr's eldest son, and consequently a cousin of Tewfik, Saleem, Naim and Nahil).

It seems that in 1907 Nasr took steps to establish his possession of the land before the Court at Acre, that the proceedings subsequently went to the Court of Cassation, and that in the result Iskander failed. It also appears that at some time before 1897 a claim was made to the land by the *waqf*, which, many years afterwards, was held to be unfounded.

The land, which was on the outskirts of Haifa, with the growth of that town became of commercial importance and of considerable value, and in 1929, one, Kaiserman, acquired the various shares in the land, and eventually sold the whole to Lord Melchett. In the course of that transaction, by virtue of a certificate of succession, dated 23.11.25, on the 22nd of May, 1929, Suleiman's heirs, for the first time, became registered as owners of their father's share of the land, as to one-twelfth each (*i. e.* a total of eight-twenty fourths), and on the same date, by sale, they transferred their shares of the land (*i. e.* a total of one-third) to Kaiserman, according to the entry in the Land Registry, for LP. 1589.640.

In December, 1929, Iskander brought an action in the Land Court, Haifa, (Land Case No. 27/29) against the heirs of Suleiman, one, Kamil Kotran (representing Nasr's estate), Kaiserman and Lord Melchett. The substance of his case was that Suleiman's heirs had wrongfully purported to transfer property which belonged to him, and in his statement of claim he said :—

> "I pray for hearing of the action, passing a judgment for plaintiff's ownership of the disputed property, (*i. e.* the eight shares) and cancellation of the sale transaction made to defendants 6 and 7 (*i. e.* Kaiserman and Melchett)."

The action was heard by the Land Court, and apparently on the termination of the proceedings the President of the Court stated :—

"In the circumstances, it is obvious that the Plaintiff cannot prove bad faith on the part of either Lord Melchett or Kaiserman ; and as regards them the action is dismissed with costs to include advocate's fee LP. 5.

"As regards the remaining Defendants, there will be a declaration that the Plaintiff owned 16 shares out of 24 in the land in question. The heirs of Suleiman Kotran, *i. e.* Defendants (1), (4) and (6) must pay the Plaintiff's costs including advocate's fee LP. 10."

When, however, the formal judgment was published, it was in a different form, the most material parts being as follows :—

"As regards the remaining Defendants, there will be a declaration that submitted by Counsel for the Defendants, is irrelevant, because the Plaintiff did not file the documents which he produced in order to execute them but produced them in order to prove what had taken place at the time in support of this claim. The Court is satisfied from all these documents, from the evidence heard, and from the admission of the (rest) of the Defendants that the Plaintiff did actually own 16 Kirats out of 24 Kirats in the whole of the plot of land claimed, situate in the locality known as "El Ballan" Haifa, and registered in the *Tabu* under 416 of 25.7.21, which he owned in the manner described in his claim. Had the share of Suleiman Kotran remained registered in his name in the Land Registry, and was not transferred by his heirs to others, it would have been possible to cancel that registration and have it registered in the name of the Plaintiff, as it has been established that it was sold to him in a lawful manner, but as the whole of the said share has been transferred by the heirs of Suleiman Kotran and registered officially later in the name of Lord Melchett, and Counsel of the Plaintiff, even though he stated that the purchasers had knowledge of the fact of his client's ownership, he later on stated that he has nothing to show that Lord Melchett himself (the person to whose name the whole land was transferred and in whose name it was registered in the Land Registry) had knowledge that his client was previously the owner of the said share at any time.

.....

.....

"We therefore unanimously dismiss this action. Plaintiff has the option to resort to the legal means to collect the value of this share from the said heirs of Suleiman."

Three of the Defendants — Salem, Naim and Nahil, appealed to this Court in Land Appeal No. 74/32. Judgment was delivered on the 7th of July, 1933, as follows :—

"This appeal arises out of an action brought in the Land Court of Haifa by the Respondent Iskander Nasr Kotran who claimed a declaration of title to 8 out of 24 shares in a certain piece of land which shares he alleged had been purchased by his father from Suleiman Kotran.

"The Respondent further alleged that the present Appellants, who are

> the heirs of Suleiman, sold the shares to one, Nathan Kaiserman, by whom they had been resold to Lord Melchett.
>
> "The Land Court found in favour of the Respondent that he had acquired title to the shares in claim, but dismissed his action on the ground that there was no evidence proving that Lord Melchett had knowledge of the Respondent's previous ownership.
>
> "The present Appellants were joined with Lord Melchett as Defendants to the action though there does not appear to be any ground for this, as the only question before the Court was that of the title to the land and the Appellants clearly have no claim to be the owners. The Appellants have brought this appeal, not on the ground that they object to the judgment dismissing the Respondent's claim, but because they are aggrieved by the finding of the Court that the Respondent was formerly the owner of the shares in dispute.
>
> "We hold that this is not a ground upon which an appeal can lie.
>
> "Unless a party desires that a judgment shall be set aside or varied, he is not entitled to appeal against that judgment merely because he is of opinion that one of the issues before the Court was wrongly decided.
>
> "The Appellants have stated that the reason for which they have filed this appeal is that they fear that the Respondent may bring an action against them for the value of the shares and may rely upon the finding of the Land Court as to his former ownership.
>
> "If, however, such an action is brought, it will be for the Court which hears that action to decide all the necessary issues including that of the Respondent's former title to the shares.
>
> "The appeal is dismissed with costs."

The present action was brought by Iskander against the heirs of Suleiman, in the Haifa District Court, but by an Order of the High Court, the venue was changed to Jerusalem on the ground that upon the facts the Defendants would be prejudiced if the case was tried in the Haifa District Court.

In his statement of claim Iskander says :—

> "The Plaintiff now claims, on the basis of the said judgment in the Haifa Land Court, to recover from the Defendants the value of the said shares wrongfully transferred by them",

and he puts the value of LP. 1589.640. In the alternative he says that the eight shares sold were his property wrongfully appropriated and disposed of by the Defendants. He sets out the facts and goes on to say :—

> "The said sale (*i. e.* to Kaiserman) was made fraudulently in derogation of the Plaintiff's rights and with the full knowledge of the Defendants of those rights."

and in paragraph 5 of his statement of claim he formulates his actual claims as follows :—

"(a) Under the said judgment of the 14th of July, 1932, payment by the Defendants and each of them, jointly and severally, to the Plaintiff of the said sum of LP. 1589.640 mls.

(b) Alternatively, payment by the Defendants and each of them, jointly and severally, to the Plaintiff of the said sum of LP. 1589.640 mils, as being moneys had and received by the Defendants to the use of the Plaintiff.

(c) Such other or further relief as to this Honourable Court may seem just and proper."

On the 20th of January, 1935, the Defendants filed a reply in which they referred to the judgment in the Court of Appeal mentioned above (Land Appeal 74/32).

They said that :—

"documents which have not been enforced or executed for a period exceeding the time of prescription cannot be used as a basis for establishing any right"

and they attacked the validity of the original arbitration proceedings.

The Plaintiff filed a further pleading, setting out some additional facts, and in paragraph 4 pleaded :—

"By reason of the premises it is submitted that, if (contrary to the contentions of the plaintiff) prescription can apply to documents at all, yet in the present instance no prescription can attach to the *Hujje Sheria* of 1312, inasmuch as all transactions in the said land were prevented by orders of competent authorities from 1320 until 1926, and in November, 1929, the plaintiff instituted his proceedings in the Land Court of Haifa for recovery of the area in issue in the present case. Therefore, in November, 1929, the period of prescription had not expired and in the course of that action it was discovered that the defendants had parted with the property to third parties, thus making it impossible for the authority given to the attorney under the said *Hujje Sheria* to be exercised. Therefore, there has never been a period of fifteen years during which action could have been taken effectively on the *Hujje Sheria* and the same cannot be prescribed."

The Defendants filed a further pleading in which they discussed the question of the possession of the land and also the damages which would flow from a breach of the agreements. They also stated that the Plaintiff, in a letter of 1922, had acknowledged the Defendant, Salim's ownership of the land.

In this unsatisfactory state the matter first came before the District Court on 3.4.35. There appear to have been eight hearings and six adjournments without hearing, and judgment was eventually delivered some time after the 6th of April, 1938. It is not surprising, therefore, that the issues tended to become obscured, and I can only hope that

the new Civil Procedure Rules will do something to prevent so long a delay in the hearing of an action and to insure that issues are clarified.

At the conclusion of a lengthy judgment the District Court held :—

> "We are satisfied that the Plaintiff was in fact the owner of the 8 shares in dispute, which the Defendants wrongfully sold to N. Kaiserman, and as they were in the position of trustees, we enter judgment against them, jointly and severally, for LP. 1589.640 plus legal interest from the date of this action, with costs and advocate's fees LP. 10."

Whether the Plaintiff was the owner of the eight shares must be a question of law, and in my judgment he never was the owner, and I do not think the Defendants were ever in the position of trustees.

It is necessary to follow the proceedings with care to discover precisely what case the Plaintiff was proceeding to make. At the hearing of 24.5.35 it appears from the notes that the Plaintiff put his case in the following way :—

> "Suleiman and his heirs were in a position of Trust. They had disposed of their interest for good and proper consideration. Cause of Action arose in 1929 and is not prescribed, when Defendants transferred to Kaiserman and refused to account for value.
> Not using documents except to prove the ownership, operation of a document is prescribed not the document.
> This came up in 1929. Plaintiff was the true owner.
> Now claiming the proceeds not the ownership.
> No Cause of Action until 1929. Can further prove possession and *Werko* receipts.
> Validity of documents unquestionable.
> They are certified copies from Competent Court."

It also appears that the Defendant made no admission that the documents were properly made, and relied chiefly on prescription. The Court then gave an interlocutory judgment, as to which I will refer later, and at the hearing on 28.6.35, it appears from the record that Mr. Horowitz, on behalf of the Plaintiff, stated :—

> "that documents and judgment give *prima facie* case. The Defendants as Trustees have got themselves registered for the purpose of disposing and in fact have disposed of those shares and pocketed the proceeds — breach of trust — claim the amount of value declared in *Tabu* LP. 1589.640.
>
> "Consequential claim interest from 1st Claim in Land Court November, 1929, against the Defendants jointly and severally. Not claiming under *Mejelle* not a joint debt in ordinary cause (*sic*), but on footing of breach of Trust. Unlawful conversion and registration wrongfully as joint owners and entitled to go against them as one individual, but must apply doctrine of English Equity. Clear Breach of Trust by joint Trustees. They are jointly and severally liable."

and he went on to rely on Lewin's Law of Trusts and on Halsbury, Vol. 28.

It appears that at the hearing on 10.12.37 Mr. Horowitz submitted :—

> "Turkish documents were in fact a conveyance of the land, and due to attachment were not registered and judgment of Land Court finding of facts.
>
> Alternatively can rely upon the documents."

But it may be noted, that at the hearing on 1.4.38, it appears from the record —

> "that Plaintiff still relied on *res judicata*."

and later :—

> "Case based on breach of trust by trustees, it is quite clear, trustees are jointly and severally liable. Halsbury, Vol. 28, para. 378, (187) Estoppel, Lewin on Trusts, 11th Edition, Remedy for Breach of Trust."

There can be no doubt that Mr. Horowitz, on behalf of the Plaintiff (apart from any question of *res judicata*) was making then substantially the same case which he now makes before this Court, that is, that as a result of the transactions in 1889 and 1896 the Plaintiff, Iskander, was in the position of a purchaser who had paid the purchase price but had not had the property conveyed to him, and that the heirs of Suleiman were in the position of vendors who had received the purchase price but had not conveyed the property, and consequently, by the application of a principle of English Equity, they became constructive trustees for Iskander. For this purpose he was not suing upon the documents themselves, but using them only as evidence of the state of affairs for which he contends.

Alternatively as I have said, he submitted he could rely upon the documents, but for what purpose is not clear, and I am satisfied that his case was as I have stated.

The District Court, in its judgment, after setting out the facts, stated :—

> "After consideration we point out that the judgment of the Land Court, dated 14th July, 1932, No. 24/29, contains the following declaration :—
>
> 'As regards the remaining Defendants, there will be a declaration that the Plaintiffs owned 16 shares out of 24 in the land in question. The heirs of Suleiman Kotran must pay costs including Advocate's fee LP. 10.'
>
> from which it infers that Iskander Kotran, the Plaintiff in that action, owned 16 out of 24 shares in the land in question, which declaration became final by decision in Land Appeal 74/32.
>
> "In conformity with the directions contained in the last para. of said judgment, we proceeded with the case to decide whether or not the Plaintiff in this action is now entitled to recover from

> Defendants the purchase price of the 8 shares (out of the said 16 shares referred in Land Court Judgment, dated 14th July, 1932, No. 24/29)."

and it goes on to say :—

> "This Court, on the 28th June, 1935, issued the following Interlocutory Judgment :—
>
> In view of the fact that —
>
> (1) The action is based mainly on a *Hijje* during the Turkish Regime which constituted an irrevocable Power of Attorney to transfer the shares in dispute for a consideration paid at the time;
>
> (2) The sequestration placed on the land by the Turkish authorities as a result of a claim of the *Wakf*, constitutes a good defence for not using the document during the period of sequestration ;
>
> (3) It was a transaction between members of the same family which indicates that the Defendant held the position of a trustee ;
>
> (4) We are of opinion that there is no prescription on the document produced and we decide to go into the merits of the case.
>
> The said sequestration was not removed until 1926. No forgery was alleged against the *Hijjeh*. As the case of the Plaintiff is based upon written documents, upon which the Land Court in Case 24/29 decided that the Plaintiff was entitled to 16 out of 24 shares, it was for the Defendant, if he claims possession title, to prove same with right to the Plaintiff to bring rebutting evidence.
>
> The Defendant now claims possession and Court proceed to hear evidence for the Defendant".

It then discussed the evidence as to possession by the Defendant and stated :—

> "From the evidence before us we are satisfied that the land was not in possession of the Defendants for a period of prescription as claimed by them, and that the documents produced by Plaintiff are in our opinion sufficient to convey ownership.
>
> "The Plaintiff is therefore entitled to the value of 8 shares out of the 16 shares out of 24 mentioned in the judgment of the Land Court 24/29. As regards the value of these 8 shares, the Defendants as heirs to Suleiman Kotran who had sold to the Plaintiff must be considered in the position of trustees for the Plaintiff."

As I have already said, the Court went on to hold that as the Defendants were in the position of trustees their liability was joint and several, and it gave judgment for LP. 1589.640, the figure appearing in the Land Registry upon the transfer to Kaiserman.

It is clear that the District Court was under a misapprehension as to the terms of the actual judgment of the Haifa Land Court, and it is also clear from the earlier judgment of this Court to which I have referred in full — particularly paragraphs 4, 8 and 9 — that no issue

in the present proceedings was *res judicata,* nor was any estoppel between the parties to the present proceedings created thereby.

While reserving my judgment as to whether an action may be brought in a District Court upon a judgment of another Court of this Territory, I am satisfied that the present Plaintiff could not bring an action upon the judgment (nor upon the basis of the judgment) of the Haifa Land Court.

As to the interlocutory judgment of the District Court on the 28th of June, 1935, which is incorporated in the judgment, as I have stated, I do not think that the Paintiff ever based his claim on the *Hijjeh.* Had be done so the question would have arisen as to how far his right to base a claim upon it had become prescribed by lapse of time — and I desire expressly to reserve my opinion as to how far, if at all, any sequestration placed upon the land could have effected that right. I do not think that under Ottoman Law a transaction between members of the same family, *per se,* creates a trust, and I am of opinion that on any view of the case, and even if the Defendants were in the position of trustees for the Plaintiff, each would only be a trustee of his own shares, which he could have transferred independently of the other Defendants, and I fail to see how their liability could be joint and several.

It would appear that the District Court treated the case, although I find no mention of the Ordinance, as though it was an action before a Land Court brought under section 8 of the Land Courts Ordinance, Chapter 75, and to have assumed that if the Plaintiff could have established his title in such proceedings a trust would have been created. How far a Court, other than a Land Court, can avail itself of the proviso to section 8, may be a matter of argument, but apart from this, and assuming, contrary to my opinion, the Court was right in so approaching this case, I am of opinion that it misdirected itself in holding :—

> "As the case of the Plaintiff is based upon written documents, upon which the Land Court in case 24/29 decided that the Plaintiff was entitled to 16 out of 24 shares, it was for the Defendant, if he claims possession title, to prove same with right to the Pliantiff to bring rebutting evidence."

The judgment of the Land Court is not very clear, but in my view it never decided that the Plaintiff was entitled to 16 out of 24 shares, but if it did so it was not justified in so deciding without determining the fundamental issue of prescription. I have already referred to this Court's view of the effect of that judgment.

It follows that the District Court wrongly cast upon the Defendant the onus of proving possession.

Mr. Horowitz, on behalf of the Respondent (Plaintiff) did not suggest that a trust could be created by the section but fell back upon a doctrine of English Equity. To this it seems to me there are two answers. Firstly, what is the English principle which must be applied. It is discussed in Lysaght *v.* Edwards, 2 Ch. D., page 499, and at page 510, Jessel M. R., after reviewing the authorities, states :—

> "It must, therefore, be considered to be established that the vendor is a constructive trustee for the purchaser of the estate from the moment the contract is entered into."

The corollary to introducing into the law of Palestine an equitable right must be the introduction of the appropriate equitable remedy, and the Courts must consider whether the Plaintiff has been prompt in seeking his remedy. In a Privy Council case, Beckford *v.* Wade, Sir William Grant stated :—

> "It is certainly true that no time bars a direct trust as between *cestui que* trust and trustee ; but, if it is meant to be asserted that a Court of Equity allows a man to make out a case of constructive trust at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be ; so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into a Court of Equity to seek that relief."

which pronouncement is quoted with approval in Soar *v.* Ashwell, 1893, 2 Q. B. D., page 401, and see Taylor *v.* Davies, 1920, A. C., at page 61.

In the present case the Plaintiff took no effective step ta establish his equitable right until he brought this action in 1934. It is clear that he was making no equitable claim before the Land Court, as is pointed out in the judgment of this Court on Appeal, which, as I have already said, states :—

> "The only question before the Court was that of title to the land".

In my judgment, assuming that the Plaintiff's rights had not already been decided by Ottoman Law, he was too late in seeking his equitable remedy.

Mr. Horowitz contended that no cause of action arose until there was a breach of trust. In my view this is a fallacy. As soon as the equitable right arose the appropriate equitable remedy existed, and

to postpone an application to the Court to enforce it, is to create the mischief to which Sir William Grant refers.

Secondly, the doctrines of equity in force in England are invoked under Article 46 of the Order-in-Council. Its provisions may be open to argument, but in my opinion, those doctrines do not apply when the local law is clear.

Despite the difficulties which have arisen in the present case, where a contract for the sale of land was entered into before the British occupation and the purchaser did not obtain the property, the local law gives him, subject to the limitations on bringing actions, two remedies. He can avail himself of section 8 of the Land Courts Ordinance, which would seem to have been passed expressly to meet that situation (see L. A. 88/25, Rotenberg Vol. V, p. 1777) or, despite the fact that he has failed to avail himself of those provisions, he may bring an action for damages.

In Civil Appeal No. 136/33, Rotenberg, Vol. IV, p. 1415, where the facts were similar to this case in that there had been an unregistered sale before the British occupation and a subsequent sale to a third party, this Court held that the remedy was damages, and although it does not appear from the judgment, it appears from the record of the argument at which I have looked, that the question of breach of trust was raised. I may perhaps add that it does not appear that in that case the question of limitation was raised, and that since that judgment the question of the quantum of damage for breach of a contract to sell land has received further consideration by this Court.

Whether, on the facts of the present case, the Plaintiff could have succeeded if he had brought an action under the Land Courts Ordinance before the property was resold, and whether, having failed to do so, he could on the facts recover any, and if so what damages, it is not for me now to decide. I am satisfied that insofar as the Plaintiff's claim had not been affected by limitation, the local law gave him adequate remedies, and not having availed himself of them I do not think he can successfully invoke the principles of English Equity.

As the other members of this Court do not agree with me the result will be as indicated by my brother Copland at the end of his judgment.

Delivered this 30th day of November, 1938.

Chief Justice.

CIVIL APPEAL No. 199/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Frumkin, JJ.

IN THE APPEAL OF :

"Hamanchil" Co. Ltd. APPELLANTS.

v.

Jacob Halperin. RESPONDENT.

Agreement for sale of land — Failure to transfer within stipulated time — Damages and interest.

In dismissing an appeal from a judgment of the District Court of Jaffa, sitting in Tel-Aviv, dated the 8th day of July, 1938 :—

HELD : 1. The lower Court had correctly dealt with all the points raised in the appeal.

2. Interest on the amount of damages should not have been awarded.

ANNOTATIONS :

1. On the distinction between liquidated damages and penalties, *vide* cases set out in annotation to C. A. 132/38 (1938 1 S. C. J. 387). See also C. A. 217/38 (*post*, p. 221).

2. *Vide, e. g.* C. A. 114/36 (1937, 1 S. C. J. 207, 2 Ct. L. R. 47 C. of J. 1934-6 679).

FOR APPELLANTS : Dunkelblum.

FOR RESPONDENT : Greenbaum.

JUDGMENT:

This appeal arises out of a contract between the Appellant company and the Respondent. The Appellant company agreed to transfer certain land at Haifa to the Respondent for the sum of LP. 300. LP. 112 of the amount had been already paid and the agreement provided that the Respondent should pay a further LP. 88 and the balance of LP. 100 at the time of the issue of the *kushan*. The time for the issue of the *kushan* was fixed for the 1st of May, 1934, and it was provided that if the company repented from the sale they were to pay back LP. 200, part of the purchase money received and a further LP. 200 as compensation agreed to beforehand. This agreement was made on the 20th of November, 1933. Nothing was done in connection with the transfer until the 11th of October, 1935, when the Respondent's advocate wrote to the company calling upon it to transfer the plot of land within two weeks. The transfer was apparently not effected and on the 31st of March, 1938, we find the Respondent serving a notarial notice on the

company to transfer the plot of land by the 10th of April, 1938. The company replied to them saying that LP. 40 further was due to them and that they would not transfer the land until that amount was paid, and there was another letter from the company dated the 8th of April, 1938, alleging that the time fixed for the transfer of the land was insufficient. The land was not transferred and the Respondent took action in the District Court sitting at Tel-Aviv claiming LP. 200, part of the purchase money paid and LP. 200 as damages. The company set up a defence stating firstly, that the balance of LP. 100 had to be paid before the transfer ; secondly, that the time given for the transfer was insufficient ; thirdly, that the company had never repented from the agreement ; and fourthly, that the damages stipulated were actually a penalty. In its judgment the District Court dealt with all these points. It found that there was no stipulation that the LP. 100 had to be paid before the transfer and that there was not any undertaking by the Respondent to pay LP. 40 in connection with the building of a road. It further found that the letters and documents produced in Court contained no reference whatever to an extension of time, and it decided that there was no difference whatever between repenting from the execution of an agreement and a breach of the agreement.

On the question of penalty it took the facts at the time of the contract into consideration including the fact that LP. 112 had been paid 8 years previously by the Respondent and it found that the LP. 200 agreed on were liquidated damages. The company has appealed to this Court and Mr. Dunkelblum on its behalf has urged the same points which he urged before the Court below. All we need say with regard to this, is that we are in full agreement with the findings of facts and the ruling of law in the Court below and we can add nothing useful to their judgment. Mr. Dunkelblum took a further point, objecting to the award by the Court below of interest from the date of action on the LP. 200 awarded as damages. Mr. Greenbaum for the Respondent did not press for the award of this interest, and we think that the Court below erred in awarding it. In the result the order will be that the appeal is dismissed, but that the judgment of the Court below must be varied so that legal interest from the date of action is awarded on LP. 200 only and not on LP. 400. The Respondent will have the costs of this appeal and the fee for attendance at the hearing is fixed at LP. 15.

Delivered this 24th day of November, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 188/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Frumkin, JJ.

IN THE APPEAL OF :

Assicurazioni Generali. APPELLANTS.

v.

Samuel M. Levy. RESPONDENT.

Insurance — Exceptions — Abnormal conditions — Onus of proof — Construction of policy — Nature of proof required — Evidence of the existence of abnormal conditions.

In allowing an appeal from a decree of the District Court of Tel-Aviv, dated the 30th day of June, 1938, and in setting aside the judgment of the District Court and entering judgment for the Appellants :—

HELD : 1. On the construction of the policy, if the Insurance Company alleges the existence of abnormal conditions and relies upon the exception, it is for the insured to prove the absence of the exception or that, if the exception existed, it did not in any manner occasion or contribute to the loss.

2. The insured can discharge this onus by showing that the abnormal conditions could not reasonably have caused or contributed to the fire. In the result, it is necessary for the Court to be satisfied either that there was no abnormal condition joined by a chain of causation to one of the events set out in the condition, or, that if there was that condition of affairs, it did not affect the fire.

3. The object of the policy was to cover the fire unconnected with certain exceptions, and by issuing it on a certain day, the Appelants did not waive their right to rely upon the exceptions if and when they existed.

4. There was no dispute as to the facts and the Appellate Court was entitled to draw therefrom the inference that there were abnormal conditions : At the date of the fire the Emergency Regulations were in force, the police were carrying arms, which in 1935 they did not do, and, from the evidence of Mr. Hackett, it could not be said that the loss or damage happened independently of the abnormal conditions.

ANNOTATIONS : See and compare C. A. 43/37 (P. P. 11-13.v.37) where the same clause was discussed.

FOR APPELLANTS : Horowitz.

FOR RESPONDENT : Levitsky.

JUDGMENT:

This is an appeal from a judgment of the District Court sitting at Tel-Aviv, which, in my judgment, should be allowed.

By a policy dated 13th November, 1936, the Appellant Company insured the Respondent against fire in his warehouse in Jaffa. The policy contained a number of conditions, but we are concerned only with condition 6, as follows :—

> "6. This insurance does not cover any loss or damage which either in origin or extent is directly or indirectly, proximately or remotely, occasioned by or contributed to by any of the following occurrences, or which, either in origin or extent directly or indirectly, proximately or remotely, arises out of or in connection with any of such occurrences, namely :—
>
> (1) Earthquake, volcanic eruption, typhoon, hurricane, tornado, cyclone, or other convulsion of nature or atmospheric disturbance.
>
> (2) War, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not), mutiny, riot, civil commotion, insurrection, rebellion, revolution, conspiracy, military or usurped power, martial law or state of siege, or any of the events or causes which determine the proclamation or maintenance of martial law or state of siege.
>
> Any loss or damage happening during the existence of abnormal conditions (whether physical or otherwise), directly or indirectly, proximately or remotely, occasioned by or contributed to by or arising out of or in connection with any of the said occurrences shall be deemed to be loss or damage which is not covered by this insurance, except to the extent that the Insured shall prove that such loss or damage happened independently of the existence of such abnormal conditions.
>
> In any action, suit or other proceeding, where the Company alleges that by reason of the provisions of this condition any loss or damage is not covered by this insurance the burden of proving that such loss or damage is covered shall be upon the Insured."

On 14th December, 1936, a fire occured at the insured premises. In March, 1937, the Insured brought an action claiming LP. 1900. In its defence the Company admitted that the fire occurred, and admitted the amount of the damage, but pleaded that, by reason of condition 6, it was not liable. Alternatively it pleaded (a) that the loss happened during the existence of abnormal conditions, within the meaning of that condition ; (b) the :—

> "loss or damage (if any) either in origin or extent was directly or indirectly, proximately or remotely, occasioned by or contributed to by, or arose directly or indirectly, proximately or remotely, out of or in connection with riot, civil commotion, insurrection, rebellion,

> revolution, conspiracy, military or usurped power, or one or more events or causes which determine the proclamation or maintenance of martial law or state of siege."

The District Court, not without doubt, following earlier decisions of the same Court (which unfortunately were not cited to us) held that under the condition the onus of proof was upon the Defendant Company, and having heard evidence held, for reasons to which I will later refer, that the Company had failed to discharge that onus and gave judgment for the Plaintiff. The Company now appeals to this Court on the ground that the Court of Trial was wrong in placing the onus upon it, and that that Court misdirected itself in coming to the conclusion that it (the Company) had failed to discharge the onus placed upon it of showing the existence of abnormal conditions.

Mr. Horowitz, on behalf of the Company, informs us that the policy is in a form common to a group of companies doing business in this part of the world, and that consequently this case is of interest to persons other than the parties.

The first paragraph of the condition in question provides, in an elaborate form, that the insurance does not cover loss due directly or indirectly to (1) natural phenomena, (2) violence due to human agency. If this stood alone it would be for the Company to show that an exception applied.

It is manifestly difficult in times of emergency to prove whether a fire is due directly or indirectly to the cause of the emergency, and I assume that for this reason the second paragraph of the clause was inserted. It provides in wide terms that loss or damage happening during the existence of abnormal conditions arising out of or in connection with the matters set out in the earlier part of the clause, shall be deemed to be loss which is not covered except to the extent that the Insured shall prove that the loss was independent of the abnormal conditions. In deference to the argument which was addressed to us I may say that, in my opinion, the words from "whether" to "said occurrences" qualify abnormal conditions. Again, if this paragraph stood alone it would be for the Company to prove the existence of abnormal conditions, and for the Insured then to prove that the loss happened independently of them.

In the third paragraph of the clause the parties have expressly agreed as to the onus of proof, and I know of no reason why they should not do so. It is true that the primary object of a fire policy is to insure against fire, that it is often difficult to prove how a fire

emanates and that the Company draws up the policy, and in consequence, where there is an ambiguity, Courts are inclined to construe it in favour of the insured ; but there seems to me to be no ambiguity in the paragraph. "Allege" does not mean "prove", and I would point out with all respect to the Court below that if its interpretation is applied this paragraph would appear to be surplusage, and I can hardly think that it should be so regarded.

In the result, when the Company relies upon the third paragraph it is for the Insured to prove either the absence of the exception, or that, if the exception existed, it did not occasion or contribute to the loss or that the loss did not arise out of it, or that the loss or the damage in cases where abnormal conditions existed happened independently of the existence of such abnormal conditions.

Although the Defendant Company in its pleading relied on condition 6 generally, it is clear that throughout this case has been argued on the basis of the existence of abnormal conditions.

Before dealing with this case in detail I would consider what the Insured must prove assuming the Court is satisfied that abnormal conditions existed. Must he prove positively the cause of the fire or can he show by argument or otherwise that the abnormal conditions could not in any reasonable probability have caused or contributed to the fire.

Bearing in mind, as I have said, that the object of a fire insurance is to insure against fire, and that it is common knowledge that in many cases it is difficult if not impossible to prove the cause of a fire, and that the condition does not provide that the Insured shall prove the cause of the fire, I am of opinion that the Insured can discharge the onus by showing that the abnormal conditions could not reasonably have caused or contributed to the fire. In the result, subject to the shifting to and fro of the onus of proof in order that the Plaintiff may recover, it is necessary for the Court to be satisfied either that there was no abnormal condition joined by a chain of causation to one of the events set out in the earlier part of the condition, or, that if there was that condition of affairs it did not affect the fire.

In this case the Court had before it the evidence of the police officer in charge of the district at material times, he was actually called by the Company and cross-examined by the Plaintiff. I will refer in detail to his evidence later. Throughout it seems to have been assumed that the state of affairs which he described was due to one of the matters set out in group (2) in the clause. Upon this evidence

the Court below does not appear to have decided if conditions were abnormal in the general sense, but to have decided that they were normal within the contemplation of the parties in that the state of affairs when the policy was issued is the standard of normality (if I may use such an expression) to be applied, and it goes on to state in its judgment :—

> "It seems that they themselves (the Insurers) on 13th November, 1936, did not consider conditions to be abnormal, otherwise presumably they would have refused to accept the risk."

With all respect I cannot agree with this view. The object of the policy was to cover fire unconnected with certain exceptions, and by issuing it on a certain day I do not think the Company waived its right to rely upon the exceptions if and when they existed.

Normal conditions no doubt change from time to time, but under the policy abnormal conditions must be connected with certain occurrences, and when this is remembered, I see no reason why a Court should not be able to determine the question of their existence.

Mr. Horowitz suggested that if we were of opinion that the onus was wrongly cast upon the Defendants the case might go back for further hearing, but I do not think that it is necessary. In the result the Court heard the evidence of a responsible police officer, and the Plaintiff did not give evidence himself or call any other evidence. There is no real dispute as to the facts, and we are entitled to draw inferences therefrom.

At the date of the fire the Emergency Regulations were in force — in itself that would seem to be an abnormal condition, other than physical, but it could hardly be suggested that the loss did not happen independently of that. The police were carrying arms, rifles, which in 1935 they did not do. In itself, in the absence of some quite extraordinary accident, this would not affect a fire.

Mr. Hackett also said : —

> "Curfew on Jaffa area was removed on 26.10.36. After curfew was taken off fires took place frequently in Jaffa area. These were not fires which would occur in times of normal position of security. I could not say that conditions were normal, there was great enmity between Jews and Arabs at that time. There was a virtual boycott. Arabs were being prevented by intimidation from buying Jewish goods and *vice versa*. In this quarter, then, at 6.45 *p. m.*, on the 14th December, 1936, it would not be safe for Jews to walk about in this quarter. Police patrols were carrying arms, rifles, then. As a general rule in 1935 police patrols did not carry rifles. There were a number of outrages in December, 1936, in Jaffa a number of bombs thrown."

and in answer to the Court he said :—

> "If a Jew who had a business in Mustaquim area just prior to 14.12.36 asked me for advice as to re-opening his shop, I would have told him that it was dangerous. The services of the army were not required then."

Can it be fairly said that the loss or damage must, upon any reasonable view, have happened independently of these abnormal conditions which Mr. Hackett described ? I do not think that it can. The Plaintiff has failed, therefore, to discharge the onus placed upon him.

The judgment of the District Court will be set aside and judgment entered for the Defendants, with costs here and below. Costs in this Court to include disbursements and Advocate's fees, to be fixed at LP. 15.

Delivered this 8th day of December, 1938.

Chief Justice.

HIGH COURT No. 68/38.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPLICATION OF :

1. Sonta Cordi,
2. Yulia Cordi,
3. Christian Cordi,
4. Daoud Cordi,
5. Emile Cordi. — PETITIONERS.

v.

1. President, District Court, Jerusalem,
2. Catherine Lolas. — RESPONDENTS.

Application for stay of sale — High Court reluctant to interfere with discretion of C. E. O. — Reasonable exercise of discretion — No costs where application in forma pauperis.

In dismissing an application for an order directed to the First Respondent to show cause why his order dated the 19th November, 1938, in Execution File, Jerusalem, No. 2330/37, should not be set aside and why he should not grant

a postponement for six months of the sale of the Petitioners' mortgaged immovable property :—

HELD : The High Court is always reluctant to interfere with the discretion of the Chief Execution Officer if he has exercised that discretion properly. In this case the Chief Execution Officer had by no means hurried the sale and had given a series of extensions. It could therefore not be said that he had exercised his discretion wrongly.

ANNOTATIONS : See H. C. 58/38 (*ante*, p. 82) and annotations.

PETITIONERS : 1—4. In person,
5. Absent.

FOR RESPONDENTS : 1. No appearance,
2. Mizrachi.

ORDER:

In this application the Petitioners are asking us to grant a further stay of six months in respect of an order of sale given by the Chief Execution Officer, Jerusalem. The mortgage, in respect of which this application for sale has been made, fell due on the 14th of February, 1936. Extensions were granted on the 30th of July, and again in November, 1937. It was not until the 25th of November, 1937, that an order for sale was given. On the 11th of July, 1938, Petitioners put in a fresh application asking for a further delay which was refused and they repeated their application on the 11th of November, 1938, and that application was also refused.

Now, as we have said on several occasions, the High Court is always reluctant to interfere with the discretion of the Chief Execution Officer if he has exercised that discretion properly. In this case it seems to us that he has by no means hurried the sale of this property, that he has given a series of extensions to the Petitioners on their applications, and that it is now nearly three years since this mortgage debt matured.

In these circumstances we cannot say that the Chief Execution Officer has exercised his discretion wrongly. That is really the only point before us in this application and we think that the application fails. The order *nisi* must therefore be discharged. No order as to costs as the application is made in *forma pauperis*.

Delivered this 20th day of December, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 217/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, the Senior Puisne Judge, Greene, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Yacoub Nakashian. APPELLANT.

v.

Salim Abdo Nassor. RESPONDENT.

Measure of damage for breach of contract in Ottoman Law — C. P. C. 109, 110 — *Direct loss and loss of profit — C. A.* 126/38 *and C. A.* 147/26 — *Agreements to sell and void dispositions — Land Transfer Ordinance, secs.* 2, 11 — *Remittal under rule* 342.

In allowing an appeal from a judgment of the District Court of Jaffa, dated the 30th July, 1938, and in remitting the case to the lower Court with directions : —

HELD : 1. "Profits" in Act. 110 of the Code of Civil Procedure refer to a gain a party expects to realise by some dealings with the subject matter of the contract after the contract has been fulfilled. They do not include an advantage, which he expects to gain exclusively out of the bargain between himself and the other party to the contract.

2. Following C. A. 147/26, not following C. A. 126/38. The amount of damages recoverable by Appellant was the difference between the contract price and the value of the land at the date of the repudiation.

3. A person who agrees to buy land and pays the purchase money or part of it cannot recover the purchase money under sec. 11 of the Land Transfer Ordinance, unless he satisfies the Court that there has been a disposition of the land within the meaning of the section and that the disposition was made without the consent of the Director of Lands.

A mere agreement to sell is not a disposition within the meaning of the section and does not require the consent of the Director of Lands.

FOLLOWED : C. A. 147/26 (P. L. R. 116, C. of J. 378).

NOT FOLLOWED : C. A. 126/38 (1938, 1 S. C. J. 428).

ANNOTATIONS : *Vide* note 3 to C. A. 126/38 (*supra*). See also C. A. 157/22 (C. of J. 1626) ; C. A. 99/29 (C. of J. 1632) ; C. A. 124/25 (C. of J. 1627 sub No. 149/26) ; C. A. 105/30 (C. of J. 1636).

2. *Vide* C. A. 199/38 *Supra*, p. 212) and note.

3. See cases quoted in note 1. to C. A. 221/38 (*ante*, p. 161) and annotation thereto.

FOR APPELLANT : Cattan, Germanus.

FOR RESPONDENT : Shehadeh.

JUDGMENT.

This appeal is concerned with the measure of damages under the Ottoman Law in the case of a breach of contract to purchase land. The relevant provisions of the law are Articles 109 and 110 of the Ottoman Code of Civil Procedure. These are as follows :—

> "Art. 109. If the non-performance of an obligation be not due to bad faith on the part of the person bound to perform it, the damages awarded against him shall be equivalent only to the direct and determinate loss suffered by the other party owing to such non-performance."
>
> "Art. 110. If the non-performance of the obligation be due to fraud or bad faith on the part of the person bound to perform it, he shall be liable to pay damages which shall include both direct loss caused to the other party by such non-performance and also profits of which he may have been deprived owing to such non-performance."

A distinction is drawn between direct and determinate loss caused by the breach and profits of which a person may be deprived owing to the breach. In the case at present before us the facts were that the Appellant agreed to sell land to the Respondent for LP. 300. A fine of LP. 300 was provided in case of breach and the Respondent had paid LP. 65 as part of the purchase money. The Respondent repudiated the contract and sued successfully in a Magistrate's Court for the return of his LP. 65. The Appellant then sued in the District Court for LP. 300 as damages. The District Court held that there had been a breach of contract by the Respondent. Though the judgment does not say so expressly it is clear that it held that the LP. 300 was a penalty. The Appellant called evidence to show that at the time of the repudiation by the Respondent, the land was not worth LP. 300 and claimed that he was entitled to damages, such damages to be calculated by the difference between the contract price of LP. 300 and the value of the land at the date of the repudiation. The Court below held that if such damages were proved they fell under the heading of profits of which the Appellant had been deprived owing to the breach, that there had been no fraud or bad faith on the part of the Respondent and that consequently the Appellant was not entitled to recover any damages for the breach. His action was consequently dismissed.

2. In coming to this decision the Court below followed a recent decision of this Court namely Paz *v.* Salim Mustafa and others, No. 126 of 1938. In that case Salim Mustafa and other persons had agreed to sell land to Paz. They refused to fulfil their contract and Paz sued them for damages in the District Court. He claimed LP. 300

as liquidated damages, LP. 44 which he had paid in advance for the land and LP. 20 which he had paid to a surveyor. The District Court decided that the LP. 300 was a penalty. Paz then contended that the measure of damages was the difference between the price stated in the contract and the selling price on the date of the breach. The District Court took the view that such damages came under the heading of profits of which Paz had been deprived owing to the breach and that as there was no allegation that the breach was due to fraud or bad faith, no damages could be awarded under this head. They awarded Paz as damages the LP. 44 which he had advanced and the LP. 20 which he had paid to the surveyor. This decision was upheld by this Court on appeal, but in dismissing the appeal this Court overruled one of its previous decisions, decided as long ago as 1926, namely Zeide *v.* Alcalay, Volume 1, Palestine Law Reports p. 116. That case was similar to the present one. Zeide had agreed to sell land to Alcalay. The latter repudiated the agreement and sued for the refund of the purchase money. Zeide counterclaimed for damages, Alcalay succeeded in his claim. Zeide's counterclaim failed. He appealed and this Court held that he was entitled to be compensated in damages, and that the measure of the damages was the difference between the agreed price and the estimated market price of the land at the time when the contract was repudiated.

3. In the present appeal Mr. Cattan has asked us to say that this latter decision was correct and that this Court erred in overruling it in the Paz case (*supra*). The solution of the question depends on the interpretation to be placed on the Articles set out above. We are of opinion that "profits" in Art. 110 refer to a gain which a party expects to realise by some dealing with the subject matter of the contract after the contract has been fulfilled. They do not include an advantage which he expects to gain exclusively out of the bargain between himself and the other party to the contract.

4. Neither fraud nor bad faith was alleged in the present action. No question therefore arises as to any profits of which the Appellant has been deprived by the breach nor are there any allegations of fact which make the question of any such profits relevant. The issues to be determinated are :—

(a) Did the Appellant suffer any direct or determinate loss owing to the breach ?

(b) If so, how is he to be compensated for that loss.

The Appellant desired to sell his land, that is to exchange it for money. He succeeded in inducing the Respondent to offer LP. 300

for it. The Respondent repudiated the agreement, and if at the time of this repudiation the land was worth less than LP. 300 the Appellant lost the benefit of his bargain. This would be a direct loss and the Appellant would be entitled to be compensated for it. The amount of this compensation can be determined and an appropriate method of determining it would be to award the Appellant the difference between the contract price and the value of the land at the date of the repudiation. It seems therefore that the Zeide case (*supra*) was correctly decided and that it ought not to have been overruled.

5. We think it necessary to refer to one point in connection with the case. The Respondent repudiated the agreement by suing for the return of the LP. 65 which he had advanced. The learned Magistrate considered that he was bound to give judgment in his favour owing to the provisions of Section 11(1) of the Land Transfer Ordinance. This subsection read as follows :—

> "Every disposition to which the consent required by Section 4 has not been obtained shall be null and void : provided that any person who has paid money in respect of a disposition which is null and void may recover such money by action in the courts."

The consent required by Section 4 is the consent of the Director of Lands. Disposition is defined in Section 2 as follows :—

> "Disposition means a sale, mortgage, gift, dedication of *waqf* of every description, and any other disposition of immovable property, except a devise by will or a lease for a term not exceeding three years, and includes a transfer of mortgage and a lease containing an option by virtue of which the term may exceed three years."

If a party agrees to buy land and pays the purchase money or part of it, he cannot recover this money under Section 11(1) of the Land Transfer Ordinance, unless he satisfies the Court that there has been a disposition of the land within the meaning of this definition and that the disposition was made without the consent of the Director of Lands. A mere agreement to sell land is not a disposition within the meaning of the definition. Such agreements do not require the consent of the Director of Lands. The Courts always treat them as valid in actions for their breach and do not insist on the consent of the Director of Lands being proved. There may be grounds on which a prospective purchaser of land may recover his money before there has been an actual disposition but Sec. 11(1) of the Land Transfer Ordinance is not one of them.

6. Although the Court below took evidence as to the value of the land at the time of the repudiation, it made no finding on this issue. We are therefore unable to decide this appeal at present and

under the provisions of Rule 342 of the Civil Procedure Rules, 1938, we frame an issue as to what was the fair value of this land at the time of the repudiation by the Respondent, *viz.*, the date when he commenced his action in the Magistrate's Court for the refund of his LP. 65. We refer this issue for trial to the Court below and direct that either party is at liberty to adduce any additional evidence on the issue. After the issue has been tried the Court below will return to this Court the said evidence with the finding thereon and its reasons therefore.

Costs reserved.

Delivered this 22nd day of December, 1938.

Senior Puisne Judge.

HIGH COURT No. 67/38.

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

BEFORE : Copland and Khayat, JJ.

IN THE PETITION OF :

J. L. Hirshlovitz. PETITIONER.

v.

1. The President of the District Court, Tel-Aviv,
2. Jacob Leibowitz,
3. Moshe Chazan. RESPONDENTS.

Sale of mortgage in execution — Affidavit may be sworn by advocate — Non-interference by High Court with discretion of C. E. O., except in certain circumstances — Land Transfer Ordinance, sec. 14.

In dismissing an application for an order to issue to the First Respondent to show cause why his served order, dated the 7th October, 1938, should not be set aside, and his first order, dated the 4th February, 1938, restored :—

HELD : 1. There is no objection to an advocate swearing an affidavit on behalf of his clients if the facts are within the knowledge of the advocate, particularly, in proceedings such as these, which concern execution matters, where the advocate is in a better position to judge as to the truth of the various facts, than would be the Petitioner himself.

2. The High Court is loath to interfere in matters of discretion, unless it can be shown that the Chief Execution Officer has acted illegally, or has taken into consideration facts which should not have been so taken, or has been influenced by arguments which are irrelevant to the issue before him.

ANNOTATIONS: See also H. C. 58/38 (*ante*, p. 82) and annotations; H. C. 68/38 (20.xii.38).

FOR PETITIONER: Spindel.
FOR RESPONDENTS: 1 and 3 No appearance.
2. Levitsky.

ORDER.

In this application the Petitioner has asked us to say that the Chief Execution Officer of Tel-Aviv, in ordering a postponement of sale proceedings in respect of a mortgage, has not exercised his duties or his discretion properly, and has granted too long a period of delay before proceedings of sale should commence.

Two points of importance have been taken by the 2nd Respondent, who is the mortgagor, in the arguments before us to-day. The first one is that the affidavit in respect of the petition was not sworn to or affirmed by the Petitioner himself, but by his advocate. We see no objection to this course if the facts deposed to in a petition are within the personal knowledge of the advocate making an affidavit. In proceedings such as these, which concern execution matters, the advocate probably is in an infinitely better position to depose as to the truth of the various facts set out, than would be the Petitioner himself.

The second point is with regard to the discretion exercised by the Chief Execution Officer in making the Order which he did. Now it is necessary I suppose once again to say that in matters of discretion this Court is always loath, to interfere, and unless it can be shown to us that the Chief Execution Officer has acted illegally or has taken into consideration facts which should not have been so taken, or has been influenced by arguments which are irrelevant to the issue before him, unless as I say something of that nature is proved before us, we will not interfere with an Order given by the Chief Execution Officer under Section 14 of the Land Transfer Ordinance. Nothing in the arguments which have been addressed to us by the Petitioner has convinced us that any of these factors are present in this case. For that reason we think that the petition fails. The rule *nisi* is discharged with costs assessed at LP. 10.—, to include advocate's fees, to be paid by the Petitioner to the 2nd Respondent.

Given this 22nd day of December, 1938.

British Puisne Judge.

CRIMINAL APPEAL No. 84/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Frumkin, JJ.

IN THE APPEAL OF :

The Attorney General. APPELLANT.

v.

Mohammad Mustafa Kleibo. RESPONDENT.

Theft of electricity — Gravity of offence — Appeal by A. G. against sentence — Criminal Code Ordinance secs. 37(*d*), 43 — *Compensation.*

In allowing an appeal from a judgment of the District Court, Jerusalem, dated the 11th October, 1938, whereby the Respondent was convicted of an offence under Section 285(1) of the Criminal Code Ordinance, 1936, and sentenced to a fine of LP. 5.—

HELD : The sentence should be increased and the Respondent would pay compensation to the Jerusalem Electric and Public Service Corporation Ltd., in addition to the fine.

ANNOTATIONS : See the following cases on theft of electricity. — CR. A. 73/38 (*ante*, p. 79) ; CR. A. 77/38 (*ante*, p. 89).

FOR APPELLANT : Salant.

RESPONDENT : In person.

JUDGMENT.

This is an appeal by the Attorney-General on the ground that the punishment awarded was insufficient in a case in which the accused person was convicted by the District Court of stealing electricity and sentenced to a fine of LP. 5 or two months' imprisonment.

This Court recently pointed out that stealing electricity is a felony, and that persons committing it might find themselves condemned to imprisonment ; although no doubt, the offence in this case was committed before those observations were made.

It is clear from the facts of this case that a deliberate and ingenious swindle was going on for a considerable time.

The Accused was fortunate in receiving so light a punishment, and in the circumstances we consider that it should be increased, and by virtue of the provisions of Section 37(d) of the Criminal Code Ordinance, we direct that the Accused pay the sum of LP. 40 (in

addition to the fine) by way of compensation to the Jerusalem Electric and Public Service Corporation, Ltd., which sum will be recoverable in accordance with Section 43 of that Ordinance.

Delivered this 30th day of November, 1938.

Chief Justice.

PRIVY COUNCIL LEAVE APPLICATION No. 13/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Greene and Frumkin, JJ.

IN THE APPLICATION OF :

1. Jaher Elias Kotia,
2. Sami Elias Kotia. APPLICANTS.

v.

Katr Bint Jiryes Nahas. RESPONDENT.

Petition for leave to appeal to Privy Council — No indication as to amount involved — Necessity to file affidavit — Time to file affidavit — Petition defective for want of affidavit — What amounts to an application for extension of time — Adjournment granted to amend defect in petition — Counter affidavits.

In adjourning an application for leave to appeal to His Majesty in Council from a judgment of the Court of Appeal, dated the 31st October, 1938 :—

HELD : 1. In view of the fact that there was nothing in the proceedings to indicate that the amount involved exceeded LP. 500, it was necessary for Applicants to file an affidavit.

2. Although before the Court, the petition was defective.

3. The Court could adjourn the petition in order to enable the Applicants to remedy the defect. This did not amount to an application for an extension of time.

ANNOTATIONS : The previous proceedings (C. A. 220/38) are reported *ante*, p. 151.

FOR APPLICANTS : Eliash.

FOR RESPONDENT : Goitein.

ORDER:

This is a petition for leave to appeal to His Majesty in Council from a judgment of this Court. The petition simply consists of state-

ments made by the advocate for the Petitioners. In that statement it is said that the amount involved in the dispute exceeds LP. 500. This is contested by the other side. There is nothing in the proceedings either of the District Court or this Court to indicate what amount, if any, is involved in this appeal. We are in agreement with Mr. Goitein for Respondent that in a case of this kind an affidavit should have been filed on behalf of the Petitioners. Mr. Eliash, for the Petitioners, having been notified of this view of the Court, has asked the Court to grant him an adjournment so that the necessary affidavit may be filed. Mr. Goitein objected to this course being taken on the grounds that it is really an application for an extension of time within which to file the petition, and that, there being no affidavit, there is no proper petition before this Court. We do not agree that there is no proper petition before the Court. There is a petition but it is defective for want of an affidavit. Neither do we think that Mr. Eliash's application is an application for an extension of time. We are not disposed to refuse a petition on the ground merely that the petition is defective in some particular, and we have the power to adjourn it in order that the effects may be cured or amended.

In deciding to grant an adjournment we are not deciding the important points which have been raised by Mr. Goitein as to whether an appeal lies as of right in this matter to His Majesty in Council. These points will be decided later if necessary.

This petition is therefore adjourned. The Petitioner will file an affidavit as to the description and value of the land mentioned in the case within ten days from today.

A counter affidavit may be filed by Respondent within the ten following days, and a date can then be fixed for the resumed hearing of this petition.

In the circumstances the Respondent will have today's costs to include a fee of LP. 10 for attendance at this hearing.

Given this third day of December, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 192/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Frumkin, JJ.

IN THE APPLICATION OF :

Dr. Paul Berg. APPLICANT.

V.

1. Itzhak Karokes,
2. Israel Avivi. RESPONDENTS.

Application for rehearing of appeal given ex-parte — C. P. R. 337-8 — Affidavits — Sufficient cause shown.

In allowing an application under rule 338 of the Civil Procedure Rules, 1938, for the rehearing of the above appeal which was heard *ex-parte* in the absence of the Applicant ; and in setting aside the appellate judgment and ordering that the appeal be reheard :—

HELD : It was not contested that the Applicant's advocate had been stopped by the military authorities on the day of the case. This constituted a sufficient cause for Applicant's failure to appear on the day of the case.

ANNOTATIONS : For earlier proceedings see *ante*, p. 144.

FOR APPLICANT : Levitsky.
FOR RESPONDENT No. 1 : Nedder.
FOR RESPONDENT No. 2 : Goddard.

ORDER:

This is an application made under Rule 338 of the Civil Procedure Rules, 1938. An appeal had been decided in the absence of the Appellant under Rule 337. The Appellant asks the Court now to rehear the appeal on the ground that there was sufficient cause to prevent him from appearing on the date fixed for the hearing of the appeal.

Affidavits have been filed showing that, on this latter date, the Appellants advocate, who lives in Tel-Aviv, started at 7.30 a. m. to come to Jerusalem in a motor car, and that he was stopped by the military authorities who refused to allow him to proceed, although he explained to them that he was going to attend a case in the Supreme Court.

This affidavit is supported by another affidavit by Dr. Dycian.

A counter affidavit was filed by the Respondents to the effect that

numerous cars were allowed to proceed to Jerusalem from the early morning of that day, and the Court is aware that the advocates for the Respondents did travel on that day to Jerusalem from Tel-Aviv, and did actually appear in Court in the case.

The important point is, however, that even if this be so, it is not contested that the Appellant's advocate was stopped and turned back that morning by the military authorities.

In these circumstances we think that sufficient cause has been shown by the Appellant for the failure to appear on the 31st October last, and accordingly we set aside the appellate judgment of the 31st October and we order that the appeal be reheard on conditon that the Appellant do pay to the Respondents costs assessed at LP. 25, this to include fees for attendance at the hearing.

Delivered this 13th day of December, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 235/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khayat, JJ.

IN THE APPEAL OF :

Cherif and Alami. APPELLANTS.

v.

Lodzia Textile Co. Ltd. RESPONDENTS.

Leave to appeal — C. A. 191/38 — Must be by motion with notice unless delay caused by notice would cause damage.

In dismissing an appeal from the decree of the District Court of Tel-Aviv, (in its appellate capacity) dated the 18th day of July, 1938 :—

HELD : The application for leave to appeal had not been made by motion. The correct procedure is that it should be made by motion with notice unless the notice was likely to cause delay.
The objection was fatal to the arguing of the appeal.

FOLLOWED : C. A. 191/38 (*ante*, p. 141).

ANNOTATIONS : See notes to the above case.

FOR APPELLANTS : Haddad.

FOR RESPONDENTS : Rosental.

JUDGMENT.

In this appeal a number of preliminary objections have been urged by Mr. Rosental on behalf of the Respondent. We think it necessary to deal with one only of these objections, namely, that leave to appeal was not obtained in accordance with the new rules of Civil Procedure. This objection is based on a recent decision of this Court laying down certain procedure as being necessary for obtaining leave to appeal from the presiding judge of a District Court. The decision is the case of Rubin *v.* Kaufmann, Civil Appeal No. 191/38. In that case it was laid down by this Court that an application for leave to appeal must be made by motion with notice, unless the delay caused by notice being given would cause serious damage. It is clear from the record in the present case that the application for leave to appeal was not made by motion at all, and consequently not by motion with notice. In the Rubin case to which I have just referred, it was laid down that if this method of procedure has not been adopted, the effect is fatal to the arguing of the appeal before this Court and that the appeal must be dismissed. The case laid down a definite rule of procedure and this procedure must be followed. As a result this preliminary objection succeeds and the appeal is dismissed with costs to include LP. 15 fees for attendance at the hearing.

Delivered this 15th day of December, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 96/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

1. Joseph Ouziel,
2. Isaac Yishvi. APPELLANTS.

v.

Benjamin Eliahu Sassoun. RESPONDENT.

Promissory notes — Security that loan will be made to pledgee — Negotiation of note to person not a holder in due course — No words indicating that signature made in representative capacity — Interpretation of deeds — Reasonable objections may be made to signing

documents in connection with loan — No evidence of unreasonableness to complete or that loan would be granted.

In dismissing an appeal from a judgment of the District Court, Tel-Aviv, sitting in its appellate capacity, dated the 22nd March, 1938 :—

HELD : 1. Appellants had signed the notes on their own responsibility and it was not open to them to plead that they had signed them as agents for any other party.

2. There was no evidence that it was unreasonable on the part of the payees of the notes to refuse to go any further in the matter and there was no evidence that, had they signed the documents which had been submitted to them, the loan would have been granted.

FOR APPELLANTS : Levitsky.
FOR RESPONDENT : Elkayam.

JUDGMENT:

The facts in this case were that the Appellants signed a promissory note payable to two payees for the sum of LP. 180. At the same time as the promissory note was made a document (Exhibit B) was drawn up signed also by the Appellants. In that document the Appellants acknowledged the receipt of the sum of LP. 180 and its effect was that the promissory note was to be a pledge in the hands of the payees, that a loan to them should be negotiated by a company in England within four months. The payees endorsed the note to the Respondent and at the end of the four months which was the period of the promissory note, the Respondent sued the Appellants on it. It was admitted that the Respondent was not a holder in due course and the consequence of that was, that the Appellants had available to them all defences which they would have had against the original payees. It is quite clear that they had signed the note on their own responsibility. There are no words to indicate that they signed as agents for any other party. In consequence no defence on that ground is open to them. Another defence which they put foreward depends on the interpretation of the document Exhibit B. to which I have already referred as being made at the same time as the promissory note. The Appellants admit that the loan was not effected, but allege that this failure to effect the loan was entirely the fault of the payees in refusing to sign certain documents and that that being so the payees could not successfully sue on the note and that therefore the Respondent could not sue on the note. This defence of the Appellants prevailed before the learned Chief Magistrate. On appeal, however, the District

Court reversed the Chief Magistrate, holding in effect that the payees had not acted unreasonably, that they might find that they were unable to conclude the matter for a variety of reasons and that they were not to blame for the fact that the loan was not effected. We are in agreement with the decision arrived at by the District Court. When a person undertakes to accept a loan and the said loan is to be effected within the following four months with some person or company who was unknown to the payees at the time of the making of the promissory note, there may be many reasonable objections on the part of a prudent man to sign the documents which are put before him in connection with the loan. Further, as actually happened, documents may be placed before him at so late a date that the loan could not possibly be effected within the four months.

We think therefore that there was no evidence that it was unreasonable on the part of the payees to refuse to go any further with the matter and that there was no evidence that had the documents referred to been signed, the loan would actually have been effected. The judgment of the District Court was correct and the appeal will be dismissed with costs to include a fee of LP. 15.— for attendance at the hearing.

Delivered this 19th day of December, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 238/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Khalil Hamadouh. APPELLANT.

v.

Keren Kayemet Leisrael Ltd. RESPONDENT.

Appeals — Dismissal for failure to appear — Costs — C. P. R. 327.

In dismissing an appeal from a judgment of the District Court of Haifa, sitting in its appellate capacity, dated the 28th day of February, 1938 :—

HELD : The appeal which had been listed for dismissal, would have to be dismissed, without costs, there being no appearance on behalf of either party who were given notice of the dismissal.

ANNOTATIONS : As to the procedure to be followed by an appellant after the appeal has been listed for dismissal, see C. A. 227/38 (*ante*, p. 176).

FOR APPELLANT : No appearance — served.
FOR RESPONDENT : do. do.

JUDGMENT:

This appeal has been listed by the Chief Registrar for dismissal under the provisions of Rule 327 of the Civil Procedure Rules, 1938, and the Court has no alternative but to dismiss the appeal, without costs, as there is no appearance by counsel of either the Appellant or the Respondent who were given notice of dismissal.

Delivered this 20th day of December, 1938.

British Puisne Judge.

APPENDIX

CIVIL APPEAL No. 243/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Khaldi and Khayat, JJ.

IN THE APPEAL OF :

1. Rizk Mahmoud Mohammad Ahmad Khalaf,
2. Mohammad Said Suleiman el Bakkar,
3. Musa el Nasir. APPELLANTS.

v.

1. Fadl Abbas el Fahoum,
2. Nayef Amin el Fahoum. RESPONDENTS.

Arbitration — Arbitration (Amendment) Ordinance, 1936 — Appeal from Decision of Land Court authenticating an award.

In overruling the preliminary objection in an appeal from the judgment of the Land Court of Nablus, dated the 12th November, 1937, confirming the award of the A/District Commissioner, Samaria, dated the 12th December, 1935, and in allowing the appeal to proceed :—

HELD : 1. The expression "District Court" in sec. 15(3) of the Arbitration Ordinance does not include a Land Court.

2. An award authenticated by a Land Court becomes a judgment of the Land Court, and is appealable without leave.

N. B. : *Vide* 1938, 1 S. C. J. 101, *ante,* for the final judgment.

FOR APPELLANTS : Boustany.

FOR FIRST RESPONDENT : Cattan.

FOR SECOND RESPONDENT : Salah.

INTERLOCUTORY JUDGMENT.

In this appeal from the Land Court of Nablus, Mr. Cattan, for the Respondents, raised as a preliminary objection that there was no appeal properly before this Court, as leave to appeal had not been obtained, either from the Land Court or from this Court.

The Land Court had given a decision authenticating an award of an arbitrator to whom a dispute had been referred under the Land Courts Ordinance. In the Arbitration Ordinance, the only provision made for appeals from the judgments of a Court confirming an award relates to Magistrates' Courts and District Courts only. Land Courts are not referred to. Mr. Cattan argued that, in view of an amendment to the Arbitration Ordinance which came into force on the 11th June, 1936, and which included a Land Court within the definition "Court" in that Ordinance, therefore this Court ought to hold that in the Section dealing with appeals the District Court included a Land Court.

We are unable to agree with that argument.

In the Arbitration Ordinance as it now stands, although the definition of the word "Court" includes a Land Court which has referred a dispute to arbitration, there is no Part of the Ordinance dealing with appeals from a Land Court. In consequence, if one seeks to find whether an appeal lies from a Land Court or not, one has to turn to the Land Courts Ordinance, and it is found there that an appeal to this Court from a Land Court always lies on a question of law. When a Land Court authenticates an award of an arbitrator, that award becomes a judgment of the Land Court, and that judgment of the Land Court is subject to appeal under the Land Courts Ordinance, and no leave, either from the Land Court or from this Court, is necessary.

The preliminary objection is therefore overruled and the hearing of the appeal will proceed.

Given this 25th day of January, 1938.

Senior Puisne Judge.

CRIMINAL APPEAL No. 46/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Abdul-Hadi, JJ.

IN THE APPEAL OF :

1. Ibrahim Mohammad Siksek,
2. Jamil Abdul Hafiz Kayyali. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Evidence of accomplices — Definition of accomplice — Accessory after the fact may be an accomplice — No conviction on the uncorroborated evidence of an accomplice — English and Palestine definitions of accessories — Criminal Code Ordinance, sec. 26 — A witness with guilty knowledge may become accomplice — Court should decide whether evidence of witness is tainted and record their findings — Criminal Procedure (Trial Upon Information) Ordinance, sec. 72(1)(c) — Appeal against sentence.

In allowing the appeal of the Second Appellant from a judgment of the District Court, Jaffa, dated the 5th April, 1938, quashing the conviction and remitting the case with directions for a retrial ; and in dismissing the appeal of the First Appellant :—

HELD : 1. An accomplice is one who is concerned with another or others in the commission of a crime. The Criminal Code Ordinance does not define an accomplice but a number of persons therein defined as principal offenders may be accomplices.

2. An accused person cannot be convicted on the uncorroborated evidence of an accomplice.

3. A witness may or may not be an accomplice depending upon whether he has guilty knowledge.

4. If the evidence of a witness may be tainted, it is for the Court to decide whether his evidence is tainted before considering what weight may properly be given to it. It is desirable that the Court of Trial should record its reasons for such decision.

5. The Court of Trial having decided that the witness Saleh was an accessory after the fact, they must have taken the view that he had guilty knowledge and should therefore have regarded him as an accomplice.

6. It was not clear whether the Court regarded the other witnesses as accomplices and the case of the second Appellant would have to be sent back for a finding to be made and a fresh judgment given.

7. The first Appellant had appealed only against the sentence and there was no reason to interfere therewith.

ANNOTATIONS : The present state of the law regarding corroboration and the evidence of accomplices is summarised in the annotations to CR. A. 160/37 (1938, 1 S. C. J. 103 *q. v.*) which is referred to in the judgment. Subsequent cases on corroboration : CR. A. 32/38 (*ibid.* p. 232) ; CR. A. 44/38 (p. 287) ; CR. A. 54/38 (p. 340) ; CR. A. 71/38 (Vol. II, p. 45) ; CR. A. 79/38 (Vol. II, p. 113).

FOR APPELLANTS : Cattan.

FOR RESPONDENT : Crown Counsel. (Hogan).

JUDGMENT:

It is not clear from the judgment of the District Court if that Court regarded all the witnesses who gave evidence as to the actual commission of the crime, except Mohammad Saleh, as accomplices. As to him the Court found that they did not consider him to be an accomplice but an accessory after the fact.

An accomplice may be defined as one who is concerned with another or others in the commission of a crime. The Criminal Code Ordinance does not define an accomplice, but a number of persons therein defined by Sec. 23 as principal offenders may be accomplices, and the English word, owing no doubt to the discussion of English principles and cases, has been used in Palestine, and this Court has laid down the principle that an accused person cannot be convicted on the uncorroborated evidence of an accomplice.

An accessory after the fact in English law is one who knowing a felony has been committed, receives, relieves, comforts or assists the felon (with some qualifications to this broad definition). An accessory after the fact in Palestine is defined in the Criminal Code Ordinance in Sec. 26, as one, with certain exceptions, who, knowing an offence has been committed by another person, receives or assists such other person in order to enable him to escape punishment.

It is clear that a witness may or may not be an accomplice, the question depending upon whether he has a guilty knowledge. A good example is that of a motor driver who may be driving his vehicle innocently while assisting the offenders, but who may, on the other hand, be driving his vehicle assisting the offenders, knowing that an offence is being committed.

If the evidence of a witness may be tainted, it is for the Court to decide whether his evidence is tainted before considering what weight may properly be given to it, and it is most desirable that the Court of Trial should record its reasons for such decision.

In the present case the Court has decided that the witness, Mohammad Saleh, was not an accomplice but an accessory after the fact. In order to come to that conclusion the Court must have taken the view that he had a guilty knowledge, and in my view, if he had a guilty knowledge the Court were mistaken in describing him as an accessory, and they should have regarded him as accomplice.

That being so I do not think that the Court could convict on his evidence alone, and, as I have stated, it is not clear if they regarded the other witnesses as accomplices, in particular the evidence of Zein

Khattar may or may not, according to the view that is taken of that witness, be tainted. We therefore, by virtue of Sec. 72(1)(c) of the Criminal Procedure (Trial Upon Information) Ordinance, quash the conviction of the second Appellant Jamil and remit the case to the Court below for a new trial with a direction to them to determine whether Zein Khattar was or was not an accomplice, and in the light of that finding and of the observations in this judgment, to give a fresh judgment in Jamil's case.

The First Appellant Ibrahim appealed against his sentence only. We see no reason to interfere and his appeal is dismissed — his sentence will run from the date of hearing, *i. e.* 28th April, 1938.

Delivered this 28th day of May, 1938.

Chief Justice.

CIVIL APPEAL No. 84/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

Tewfiq Yousef Abboud. APPELLANT.

v.

Yousef Yabbour, on behalf of the Wakf of the Maronite Church, Nazareth. RESPONDENT.

Claim by waqf to title to immovable property — Defence of bona fide purchase — Not defeated by failure to consult Land Registry files — L. A. 173/26.

In allowing an appeal from a judgment of the Land Court of Nablus, dated the 12th March, 1938, and in setting aside the judgment of the Lower Court and in dismissing the Respondent's action :—

HELD : The finding of the Lower Court that the Appellant should have consulted the files in respect of the property, did not defeat the plea of purchase in good faith.

FOLLOWED : L. A. 173/26 (P. L. R. 269, C. of J. 1843)

ANNOTATIONS : In addition to the above case, *vide* L. A. 49/35 (C. of J. 1934—6, 491) ; C. A. 48/38 (1938, 1 S. C. J. 327) and annotation and C. A. 215/38 (1938, 2 S. C. J. 177).

FOR APPELLANT : Henry Cattan.
FOR RESPONDENT : Zaki el Ousta.

JUDGMENT:

This appeal arises out of an action brought by the Respondent, suing on behalf of the *Waqf* of the Maronite Church of Nazareth, against the Appellant, claiming the non-interference of the Appellant in a room and a piece of land which the Respondent states to be *waqf* of the Maronite Church of Nazareth, and asking for judgment to be given declaring the ownership of this property and its registration in the Land Registry of Nazareth in the name of the said *waqf*.

The facts of the case are as follows :—

In 1898 a certain Jebran Jabbour made a dedication of certain property in favour of the Maronite Church, Nazareth. At about that time, the dedicator's brother, Yacoub, was married to the owner of the neighbouring property and living in it. In 1924, Yacoub's wife, Nijmeh, proposed to give her property to Yacoub, but prior to the transfer she undertook to make a correction in the boundaries. This correction was carried out and the property so re-registered was transferred to Yacoub who, in his turn, sold to his wife, Farha, and then by Farha to the Appelant (Defendant in the Court below).

The Appellant pleaded, *inter alia,* before this Court as well as before the Court below, that the property was purchased in good faith, and we see nothing in the evidence before the Court below to show that he had knowledge that that property was *waqf*, nor is there any record in the Land Registry registers to the effect that the property in dispute was *waqf*.. The finding of the Court below that the Appellant should have consulted the files of the transactions in respect of this property, prior to his transaction, and that if he had done so he would have discovered the existence of a neighbour not bound by the plan and the *mazbuta,* does not, in our opinion, defeat the plea of purchasing in good faith.

Following the principle laid down in Land Appeal No. 173/26, we are of opinion that this appeal must be allowed. The judgment of the Land Court is set aside, and the Plaintiff's action dismissed with costs fixed at LP. 10.— and LP. 5.— fee for attending the hearing.

Given this 14th day of June, 1938.

British Puisne Judge.

CIVIL APPEAL No. 119/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Greene and Khaldi, JJ.

IN THE APPEAL OF :

Keren Kayemeth Leisrael Ltd. APPELLANT.

v.

Mahmoud el Haj Naser & 56 ors. RESPONDENTS.

Claim to land under Art. 45 of the Land Code — Co-villagers' right to pre-empt — Claim by purchasers for improvements — Appeal against three judgments given on separate dates — C. P. C. Art. 66 — Interlocutory and final judgments.

In dismissing an appeal from a judgment of the Land Court of Nablus, dated the 2nd day of March, 1937, whereby judgment was given in favour of Appellant for improvements on lands adjudged to Respondents by the Land Court on the 28th day of June, 1933, and assessed at LP. 8.400 by a judgment of the Land Court dated the 21st day of June, 1934 :—

HELD : The judgment dated the 21st day of June, 1934, was a final judgment an appeal against which had already been filed and dismissed. No further appeal could, therefore, be entertained.

ANNOTATIONS : For subsequent proceedings, *vide* P. C. L. A. 9/38 (Vol. I, p. 410).

FOR APPELLANT : Eliash.

FOR RESPONDENTS : Bushnaq.

JUDGMENT.

In this case a preliminary point has arisen as to what judgment is being appealed from. The facts were that Saleh Salah el Hamdan sold certain land to the Appellant Company and the land was registered in the name of the Company on the 11th of May, 1931. The Respondents took an action under article 45 of the Land Code before the Land Court of Nablus. This article reads as follows :—

> "If the possessor by title-deed of land lying within the boundaries of a village has transferred it to an inhabitant of another village the inhabitants of the former place who are in need of (*zarouret*) land have, for one year, the right to have the land adjudged to them at its equivalent value (*bedl misl*) ".

Judgment was given on the 28th of June, 1933, and it was decided that the Respondents had a right to have the land adjudged to them

at its equivalent value and the parties were ordered to nominate experts and assess this value. The parties appointed experts and an expert was also appointed by the Court. The Court considered the report of the experts and heard evidence on the 21st of June, 1934. It delivered judgment assessing the value at 8,400 pounds. The Company had contended that they were due a further sum for certain improvements which had been effected on the land, and the Court reserved decision as to the value of these improvements and ordered the experts to make a further investigation. The Company appealed from this decision and on the 20th of June, 1935, the appeal was dismissed. With regard to the improvements, the experts again submitted a report, evidence was heard and on the 2nd March, 1937, the Court of Nablus delivered a further judgment assessing the value of these improvements at LP. 140.

The Company has appealed and Mr. Eliash on its behalf says that he has the right to appeal against the three judgments, namely: the judgment delivered on the 28th June, 1933, the judgment delivered on the 21st June of 1934, and the judgment delivered on the 2nd March, 1937. He refers to article 66 of the Ottoman Code of Civil Procedure which reads as follows:—

> "No decision delivered by a Court shall be subject to appeal except with an appeal against the final judgment in the suit. If the suit include more heads than one, no one head may be isolated for purposes of appeal before the delivery of the final order".

He says that the judgment delivered on the 2nd March, 1937, was the final judgment in the action and that is the only judgment from which an appeal can be made. He says that the other two judgments are merely interlocutory judgments and that when he appeals against the last judgment he is entitled to argue against the correctness of the two previous judgments. With regard to the previous appeal he says that the Company lodged it by mistake and that therefore it should be disregarded as having any effect on his argument.

On the other hand Osman Eff. Bushnaq for the Respondents says that the judgment delivered on the 21st June, 1934, must be regarded as a final judgment and that an appeal against that judgment having been dismissed the Company is now precluded from submitting a further appeal against it.

Having carefully considered the point, we have come to the conclusion that the contention of Osman Eff. Bushnaq is right. When the case came before the Land Court of Nablus there were two points to be decided. Firstly, whether the Respondents had a right to have

the land adjudged to them, and secondly, the value which should be placed on the land and paid to the Company. The first point was decided in favour of the Respondents in the first judgment, only a small matter being left over to be decided. After the delivery of the second judgment the Appellant Company elected to treat the dispute as having been finally decided, there can be no doubt that they considered the matter left over as one not seriously affecting the main issues between them and the Respondents. They decided to appeal, but they unfortunately made a mistake in procedure and the appeal was dismissed on a preliminary objection. The present position is that the main issues have been decided against the Company by the appropriate Court of first instance and that the decision of that Court has remained unreversed on appeal. It is clear that after a second judgment the Company took no steps to have the amount assessed for the improvements, but it decided there and then to treat the case as at an end, and to appeal from the decision as it then stood. This being so we have come to the conclusion that the judgment delivered on the 21st June, 1934, was a final judgment. It has already been appealed from and no further appeal against it can be entertained by this Court. It is a moot point whether in the circumstances the last judgment awarding LP. 140 as compensation for improvements can be appealed from, but we have decided to hear the Appellants on this point.

Given this 9th day of March, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 15/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland and Khaldi, JJ.

IN THE APPEAL OF :

1. Mohammad Said el Kassam,
2. Mahmoud Mohammad Barakat,
3. Mustafa Mohammad Barakat,
4. Yousef Mohammad Barakat. APPELLANTS.

v.

Younes Daoud el Younes. RESPONDENT.

N. B. : The following is the dissenting judgment of Khaldi, J., in the above appeal reported in Vol. I, p. 204.

JUDGMENT.

Khaldi, J.: I have had the privilege of going over the judgment of His Honour the Presiding Judge dismissing this appeal for the two reasons mentioned therein, and I found myself unable to agree with him and with the conclusion he arrived at.

As regards the first reason, the Appelant stated that the transaction was a *Bei' bil wafa*, then he said it was a sale outside the Land Registry. If the contradiction between these two statements suffices to dismiss the action, such contradiction is removed by the admission of the Respondent himself that the transaction was a sale outside the Land Registry, and this is in accordance with the provisions of Article 1563 of the *Mejelle*.

As regards the second reason, I hold that the doctrines of equity as applied in England cannot be applied in Palestine under Article 46 of the Palestine Order in Council, in a transaction of receiving the price of a land sold and delivering it over to the purchaser as such application of the doctrines of equity will be in contradiction with the Palestine laws, because the Land Transfer Ordinance, 1920, which is a Palestinian Law, provides under Sections 2, 4 and 11 that every disposition of land without the consent of the Administration in writing is null and void, and the alleged sale in this action did not have the consent of the Administration.

For these reasons, I am of apinion that the judgment of the Land Court must be set aside and the case remitted to it for hearing.

Puisne Judge.

CRIMINAL APPEAL No. 83/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: The Senior Puisne Judge, Copland and Frumkin, JJ.

IN THE APPEAL OF:

Fareed Hassan Shawash. APPELLANT.

v.

The Attorney General. RESPONDENT.

Arson — Evidence to support charge — Identification a question of credibility.

In dismissing an appeal from a judgment of the District Court, Haifa, dated

the 3rd October, 1938, whereby Appellant was convicted under Section 321 of the Criminal Code Ordinance, 1936, and sentenced to seven years' imprisonment :—

HELD : The question raised by the Appellant to the effect that he was improperly identified was one of credibility, and could not be dealt with by the Appellate Court.

ANNOTATIONS : On identification, *vide* CR. A. 54/38 (1938, 1 S. C. J. 340) ; CR. A. 49/38 (*ibid.* 314) ; CR. A. 39/26 (P. L. R. 90 ; C. of J. 465, O. G. 16.vii.26). *Cf.* CR. A. 22/38 (1938, 1 S. C. J. 141).

APPELLANT : In person.

FOR RESPONDENT : Crown Counsel (Hogan).

JUDGMENT:

There is no need to call upon you, Mr. Hogan.

On the 3rd of October, 1938, the Appellant was convicted of arson by the District Court of Haifa, and sentenced to seven years imprisonment. The evidence against the Appellant was to the effect that fire had broken out in a carpentry workshop, and that shortly afterwards he was seen getting out of the window of the workshop. Taking the circumstances into consideration the Court below was justified in inferring that the Appellant was responsible for the fire. The question raised by the Appellant to the effect that he was improperly identified is one of credibility, and we do not propose to deal with that.

The appeal is therefore dismissed and the conviction and sentence are confirmed.

Delivered this 26th day of October, 1938.

Senior Puisne Judge.

MISC. APPLICATION No. 41/38.

IN THE SUPREME COURT OF PALESTINE.

BEFORE : The Chief Registrar (L. W. Orr.)

IN THE APPLICATION OF :

Mohammed Ali Sheikh Ali. APPLICANT.

v.

1. Meyer Moshe Meyer,
2. Ali Ahmed Sheikh Ali,
3. Jacob Bechor. RESPONDENTS.

Application for exemption from Court fees — Applicant possessed of means but no liquid assets — Application to postpone payment of fees —Court Fees Rules, 1935, rule 19 — If Applicant has means application cannot be granted, Ridgway v. Edwards — Applicant "good for" fees, Kydd v. Liverpool Watch Committee — Borrowing from public revenue.

In refusing an application for exemption from Court Fees under Rule 19(1) of the Court Fees Rules, on Appeal to the Supreme Court, sitting as a Court of Appeal, from the decree of the District Court, Jaffa, dated 2.6.1938 :—

HELD : 1. The Registrar had no power to postpone payment of the Court fees under Rule 19(1) of the Court Fees Rules.
2. The Applicant was not entitled to exemption from Court fees, although he had no ready cash or a steady income, as he was possessed of substantial holdings and property which he had not attempted to realise, and was therefore good for the amount of the fees.

FOLLOWED : Ridgway *v.* Edwards (1874) 29 L. T. 906, Kydd *v.* Liverpool Watch Committee (1908) 24 T. L. R. 257.

ANNOTATIONS :

1. *Vide* also Misc. A. 48/38, 53/38 and 56/38 (*post*).
2. Other proceedings in this case : C. A. 130/38 (*ante*, p. 3).

FOR APPLICANT : Goitein.

FOR FIRST RESPONDENT : Kehaty, Sharf.

SECOND RESPONDENT : In person.

FOR THIRD RESPONDENT : No appearance.

ORDER.

I am satisfied from the evidence before me that the Applicant is not possessed of ready cash or a steady *regular* income but it is admitted that he is the owner of substantial holdings of orange land — all of which are mortgaged with the exception of a very small piece of land. He is also the owner of a house which stands on the mortgaged land. He owns a 4 year old motorcar which he uses for going to and from his orange groves and which he claims is a necessity for his business as an orange grower. He admits that his orange trees are bearing fruit and usually produce 6000 to 7000 boxes of oranges *per annum*, but says that merchants or brokers are reluctant to purchase the future crops of orange trees at this time of the year, and admits that he has not, in the circumstances, made any attempt to sell the young fruit at present on his trees as it is customary for purchasers to approach the

grower rather than for the grower to look for purchasers. He states that he is unable to increase the mortgage on his land and that he has tried to borrow LP. 50 for Court Fees from banks and friends without success.

Mr. Goitein for the Applicant argues that the real question is a postponement of the payment of Court fees as the Applicant will very likely have the money later in the year.

Mr. Kehaty for Respondent No. 1 strongly opposes the application.

I propose, firstly, to deal with Mr. Goitein's point that I am really being asked to postpone the payment of Court fees. It is clear that I cannot act on this contention as Rule 19(1) of the Court Fees Rules, 1935, gives me no power of postponement. I have under that rule to decide what proportion (if any) of the Court fees the Applicant can pay and certify accordingly on the case file. This clearly means what proportion of the fees (if any) the Applicant is capable of paying to-day, as a notice of appeal may not be accepted unless :

(1) the fees thereon are paid, *or*

(2) an order under rule 19(1) of the Court Fees Rules is made.

I am therefore left to decide whether or not the allegation of poverty is true.

There are not any local precedents to guide me in deciding whether or not a person of property, who is in debt, but who has an asset which could be realised, probably with an ultimate loss of profit (I refer to the fruit on the orange tree) can be regarded as a person entitled to whole or partial exemption from Court Fees under Rule 19(1) as aforesaid. I propose therefore to rely upon the general principles of English Law on the subject.

In the judgment in Ridgway *v. Edwards* (1874)29 L. T. 906, it was held that a farming tenant who has valuable crops on his farm, but no other property, will not be permitted to defend in *forma pauperis*, although he has in the suit been restrained from selling or removing the crops.

In the present case the Applicant has valuable crops on his land and he is not restrained from selling them — admittedly the crops are not yet ripe and would be valueless if removed, but they do, I am convinced, represent an asset at the present time.

I am furthermore of opinion that the Applicant is good for the amount of the fees — I use the expression "good for" in the same sense as it is used in the judgment of Buckley L. J. in Kydd *v.*

Liverpool Watch Committee (1908), 24 T. L. R. 257, what I mean by this is, that if the Applicant has an asset which is capable of realisation he cannot be regarded as being unable to pay Court Fees as he is clearly worth the amount which can now be realised.

The Applicant has in his evidence admitted that he has not made any effort at all to realise this asset, his reason apparently being that he expects to make a greater profit if he retains ownership of his crops until they ripen when he expects buyers to approach him. This in effect means that he wishes to "borrow" the amount of the Court Fees from Public Revenue interest free in order that he may stand the chance of a profit on his "borrowings". In other words the Applicant wishes to be allowed to file his notice of appeal without payment of fees leaving the Court to recover the fees under Rule 19(2) of the Court Fees Rules, 1935, when the Applicant has been successful in selling his ripened fruit, the Public Revenue being apparently left with possibility of standing the loss if the fruit or the orange trees should be in the meantime wholly or partially destroyed by any agency natural or otherwise.

For the reasons above stated I refuse the application. I have not been asked for costs by either of the Respondents who appeared and I therefore make no order for costs.

Given this 1st day of August, 1938.

Chief Registrar.

MISC. APPLICATION No. 48/38.

IN THE SUPREME COURT OF PALESTINE.

BEFORE : The Chief Registrar (L. W. Orr.).

IN THE APPLICATION OF :

Abdel Raouf Mohammed Shahin, in his personal capacity and on behalf of the heirs of Mohammed Jaber Shahin. APPLICANT.

v.

Yehuda Blum. RESPONDENT.

Application to appeal in forma pauperis — Whether included in the expression "sue in forma pauperis", Registrars Ordinance, secs. 2, 6(e)

(2)(9) — *C. P. R.* 2, *Annual Practice — Court Fees Rules*, 1935, *rule* 19 — *C. P. R.* 323.

In dismissing an application for leave to appeal to the Court of Appeal in *forma pauperis* :—

HELD : The Registrar had no power to grant the application, his powers being restricted, under Section 6(e)(2) of the Registrars Ordinance to granting leave to sue in *forma pauperis*.

ANNOTATIONS :

1. See Misc. A. 53/38 (*post*) and annotations thereto.
2. Subsequent proceedings : C. A. 231/38 (5.i.39).

FOR APPLICANT : Shehadeh.

FOR RESPONDENT : Wilner and Olshan.

ORDER:

I have listened to the arguments advanced by Mr. Wilner and Mr. Olshan and to Mr. Shehadeh's reply with interest. Agreement was reached towards the end of the arguments to the effect that the question resolved itself into one as to whether or not the expression *"sue in forma pauperis"* in Section 6(e)(2) of the Registrars Ordinance includes appeal in *forma pauperis*.

Mr. Shehadeh refers me to the Annual Practice 1937, p. 2447, to the effect that a suit includes an action and to rule 2 of the Civil Procedure Rules, 1938, which defines an action as including all civil proceedings and argues therefrom that as an appeal is included in the civil proceedings under the 1938 Rules, it follows that the expression *"sue in forma pauperis"* would extend to an appeal

Mr. Olshan in reply points out that certain other sub-sections of Section 6 of the Registrars Ordinance expressly make provision of appellate matters and if it was intended that sub-section (2) was to cover appeals it would have stated as much in express terms. He refers me particularly to sub-section (9) of Section 6(e) of the Registrars Ordinance which refers to 'action, proceedings or appeal'.

It is clear that a Chief Registrar or for that matter a Registrar cannot exercise powers other than those given to him by the Registrars Ordinance and no jurisdiction in excess of that given to him by the Registrars Ordinance may be conferred by rule, otherwise it might have been argued that the use of the word "proceeding" in Rule 19 of the Court Fees Rules, 1935, would include appeal and by the application of Section 2 of the Registrars Ordinance, the Chief Registrar would have had jurisdiction.

I am persuaded that the argument of Mr. Wilner and Mr. Olshan is correct and that I have no power to grant this application. There is no need for me to give any reasons for this decision. Mr. Olshan's remarks referred to above, with which I agree, are sufficient. It will rest with Mr. Shehadeh if he wishes, to apply to the Supreme Court for exemption in whole or in part from the payment of Court fees on appeal, as it would appear that the Court may have power to hear the application in view of rule 323 of the Civil Procedure Rules, 1938, which makes reference to orders exempting persons from payment of fees on appeal.

Application dismissed.

Given this 12th day of September, 1938.

Chief Registrar.

MISC. APPLICATION No. 53/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice and Khayat, J.

IN THE APPEAL OF :

1. Benzion Khojahinoff,
2. Mordekhay Khojahinoff. APPLICANTS.

v.

1. Hubert Walter Norden,
2. Abraham Haim Khojahinoff. RESPONDENTS.

Application for exemption from fees on appeal — C. P. R. 359, 323, 328 — Court Fees Rules — Court of Appeal cannot grant the application.

In dismissing an application for exemption from Court Fees on appeal :—

HELD : The Supreme Court, sitting as a Court of Appeal, has no power to grant the application.

ANNOTATIONS :

1. The position has since been clarified and by rule 19(2) of the Court Fees Rules, as enacted in the *Gazette No.* 835 of the 3rd November, 1938, on p. 1402, power is given to the Supreme Court to grant exemption from Court fees on appeal.

2. In Misc. A. 41/38 (*ante*) a similar application was refused on merits.

FOR APPLICANTS : Scharf.

FOR FIRST RESPONDENT : Goitein.

FOR SECOND RESPONDENT : No appearance.

ORDER:

This case raises an interesting point. It appears that an application was made to the Chief Registrar for leave to proceed by way of appeal to the Supreme Court without payment of fees. The Chief Registrar, for reasons which he set out in other proceedings, took the view that he had no power to grant the application and to give the exemption which was asked for, and he directed that the application should be put in the Judges' list. That having been done the present Applicants filed on the 30th September, 1938, a document in the Supreme Court "Misc. App. No. 53/38" in which they said :—

> "Whereas the Chief Registrar has on 21.9.38 expressed the opinion that he has no jurisdiction to entertain Appellants' application for exemption from payment of fees on appeal, and
> Whereas he has directed that the case be put in the Judges' list, application is hereby made in accordance with Rule 359 of the Civil Procedure Rules, 1938, that the heading of the application of Appellants for exemption of fees dated 2.8.38 be amended so as to read in the Supreme Court sitting as a Court of Appeal".

The effect therefore would seem to be that this is an application to us to order the exemption of these Applicants from the payment of fees. It is clear from Rules 323 and 328 of the Civil Procedure Rules, 1938, that the Rules contemplate that someone has the right to order exemption from payment of Court fees. It is also clear that in two other cases this Court has assumed jurisdiction and has granted in one of these cases exemption from payment of fees and refused the application in the other, but no argument such as is now submitted to this Court was put forward in the two cases to which I have referred.

The short answer to the present application is that the Applicants being unable to call our attention to any rule or provision of law vesting in this Court the power to order exemption from payment of fees, this application must be refused.

As to the general question, we have had the benefit of an exhaustive argument dealing with the position which exists as to the exemption from payment of Court fees and the practice which has been so far followed in granting such exemption and our attention has been called to the various provisions in the Rules of Court (Court Fees) Rules

1935. It is unnecessary for us to make any pronouncement on this point but I may say that I propose to take steps to make the position clearer.

The result is that this application is refused with costs fixed at LP. 5.—.

Given on 7th day of October, 1938.

Chief Justice.

MISC. APPLICATION No. 56/38.

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

BEFORE : The Chief Justice and Khayat, J.

IN THE APPLICATION OF :

Manneh Hanna Karr'aa. APPLICANT.

v.

1. Chief Execution Officer, Jerusalem,
2. Mikhail Odeh Sansour. RESPONDENTS.

Application to petition High Court in forma pauperis — Lacuna in rules remedied — Application made to High Court — P. O. in C. Art. 43.

In granting an application for leave to petition the Supreme Court sitting as a High Court of Justice in *forma pauperis.*

HELD : Whilst steps had been taken to remedy the *lacuna* in the rules regarding such application the present application had been made and accepted under Art. 43 of the Palestine Order in Council.

ANNOTATIONS :

1. See annotations to Misc. A. 53/38 (*ante*).
2. Subsequent proceedings : H. C. 65/38 (*ante*, p. 189).

FOR APPLICANT : Hazou.

FOR RESPONDENT : No appearance.

ORDER :

In other proceedings before the Supreme Court it appeared that there was a *lacuna* in the Civil Procedure Rules, with the result that thereunder exemption from the payment of fees could not be granted

to an Appellant to the Supreme Court sitting as a Court of Appeal, or to an Applicant to that Court sitting as a High Court. Steps have been taken to remedy this defect. Meanwhile this application is made to this Court sitting as a High Court, by virtue of Article 43 of the Order-in-Council.

We are satisfied from the affidavit, and the information given to us by her learned advocate, that the Applicant should be exempted from the payment of fees, and we make an Order accordingly.

Given this 3rd day of November, 1938.

Chief Justice.

MISC. APPLICATION No. 37/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice (Copland, J.).
(*In Chambers*).

IN THE MATTER OF A NOTICE OF APPEAL AND IN THE APPEAL OF :

Miriam Easa el Jada'. APPELLANT.

V.

Mikhail Sliman Diban. RFSPONDENT.

Decree signed by Registrar — C. P. R. 330, 206, 2, *Form XII — Registrars Ordinance, sec.* 15 *— Rule* 206 *ultra vires the Registrars Ordinance — "Decree", "formal expression of adjudication" — Failure to state amount of costs in decree not fatal — Judgment and decree.*

In allowing an appeal from a decision of the Chief Registrar :—

HELD : 1. The words "formal expression of an adjudication" in Rule 2 of the Civil Procedure Rules mean the same as "formal judgment" as an adjudication by a Court is a judgment Under Section 15 of the Registrars Ordinance decrees may be signed by the Registrar.

2. Since a part of the second paragraph of Rule 206 conflicts with Section 15 of the Registrars Ordinance, that part must be held to be *ultra vires.*

3. The objection that the decree did not comply with Form XII in the First Schedule was not fatal.

ANNOTATIONS :

1. Subsequent proceedings : C. A. 159/38 (*ante,* p. 10).
2. *Cf.* notes to CR. A. 69/38 (*ante,* p. 43).

FOR APPELLANT : Cattan.
FOR RESPONDENT : *Ex parte.*

DECISION.

This matter comes before me under Rule 330 of the Civil Procedure Rules, 1938, on appeal from a decision of the Chief Registrar, dated 15th June, 1938.

The Chief Registrar refused to accept the appeal for filing on the ground that it did not comply with the provision of Part XXXI of the Rules, since the copies of the decree presented did not show that the original was signed by the members of the Court which gave judgment, but was only signed by the Registrar, contrary to Rule 206.

The relevant part of this Rule is as follows :—

> "It may be in form 12 in Schedule I hereto and may be signed by the members of the Court to whose judgment it gives effect or by the Registrar if he has entered judgment".

A decree is defined in Rule 2 in these terms :—

> "*Decree* means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the action and may be either preliminary or final ;"

Section 15 of the Registrars' Ordinance, 1936, says :—

> "Formal judgments and orders of the Court may be signed by the Registrar".

It seems to me that the words — "formal expression of adjudication" are a somewhat prolix method of saying what can equally well and more simply be said by the phrase "formal judgment" because an adjudication by a Court is a judgment. If that be so, then it necessarily follows that, under Section 15 of the Registrars Ordinance decrees may be signed by the Registrar. The second paragraph of Rule 206 conflicts with this, but it is a well recognised rule of law that a Rule of Court cannot abrogate or vary the statute law. Since a part of the second paragraph of Rule 206 conflicts with Section 15 of the Registrars Ordinance that part must be held to be *ultra vires*, and the Rule making authority had no power to make it.

I therefore decide that this appeal does comply with the provisions of Part XXXI of the Civil Procedure Rules and the Chief Registrar's decision must be reversed.

There is the further point that the decree does not comply with Form No. 12 in Schedule I, since the amount of the costs to be paid is not stated therein. Rule 206, however, states that the decree "may be" in form 12, and it is frequently a matter of impossibility to fix the amount of costs, if they have to be taxed, within the period within which an appeal must be lodged, namely thirty days after delivery of judgment. The costs, when taxed, can always be made the subject matter of another decree. I do not think, therefore, that this objection is fatal.

Mr. Cattan has further asked me to rule that the filing of a copy of a judgment is of the same effect as the filing of a decree. This question, however, does not arise in the present reference, and I think therefore that its determination should be left until it is referred to me or some other Judge by the Chief Registrar.

Given this 16th day of June, 1938.

A/Chief Justice.

MISC. APPLICATION No. 38/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice (Copland, J.).
(*In Chambers*).

IN THE APPLICATION OF :

Salamander Aktiengesellschaft. — APPLICANT. (APPELLANT).

v.

Dan Gabrieli. — RESPONDENT.

Notice of appeal — Copy of judgment filed instead of decree — C. A. 149/38.

In allowing an appeal from a decision of the Chief Registrar :—

HELD : If the Appellant files a copy of a judgment, which is a more expensive document to obtain than a copy of a decree, the appeal should be accepted, because a decree contains nothing that is not found in the judgment on which it is based.

FOLLOWED : C. A. 149/38 (1938, 1 S. C. J. 439).

ANNOTATIONS : *Vide* note to above case. The point was left undecided in Misc. A. 37/38 (*ante*). Subsequent proceedings : C. A. 180/38 (*ante*, p. 76).

FOR APPLICANT : Jacoby.

FOR RESPONDENT : No appearance.

DECISION.

In my opinion, and in this I am supported by a judgment of the Supreme Court in Abu Assi *v.* Abu Assi (C. A. 149/38), if Appellant chooses to file a copy of a judgment, which is a more expensive document to obtain than a copy of a decree, the appeal should be accepted, because a decree contains nothing that is not found in the judgment on which it is based. The Chief Registrar's decision must be overruled.

Given this 1st day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 153/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin, and Khayat, JJ.

IN THE APPEAL OF:

Raphael Navon. APPELLANT.

v.

Alfred Nicholson Young, Administrator of the estate of Eliahu Navon. RESPONDENT.

Succession — Certificate refused by Rabbinical Court — Application to District Court for certificate of succession — Proper course open to heirs.

In dismissing an appeal from an order of the District Court of Jerusalem, dated the 13th May, 1938, refusing to grant to Appellant a certificate of succession to the estate of his grandfather on the ground that the Rabbinical Court had already granted a certificate of succession in respect of the same estate, although Appellant's name had not been included therein: —

HELD: The proper course for the Appellant to follow was to apply to the Rabbinical Court for the alteration of the certificate of succession.

FOR APPELLANT: Ades.

FOR RESPONDENT: Goitein.

JUDGMENT:

We entirely agree with the Court below that the proper course for the Appellant to follow is to apply to the Religious Court for the alteration of the Certificate of Succession.

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

We make no order as to costs.

Delivered this 5th day of July, 1938.

Acting Chief Justice.

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PREPARED IN COLLABORATION WITH DR. H. KITZINGER

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Note: The Roman numbers (I or II) indicate the volume.

ADDENDA & CORRIGENDA

Vol. I

Page 4, Abbreviations, *add*: Ha. — Haarez Reports;

16, *line 4, read*: (27.I.38) *instead of* (27.I.37);

Note: Sec. 14 of the Land Transfer Ordinance has been re-enacted in the Land Transfer (Am) Ordinance, No. 16 of 1938;

24, *Note*: The corresponding rules in C.P.R., 1938, are rules 326, 327; this decision has been rendered obsolete by C.P.R. 328 A (*Gazette* 1938, No. 792, Suppl. II, on p. 702);

30, *Note*: A contrary decision was given in C.A. 105/38 (1938, 2 S.C.J. 25);

Further proceedings in this case: C.A. 151/38 (1938, 2 S.C.J. 23);

32, *Note*: Further proceedings in this case: C.A. 152/38 (1938, 2 S.C.J. 34);

34, *sub* "Followed" *add*: (2, P.L.R. 352, C.of J. 1934—6, 836);

36, *line 5, read*: Rubin Abdel-Wahhab Kiyali *instead of* Riyali;

37, *Note*: Further proceedings in this case: C.A. 111/38 (*post*, p. 312), C.A. 210/38 (1938, 2 S.C.J. 86);

40, *Note*: The judgment of the District Court is reported in Law Reports of the District Court in Tel-Aviv, p. 44;

41, *sub* annotation I, *line 4, read*: C.A. 105/28 (P.L.R. 373..) *instead of* (P.L.R. 273..);

44, *Note*: Sec. 14 of the Land Transfer Ordinance has been re-enacted in the Land Transfer (Am) Ordinance, No. 16 of 1938;

49, *Note*: The corresponding section of the Advocates Ordinance, 1938, is sec. 4(2);

Further proceedings in this case: C.A. 60/38 (*post*, p. 249); C.A. 61/38 (*post*, p. 316);

54, *Note*: Further proceedings in this case: *post*, p. 242;

67, *sub* annotations, *line 6, read*: C.A. *instead of* L.A.;
last line, read: C.A. 82/33 *instead of* C.A. 83/33;

71, *sub* annotation I, *read:* H.C. 11/38 *instead of* H.C. 12/38;

80, *between* "Held" *and* "Annotations" *insert*: Not followed: C.D.C. Ha. 83/36 (Shems, p. 245);

84, *sub* annotation, *line 2, read:* C.A. 87/32 *instead of* C.A. 80/27;
line 3, read: C.A. 222/37 *instead of* C. of J. 222/37;
line 4, read: C.A. 104/36 *instead of* C.A. 146/36;

92, *line 1, read*: H.C. 110/36 *instead of* H.C. 110/37 *and* H.C. 111/36 *instead of* H.C. 111/37;

Note: Sec. 14 of the Land Transfer Ordinance has been re-enacted in the Land Transfer (Am) Ordinance, No. 16 of 1938;

95, *last line read*: CR.A. 160/37 (21.II.38) *instead of*... (7.II.38);

Note: The Evidence on Commission Rules and also Art. 63 of the Ottoman Code of Civil Procedure have been repealed by the Civil Procedure Rules, 1938; Sec. 4 of the Civil Procedure Ordinance, No. 14 of 1938, repeals any provision in any Ottoman Law which is inconsistent with any Rule of Court lawfully made;

98, *Note*: Rule 2 of the Arbitration Rules was already repealed by the Court Fees Rules, 1935, the corresponding provisions of which are items 7, 8 & 10 of the Schedule thereto;
Further proceedings in this case, *post*, p. 346;

101, *Note*: The interlocutory judgment in this case is reported in 1938, 2 S.C.J. 237;

105, *sub* annotations, *first paragraph, last line, between* "corroboration" *and* "is" *insert*: of the evidence of an accomplice;
fourth paragraph, line 3, read: (P.P. 12.X. 37, ..) *instead of* (P.P. 2.VII.34, ..);
ibid. line 4, read: Assize Case (P.P. 22.VII. 34) *instead of* A.A. (P.P. 22.VII.34);

ibid. line 6, read: CR.A. 62/37 (I S.C.J. 465) *instead of* .... (I S.C.J. 456);

ibid. line 7, read: Assize Case 11/37 (I S.C.J. 432) *instead of* CR.A. 11/37 (...);

ibid. line 9, read: A.A. 9/28 (P.L.R. 281, C. of J. 466) *instead of* ... (... C. of J. 466, 457);

ibid. penultimate line, delete everything but: M.A. 31/28;

ibid. last line, read: C.A. 248/37 *instead of* CR.A. 248/37;

111, *line 1, read:* High Court Case No. 11/38 *instead of* No. 12/38;

115, *Note*: Earlier proceedings in this case: C.A. 141/37 (2 Ct. L.R. 130);

118, *line 9, read*: secs. 42(2), 386(1)(b)(c), 251(b) *instead of* secs. 326, 42(2), 251(b);

121, *Between* "Held" *and* "Annotations" *insert*: Followed: Knowles *v.* the. King, (46, T.L.R. 276), CR.A. 160/37 (*ante*, p. 103);

sub annotations, *second paragraph, line 1, read*: CR.A. 30/27 *instead of* CR. A. 160/37;

127, *Note*: The last sentence in the first paragraph refers to CR.A. 160/37 (*ante*, p. 103);

132, *sub* "Considered" *read*: CR.A. 5/36 *instead of* CR.A. 6/36;

134, *Note*: Earlier proceedings in this case: H.C. 25/36 (C. of J. 1934—6, 409; P. P. 5.VIII.36), C.A. 124/36 (I Ct.L.R. 43, C. of J. 1934—6, 481, 1937, I S.C.J. 214);

138, *line 8, from the bottom, read*: 5(8) — Ottoman Commercial Code Arts. 147—315 — Bankruptcy Ordinance, secs. 2, 10(3), 33, 142 — *instead of* 5—8, 147—315, Bankruptcy Ordinance, secs. 2, 3, 10(3), 142;

145, *Note*: The judgment of the District Court is reported in Law Reports of the District Court in Tel-Aviv, p. 53;

147, *sub* annotations, *line 1, read*: (P.L.R. 769, C. of J. 313) *instead of* (..., C. of J. 213);

149, *put on top:* 2. Compare C.A. 87/37 (1937, 2 S.C.J. 15, P.P. 2, 3.VIII.37, Ha. 7, 21.X., 4.XI.37, 2 Ct.L.R. 19); C.A. 138/37 (P.P. 5—10.X.37, Ha. 4.XI.37, 2 Ct.L.R. 73);

155, *Note*: Earlier proceedings in this case: L.A. 16/36 (1937, I S.C.J. 343);

156, *sub* annotations, *line 1 read*: (1938, 1 S.C.J. 51..) *instead of* (1937, 1 S.C.J. 51);

165, *line 10, read*: L.A. 14/32 *instead of* L.A. 14/23;

sub "Distinguished and considered", *line 3, read:* L.A. 14/32 (C. of J. 66) *instead of* L.A. 14/23 (C. of J. 1112);

ibid. last line, add: (unreported);

sub annotations, *line 5, read*: 2, 3.VIII.37...) *instead of* 23.VIII.37;

Note: The judgment of the District Court is reported in Law Reports of the District Court in Tel-Aviv, p. 64; Art. 90 of the Ottoman Code of Civil Procedure has been repealed by the Civil Procedure Rules, 1938;

174, *Note*: The judgment of the District Court is reported in Northern Law Reports, p. 6;

185, *Note*: The judgment of the District Court is reported in Law Reports of the District Court in Tel-Aviv, p. 70;

187, *Note*: The corresponding section of the Trade Marks Ordinance, 1938, is section 7 which provides also a definition of "distinctive"ness;

193, *Note*: The effect of the ruling in H.C. 15/38 was the enactment of the Medical Practitioners (Amendment) Ordinance, No. 6 of 1939;

203, *line 10, read:* Patents and Designs Ordinance, *instead of* Trade Marks Ordinance;

sub annotations, *read*: H.C. 11/38 *instead of* H.C. 12/38;

208, *Note*: The dissenting judgment of Khaldi, J., in C.A. 15/38 is reported in 1938, 2 S.C.J. 245;

209, *Note*: Further proceedings in the case C.A. 17/38; H.C. 33/38 (*post,* p. 326) and C.A. 230/38 (1938, 2 S.C.J. 190);

The Land Courts Rules, 1921, have been repealed by the Civil Procedure Rules, 1938;

212, *Note*: Further proceedings in this case: C.A. 20/39 (1939, I. S.C.J. 116);

215, *sub* "Distinguished" *add*: Assize Case 20/37 (P.P. 12, 13, 15.VIII.37);

sub annotation 1, *line 2, read*: (CR.A. 96/37, P.P.12.X.37..) *instead of* (..P.P.12.VII.37..);

sub annotation 2, *line 3 read*: (...C. of J. 467) *instead of* (..C. of J. 767);

226, *sub* annotations, *line 1, read*: H.C. 11/38 *instead of* H.C. 12/38;

230, *Note*: Art. 142 of the Ottoman Code of Civil Procedure and also the Judgment by Default (District and Land Courts) Rules have been repealed by the Civil Procedure Rules, 1938;

236, *Note*: The judgment of the District Court is reported in Law Reports of the District Court in Tel-Aviv, p. 95;

247, *Note*: Further proceedings in this case: C.A. 178/38 (1938, 2 S.C.J. 74);

249, *Note*: The judgment of the District Court is reported in Law Reports of the District Court in Tel-Aviv, p. 98;
Further proceedings in this case: C.A. 61/38 (*post*, p. 316);

250, *sub* annotations, *line 2, read*: (1938, 1 S.C.J. 23) *instead of* (1937, 1 S.C.J. 23);

Note: The corresponding rules in C.P.R., 1938, are rules 326, 327 and 333;

253, *sub* annotations, *last line, read*: (17.III.38, *ante*, p. 213) *instead of* (17.II.38);

257, *sub* annotations, *line 1, read:* H.C. 11/38 *instead of* H.C. 12/38;

262, *sub* annotations, *first paragraph, last line, add*: L.A.5/35 (P.P. 6.XII.35);

second paragraph, penultimate line, read: (..C. of J. 1934—6, 209) *instead of* (..C. of J. 1934—6, 207);

third paragraph, line 2, read: (....C. of J. 512) *instead of* (...C. of J. 1512);

Note: The Land Courts Rules have been repealed by the Civil Procedure Rules, 1938;

264, *Note:* For appeals from orders see now C.P.R., rule 317;

265, *Note*: Art. 181 of the Ottoman Code of Civil Procedure has been repealed by the Civil Procedure Rules, 1938; For the period of appeal where leave is required see now C.P.R., rule 321 (b) as enacted in *Gazette* 1939, No. 875, Suppl. II, on p. 256;

266, *Note*: The judgment of the District Court is reported in Northern Law Reports, p. 33;

269, *sub* annotation 2, *line 2, read*: C.A. 124/25 (C. of J. 1628 *sub* No. 149/26) *instead of* C.A. 149/26 (C. of J. 1628);

278, *Note*: The judgment of the District Court is reported in Law Reports of the District Court in Tel-Aviv, p. 82;

281, *sub* annotations, *third paragraph, line 8, read:* (L.A. 50/36, *instead of* (C.A. 50/36,;

ibid. penultimate line, delete: 1937, I S.C.J. 106, *and* and, as L.A.50/36, in;

285, *sub* "Followed", *add*: (unreported);

286, *sub* annotation 2, *line 1, read*: as to how *instead of* as to law;

sub annotation 3, *line 3, read*: 359, C. of J. 998) *instead of* 395..;

Note: Earlier proceedings in this case: L.A. 45/34 (C. of J. 1934—6, 840);

289, *Note*: For exemption from Court fees on appeal see now: Court Fees (Amendment) Rules (No. 2), 1938, *Gazette* 1938, No. 835, Suppl. II, p. 1402;

301, *line 19, read*: Rules 93, 96, *instead of* Rules, 99, 93;

Note: The corresponding rules in C.P.R., 1938, are rules 326, 333 and the corresponding form is form 31;

305, *sub* annotations, *line 2, read*: C.A. 101/38 *instead of* C.A. 101/34;

307, *Note*: Further proceedings in this case: C.D.C.Tel-Aviv 92/38 (P.P. 31.III.39);

310, *line 4 from the bottom, read*: Land Appeal 46/36 *instead of* Land Appeal 46/33;

312, *line 14, read*: Hussein Muhammad Daqqa *instead of* ....Buqqa;

Note: Further proceedings in this case: C.A. 210/38 (1938, 2 S.C.J. 86);

316, *Note*: The judgment of the District Court is reported in Law Reports of the District Court in Tel-Aviv, p. 98;

317, *Between* "Held" *and* "Annotations" *insert*: Distinguished: C.A. 124/25 (C. of J. 1628 *sub* No. 149/26);

Note: The judgment of the District Court is reported in Northern Law Reports, p. 51;

318, *Note*: The judgment of the District Court is reported in Northern Law Reports, p. 25;

326, *sub* annotations, *last paragraph, line 1, read*: H.C. 31/34 (2 P.L.R. 81...) *instead of*.... (2 P. L. R. 31....);

Note: Further proceedings in this case: C.A. 230/38 (1938, 2 S.C.J. 190);

341, *sub* "Followed", *between* "Stawsky" *and* "(P.P....)" *insert*: Assize Case 3/34;

sub annotations, *add*: 3. See CR. A. 39/26 (P. L. R. 90, C. of J. 465);

349, *sub* annotations, *line 1, read*: 1937, I S.C.J. 316 *instead of* 1937, I S.C.J. 216;

351, *sub*."Considered" *add*: C.A. 43/28 (C. of J. 1375);

362, *Note*: The judgment of the District Court is reported in Northern Law Reports, p. 77;

374, *sub* annotations, *line 6, read*: (H.C. 70/28, P.L.R. 342..) *instead of* (.. P.L.R. 343 ...);

379, *line 10 from the bottom, read:* L.A. 80/29 *instead of* L.A. 85/29;

Note: Art. 162 of the Ottoman Code of Civil Procedure has been repealed by the Civil Procedure Rules, 1938;

383, *Note:* The corresponding rule in C.P.R., 1938, is rule 333, and the corresponding form is form 31;

Further proceedings in this case: 1938, 2 S.C.J. 39;

384, *line 4 from the bottom, read:* C.A. 93/38 *instead of* CR.A. 93/38;

387, *line 21, read:* C.A. 43/28 *instead of* C.A. 43/38;

388, *line 4, add:* (*sub* No. 88/25);

line 6, read: (1938, I S.C.J. 350) *instead of* (1938, I S.C.J. 210);

sub annotations, *line 3, read:* C.A. 48/38 (*ante*, p. 327)) *instead of* .. (*supra*);

Note: Further proceedings in this case: C.A. 16/39 (1939, I S.C.J. 96);

399, *sub* annotations, *line 3, read:* 9/38 (*post*, p. 410) *instead of* No. 9 (..);

line 4, read: 2 Ct.L.R. 137 *instead of* 2 P.L.R. 137;

401, *line 4, add:* (unreported);

sub annotations, *second paragraph, line 3, read:* 70/27 P.L.R. 174 ..) *instead of* ... (P.L.R. 134 ..);

410, *line 9, read:* P.C.L.A. No. 9/38 *instead of* P.C.L.A. No. 9.

Note: The proceedings in C.A. 119/37 are reported in 1938, 2 S.C.J. 243;

412, *Put on top:* ANNOTATIONS: I. See also C.A. 127/26 (P.L.R. 109, C. of J. 1688);

421, *Note:* The Young Offenders Ordinance has been repealed by the Juvenile Offenders Ordinance, 1937;

Annotation 2 *add:* But this decision has been overruled in C.A. 158/38 (1938, 2 S.C.J. 126);

422, *sub* annotations, *line 2, read:* Previous proceedings in this case *instead of* The proceedings before the District Court;

428, *Note:* C.A. 147/26 has been followed and this judgment not followed in C.A. 217/38 (1938, 2 S.C.J. 221);

432, *Note:* The judgment of the District Court is reported in Northern Law Reports, p. 104;

439, *sub* annotations, *line 2, between* "reported" *and* "in" *insert*: in 1938, 2 S.C.J. 257 and;

442, *line 14, read:* Yehoshua Hankin *instead of* ... Khankin;

447, *line 16 from the bottom, read:* Najib Majdalani *instead of*... Hajdalani;

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Page 4, *sub* "Distinguished", *line 1, add:* (C. of J. 263 *sub* No. 162/32);

ibid., delete the second line;

Note: Further proceedings in this case: Misc. A. 41/38 (*post*, p. 247);

7, *Note:* Earlier proceedings in this case: C.A. 143/34 (C. of J. 1934—6, 793);

9, *sub* annotations, *line 4, read:* (2 P.L.R. 387, P.P. *instead of* 2 P.L.R. 287 ..);

10, *Note:* Earlier proceedings in this case: Misc. A. 37/38 (*post*, p. 255);

17, *Note:* Further proceedings in this case: C.A. 222/38 (*post*, p. 184);

24, *line 11, read:* To hear both parties *instead of* Both to hear parties;

Note: The Evidence on Commission Rules have been repealed by the C.P.R., 1938;

Further proceedings in this case: C.A. 1/39 (1939, I S.C.J. 57);

27, *line 12 from the bottom, delete:* British *and add the following lines:*

I concur *in toto*	British Puisne Judge.
I concur	Puisne Judge.

29, *Note:* Art. 66 of the Ottoman Code of Civil Procedure has been repealed by the C.P.R., 1938;

The corresponding rule to rule 91 of 1935 is rule 321 as enacted in *Gazette* 1939, No. 875, Suppl. II, on p. 256;

35, *Note:* Earlier proceedings in this case: C.A. 238/37 (1938, I S.C.J. 32);

38, *Note:* Arts. 99 and 103 of the Ottoman Code of Civil Procedure have been repealed by the C.P.R., 1938;

39, *Note:* The corresponding rule in C.P.R., 1938, is rule 333;

43, *Note:* Further proceedings in this case: CR.A. 89/38 (1939, I S.C.J. 10);

49, *sub* annotations, *line 2, read:* H.C. 11/38 *instead of* H.C. 12/38;

54, *Note:* This judgment has been overruled in C.A. 158/38 (*post*, p. 126);

58, *line 7 from the bottom, read:* payee and the Appellant *instead of* payee and the Respondent;

59, *line 3, read:* father and the Appellant *instead of* father and the Respondent;

68, *sub* annotations, *first paragraph, add:* C.A. 161/34 (C. of J. 1934—6, 429);

72, *line 1, read:* to C.A. 247/37 *instead of* to C.A. 247/38;

77, *sub* annotations, *first paragraph, add:* (*post,* p. 257);

Note: The judgment of the District Court is reported in Northern Law Reports, p. 131;

81, *Note:* Further proceedings in this case: P.C.L.A. 11/38 (*post,* p. 93);

86, *Note:* Earlier proceedings in this case: C.A. 244/37 (1938, I S.C.J. 37), C.A. 111/38 (*ibid.,* p. 312);

88, *Note:* The question referred to in the annotation has been settled in C.A. 158/38 (*post,* p. 126);

94, *sub* annotations, *line 2, read:* C.A. 137/38 *instead of* C.A. 127/38;

96, *sub* annotations, *line 4, read:* H.C. 11/38 *instead of* H.C. 12/38;

98, *sub* annotations, *line 4, read:* 11/38 (*ante,* p. 93) *instead of* .. (*ante* at p. 68);

111, *sub* annotations, *read:* .. (1938, I S.C.J. 332) *instead of* .. (1938, I S.C.J. 322);

114, *sub* annotations, *line 2, read:* CR.A. 54/38 *instead of* CR.A. 34/38;

line 5, read: CR.A. 59/33 *instead of* 59/33;

120, *line 2, read:* H.C. 55/33 *instead of* H.C. 55/38;

125, *sub* annotations, *line 1, read:* C.A. 224/38 *instead of* 224/34;

126, *line 12 from the bottom, between* "Copland" *and* "and" *insert:* Frumkin, Khajat;

127, *sub* "Considered in majority judgment", *line 2, read:* C. of J. 1665 *instead of* C. of J. 1678;

sub "Considered in judgment of Copland, J.", *line 2, read:* III L.T.Rep. at p. 420 *instead of* III L.T.Rep. at p. 384;

sub annotations, *line 2, read:* C.A. 178/38 *instead of* C.A. 178/34;

141, *line 8, read:* C.P.R. 305, 306 *instead of* C.P.R. 306, 307;
sub "Followed", *add:* C.A. 29/31 (P.L.R. 599, C. of J. 512);
sub "Not followed", *line 1, delete:* C.A. 29/31 (P.L.R. 599, C. of J. 512);
sub annotations, *line 1, between* "that" *and* "point" *insert:* the; *line 6, read:* .. (2 Ct.L.R. 49, ..) *instead of* .. (2 Ch.I.R. 49 ..);

145, *Note:* Further proceedings in this case are reported *post*, p. 230;

152, *Note:* Further proceedings in this case: P.C.L.A. 13/38 (*post*, p. 228 and 1939, I S.C.J. 98);

154, *sub* annotations, *line 5, read:* C.A. 206/38 (14.XI.38) *instead of* .. (14.VI.38);

161, *sub* "Held", *third paragraph, between line 1 and 2, insert*: land. Appellant had an equitable title in;

162, *line 11, read:* was reversed *instead of* was reserved;

164, *Note:* Further proceedings in this case: P.C.L.A. 14/38 (1939, I S.C.J. 20);

167, *line 5, read:* Nimer Ahmad Minawy *instead of* ... Hinawy;
sub annotations, *line 3, read:* L.A. 42/35 *instead of* L.A. 36/36;

178, *Note:* Further proceedings in this case: P.C.L.A. 15/38 (1939, I S.C.J. 21);

189, *Note:* Earlier proceedings in this case: Misc. A. 56/38 (*post*. p. 254);

198, *line 2, read:* L.A. 58/25 (C. of J. 1777 *sub* No. 88/25) *instead of* L.A. 88/25 (C. of J. 1777);
Note: Further proceedings in this case: P.C.L.A. 16/38 (23.I.39);

211, *Note:* The correct description of the case referred to in line 13 is L.A. 58/25 and not L.A. 88/25;

228, *Note:* Further proceedings in this case are reported in 1939, 1 S.C.J. 98;

243, *Note:* Art. 66 of the Ottoman Code of Civil Procedure has been repealed by the C.P.R. 1938;

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[7] Now amended by the Medical Practitioners (Am) Ordinance, No. 6 of 1939.

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8 Now repealed by the Trade Marks Ordinance, 1938.

9 Repealed by the Court Fees Rules, 1935, and the Arbitration Rules, 1938.

10 Repealed by the Civil Procedure Rules, 1938.

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11 Now amended: Palestine Gazette 1938, Suppl. II, No. 835, p. 1402.

12 Now repealed by the Civil Procedure Rules, 1938.

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