Current Law Reports

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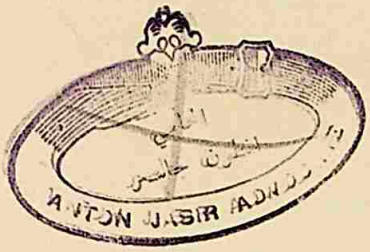

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CIVIL APPEAL No. 61/36.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

Paulina Vangrover — Appellant

v.

Mikhail Hanna Raji and another — Respondents.

Landlords & Tenants — Consideration.

Where no rent payable, Landlords & Tenants (Ejection and Rent Restriction) (Extension) Ordinance, No. 12 of 1935, does not apply.

Refraining of bringing an action may be regarded as consideration.

Weinshal for Appellants. *Sahyoun* for Respondents.

Appeal from judgment of District Court, Haifa, dated 16.3.1936.

JUDGMENT

The Respondents in this case have signed an undertaking in writing to vacant a plot of land purchased by the Appellant within two months, failing which they were to pay the sum of LP 3.— for each day of delay.

When the appointed day fell, however, they failed to carry out their undertaking and the Appellant therefore brought an action claiming the sum of LP. 393 — in respect of a delay of 131 days.

District Court of Haifa dismissed Appellant's claim on 16th March, 1936, on the ground that the Landlords and Tenants (Ejection and Rent Restriction) (Extension) Ordinance, No. 12 of 1935, renders the undertaking unenforceable.

Counsel for the Appellant has raised two points for determination by the Court. He argued that the Ordinance relied upon by the Court of Trial does not apply to the present case for two reasons. First, because the said Ordinance refers to premises, while the subject matter of the lease in this case is land; and secondly because the Respondents are not tenants within the meaning of the Ordinance as they were under no obligation to pay rent, and were thus in possession at will. On this second point, the Court is in entire agreement with Appellant's contentions, and we hold that since no rent is payable, the Respondents are not Tenants and that for these reasons the Landlords and Tenants (Ejection and Rent Restriction) (Extension) Ordinance No. 12 of 1935 doe not apply.

Respondent's attorney has argued, on the other hand, that the undertaking to leave is invalid for lack of consideration, and cannot therefore be enforced. With this the Court cannot agree, for clearly the consideration is two-fold, viz : the permission granted to Respondents to remain in possession for two more months, and the refraining by the Appellant of bringing an action against the Respondents during this period.

For these reasons, the appeal is allowed and the case in remitted to

the District Court to ascertain the number of days during which the Respondents remained in possession after the date on which they contracted to vacate and to give judgment accordingly for the amount so found due. Costs to follow result.

Delivered this 12th day of April, 1937.

CIVIL APPEAL No. 128/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL

Before:— Copland A/S.P.J. and Frumkin, J.

Yusef Khilil Muhammad — Appellant

v.

Yusef Ali Hamad — Respondent

Oral Evidence against document.

Oral evidence other than that of parties — inadmissible to prove failure of consideration in contradiction to declaration in promissory note that value received in cash.

Appeal from judgment of District Court, Jerusalem, dated 15.12.34.

JUDGMENT.

This is an appeal by way of leave granted on the following point of law :—

"Where in a promissory note the maker alleges as against the payee that although the consideration is in the body of the note declared to have been received in cash', in fact no consideration was received and the note was given on trust, the Court may hear the evidence of witnesses other than the parties to prove this allegation".

Our reply to this is in the negative.

It is true that an admission made before arbitrators may be admissible in certain cases, but where the arbitrators give evidence, as in this case, regarding an admission against a document then certainly their evidence is inadmissible and was wrongly received.

This point has been decided so often, that we must express our surprise that leave to appeal on it is granted and comes before us for yet another decision in 1937.

The appeal is, therefore, allowed and the case remitted to the Magistrate's Court to hear the case afresh and give judgment accordingly.

Costs to be costs in the action.

Delivered this 21st day of January, 1937.

CIVIL APPEAL No. 161/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL

Before:— Manning, A/C.J. and Frumkin, J.

Sara, wife of Shimon Jacob Shimon — Appellant.

v.

Joseph Hassoun. Respondent

Constructive Admission.

1. Where money is payable by party to contract at time of signature, signing and delivering the document by other party knowing that the money was then payable amounts to admission of receipt of such money.

2. No damages payable where both parties in default.

Marein and *Friedenberg* for Appellant. *S. Mizrahi* for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 25.7.35.

JUDGMENT

The first point to be decided in this case is whether the Respondent in fact received the sum of LP. 140 which under the contract Appellant was to pay at the time the contract was signed.

The document contains no clear acknowledgment of receipt, but when the Respondent signed the contract and delivered it to the other side knowing that the money was payable at the time of signature, he must be considered as having assumed liability for the receipt of such sum.

As to the second point on the amount claimed as damages, it seems that both parties were at default.

On the 4th of October the Respondent received a Notarial Notice from the Appellant asking him to transfer the land until the 6th, which must have been on or about the 6th. If the Respondent was really ready to transfer, he should have informed the Appellant when exactly between the 4th and the 6th he wants her to accept transfer. The Appellant on his side should have shown her readiness at the day of the Notice: and we therefore hold that neither of the parties has proved a good case for damages.

The appeal is, therefore, allowed, the judgment of the District Court set aside and judgment entered for Appellant for the sum of LP. 140 with half of the costs in this appeal.

Delivered this 4th day of January, 1937.

; CIVIL APPEAL No. 126/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL

Before : The A/Chief Justice & Mr. Justice Abdul Hadi.

Ahmed Atiyeh Jaber Appellant

v.

Shehadeh Saleh Diab Respondent

Excessive Interest — Evidence against admission.

In cases under Usurious Loans Ordinance 1934 a debtor — not bound by any admission and evidence may be given in contradiction.

Kehati for Appellant. *Goitein* for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 4.6.36.

JUDGMENT

The Appellant sued the Respondent in the District Court for LP. 472.— due on a mortgage. It was clear from his statement of claim that the Respondent had opposed execution of the mortgage on a plea of excessive interest. The District Court inquired into this matter and found that the loan made was LP. 250.— only, and having adjusted the account between the parties, gave judgment for the Appellant for LP. 200.450 mils only.

In the mortgage-deed, the Respondent had admitted before the Land Registrar that the loan was LP. 472, and Mr. Kehati has argued that he cannot now go behind that admission. But it is clear from the Usurious Loans Ordinance that in cases arising under that Ordinance a debtor is not bound by any admission and evidence may be given in contradiction.

The judgment of the District Court was right.

The appeal is dismissed with LP. 2.— advocate's fees.

Delivered this 21st day of January, 1937.

CIVIL APPEAL No.152/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before : The Senior Puisne Judge and Mr. Justice Abdul Hadi.

1. Jacob Brook.
2. Moshe Ratnovsky.
3. Mordekhai Dolgin.

(in their capacity as representatives of the Shechunath Hazrifim Macabee Cooperative Society Ltd. Appellants.

v.

Said and Khalil Hallou. Respondents

Procedure — Juristic Persons.

A body corporate must be sued in its corporate name, persons representing it cannot be sued even in their capacity, as representatives of that body.

Appeal from judgment of District Court, Haifa, dated 18.6.35.

JUDGMENT.

The Respondents sued the Appellants for rent due by a Co-operative Society, citing the Appellants as representatives of the Society. Their statement of claim and all the arguments in the Court below and on the hearing of this appeal made it clear that the party responsible for the rent, if any ,was the Co-operative Society.

By Sec. 21 of the Cooperatives Societies Ordinance such a Society

is a body corporate. As such it must be sued in its corporate name and the parties who represent it cannot be sued.

This objection was taken in the Court below but was apparently decided against the Appellants, against whom judgment was given for LP. 100.— The point has again been raised before us. We think the objection is a fatal one. It is clear that the Society itself should have been made the defendant and that the persons actually made defendants could not be sued.

The Appeal is allowed. The judgment of the Court below is set aside with costs here and below. Costs here to include LP. 3.— advocate's fees.

Delivered this 19th day of November, 1936.

CIVIL APPEAL No. 74/36.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL

Before : Mr. Justice Copland, Mr. Justice Khaldi, and Mr. Justice Abdul Hadi.

Abdul Fattah Younis El Khawalidi — Appellant

v.

Hassan Abdul Quader El Sayyed — Respondent

Grounds of Appeal — Pleas.

1. Ground not mentioned in statement of appeal cannot be argued on appeal.
2. Point never raised and discussed in trial Court even if being one of grounds stated in the statement of appeal, cannot be argued on appeal.
3. Alternative pleas must not be contradictory.

Cattan for Appellant. *Moghannam* for Respondent.

Appeal from judgment of District Court, Jaffa, dated 16.4.36.

JUDGMENT.

Mr. Cattan, who argued this appeal at considerable length and ability, raised four grounds of appeal.

2. The first point was that the Court should have heard witnesses to prove the allegations of the present appellant, who was the defendant in the Court below. We hold, however, that in the circumstances the District Court was justified in refusing to hear the evidence.

3. The second point taken was that appellant had no capacity to contract. As the appellant did not mention this ground in his lengthy statement of appeal, this point cannot be argued at this stage.

4. His third point was regarding alternative defences. The present appellant had two defences in the Court below first that there is fraud, and alternatively that he refused to sign the contract as the purchase price was wrongly stated. We agree with Mr. Cattan that alternative pleas may be taken, but the person taking alternative pleas must be

very careful in doing so, as such a course is very dangerous. The case quoted by Mr. Cattan, Civil Appeal No. 58 of 1927, cannot apply in the present case.

5. Mr. Cattan's fourth point was as regards the question of penalty and damages. This point was never raised and discussed in the lower Court, and although it is one of the grounds stated in the statement of appeal it cannot be argued now before us. The same question has already been decided by this Court in Civil Appeal No. 160 of 1935.

6. The appeal should be dismissed with costs to include LP. 5 advocate's fees.

Delivered this 15th day of April, 1937.

CIVIL APPEAL No. 149/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL

Before : The Acting Chief Justice and Mr. Justice Frumkin.

David S. Agassi — Appellant

v.

David Aboutboul — Respondent

Oral Evidence.

Where document itself not contradictted, oral evidence may be heard as to circumstances under which it was made and negotiated.

Appeal from judgment of District Court, Jaffa, dated 13.6.35.

JUDGMENT.

This is an action on a cheque. Defendant admits the cheque. He alleged, however, fraud, duress and want of consideration and asked to be allowed to call evidence on these points. The Court below refused his application apparently on the ground that none of these defences had been put forward.

We think the Court below was wrong and their judgment must, therefore, be set aside and the case remitted to them with instructions to hear the Defendant and his witnesses on the above issues, and the Plaintiff's witnesses, if any, in reply, and then to give judgment in the action.

Costs to abide the event.

We think that in an action on a cheque, where the document itself is not contradicted, but other matters such as above are alleged, oral evidence may be heard as to the circumstances under which the cheque was made and negotiated.

Delivered this 5th day of January, 1937.

CIVIL APPEAL No. 61/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL

Before : The Senior Puisne Judge, Mr. Justice Khaldi, and Mr. Justice Frumkin.

Yehoshua Hankin — Appellant

v.

Abdul Rahim Hanoum and a. — Respondents

Evidence — Onus Probandi.

1. After institution of action under contract defendant entitled to inference that he considered the agreement at an end.

2. Certain amount of evidence necessary to shift burden of proof. In considering it regard must be had to the opportunities of knowledge with respect to fact to be proved which may be possessed by the parties respectively.

Eliash for Appellant. *'Aouni Abd-el-Hadi* for Respondents.

Appeal from judgment of District Court, Jaffa, dated 21.1.35.

JUDGMENT

1. This appeal is concerned with damages for breach of contract. The respondents agreed to sell certain land to the appellant but failed to carry out their agreement. The material clause in the agreement is as follows :

> "Both parties have undertaken to perform all the terms of this agreement completely, and if any of the parties commits a breach of any of the terms he will have to pay to the other party the sum of LP. 1000.— by way of liquidated damages without the necessity for sending a notarial notice. If the first party commits a breach or fails to perform his obligations, intending by so doing to leave the land to him or to sell it to another then he will be liable to pay LP. 3000 as liquidated damages in addition to the LP. 1000.— liquidated damages stated above without the necessity for sending a notarial notice. He will also have to refund the sum of LP. 1000 received by him under clause 12(a) together with legal interest from the date of the receipt of this sum until payment".

2.The Respondents admit that they are liable to pay the appellants LP. 1000 damages and to refund LP. 1450.— part of the purchase price which was paid. The appellant however, contends that they are liable to pay him the LP. 3000 further damages as provided by clause 14.

3. The issue in the case was, therefore, whether the failure to fulfil the agreement was due to an intention on the part of the respondents either to keep the land for themselves or to sell it to another. The trial took place before a District Court of two judges. Copland, J., held that the appellant had failed to prove the relevant intention; Mani, J., held that he had succeeded in proving it. I can find no provision in the law for the proper order to be made in such a disagreement, but in accordance with local practice it was held that the appellant's claim failed. He has appealed to this Court.

4. The issue was a question of fact, and if this Court had to decide that question, it would find itself in a position of difficulty, as it has neither heard or seen the witnesses. But Mr. Eliash, who argued the appeal on behalf of the appellant, had argued it on two points of law, viz : that Copland J. has misdirected himself on two vital matters. The learned judge held that the onus of proof was on the plaintiff, i. e. the appellant in this appeal. Mr. Eliash cites the well-known rule of evidence quoted in the Hailsham edition of Halsbury, Vol. 13, p. 545, viz that the burden of proof is shifted from the person on whom it would naturally fall when the truth of the allegation lies peculiarly within the knowledge of his opponent, That is, in this case the appellant would in ordinary course have to prove that the intention of the respondents was to keep the land for themselves or to sell it to another, but what their intention actually was is a matter peculiar within their own knowledge, and therefore the burden is on them to prove that they had not the relevant intention.

5. From an examination of the decided cases it is clear that the rule was never meant to have this effect—its effect is usually to relieve a party from having to prove a negative averment. In this case Mr. Eliash would use it to throw the burden of proving such an averment on the respondents. Besides, as mentioned on p. 546 of the volume of Halsbury referred to by Mr. Eliash, the validity of the rule as stated on p. 545 has been challenged and the manner of stating it which is least open to objection is: "In considering the amount of evidence necessary to shift the burden of proof, the Court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively". I am in full agreement with Copland, J., that the onus of proving the requisite intention in this case rested on the appellant ; how much evidence was necessary to shift that onus was a matter for him. I hold that the learned judge did not misdirect himself on this point.

6. Looking at the judgment of the learned judge it is also quite clear that he considered the evidence before him and came to the conclusion that what prevented the respondents from fulfilling their agreement was the refusal of their brothers to join in the sale. Thus, there was a definite finding on the issue in the case, viz the intention which induced the breach of contract. The question of onus does not therefore arise. In the case of Robins v. National Trust Co. and others, 43 L.R. 243, Lord Dunedin, in delivering the judgment of the Privy Council, said, at pages 244 and 243 :

> "Their Lordship cannot help thinking that the appellant takes rather a wrong view of what is truly the function of the question of onus in such cases. Onus is always on a person who asserts a proposition of fact which is not self evident. To assert that a man who is alive was born requires no proof. The onus is not on the person making the assertion because it is self evident that he had

been born. But to assert he had been born on a certain date, if the date is material, requires proof. The onus is on the person making the assertion. Now, in conducting any inquiry, the determining tribunal, be it judge or jury, will often find that the onus is sometimes on the side of the other, or as it is often expressed, that in certain circumstances the onus shifts. But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter. But if the Tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered".

7. The second ground on which the decision of Copland, J. is attacked is that, in estimating the intention of the respondents he held that he could not take into account their conduct subsequent to the breach. This conduct consisted of negotiations on part of the respondents to sell the land to the other persons. There are certainly passages in the judgment which might lead one to think that the learned judge thought it unnecessary to consider this part of the evidence. But the judgment must be looked at as a whole and it is not fair to pick out isolated passages. It is clear that the learned judge did weigh the value of the subsequent conduct as evidence, but came to the conclusion that it was of no importance as whatever negotiations were entered into were all dependent on the consent of the appellant. Further there can be doubt that the respondents were entitled to the inference that after action brought they considered the agreement at an end and felt themselves free to enter into negotiations with others for the sale of the land.

8. Both grounds of appeal fail in my opinion the appeal should be dismissed with costs.

Delivered this 4th day of November, 1936.

HIGH COURT No. 109/36.

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

Before:— Copland A/S. J. and Khayat, J.

1. Moses J. Dukhan
2. Liubov Doukhan — Petitioners.

v.

1. District Commissioner Northern District, Haifa.
2. Commissioner of Lands and Surveys, Jerusalem. Respondents.

Urban Property Tax — Procedure on allegation of exemption.

Person alleging exemption from Urban Property Tax whose property appears on Valuation List can only object to Assessment Committee.

Doukhan for Petitioners.

Application for an Order to issue to Respondents directing them to

show cause why Petitioners should not be exempted from payment of Urban Property Tax for three years and why first Respondent should not abstain from demanding and collection the Tax.

ORDER

This is an application for an Order Nisi to issue against the District Commissioner, Northern District, and the Commissioner for Lands and Surveys, calling upon them to show cause why the Petitioners should not be exempted from payment of the Urban Property Tax in respect of their house in Haifa, for a period of three years.

The facts of the case are not disputed. It appears that Petitioners have built a new storey in Haifa, which they allege ought to be exempted from taxation for a period of three years. The fact remains, however, that Petitioner's property did appear on the Valuation List. The Petitioners say that they do not object to the valuation, but that they are not liable to pay, being exempt.

Section 14 (1) of the Urban Property Tax Ordinance No. 25 of 1928, provides :—

> "Any person who feels himself aggrieved by the Valuation List on the ground that he is not liable to pay the tax or..... may..... give to the assessment committee notice in writing of his objections, specifying the grounds thereof.....

From this it is clear, that a person who alleges exemption, but whose property appears on the Valuation List, should, if he is objecting to it, do so to the assessment committee. The Property of an exempted person should not appear on the Valuation List, but if does appear, then that is sufficient justification for him to lodge his objection with the committee.

This point has been raised before the District Court of Haifa, whose decision is the same as ours outlined above, and we take this opportunity to say that we agree entirely with that Court's interpretation of the Law.

Petitioners thus failed to take the right course by asking for leave to appeal on a point of law and appealing it to this Court as a Court of Appeal, but instead followed the wrong procedure by filing this application before the High Court.

For all these reasons the application is refused.

Delivered this 6th day of January, 1937.

CIVIL APPEAL No. 23/36.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL

Before:—Trusted, C.J., Frumkin, J. and Khayat, J.

In the Case of :

Jamil Abyad.

Appellant

v.

Socrat Tokatlides

Respondent.

Estoppel — Interest — Chief Execution Officer.

1. When there was a decision on one issue in a case but no final judgment ever given, no estoppel created.

2. Court follows decision in C.A. 96/29, PLR p. 583 (that where no undertaking by debtor to pay interest until full satisfaction of that, or protest by creditor, a claim for interest beyond the period stipulated in the contract cannot be sustained).

3. Court follows decision in H.C. 50/31, PLR p. 636 (that decision of Chief Execution Officer is not a judgment of a Court and cannot bind the Magistrate's Court).

Weinshall for Appellant. *B. Joseph* for Respondent.

Appeal from judgment of District Court, Haifa, dated 5.11.35.

JUDGMENT

This is an appeal by leave of the President of the District Court of Haifa, from a judgment of a magistrate given on 28.7.35 and is the culmination of prolonged litigation between the parties.

The actual claim before the Magistrate was for the balance of a mortgage debt together with two claims for interest.

These points arise for the decision of this Court.

(1) Was the Defendant (the present Appellant) estopped from alleging before the Magistrate that although the mortgage appeared to secure the sum of L.P. 1150, 950 only was advanced, the balance, i.e. LP. 200 being interest which, owing to the period for which the mortgage was given, would be excessive.

The facts as to this are peculiar. It seems that the present Appellant was the Plaintiff in an action before the District Court in which he alleged that only 950 was advanced and that therefore LP. 200 was excessive interest. The District Court consisted of two judges and differed and in accordance with the practice the point was decided against the Plaintiff in what has been called an interlocutory judgment. I should prefer to avoid the use of the expression "interlocutory", and refer to it as a decision given in the course of the proceedings upon the issue. Other matters were in issue but the Plaintiff failed to go on with his action and it was struck out.

The Magistrate took the view that this amounted to an estoppel. In my opinion he was wrong in so doing. When a decision on one issue is given in the course of hearing a case that decision no doubt becomes incorporated in the final judgment when one is given normally would be expressly mentioned but when no final judgment is ever given I do not think an estoppel is created.

I may say that if that view is not accepted, it seems to me illogical to hold, as the learned Magistrate apparently held, that an estoppel is created, i.e. the parties are estopped from saying that the sum of LP. 200 was interest, and then to go on to hold that because the Plaintiff claimed that LP. 200 was interest upon which the Court decided against him, he is now estopped from saying that interest was not payable.

(2) The next point which arises is, if the appellant is entitled to show

that LP. 200 of the LP. 1150 was interest is he liable to pay interest after the date of maturity and at what rate. That seems to me to be covered by the decision of the majority of this Court in Civil Appeal No. 96/29, P. L.R. 583, with which I agree.

(3) The third point which arises is, was the Magistrate bound by an order of the Chief Execution Officer. This seems to be answered by a decision of this Court in H. C. No. 50/31, P. L.R. 639, which lays down, "The decision of the Chief Execution Officer is not a judgment of a Court and cannot bind the Magistrate's Court.

In my judgment this appeal should be allowed with costs, advocate's fees LP. 3, and the case remitted to the learned Magistrate with a direction to him to hear and determine it in accordance with the views I have expressed.

Delivered this 23rd day of April, 1937.

CIVIL APPEAL No. 147/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL

Before:— Copland A/S. J. and Khayat, J.

Muhammad Khanis Salim Shahin — Appellant

v.

Daud Bey Moyal — Respondent

Meaning of Document.

If meaning of document clear, Court will not speculate as to what was the intention of person executing it.

Ayoubi for Appellant. *Moyal* for Respondent.

Appeal from judgment of District Court, Jaffa, dated 10.7.35.

JUDGMENT

The point raised in this appeal is a simple one. It revolves round the meaning to be attached to a Power of Attorney given by the Respondent.

The District Court which had the document before it and which heard evidence on this point, found that it applied to Muhammad Khamis only and not to the other heirs. It is only reasonable to suppose that if the Respondent wanted the Power of Attorney to apply to all the heirs, he would have said so, and of course, we need hardly say that we are not concerned to speculate as to what Respondent's intention was, when the document before us is a clear one.

The question is thus purely one of fact and we hold that the Lower Court arrived at the correct conclusion.

For these reasons the appeal is dismissed with costs.

Delivered this 25th day of January, 1937.

CIVIL APPEAL No. 112/36.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before:— The Senior Puisne Judge and Copland, J.

Joseph Dienfield — Appellant.

v.

Sara Dienfield — Respondent.

Religious and Civil Courts Concurrent Jurisdiction.

Where a Court having concurrent jurisdiction was chosen by parties and has made an order, the only Court competent to deal further with the matter is the Court which originally dealt with it.

Appeal from judgment of District Court, Jerusalem, dated 29.9.36.

JUDGMENT

The Respondent sued the Appellant in the District Court of Jerusalem for maintenance of her children. Appellant's advocate raised a preliminary objection as to jurisdiction. The District Court overruled this without hearing any evidence. In this we think they were wrong.

The hearing resulted in an order against the Appellant. Again no evidence was heard on the issues raised. This also was an irregularity, and the order as made cannot, therefore, stand.

There is, however, a further and more weighty objection to the order made. The Appellant pleaded that the matter had been already before the Rabbinical Court and that that Court had already made an order of LP. 3 a month. He contended that the Respondent could not now come to a different Court for a fresh order.

The Respondent contended that she had never consented to the jurisdiction of the Rabbinical Court. If this was so, that Court had no jurisdiction. But there is a decision of this Court delivered on the 12th February, 1935, and in the course of that decision it was decided that the Respondent had submitted to the jurisdiction of the Rabbinical Court. The appeal before this Court was between the same parties and a decision on this point was necessary to the determination of the appeal. This part of judgment is, therefore, binding on both parties and the Respondent cannot now be heard to say that she did not submit to the jurisdiction of the Rabbinical Court.

This being so, can the Respondent, having already an order from the Rabbinical Court, go to the District Court for a variation of that order? The District Court has jurisdiction and no question could arise if it had been approached in the first instance. But as another Court having concurrent jurisdiction was chosen by the parties, we feel bound to hold that if any variation of the order was desired, the only Court which had jurisdiction was the Court which originally dealt with the matter. There is no authority on this point and we decide the matter as we do, so that there may be finality in litigation and to prevent

the clashing of Courts having concurrent jurisdiction in the same matter.

The District Court should have refused to hear the case on the ground urged by the Appellant. Its order must be set aside.

Appeal allowed with costs to include LP. 5 advocate's fees.

Delivered this 27th day of November 1936.

MISC. APPEAL 10/36

IN THE SUPR. COURT SITTING AS A COURT OF CIVLI APPEAL.

Before Manning C.J., Plunkett, J. and Khayat J.

Haim Abu Sham — Appellant

v.

Attorney-General — Respondent.

Procedure — Appeal from Magistrate's Court.

District Court can refer case back only when finding serious error in procedure, but not when new evidence is alleged to have come to light. (Rule 8 of the Mag. Court (Procedure) Rules made by the Senior Judicial Officer on the 4th July 1918) (Drayton III p. 2372, §10).

Appeal from judgment of District Court of Haifa, dated 30.3.36 whereby judgment of Magistrate's Court, Haifa, dated 14.1.36, acquitting appellants from a charge under Article 38 of Town Planning Ordinance 1921-29, was set aside, and case remitted for purpose of hearing new evidence.

JUDGMENT

1. On the 14th January 1936 one Haim Abu Sham was acquitted in the Magistrate's Court, Haifa, on a charge of erecting a building without a permit, contrary to Section 38 of the Town Planning Ordinance. The Attorney General appealed to the District Court, and on March 30th, 1936 that Court made an order as follows :—

> "The appellant alleges that since the trial new evidence has come to light which leads to establish the quilt of the accused (Respondent) — namely a map drawn by Mr. Atlas, the Surveyor of the Land Registry of Haifa, and a complaint lodged by Mr. Saadia Paz with the District Court, Haifa, on the 1st day of October 1934.
>
> In the circumstances, the judgment of the Magistrate is set aside, and the case is remitted to him for enquiring into the new evidence, referred to by the Prosecution".

2. Sham's counsel applied for leave to appeal against this order, and was granted leave to appeal on the following point of law :

> "Has the District Court, sitting in its appellate capacity, any — and if so what — powers to remit criminal proceedings to the Magistrate's Court for the purpose of hearing further or fresh evidence; and if so, in what circumstances and within what limitations?".

3. The only provision with reference to the powers of the Dis-

trict Court on an appeal from a Magistrate's Court is rule 8 of the rules made by the Senior Judicial Officer on the 4th July 1918 (See Bentwich, Vol. 2, p. 458). This rule is as follows :—

> 8. The following provisions are substituted for Article 46:
> If it is held that the Magistrate had no jurisdiction the District Court shall name the tribunal proper to try the case. If the judgment was based on wrong grounds, the District Court, shall decide the case itself. If there was a serious error in procedure, the District Court may either decide the case itself or refer it back to the Magistrate for rehearing.

4. It will be seen that a District Court can refer a case back only when there has been a serious error in procedure. In the present case in is not alleged that there had been any such error, what is alleged is that new evidence has come to light establishing the guilt of the appellant.

5. The rule itself answers the question propounded by the District Court. In my opinion the order of the District Court was wrong and the appeal should be allowed.

Delivered this 14th day of November 1936.

LAND APPEAL No. 70/35.

IN THE SUPR. COURT SITTING AS A COURT OF LAND APPEAL

Before:— Trusted, C.J., Khaldi, J. and Frumkin, J.

Rarah Elias Atallah El-Danmani — Appellant.

v.

Najib Elias Banna and 2 others — Respondents.

Appeal — Court Appellate — Land.

1. Appeal cannot now fail only because addressed to District Court instead of Land Court.

Asfour for Appellant *Cattan* for Respondents.

Appeal from judgment of Land Court, Nablus, dated 12.9.35.

JUDGMENT

This is an appeal from the judgment of the Land Court of Nablus dated the 12th September, 1936.

Counsel for Respondents raised two preliminary objections:

(1) that the appeal was not filed in the proper Court in that the appeal was lodged in the District Court of Haifa instead of being lodged in the Land Court of Nablus, or in the Court of Appeal.

(2) that the Court of Appeal was not seized of the appeal, as it was out of time, owing to the fact that it reached the Court of Appeal by the 1st, November, 1935.

With regard to the first objection as to the distinction between the District Court and Land Court, it appears to me that it is artificial. In the past, there were two separate Courts, a Land Court and a District Court, by the Establishment of Courts Order of the 22nd December,

1932 the Land Court was merged in the District Court in the sense that its jurisdiction is now exercised by the Judges of the District Court. That being so, it may be convenient that certain land matters should be dealt with by Land Courts owing to the statutory jurisdiction given to these Courts: but I do not think that an appeal should fail simply because the notice of appeal is addressed to the District Court.

The case referred to by the Counsel for Respondents (i. e. L. A. No. 38/28 P.L.R. p. 455) was decided at a time when Land Courts were separate from District Courts.

As regards the second objection raised, that is, that the Court of Appeal was not seized of the appeal, as it was out of time Rule 8 (1) of the Land Court Rules of 15th May, 1921, (Drayton vol. III p. 2369), provides as follows: —

> The period within which notice of appeal against a judgment of a Land Court may be lodged in the office of the Supreme Court or of the Land Court shall be thirty days.

In this appeal, the notice and grounds of appeal were lodged at Haifa on the 10th October, 1935, and the court there accepted them as a post office and on the same day sent them to Nablus, and the contrary not being shown, I think it must be presumed that they reached Nablus in due time.

Both objections, therefore, are over-ruled.

I should not be taken as approving of the practice, if it exists, of notices of appeal and other documents being lodged in a court in order that it may act merely as a post office to forward them to another Court.

As regards the appeal itself, we are of opinion that the question raised therein is a question of fact.

The Court below went into the evidence and considered it and came to a conclusion upon it.

In these circumstances, the appeal is dismissed with costs and advocate's fees assessed at LP. 2.

Delivered this 20th day of March, 1937.

CIVIL APPEAL No. 141/35

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before:— Trusted, C.J., Frumkin, J. and Abdul Hadi, J.

Elazar Kantrovitz and 2 others — Appellants.

v

Shalom Yochanan Mizrahi — Respondent.

Appeal as to claim and counteclanim — Court fees — Costs.

1. Appeal lodged against decision on claim and counterclaim must fail as a whole, if fees not paid in due time in respect of both claims.

2. Successful Respondent may be disallowed costs, if his advocate cited no authority for his contention, although he should and could have done so.

JUDGMENT

On the authority of C.A. No. 15/30 P.L.R. p, 625 the correct fees not having been paid within the prescribed time, the appeal must be dismissed. It is not possible to sever the appeal so as to say that while the fees on the appeal against the decision on both claims was not sufficient, nevertheless as there was a sufficient fee to cover an appeal from the decision on the claim this can be proceeded with though the appeal on the decision on the counter claim must be dismissed as there was no fee paid thereupon.

The case is on all points with C.A. 101/34 so far as the time of paying fees is concerned but is distinguished from it as to severance inasmuch as there were two appeals filed at an interval of several days.

The appeal is, therefore, dismissed but inasmuch as the advocate for the Respondents cited no authority for his contention, which he should and could have done, we make no order for costs.

Delivered this 15th day of September 1936.

CIVIL APPEAL No. 43/37

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before:— Trusted, C.J., Copland, J. and Frumkin, J.

Haim Rakover — Appellant.

v

"Switzerland" (La Suisse")
General Insurance Co., Ltd. — Respondent.

Insurance — Evidence — Contract.

Party to a contract — not barred by art. 1699 of Mejelleh (inadmissibility of negative evidence) from undertaking in certain circumstances to prove a negative.

Eliash for Appellant. *Abcarius* and *Aboulafia* for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 11.3.37.

JUDGMENT

This is an appeal from a decision of the District Court, Jerusalem, given on the 11th of March last.

Owing to the terms of an insurance policy upon which the proceedings were based, the hearing of this appeal has been accelerated upon the application of the appellant.

The plaintiff claimed the sum of LP. 3000 under a policy of insurance against fire effected with the defendant company.

In his statement of claim the plaintiff pleaded that a fire occurred on the night of the 25—26 of April, 1936, at his warehouse and destroyed his property. He further pleaded that he had carried out whatever was incumbent on him under the policy, as shown by certain documents which were attached to the statement of claim.

The defendant put in no defence.

The proceedings before the District Court consisted of argument only upon the policy and the correspondence.

Abcarius Bey, on behalf of the defendants, relied upon clause 11 and clause 6 of the policy.

Clause 11 is a long clause dealing, *inter alia*, with the proof which the company is entitled to demand as to the value of the goods damaged, in respect of which a claim is made. One of the sub clauses provides that the insured will at any time be equally bound to obtain, produce and communicate at his expense, to the Company all particulars, plans, specifications, etc., which the company is entitled to ask of him, and goes on to state, that at the same time the insured will be bound to affirm the truth of his claim and of all the points therein set out, by a declaration either on oath or in any other legal form.

It was argued by Abcarius Bey that this latter provision applied to the original notice of claim which admittedly was not supported by oath or declaration. The District Court, however, did not agree with that contention.

Clause 6 of the policy provides that the policy does not cover loss or damage which arises directly or indirectly or which is the consequence of a number of excepted causes, for example, earthquakes or meteorological phenomena, invasion riots, political trouble etc, and goes on to provide, that in the event of a claim for indemnity for loss or damage following a fire being made under the policy, the company may require the insured to furnish satisfactory and indubitable proof, that the loss or damage had taken place independently of such causes and further provides that upon failure of such satisfactory proof the company will not be obliged to pay any indemnity.

It is clear from the letter of the defendant's advocate, dated the 8th of May, 1936, that the company requested the insured to furnish the necessary proof in accordance with this clause.

In reply to that letter, the only documents furnished which could be regarded in any way as proof, were copies of letters which had been obtained from the Police, one dated 27th of May, 1936, and signed by Mr. Burns, in which he states that at present there is no evidence to show whether this fire was accidental or due to some criminal act; and another signed by Mr. Rice, dated 4th of July, 1936, in which he says that no evidence of arson was discovered in connection with the fire in question.

Abcarius Bey argued that these letters did not comply with the requirements of the clause, and on this point, in its judgment, the District

Court held: "in fact, plaintiff made no real effort to submit satisfactory proof", and in the result decided that the action was premature and should be dismissed with costs. Against that judgment, the plaintiff now appeals.

To deal firstly with clause 11 of the policy, which was interpreted by the District Court in favour of the plaintiff. Abcarius Bey argues that although there is no cross appeal by him he is entitled to question the decision of the District Court on this point. Whether he is technically entitled to do so or not, I am of opinion that the view of the District Court was right and that upon the true construction of the clause the obligation upon the insured was to verify on oath or by other declaration the details of his claim which he might be called upon to produce under clause 11 and not the notice of his claim which he had to give in the first instance.

As to the interpretation of clause 6 of the policy, Mr. Eliash argues that, owing to the provisions of Article 1699 of the Mejelle which provides that the object of evidence is to prove a right, negative evidence is inadmissible, and that consequently a provision in a contract which may, in certain circumstances, call upon the party to prove a negative, e.g. that there was not an earthquake, is illegal and consequently void. With that contention I do not agree. Whatever may be the true effect of the article of the Mejelle it is a provision as to evidence, and I can see no reason why a party to a contract should be barred by it from undertaking, if he is so minded, in certain circumstances to prove a negative.

It is further argued by Mr. Eliash that the true effect of clause 6 is, that it is for the company to set up the exception and then for the insured to show that the loss occurred irrespective of the exception, and he relied on a reference to a decision of the courts in South Africa. We have no report of the case in question and I did not know what were the precise terms of the policy discussed in that case.

It seems to me that the meaning of the clause is clear, i. e. the policy does not extent to loss by fire resulting directly or indirectly from certain stipulated perils and that the company if they so desire, may call upon the insured to show that the loss for which he claims arose independently of such excepted perils. I can see no reason why the parties should not enter into such an agreement if they wish, and I am strengthened in that view by a passage in the judgment of Scrutton, L.J. in Hooley Hill Rubber and Chemical Company and Royal Insurance (1920, I.K.B. p. 257) at the bottom of page 272 and top of page 273 as follows: —

> "Thirdly, explosion followed by fires; as to that the memorandum says that the policy does not cover loss caused by the fire unless it be proved that the fire was not caused directly or indirectly by the explosion, or was not the result thereof. The effect of this is that, where damage is done by an explosion and fire

following it, the assured cannot recover unless he can prove that the fire was not caused by the explosion. This case is specifically dealt with by the last part of the memorandum".

What is satisfactory and indubitable proof must depend upon the facts of each case, and I take indubitable to mean without reasonable doubt in a business sense. When the insured person is called upon, under the terms of the clause, to furnish proof and does so, and such proof is rejected by the company, it may become a question for the Court to decide whether, in the circumstances the proof furnished was satisfactory within the meaning of the clause, and was such proof as the company acting reasonably should have accepted.

In this case the plaintiffs pleaded in their statement of claim, as I mentioned above, that they had done what was incumbent on them under the policy as shown in the documents attached. I have referred to the documents in question. and the view expressed by the District Court thereupon, I take that view to mean that in the opinion of the Court the proof tendered by the plaintiff was insufficient to satisfy the requirements of the clause, I think the Court was certainly entitled to come to that conclusion upon the documents produced, and I am of opinion that this appeal should be dismissed.

Dr. Eliash, before this Court, raised a further point, that if the District Court was of opinion that the proof tendered was insufficient it should itself have heard evidence upon the matter. I find no record of any such submission in the proceedings of the Court below nor do I find any application by Mr. Eliash to be allowed to call such evidence. I do not think, therefore, that this point is open to him and consequently I express no opinion upon it.

The appeal is dismissed with costs, advocate's fee LP. 5.

Delivered this 14th day of April, 1937.

CIVIL APPEAL No. 135/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before:—Trusted, C.J., Khaldi, J., and Abdul Hadi, J.

The Levant Bonded Warehouse Co., Ltd. Appellant.

v

Abdel Hamid Bibi. Respondent.

Ottoman & English Law — Owner & bailee — Written admission — Court of Appeal upsetting finding of fact.

1. Where Ottoman Law provides for case before Court, there can be no question of applicability of English Law.

2. A bailee can be cued by owner, not being a bailor, of goods, regardless of absence of contractual relationship between him and owner, if latter proves that bailor sold the goods to him and authorised him to take delivery.

3. Where document contains acknowledgment of receipt of goods but both extrinsic and intrinsic evidence shows that such documents are signed before goods delivered, document cannot be regarded as written admission precluding evidence in rebuttal.

Appeal from judgment of District Court, Haifa, dated 14.3.35.

JUDGMENT

On the 9th November 1933 there arrived at Jaffa by steamer from Basra 1125 bags of wheat consigned to the Respondent through Barclays Bank. Pending payment of all sums due, the Bank asked the appellant Company (hereinafter called the company) to collect and store the wheat. This they proceeded to do but from the beginning they have maintained that owing to some mistake at the Customs at Jaffa they were able to collect 815 bags only — the remaining 310 bags could not be traced. The respondent, after settling with the Bank, proceeded to collect the wheat from the company, but in the circumstances was able to obtain delivery of 815 bags only. He sued the company for the value of the 310 bags and obtained judgment for LP. 220, interest and costs in the District Court of Haifa.

The company has appealed. There were two main grounds, apart from the question as to the amount of damages. We propose to deal with the second ground first which was that there was never any contractual relationship between the respondent and the company and that therefore the company could not be sued. Mr. Salomon who appeared for the company, argued this part of the case from the point of view of both English and Ottoman Law, but as the latter law provides for cases such as this, there can be no question of the applicability of English Law. The concluding portion of Article 1638 of the Mejelle shows that a bailee can be sued by the owner, of goods, although the owner was not the depositor, if the owner proves that the goods have been sold to him and that he has been authorised by the bailor to take delivery. The respondent's case falls within the terms of this statement of the law and he is consequently entitled to sue the company.

Mr. Solomon's next ground then is this, "Granted", he says, "that the company may be sued, it can be sued only for what had actually been deposited, it cannot be sued for the 310 bags which it never received," He had a difficult task here for there were two findings of the District Court against him, one of mixed law and fact was that there was an admission by the company that it had received the whole of the 1125 bags, and it cannot be heard now to say that it received 815 bags only.

The document in which this admission is alleged to have been made is called "Entry for Warehousing." It was signed by the company acknowledging the receipt of the 1125 bags. But all the available evidence shows that documents of this nature have to be signed before any of the goods are delivered, and the document itself contains internal evi-

dence that this is so. We hold accordingly that it cannot be regarded as an admission, and that the company was not precluded from leading evidence to show that 815 bags only were received.

The District Court also made a finding of fact that the 1125 bags had been received by the company, The only evidence to support this finding was the admission to which we have just referred, and on the conclusion we have come to this evidence was not reliable. The rest of the evidence is overwhelmingly in favour of the company's contention that it received 815 bags only. Findings of fact by a Court below are not usually set aside, but in this case the findings of the District Court was clearly due to its error in regarding the "Entry for Warehousing" as an admission.

For these reasons the appeal will be allowed, the judgment of the District Court will be set aside and judgment will be entered for the company with costs here and in the Court below, Costs here to include LP. 3.— advocate's fees.

Delivered this 4th day of November 1936.

HIGH COURT No. 112/36.

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

Before:— Copland, A/S.J. and Frumkin, J.

Kark Schneider and another. Petitioners.

v

CXO Nazareth and another Respondents

Procedure — New argument.

Where application only a means to cause delay, a point will not be entertained by Court which could have been raised when matter came up before it on former occasion, public policy not allowing of continuous litigation by instalments.

J. Levy for Petitioners.

Application for an Order to issue to 1st Respondent directing him to show cause why his order dated 11.12.36 should not be set aside

ORDER

The Petitioners in this application are asking for an Order nisi to issue against Respondents calling upon them to show cause why the Chief Execution Officer of Nazareth should not stay the Execution of a judgment in favour of the second Respondent.

The said judgment is now attacked on the grounds that having been delivered by a Magistrate prior to the enactment of the new Magistrate's Courts Jurisdiction Ordinance, and being in respect of a sum exceeding LP. 100 was outside the Magistrate's Jurisdiction and hence unenforceable on that account.

It must be remembered, however, that on a previous occasion, in

High Court No. 23/36, a similar attempt to impugn the same judgment was made on the ground that being a compromise and not having been signed by both parties it was not executory.

Now public policy does not allow of such continuous litigation by instalments. The present point could just as well have been raised when the matter came up before this Court on the former occasion. The Petitioners have failed to show any cause for the delay, and the present application, as far as we can see, is nothing but a means whereby to delay the execution of a valid judgment.

For the above reason, the rule is refused.

Delivered this 4th day of January, 1937.

CIVIL APPEAL No. 55/36.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL

Before:— Trusted, C.J., Frumkin, J. and Khayat, J.

Tesher Orange Growers Association, Magdiel Ltd. Appellant

v.

Davoud Pouchas Respondent

Claim of commission — Evidence in connection with written contract.

Evidence that there was no such contract between seller and buyer as would entitle plaintiff to commission — admissible.

Turtledove for Appellant. *Goldman* for Respondent

Appeal from judgment of District Court, Jaffa, dated 14.2.36

JUDGMENT

This is an appeal from the judgment of the District Court of Jaffa dated the 14th February, 1936 confirming the judgment of the Magistrate. It comes to us by way of special leave to appeal.

The District Court formulates, for the opinion of this Court, a theoretical question. In my view the meaning of Sec. 6 of the Magistrates' Courts Jurisdiction Ordinance, 1935, is not that theoretical questions can be propounded for this Court to answer, but that when a judgment involves a point of law of novelty or complexity such as warrants an appeal to this Court, the appeal can be brought to this Court by leave of the presiding judge. The duty of the Judge is to satisfy himself that there is such a question of law.

As to this particular case it seems to me that the first point to which the learned Magistrate had to direct his mind was the question as to whether there was a contract thereby the Plaintiff was entitled to remuneration.

The next question to which the Magistrate should have directed his mind was: — were the facts such that the Plaintiff had earned his remuneration. Unfortunately, it is not altogether clear how the learned Magistrate directed his mind to the latter question.

Certain evidence was adduced as to the negotiations which took place between the Co-operative Society which had oranges to sell and an individual who was the prospective buyer of the oranges upon which a commission was alleged to be payable. It is said that these negotiations, in fact, never terminated in a contract. It is argued, and some force is given to the argument by the judgment of the District Court, that the Magistrate may have been influenced in his decision by the technical question: whether or not he was entitled to hear and consider evidence with regard to these negotiations, in other words. as is stated in the judgment of the District Court:

> "No oral evidence to vary the written terms of the contract is admissible as against Respondent.

Alternatively, the Magistrate might not have these difficulties in his mind. He may have decided the case on the credibility of the witnesses who appeared before him, but unfortunately, we do not know what view he took.

I am of opinion, therefore, that the case should be returned to the Magistrate with an intimation that he should direct his mind to the question:—

> (1) Was there a contract between the Plaintiff and the Defendant whereunder the Plaintiff was in certain circumstances entitled to commission.
>
> (2) Was such a contract entered into between the Co-operative Society and a purchaser as entitled the Plaintiff to commission.

Evidence that no contract such as is contemplated in the second question was ever in fact made is, in my opinion, clearly admissible.

Costs to follow the event. We fix the advocate's fees at LP. 3.— in respect of these proceedings to the party eventually entitled thereto.

Delivered this 8th day of April, 1937.

Frumkin J.:

Plaintiff (Respondent) in this case sued the Appellant for commission on a contract entered into between Appellant and one Katz for the sale of oranges.

Appellant admitted that such a contract was signed, but alleged that it was not given effect to for lack of certain formalities.

The Magistrate heard evidence as to the circumstances under which the contract was to become effective, but made no finding as to such evidence, and gave judgment for Plaintiff on being satisfied that he did intermediate the sale.

On appeal, the judgment was confirmed on the ground that no oral evidence is admissible to vary the written terms of the contract.

Against this judgment the present appeal was lodged by leave granted by the President of the District Court on a point of law.

In my view there is no question in this case as to the variation of the written terms of a contract, the question being whether such a

contract ever became effective. The Magistrate who heard evidence made no finding as to that fact.

The appeal must be allowed, and the judgment of the District Court and Magistrate's Court set aside and the case remitted to the Magistrate for completion.

Costs will follow the event to include advocate's fees LP. 3.— to the successful party. 8.4.1937.

CIVIL APPEAL No. 67/36.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before:—Trusted, C.J., Frumkin, J. and Khayat, J.

Establishment Rocca, Tassy & De Roux Appellant.

v.

Israel Cohen Schatzky Respondent.

Contract — Sale of goods — Damages for breach of contract lapse of time.

Where unreasonably long period elapsed since contract, parties must be deemed to have abandoned it.

Gorodissky for Appellant. *S. Gratch* for Respondent.

Appeal from judgment of District Court, Jaffa, dated 20.2.36.

JUDGMENT

This is an appeal from the District Court of Jaffa.

It arises out of a commercial contract, dated the 4th of June, 1928, whereunder the Plaintiffs in the action, who are the present Appellants, agreed to sell to the Defendants (Respondents) a quantity of vegetaline, F. o. b. Marseilles. The contract provided: 'The orders are to be delivered, unless a contrary stipulation exists, by monthly quantities approximately equal", but there was an express provision that delivery should be at the request of the client (buyer).

There seems some doubt as to what deliveries were made under the contract and the District Court made no finding as to this, but by a Notarial Notice dated 1st June, 1934, the sellers notified the buyers as follows :

> "Therefore, the firm hereby warn you that you should within one week notify the firm directly or through their agent Mr. M. I. Gorodisky, Advocate, of your intention to take from the said firm the balance of the goods ordered by you on the 4th June, 1923, failing which the firm will institute an action against you in which case you shall have to pay, besides the cost of the goods also in respect of all damages caused to the said firm by you, with costs and advocate's fees'.

In reply to this notice the buyers did not state that there was no binding contract or that deliveries were to be monthly, as was suggested by their advocate in argument before us, neither did they reply that,

owing to the lapse of time the contract must be deemed to have been abandoned. In fact, they did not reply at all and their advocate, in answer to a question by me, stated that it was sometimes considered safer not to reply. I can only say that in my opinion that is an unsatisfactory attitude for a business man to adopt in connection with a business transaction.

Having received no reply to the Notarial Notice, the sellers brought their action seeking to recover the price of the goods.

The District Court held that the price could not be recovered and that, if the sellers had a claim, it was for damages for breach of contract, but it held that, having regard to the unreasonably long period which has elapsed since the contract, the parties must be deemed to have abandoned the contract, and in consequence, gave judgment for the Defendant.

In my view the District Court acted upon a right principle (see Pearl Mill Company Ltd. v. Ivy Tannery Company Ltd., on page 28 of vol. 120 of the L.T.R.) and this appeal should be dismissed with costs and advocate's fees LP. 3.—

Delivered this 23 day of April, 1937.

CIVIL APPEAL No. 60/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before:— Manning, C.J., Frumkin, J. and Khayat, J.

Henry Hochberg — Appellant.

v.

Bella Bergman and 2 others. — Respondents

Interpretation as to inconsistent enactments — English and Ottoman Law — Evidence of paternity.

1. A later enactment, if made retrospective as from a certain date, prevails over an earlier enactment notwithstanding fact that latter was promulgated subsequent to that date.

2. Unnecessary to consider English law, where there is a local provision dealing with the matter.

3. Hearsay evidence of paternity under art. 1688 of Mejelle, — admissible, if given as direct evidence, i.e. evidence of reputation and of matters of common knowledge.

Stein, Agronovitz, Ben-Ari and *Shmeterling* for Appellant.

Gorodissky for Respondents.

Appeal from judgment of District Court, Jaffa, dated 11.12.34.

Manning, J. JUDGMENT

1. One Jacob Bergmann, a member to the Jewish Community, died in Palestine on the 2nd August, 1932. By his last will and testament, dated November 15th, 1931, he disposed of his real and personal property situated in Palestine. On the 30th April 1934 his widow petitioned for probate in the District Court of Jaffa. The petition was opposed by a person named Henri Hochberg, hereinafter called the

appellant, who claimed that he was an illegitimate son of the deceased. The grounds of his opposition were firstly that the real property left by the deceased was miri land and that this could not be disposed of by will, and secondly that the will was not executed in accordance with the law.

2. The appellant had no locus standi in the proceedings unless he could prove that he was a son of the deceased. This issue was tried by the District Court, which was constituted of the learned President sitting alone. After hearing evidence and the arguments of the advocates the learned President came to the conclusion that the opposer had not proved that he was the illegitimate son of the deceased. He consequently rejected the opposition and pronounced in favour of the will.

3. The appellant has appealed. Mr. Ben-Ari, on his behalf put forward an argument that the District Court was not properly constituted. Section 25 (now Section 26) of the Succession Ordinance, which came into force in March 1932, provided that in cases of this kind the District Court should have jurisdiction and at that date it seems that a District Court was not properly constituted unless it consisted of the President and at least one judge. On the 1st August 1924 an Ordinance named the Courts Ordinance was brought into force and by Section 11 it provides that in civil action any two judges could constitute a District Court. On the 15th January 1932, Section 26 of the Succession Ordinance (referred to above) was amended and it was enacted that in cases under the Ordinance a District Court might be properly constituted by a President sitting alone. This provision was made retrospective, being deemed to have come into force on the 1st April 1923.

4. Mr. Ben-Ari says that by this retrospective amendment of Section 26 of the Succession Ordinance the position on the 1st April 1923 was that in succession cases a District Court could be constituted by a President sitting alone. Then he says, there is a later Ordinance, the Courts Ordinance, 1924, laying down in section 11 that in civil actions a District Court must be constituted of two judges. The two Ordinances, he says, are inconsistent, and that later in date must prevail.

5. I cannot agree with this argument. The later Ordinance, is not the Courts Ordinance 1924, but the amendment made by the Ordinance enacted in 1932. The fact that this latter Ordinance was made retrospective does not make it earlier in date so as to apply the rule of interpretation as to inconsistent enactments. The logical result is that the Ordinance of 1932 provided that the District Court could be constituted, in cases such as this, of a President sitting alone. From the date of its enactment in 1932 its provisions were in force, and its retrospective effects was the opposite to that for which Mr. Ben-Ari has contended. Instead of the Courts Ordinance prevailing over the amendment, the amendment prevailed over the Courts Ordinance by providing that

from April 1st 1923, in cases under the Succession Ordinance, a District Court was properly constituted if it consisted of a President sitting alone.

6. Mr. Ben-Ari attempted to re-inforce his argument by a reference to Section 9 and 18 of the Succession Ordinance which confer certain powers on a president or a judge sitting alone. I do not see how this can affect the constitution of a District Court as laid down in Section 26.

7. Mr. Ben-Ari had a further objection. He said that this was a question of legitimacy, and therefore a matter of personal status, and should not be tried by a District Court constituted under the Succession Ordinance. It should be tried by a District Court constituted under the Courts Ordinance. The answer to this is that no question of legitimacy arises ; Henri Hochberg admits that his mother was not married to the person whom he asserts to have been his father. He does not apply to have himself declared legitimate; his whole contention being that, though illegitimate, he is entitled to participate in the property left by the deceased.

8. Mr. Stein, who continued the argument on behalf of the appellant, dealt with the principal ground of appeal namely that the learned President had mis-directed himself as to the effect of the evidence. It is necessary to set out briefly what the evidence was. Firstly there was the evidence of Bella Hochberg the mother of Henri. She said she lived with the deceased in Cyprus in 1909 and 1910; they became intimate, and she became pregnant as a result of the intimacy. She went to Paris and was delivered of a son (the appellant) on the 20th October 1910. The deceased had paid her expenses to Paris and continued to send her money till 1919, when she returned to Cyprus and after staying for a while in a Hotel, went with her child to the deceased's house and stayed there for one year. In 1927 she came to Palestine where the deceased was then living. She says the deceased always supported her son and always recognised as his child.

9. Then there was the evidence of one Ginsburg, who was in Cyprus in 1909 and 1910. He says the whole Colony knew of the relations between the deceased and Bella Hochberg, and that it was a matter of common knowledge that the child conceived by the latter before she went to France was the child of the deceased.

10. Then there was documentary evidence. There were, firstly, a letter from the deceased in Cyprus to Bella Hochberg in Paris, dated 13th February 1917, enclosing a cheque for LP. 9, and stating that he had sent her a similar amount the previous December. Secondly there was a document signed by the appellant, engaging to claim nothing from further from the deceased "en qualite de parent", and setting out various sums given by the deceased to the appellant during the year 1930, amounting altogether to LP. 296.

11. Lastly there was the evidence of persons who heard the deceased during his lifetime acknowledge that the appellant was his son. In this class of evidence I include the evidence of appellant himself, who says that the deceased told him that he was his father.

12. There was some further evidence, namely an affidavit of a man named Artemis taken in Cyprus. This was clearly inadmissible, and as it was objected to in the Court below, it cannot be considered.

13. The learned President had grave doubts as to the admissibility of the declarations of the deceased to the effect that the appellant was his son. These doubts were caused by his reliance on the English Law of Evidence. It is unnecessary to consider these declarations would be admissible under English Law, as there is a local provision dealing with the matter, Article 1688 of the Mejelle makes such hearsay evidence admissible, but it seems necessary that it should be given as direct evidence i. e. evidence of reputation and of matters of common knowledge.

14. However this may be, the learned President admitted the evidence for what it was worth. In his judgment he said that "the only evidence in support of the alleged paternity of any value is in effect statements alleged to have been made by a man, now deceased, and which therefore cannot be contradicted or tested. I have already said, I have admitted much of this evidence, with grave doubts as to its relevancy — in such circumstances I should require strong corroboration of what is hearsay, and that corroboration with the best will in the world, I am unable to find".

15. From what I have said there was undoubtedly corroboration of the evidence. If I may say so with respect, it would have enabled the learned President to get a clearer view of the evidence if he had approached the matter from another angle. The first evidence to be considered was that of the mother of the appellant. She gave a circumstantial account of her relations with the deceased. She said that the appellant was the son of the deceased. She was corroborated by the facts that the deceased supported her after the birth of the child, that he afterwards supported the child, and that he paid large sums of money to the child in 1930 on condition that the child renounced all future claims on him. This evidence was sufficient to constitute a prima facie case on behalf of the appellant without taking into consideration the declarations alleged to have been made by the deceased, or the evidence of common knowledge.

16. I do not think that one should take strictly what the learned President said on the question of corroboration. His judgment must be looked at as a whole and in another part of it he comments on the "absence of any evidence of a kind which would be conclusive". I can read into the judgment a reluctance to declare that the appellant was the illegitimate son of a person who was dead at the time of the trial and who could not come forward to repel the allegations that he

had been unfaithful to his wife and had seduced his wife's niece (as Bella Hochberg was) when she was staying as a guest in his house. He clearly wanted better evidence than the testimony of interested parties like the appellant and his mother or the alleged declarations of the deceased. He does not seem to have attached much importance to the payments of money on account of the relationship existing between Bella Hochberg and the deceased's wife. He says he found the case a very difficult one, but that considering the evidence as a whole he came to the conclusion that the appellant had not proved that he was the illegitimate son of the deceased.

17. My own opinion is that, though the learned President made the remarks he did as to corroboration, he considered the whole of the evidence before coming to his conclusion. He has reviewed the whole of the evidence in his judgment. In these circumstances I do not think it is for us to speculate as to what conclusion we would have arrived at on the mere written record as it stands before us. It is for the appellant to show us that the learned President was wrong. This was a difficult task, the learned President wanted better evidence before giving decision in appellant's favour, and I am not prepared to say that he was wrong.

18. In my opinion this appeal should be dismissed with costs to include LP. 10. advocate's fees.

I concur. *Khayat J.*

Frumkin J.

1. I need not go into the facts of this case nor can I usefully add anything to the analysis of the evidence before the Court below which was so clearly put in the judgment of my learned brother presiding.

But on the very same analysis of facts and evidence I come to a different conclusion. The learned President of the District Court, with due respect, erred in holding that the only evidence of value in support of the alleged paternity was in effect statements alleged to have been made by the deceased. There was to my mind ample evidence and corroboration admissible in law apart from such statements; and it is because the other evidence was regarded in the Court below only as corroboration to the statements which were admitted with grave doubt that the learned President arrived at the decision he did, and the judgment cannot therefore stand.

2. We are not judges of fact and we cannot give judgment on evidence which we have not heard and in my opinion the case must be remitted for a retrial.

Delivered this 23rd day of April 1937,

CIVIL APPEAL No. 86/36.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

Abdul Aziz Ahmad Saleh Rasras and 2 others
Appellants.

v.

Radwan Husein Rasras Respondent.

Contract — Admission.

Where written agreement contains statement that sum of money has been paid on signing the agreement receipt thereof cannot be denied.

Edit Note: See CA 161/35 1CtLR p. 4.

Appeal from judgment of District Court, Jaffa, dated 15.6.1936.

JUDGMENT

This is an appeal from the judgment of the District Court of Jaffa dated 15th June, 1936, whereby Appellants were ordered to refund to Respondent the amount received by them as price of the land, namely LP. 170,500 mils, with fees & costs.

Appellants & Respondent entered into an agreement whereby the former undertook to transfer to the latter 31 dunams of land for the sum of LP. 170,500, which sum was as stated in several parts of the agreement, paid to them on signing the agreement. The agreement provided also that any party committing a breach thereof will be liable to pay a sum of LP. 3000 as liquidated damages.

The District Court found that the appellants failed to carry out their obligations under the contract and that they were thus liable for damages. The Respondent, however, waived his right for damages and contented himself to receive the amount paid by him on signing the contract, namely LP. 170, 500 mils with fees and costs. The District Court therefore gave judgment for the refund of this sum only.

The Appellants now deny the fact that they have ever received the price of the land, and further stated that they could not effect the transfer as the Settlement Officer did not yet start work in their village.

The Appellants admitted that they signed the contract with the full understanding of its contents, and as the contract contained in many of its parts an admission that the price was paid to them, they cannot now come to this court and deny the receipt of the money. Moreover the contract provided that they could also effect the transfer in the Land Registration Office, so that there was no necessity for them to wait for the Settlement Officer.

We, therefore, dismiss the appeal with costs.

Delivered this 20th day of April, 1937.

CIVIL APPEAL No. 2/34.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before : Trusted C. J., Frumkin J. and Khayat J.

Becky Silverman — Appellant

v.

Louis Silverman — Respondent.

Evidence — Stamp duty — Foreign bills.

1. A foreign bill or note, if it has not been presented for payment, endorsed, transferred, negotiated or paid, — receivable in evidence without being stamped.
2. (*Obiter*)
Document with impressed stamp may be regarded as unstamped, if it required adhesive stamps.

Goldberg for Appellant. *Ph. Joseph* for Respondent.

Appeal from judgment of District Court, Jaffa, dated 25.10.33.

JUDGMENT

This is an appeal from a decision of the District Court of Jaffa dated the 25th October, 1933.

The action was brought to recover a sum of money being the balance due under a promissory note.

The case was decided by the Court below on the ground that the document was not properly stamped and that as a result the Plaintiff was unable to sue for the amount claimed. The document in question is a foreign bill — and the history of his stamping was as follows —

The Plaintiff's representative, as was stated in argument in the Court below for safety sent it to the Stamp Commissioners in order to have the duty thereon assessed. The Commissioners assessed it and it was paid, but the Commissioners failed to put on an adjudication stamp as contemplated by section 14 of the Stamp Duty Ordinance, and stamped the document with an impressed stamp, contrary to the provisions of Section 29 of that Ordinance, which was then in force, and contrary to Section 27 of the Ordinance. It may be noted that the Plaintiff's advisers took no steps, as they easily could have done, to have these mistakes rectified.

When the document came before the District Court it is clear that, if it required stamping, it was wrongly stamped — in that the stamp thereon was impressed — it might be regarded therefore as an unstamped document.

The question is, was this such a document as having regard to section 16 of the Ordinance, could be received in evidence unstamped. A bill of exchange is clearly a document which requires a stamp, but Section 27 of the Ordinance makes special provisions as to the stamping of foreign bills. The material part of the section is as follows —

> "Every person into whose hands any bill of exchange or promissory note drawn or made out of Palestine comes in Palestine before it is stamped shall, before he presents for payment, or endorses, transfers or in any manner negotiates or pays, the bill or note, affix thereto a proper adhesive stamp or proper adhesive stamps of sufficient amount, and cancel every stamp so affixed thereto".

It does not appear to us that the note in question has ever been presented for payment or endorsed, transferred or in any manner negotiated or paid, and we are of opinion that it has not yet become liable to duty and our view would appear to be supported by the decision in Griffin and others v. Weatherby and Henshaw, 18 L.T.R., 881.

The fact that the Commissioners assessed the duty is not material to the question, as they were unaware why they were being asked to assess duty and would contemplate that it was proposed to deal with the bill in one of the ways mentioned in Section 27.

The appeal, therefore, is allowed with costs and the case remitted to the District Court to hear and determine it with an intimation that until the bill is endorsed, transferred or in any manner negotiated or paid it is receivable in evidence.

Advocate's fee LP. 3.—

Delivered this 23rd day of April, 1937.

HIGH COURT No. 5/1937

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

Before : Copland J. and Frumkin J.

Joseph Elyashar — Petitioner.

v.

The President District Court Jerusalem.

The Chief Execution Officer Jerusalem

Moshe Oxhorn — Respondents.

Interest — Date of Maturity — Default clause — Payment by instalments.

1. a) The date of maturity of a debt is the date on which the debt is expressed to be due or becomes due by operation of a default clause.

b) Where document fixes rate of interest payable "after maturity" of debt, interest at such rate is payable from date on which the debt becomes due.

2. Chief Execution Officer has no power to order payment of mortgage debt by instalments, nor can mortgagee be compelled to accept payment by instalments.

Olshan, Mizrahi for Petitioner. *Levy* for 3rd Respondent.

ORDER

The first point in this case is the date from which interest runs. In

the main body of the mortgage deed it is quite clearly stated that "the borrower hereby agrees to pay to the said lender or order the sum on the 1st day of January 1938, plus interest at the rate of 7% payable monthly as from the first April, 1936". And in the special conditions, there appears the following :

"Manner of payments — monthly instalment of LP. 100 plus interest at the rate of 7% commencing from 1st April, 1936."

Whilst the special conditions may be somewhat ambiguous, we think that there can be no doubt with regard to the main recital in the deed and we hold that interest at 7% is payable as from 1st April, 1936, only.

On this point, therefore, we rule against the Petitioner.

The second point is the meaning to be attached to the phrase "after maturity", The Chief Execution Officer held that interest at 9%, which is payable in case the borrower fails to pay the interest and fails to pay the debt after maturity, could not be charged until after 1st Jaunary 1938, which is the date on which the mortgage sum is expressed to be due.

In this, we think, he is wrong. The date of maturity of a debt is the date on which the debt becomes due. By the operation of the usual default clause, this debt became due in whole on the 2nd July, 1936. Interest at 9% is therefore payable as and from this latter date.

The third point is as follows.

At various times the 3rd Respondent has paid into an account in the A.P.C. to the name of the Petitioner various sums, amounting, it is said, to some LP. 800.— The Chief Execution Officer ordered that this sum should be deducted from the LP. 1900 due under the mortgage. We think that this Order is not correct, for this Court has already held that a Chief Execution Officer has no power to order payment of a mortgage debt by instalments : and it follows that a mortgage cannot be compelled against his will to accept payment of such a debt by instalments. See Yola Shehab v. Chief Execution Officer, Haifa and another, H.C. 50/32, P.L.R. 764.

The petitioner is, in our opinion, entitled to the full sum of LP. 1900 together with interest at 9% as from 2nd July, 1936.

The rule nisi is, therefore, made absolute as regards the second and third points, and discharged as to the remainder.

The 3rd Respondent must pay the costs and LP. 3.— advocate's fees.

Delivered this 12th day of March, 1937.

CIVIL APPEAL No. 78/36.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before Copland J., Khayat J. and Abdul Hadi J.

Yacob Nissim Mizrahi — Appellant.

v.

1. Yacob Goral
2. Moshe Goral

as administrators of the estate of their father Issac Goralishvili — Respondents.

Lease — Failure to vacate — Damages.

Sometimes practically imposible for tenants to vacate on 1st of Moharram, so they must be allowed reasonable delay to find other premises.

Goitein for Appellant. *Levitsky* for Respondents

Appeal from judgment of District Court, Jerusalem, dated 12.6.36.

JUDGMENT

This is an appeal against a judgment of the District Court of Jerusalem dated the 12th June, 1936, whereby appellant's claim for LP. 2000 damages, for alleged breach of contract, was dismissed.

The present appellant, who was the Plaintiff before the District Court, contended that the Respondents had undertaken in clause 8 of the agreement that their mother would vacate the premises, the subject matter of the agreement, by Muharram and that as she failed to vacate in time, they asked the Court to treat this as a breach and award the damages agreed upon.

It seems to us that before final judgment can be given, the Trial Court must come to a definite finding of fact as to when exactly Defendants mother left the premises. This is essential because it is common knowledge in Palestine that sometimes it is a practical impossibility for tenants to vacate on the 1st day of Muharram, and a reasonable delay must therefore be allowed to enable them to find substitutory premises for their habitation.

But if, as alleged by appellant, it appears in the result, that Respondents' mother was still in the house in June 1936 when judgment was given by the District Court, then surely this constitutes a breach of the contract and Appellant would be entitled to claim the full amount of damages agreed upon.

For these reasons the appeal is allowed, the judgment of the District Court is set aside, and the case is remitted to that Court to hear evidence as to when the premises were actually vacated by defendants' mother and give a fresh judgment in accordance with the above principles.

Costs to await the result of the second trial.

Delivered this 11th day of March, 1937.

HIGH COURT No. 12/1937.

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

Before : Copland J. and Abdul Hadi. J.

Fardieh Yiries Salem Kattan, in her personal capacity and on behalf of the estate of the late Yiries Salem Kattan of Betlehem. Petitioner.

v.

1. The Chief Execution Officer Jerusalem,
2. Ibrahim Elias Farah Kattan, in his personal capacity & on behalf of the estate of the late Elias Farah Kattan of Betlehem. Respondents.

Execution — Art. 90 of Execution law.

Married son or daughter of judgment debtor cannot invoke art. 90 of Execution law (exemption of dwelling house from restraint) as they cannot be considered any more of the family of their father, who is no more responsible for their support.

Kattan for Petitioner. *Amon* for 2nd Respondent.

ORDER

In this application the daughter of a deceased debtor is endeavouring on behalf of the heirs and the estate of the debtor to apply the provisions of art. 90 of the Execution Law in her favour.

Although there are other points raised by Counsel for Petitioner, we decided the case on one very simple point and that is the question of family.

The Petitioner is married and has grown-up children, the youngest of whom is 18 years old. Now that she is married and has children she cannot be considered any more of the family of her father who would be no more responsible for her support.

That being so, it is not necessary to discuss the other points raised by Petitioner, which may be dealt with on another occasion when found necessary.

The Court, therefore, orders that the Rule Nisi be discharged with costs and LP. 3.— advocate's fees.

Given this 29th day of April, 1937.

LAND APPEAL No. 33/36.

IN THE SUPR. COURT SITTING AS A COURT OF LAND APPEAL.

Before : Trusted J., Copland J. and Khayat J.

Fouad Abdul Ghani el Khaldi Appellant.

v.

Raisseh Muhiddin el Khaldi Respondent.

Land Court. Procedure. Disagreement of Judges.

If Land Court judges disagree case cannot be dismissed but third member *must* be called in in accordance with Rule 2(2) of Land Court Rules which provides that in such cases the Court *may* call in etc.

Ibrahim Kamal for Appellant. *Zaki Ousta* and Cattan for Respondent

Appeal from judgment of Land Court, Jerusalem, dated 30.11.1936.

JUDGMENT

This is an appeal from the judgment of the Land Court of Jerusalem dated the 30th November 1936.

It is clear that this appeal must be allowed the Court below differed and dismissed the action, but in so doing overlooked the provisions of Sub-Rule 2 of Rule 2 of the Land Court Rules, which provides for Land Courts a procedure when there is a disagreement between the Court different to the practice in District Courts.

The judgment must be set aside and the case must go back to the Court below and the attention of the Court must be called to the provisions of the above Sub-Rule.

Costs to abide the final event. Advocate's fees LP. 3.

Delivered this 22nd day of April, 1937.

CIVIL APPEAL 108/36.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before : Copland J., Frumkin J. and Khayat J.

Banco Di Roma — Appellant.

v.

Jacob Nouriel — Respondent.

Promissory note — Endorsement —Waiver — Limitation.

Waiver by indorser as to proceedings such as protest and the like — not waiver of provisions of sec. 96 of Bills of Exchange Ord, re institution of action against indorser within period of one year .

Ben Aharon for Respondent — *Amon & Ades* for Appellant

Appeal from judgment of District Court of Jerusalem, dated 25.6.36.

JUDGMENT

This is an appeal by leave of the President from the judgment of the District Court of Jerusalem, dated the 25th June, 1936, confirming the judgment of the Magistrate's Court dated the 20th April, 1936.

The Respondent endorsed and discounted a promissory note, signed by a third party, in the Appellant's Bank. On discounting the promissory note he signed a declaration including, inter alia, the following clause :—

> "The Bank shall not be responsible (a) to make a protest on the promissory note which are not paid at maturity, (b) to perform the legal proceedings against the makers or drawers or endorsers, (c) to notify the endorser of the non-payment of the discounted promissory notes, (d) to return within a specified time the dishonoured promissory notes whether a protest has or has not been made."

The promissory note was not paid by the maker on maturity and the Appellant's Bank sued the Respondent as endorser of the Bill in the Magistrate's Court of Jerusalem.

The Magistrate dismissed the claim on the ground that the action was instituted after the time stipulated in section 96 of the Bills of Exchange Ordinance, viz. after one year from the date of maturity.

On appeal the District Court confirmed the judgment of the Magistrate's Court, but on application for leave to appeal to the Supreme Court, the President of the District Court gave leave to appeal on the following points :—

> "Does the stipulation signed by Respondent referred to above exempt the applicant Bank, as holder, from the provisions of Sec. 96 (1) of the Bills of Exchange Ordinance, whereby an action against the indorser of a promissory note is barred after the lapse of one year from the time when the cause of action first accrued".

We are of opinion that this clause does not contain a waiver of the provisions of Section 66(1) with regard to instituting an action within the period of one year, but that its effect is limited to such proceedings as making protests against the endorsers, and such like.

The appeal must, therefore, be dismissed with costs and LP. 3.— advocate's fees.

Delivered this 13th day of May, 1937.

CIVIL APPEAL No. 102/36.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

Hassan Yasin Mustafa Abu Habel — Appellant.

v.

Saleh Ibn Muhammad Saleh — Respondent.

Admission — Oral evidence against document.

Even between relatives oral evidence inadmissible against document.

Said Zein Eddin for Appellant. *Ibrahim Husseini* for Respondent

Appeal from judgment of District Court, Jaffa, dated 25.6.36.

JUDGMENT

This is an appeal from the judgment of the District Court of Jaffa dated 25th June, 1936, which entered judgment for the Plaintiff (Res-

pondent) against the Defendant (Appellant) for the sum of LP. 100 by the former to the latter under an agreement, and LP. 200 as liquidated damages with costs and expenses.

The case centres around two documents between relatives :—

1. The first was an agreement dated 3.10.23 whereby Defendant sold to Plaintiff for a consideration of LP. 100 all the property that came to him by way of inheritance from his mother. He also undertook to effect transfer at the Land Registry Office.
2. The other document dated 7th Muharram 1354 is an undertaking by the Defendant to pay LP. 200 as liquidated damages to the Plaintiff in case he fails to drop his rights that came to him by way of inheritance from his ancestor, heir of Sheikh Saleh Muhammad at the competent departments.

The Defendant denied having received the LP. 100.— mentioned in the agreement of 3.10.23 and with regard to the second document he contended that it was kept as a security with a certain person upon the condition that each of the parties has to drop his right in respect of the land which he owns in the name of the other. In support of the above contentions, the Defendant asked the District Court to hear his witnesses.

The District Court held that as the Defendant has failed to corroborate his defence by any documentary evidence admissible against a written document, it was not inclined to hear parol evidence against two documents in writing.

In the Court of Appeal the Appellant delt either with questions of fact or with points not raised in the lower Court.

In our opinion the judgment of the District Court is quite correct and we do not see our way to interfere with it. Even between relatives oral evidence is not admissible against a written document.

The appeal must, therefore, be dismissed with costs and LP. 4.— advocate's fees.

Delivered this 11th day of May, 1937.

CIVIL APPEAL No. 109/36

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

Alter Gross — Appellant.

v.

Marcus Feitelson and another — Respondents.

Procedure — Leave to appeal — Points of Law.

Construction of clauses of agreement — not a point of law, unless rule of construction or legal principle involved.

Levin for Appellant. *Olshan* for Respondents.

Appeal from judgment of DC Haifa, dated 26.6.36.

JUDGMENT

This is an appeal by way of leave from the President of the District Court of Haifa which dismissed an appeal from the judgment of the Chief Magistrate's Court of Haifa dated 13th March, 1936.

The Order of the President of the District Court giving leave to appeal reads as follows :—

> "Leave to appeal to the Supreme Court sitting as a Court of Appeal is granted in regard to the construction of the agreement dated 31.1.35 and made between the Applicant and Respondents. The question for determination being:—
>
> Whether, in view of the terms of clause 15 of the contract dated 31st of January, 1935, and other terms of the said agreement, applicant was entitled to claim liquidated damages in the sum of LP. 200 or any other amounts in respect of a breach by Respondents of any of the provisions of clause 12 of the agreement".

Appeals by leave from District Courts to the Supreme Court must be on a point of law only. 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.

In this case, as will be seen above, the question — the so called question of law—is the construction of the clauses of the whole agreement. There is no statement that any rule of construction has been wrongly applied or any legal principles ignored.

No principle or point of law having been stated by the President of the District Court, the appeal must be dismissed with costs and LP. 3.— advcate's fees.

Delivered this 13th day of May, 1937.

CIVIL APPEAL No. 56/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before:— Trusted, C.J., Green, J. and Frumkin, J.

Jousef Haim Setty and a. — Appellants

v.

Habina (Eva) Setty and o. — Respondents

Will — Probate third party — Opposition by beneficiaries.

> No opposition to refusal of probate can be lodged by beneficiaries under will, if their interests were represented by executor propounding the will.

Kehaty for Appellants. *Levanon* for Respondents.

Appeal from judgment of DC, Jerusalem, dated 12.3.37.

JUDGMENT

This appeal is the culmination, and I trust the end of long drawn out litigation between various parties. It is a pity one feels, that litiga-

tion of this sort should occur in the administration of an estate, but unfortunately it has occurred and we are only concerned with it in the stage at comes before us.

There have been applications and appeals on more than one occasion to this Court, and the particular matter which is before us now is an appeal from the judgment of the District Court of Jerusalem refusing to allow opposition to be entered by certain infants who would have been beneficiaries under a will had the Court found for that will and granted probate of it.

We think that it is clear that the executor who propounded the will represented the interests of the present Appellants and that there was no conflict of interests between them, and in these circumstances we do not think that an opposition can be lodged.

In the result, therefore, this appeal is dismissed with costs and LP. 3.— advocate's fees.

Delivered this 7th day of May, 1937.

LAND APPEAL No. 14/36.

IN THE SUPR. COURT SITTING AS A COURT OF LAND APPEAL.

Before:— Trusted, C.J., Frumkin, J. and Khayat, J.

Ahmad Issa Abu Hamdeh and others — Appellants

v.

Eliazar Yosef Elyashar and another — Respondents

Land — Right of priority (Awlawieh) — Settlement Officer's Jurisdiction.

Settlement Officer has no jurisdiction to hear actions regarding Awlawieh (right of priority).

Nasr for Appellants. *Eliash* for Respondents.

Appeal from judgment of LC, Jaffa, dated 19.2.36.

JUDGMENT

Khayat, J.

This is an appeal from the judgment of the Land Court of Jaffa, dated 19th February, 1936.

In this case, the question has arisen as to whether the Settlement Officer has jurisdiction to hear actions in regard to rights of priority (Haq el Awlawieh). The Settlement Officer held that such actions are not within his jurisdiction and the Land Court, in an appeal which was lodged therein against this decision, upheld the Settlement Officer's view.

I am of opinion that:—

(1) The rights of priority is an optional right and individuals cannot be forced to make use of it, and therefore such right cannot be registered;

(2) The said optional right is limited to a period which is prescribed by law, and the individuals cannot be forced to make use of it at a certain date to be fixed by the Judge; and

(3) Even though a judgment is given in favour of claimant of the right of priority and the Badal el misl having been fixed, he can at any time withdraw from taking the land and cannot be forced to accept it.

Section 10(1) of the Land Settlement Ordinance also shows the powers of the Settlement Officer and restricts them to deciding any dispute arising out of claims to ownership or possession of land. In actions for priority there is no dispute as to ownership or possession, and the dispute is as to the estimation of Badal el Misl and ascertaining as to whether the person claiming the right of priority is the proper person in accordance with the law or not.

For these reasons, I hold that the appeal must be dismissed with costs and advocate's fees LP. 3.

Delivered this 19th day of may, 1937.

CIVIL APPEAL No. 75/34.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

Said El Karmi — Appellant

v.

Albert Faroun — Respondent.

Mortgage — Interest clause.

If interest clause in Mortgage Deed left empty interest is due as from date of application for execution of Deed but not during time the Deed was running.

Ouni Abdul Hadi for Appellant. *J. Levy* for Respondent.

Appeal from jdgt of DC, Nablus, dated 24.12.35.

JUDGMENT

The Court observed that some of the summonses sent to the heirs of Sheikh Said el Karmi have not been returned. The Respondent stated that he cannot produce guardianship orders in a Moslem case and asked the Court to proceed with those Appellants who have been served. Ouni Bey Abdul Hadi who represented Abdul Karim, Mahmud and Hassan, agreed that the case should be proceeded with.

Owing to the fact that this appeal has been pending before the Supreme Court since 1935, we consider that no more adjournments should be granted and we order that the appeal should be proceeded with in regard to those Appellants who have been served, and that the names of those Appellants who have not been served should be struck out with liberty to them to reinstate without further fees in one year if so advised.

This case arose out of a mortgage-deed under which Respondent lent to Appellant a sum of LE. 1000 (equivalent to LP. 1025.641 mils). The interest clause was not only left empty but dashes were placed in the space provided for the insertion of the amount of interest which shows clearly that the intention of the parties was that no interest should be paid.

The debt not having been paid, in time, the mortgaged property was sold, but it only realised LP. 636.210 mils. The respondent therefore raised an action in the District Court of Nablus for the sum of LP. 803.985 mils, being the balance of the debt, costs and interest.

The District Court entered judgment for the Respondent for the sum claimed.

The only question in the appeal is whether any interest is payable and, if so, as from what date should such interest be calculated.

We are of opinion that as the interest clause in the Mortgage Deed has not been filled in, no interest is payable during the time the Deed was running, but it is quite clear that interest is due as from the date when application was first made to the Execution Office for execution of the Deed.

As this appears to be the date from which interest has been calculated by the District Court, the appeal is dismissed, except as against those whose names have been struck out, with costs and LP. 7— advocate's fees.

Delivered this 11th day of May, 1937.

LAND APPEAL No. 49/35

IN THE SUPR. COURT SITTING AS A COURT OF LAND APPEAL.

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

Mustafa Yusef Ehzein and 7 others — Appellants.

v.

Israel Nesson — Respondent.

Claim that land is Waqf — Purchaser in good faith — Validity of title.

Purchaser in good faith of land registered in Land Registry as Mulk — protected against claim that land is Wakf.

Ouni Abdul Hadi and *Saraj* for Appellants.

Goitein for Respondent.

Appeal from jdgt of LC, Jerusalem, dated 11.6.35.

JUDGMENT

This is an appeal from the judgment of the District Court of Jerusalem dated 11th June, 1935, ordering Defendants (Appellants) to refrain from interfering with Plaintiff's (Respondent's) enjoyment of

a piece of land bought by the latter in February 1923 and situated in Ain Karem.

Counsel for Appellants argued before us that the land in dispute did not belong wholly to the vendor and that the plan did not contain the signatures of the Huzein family but that the signatures were of another Huzein family, and that the Respondents knew that the land was not the property of the vendor in toto.

We are satisfied that all these facts have been carefully considered by the District Court when it gave its detailed reasoned judgment with which we are in full agreement on this point.

Counsel for the Third Party claimed that the land in dispute is waqf and cannot be alienated even if purchased in good faith.

This land is registered in the Land Registry as mulk and was purchased as such by the Respondent.

The Land Court held that even if this land were waqf it made no difference because the Respondent purchased the land in dispute in good faith with the boundaries as shown in the title deed and in support of their decision they quoted the decision of this Court in Sheikh Sadeq Anabtawi and others v. Fares Ahmad & others, Land Appeal No. 173/26.

The reason which this Court gave in Land Appeal No. 173/26 was as follows:—

> "To hold the contrary would imply that no purchaser of registered mulk property could satisfy himself that he was obtaining a good title, however carefully he might investigate the entries in the Register and the facts as to possession. Until the period of limitation of thirty-six years prescribed by Art. 1661 of the Mejelle had expired, his title might be set aside on proof that the property sold to him was waqf by virtue of a dedication of which he had and could have no notice".

In the present case, the Land Court found that the Respondent had purchased the land without any knowledge that the property was waqf, especially as it was registered in the Land Registry as Mulk. Nothing having been said to the contrary in this appeal, no exception could be taken to the reasons or to the conclusions to which they arrived.

The appeal must, therefore, be dismissed with costs and LP. 3.— advocate's fees to be paid by the Appellants jointly and severally.

Delivered this 11th day of May, 1937.

CIVIL APPEAL No. 96/36

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

Moshav Salvendi Cooperative Society Ltd. Appellant.

v.

Moshe Maslobati Respondent.

Arbitration — Confirmation of award — Opposition (to confirmation of award) — Authority of Judgments of Supreme Court — Rule 3 of Arbitration rules (Drayton III p. 2323).

1. Confirmation of award of arbitrators can be opposed to without filing any notice of opposition or stating any ground for opposing.

2. Principle laid down in judgments of Supreme Court and followed for some years must be taken to be settled law unless new arguments are advanced.

Livai for Appellant. *Silberg* for Respondent.

Appeal from jdgt of DC, Jaffa, dated 22.1.36.

JUDGMENT

This is an appeal from a judgment of the District Court of Jaffa confirming an arbitration award and refusing to consider an opposition to such confirmation on the ground that the notice of opposition did not state any grounds.

The reasons given in their judgment were that since an opposition must be by a petition, it was "clear that a petition cannot be a petition unless it sets out fully what the party presenting it complains of and his reasons for so complaining" — also that, following the general rules of procedure for oppositions, oppositions must set forth the grounds for opposing. The Appellant contends that according to the Arbitration Ordinance 1926 and the Arbitration Rules, 1928, he is only obliged, if he desires to oppose confirmation of an award, to pay the fees prescribed by Rule 3 within seven days of the service upon him of a notice that confirmation has been applied for. This he has admittedly done.

The Respondent advanced the reasons given by the District Court in their judgment.

Now this very same point has already been before this Court in Hamudeh v. Yorkshire Insurance Co., C.A. 111/32, where it was held that "the only obligation upon such parties" (i.e. the opposer)" if he desires to oppose enforcement, is that imposed by Rule 3 of the Arbitration Rules 1928, namely payment of the fees prescribed within seven days of service upon him of the notice. This may be done by any person without production of a power of attorney from the party on whose behalf the fees are paid. There is no obligation upon him to file any notice

of opposition or to state any ground for opposing before his opposition is heard".

This case was followed in Litvak v. Schwarts, C A. No. 51/33.

If this point were not covered by authority, it is quite possible that I should have been inclined to agree with the judgment now under appeal, but the principle laid down clearly in Hamudeh v. Yorkshire Insurance Co., has been followed for some years, and, I think, must now be taken to be settled law. I, at any rate, even though I may, with all respect, entertain some doubts as its correctness, do not feel that I should be justified in over-ruling it. It is desirable that Courts should be consistent, and unless new arguments are advanced — which is not the case here — which might have influenced the original judg ment, then principles laid down and acted upon for some years should not lightly be set aside, otherwise the state of the law would become chaotic. In justice to the District Court, I would point out that, from the record, it would appear that their attention was not called to the judgments of this Court to which I have referred.

The appeal must be allowed and the judgment of the District Court quashed. The case will be remitted to them to hear the opposition on its merits.

Costs to follow the event.

Delivered this day of May 1937.

Khaldi, J.: I concur.

Abdul Hadi, J.

I agree with the learned President as to the result of this case in quashing the judgment of the District Court and remitting it to them to hear the opposition on its merits, I would, however, like to empha size the fact that clause 3 of the Arbitration Rule does not require the filing of any grounds of opposition when an opposition to the confir mation of an award is made within the prescribed time.

CIVIL APPEAL No.69/36

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

Wi'meh Awad el-Khouri — Appellant.

v.

Said Awad el-Khouri — Respondent.

Arbitration — Removel of Arbitrators — Misconduct.

Arbitrators' meeting with one party in absence of other and discussing with him questions pertaining to controversy constitutes misconduct.

Atallah for Appellant. *Asfour* for Respondent.

Appeal from judgment of DC, Nablus, dated 3.5.36.

JUDGMENT

This is an appeal from the judgment of the District Court of Nablus, dated the 3rd day of May, 1936, whereby the arbitrators agreed upon by the parties were removed on the ground of having met with one of the parties and discussed with her questions pertaining to the controversy.

Counsel for the Appellant has done his best to try and convince us that such behaviour does not amount to misconduct, but the weight of authority is against him. Misconduct, it is true, is a somewhat fluid term if that expression may be used, but it has been repeatedly decided that such private meetings with one of the parties in the absence of the other, constitutes misconduct.

In laying down the duties of arbitrators, we can do no better than adopt the words of Boyd J., in re Brien and Brien (1910) 2 Ir. R. 84— (see Russell on Arbitration 12th Edition, p. 207) — where this learned Judge says:—

> "When once they enter on an arbitration, arbitrators must not be guilty of any act which possibly can be construed as indicative of partiality or unfairness. It is not a question of the effect which misconduct on their part had in fact upon the result of their proceedings, but of what effect it might possibly have produced. It is not enough to show that, even if there was misconduct of their part, the award was unaffected by it, and was in reality just; arbitrators must not do anything which is not in itself fair & impartial".

Reducing this to a shorter form, it means that an arbitrator's duty is not merely to see that justice is done, but also to behave in such a way that justice appears to be done. According to this standard there can be no doubt that the arbitrators' conduct in this case was not wholly unimpeachable.

For these reasons, the appeal is dismissed with costs, and advocate's fees assessed at LP. 5.—

Delivered this 14th day of April, 1937.

CIVIL APPEAL No. 80/36

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before:— Manning S/P.J., Frumkin, J. and Khayat, J.

Yonina Shlank — Appellant.

v.

Mahmoud Muhammad el Bahloul — Respondent.

Usurious Loans — Nature of Contract — evidence of System — Admission outside Court.

1. Allegation that transaction is in reality one of money lending at usurious interest can be proved by witnesses even if opposite party relies on written document.

2. Evidence of system adwissible also in civil cases to rebut allegations of accident, mistake or innocent condition of mind.

3. Court entitled to rely on evidence of single witness as to admission outside Court if corroborated by evidence of system.

Levitsky for Appellant. Respondent in person.

Appeal from judgment of DC, Jaffa, dated 12.4.36.

JUDGMENT

1. On the 26th November 1933 the Appellant and the Respondent entered into a written contract by which the Respondent agreed to deliver to the Appellant 800 boxes of oranges at a price of 110 mils per box. At the time the contract was made the Respondent received from the Appellant a sum of LP. 60 and it is alleged that he received at various later dates sums which amounted in all to LP. 23. The Respondent failed to deliver the oranges and the Appellant sued him in the District Court of Jaffa for LP. 83 money advanced and for damages for breach of contract.

2. In his statement of defence the Respondent pleaded that though the transaction was in form a contract for the sale of oranges, yet it was in reality a loan of money to him by the Appellant, and a loan at usurious interest. He said that the LP. 60 advanced was a loan, and that he had to pay LP. 4 per month as interest. The further LP. 23 alleged to have been advanced were not advanced at all, they were sums due for interest which he failed to pay. He also appeared to have pleaded that he had repaid the amount of LP. 60.— advanced, though I cannot find this categorically stated in his written defence.

3. There were thus two issues before the District Court, firstly, whether the Respondent had repaid the LP. 60, and secondly whether the contract was a fictitious one to cover a loan at usurious interest. The Court tried these issues separately, and on the first one came to the conclusion that it was not satisfied that the LP. 60 had been repaid.

4. The Court seems to have been somewhat confused as regards the second issue. It ruled first that the Usurious Loans Ordinance was not applicable to contracts. Then it ruled that the Respondent himself might give evidence and call the Appellant as a witness. And later it ruled that the Respondent might call witnesses on the issue, in spite of the Appellant's objection. The Respondent called his witnesses and the Court decided that the transaction was a money lending one at usurious interest. It consequently rejected the Appellant's claim for damages but gave judgment in her favour for the sum advanced with interest at the legal rate.

5. The Appellant has appealed. One curious thing about the proceedings in the Court below was that neither of the parties gave any evidence and Mr. Levitsky, who argued the appeal on behalf of the Appellant, complained that his client's evidence had not been heard. There is nothing however to indicate that the Appellant desired to give evidence and she has no justifiable complaint on that score.

6. Mr Levitsky does not deny that the Court below had jurisdiction to sift the nature of the agreement between the parties, even though its form was that of a contract for the sale of oranges. He urges, however, that the Court below erred in allowing witnesses to be called by the Respondent to show that the contract of sale was in reality a money lending transaction.

He agrees that the Respondent might himself give evidence and might call the Appellant as a witness, but says that the present state of the law in Palestine does not allow any other witnesses to be called.

7. The first provision to be considered is section 3 of the Usurious Loans Ordinance, No. 20 of 1934. This is as follows:

> "In any proceedings for the recovery of money lent and in any proceedings under sub-section (2) of section 2 of this Ordinance, a court may receive any evidence whether parol or written by any person in regard to the rate of interest charged notwithstanding any provision of the law relating to the admissibility of evidence or the competency of witnesses".

8. It will be noticed that the exception made is only with regard to the rate of interest charged. The section recognises that the local law restricts the admission of parol evidence in certain cases, but makes an exception with regard to the admissibility of such evidence as to the rate of interest. But it makes no exception as regards the admissibility of oral evidence to show the nature of the transaction. The section does not afford any assistance in deciding the issue at present before us.

9. The relevant provision of the Ottoman Law is Article 80 of the Ottoman Code of Civil Procedure. This is as follows:—

> "Claims based upon a contract, agreement, partnership, lease or debt, which by law or custom are reduced to writing and which exceed 1,000 piasters in value must be proved by a sanad.
>
> "Every claim disputing liability under a sanad shall be proved by a sanad, or by the admission or account books of the defendant, even if the amount in question do not exceed 1,000 piastres".

10. Mr. Levitzky cited an authority as to the effect of this article, viz, the case of Rein v. Flint, reported on page 133 of Mr. Hopper's Civil Law of Palestine and Trans-Jordan, Vol. II. In that case the Court said "The general rule under the Civil Procedure Code, Article 80, is clear: namely that an agreement varying an agreement in writing must be proved by evidence in writing: or by the admission of the defendant or his account books. In the absence of written evidence, therefore, we have to see whether there was an admission by the appel-

lant". The Court then considered the evidence and found there had been an admission by the Appellant, who happened to be the plaintiff in the case. I am informed by my brethren, however, that the word "defendant" in Article 80 is not to be construed strictly, and that it has always been construed in the loose sense of a person resisting a claim, whether that person be the plaintiff or defendant in the action.

11. The word "sanad" means an instrument in writing, and the effect of the last part of Article 80 was therefore as stated in the Rein case (supra), that if a person wished to resist a claim based on a written instrument, he had to rely either on another written instrument, or on an admission by the opposite party. He was precluded from calling oral evidence to contradict the terms of the sanad.

12. Certain changes were made by legislation and the only one necessary to consider is section 12 of the Law of Evidence Ordinance, No. 13 of 1924 which was the law in force when the present case was being tried. That section now appears as sections 13 and 14 of the Evidence Ordinance (Vol. 1, Laws of Palestine, page 673). It read as follows:

> "12 Subject of the provisions of this Ordinance, any person may be summoned to give evidence which is admissible and relevant to the case, subject to the discretion of the court to refuse to issue a summons which may be unnecessary or which may appear to be demanded for some other purpose than the elucidation of the truth.
>
> In a civil case, either party may give evidence on his own behalf or be summoned to give evidence for the other party".

13. The effect of the first part of the section was to allow persons to give evidence which is admissible and relevant to the case. Article 80 of the Ottoman Code of Civil Procedure renders inadmissible the oral evidence of witnesses called to contradict an instrument in writing, and consequently the section does not help the Respondent.

14. I have set out the law relating directly to the right of a party to call witnesses in a case such as the present, where that party desires to prove that a document which purports to be a contract for the sale of oranges is not such a contract at all, but is merely a cloak to cover a loan of money at usurious interest. The law is in favour of Mr. Levitsky's contention that witnesses should not be heard. It is a strong point in his favour that section 3 of the Usurious Loans Ordinance (set out above) makes an exception as to evidence as to the rate of interest but makes no exception as to evidence concerning the actual nature of the transaction. But, in spite of this, I am unable to accept the proposition that in a case such as this the defendant is precluded from calling oral evidence to show the real nature of the transaction. One has to consider the object of the Uusrious Loans Ordinance. The first part of section 2 deals with proceedings for the recovery of money

lent and allows a Court to reopen all accounts between the parties and to give consequent relief to the person sued. Then sub-section 3 enacts as follows: —

"(3) The foregoing provisions of this section shall apply to any transaction which whatever the form may be is substantially one of money lending".

15. No Court could make use of this sub-section in favour of an oppressed debtor, where the claim is founded on an instrument in writing, unless that debtor was allowed to call evidence to show the real nature of the transaction. He may, of course, give evidence himself, but he should not be obliged to rely on this alone if other witnesses in his favour are available. If a moneylender is clever enough to have a document executed which conceals the fact that the transaction was in reality a loan, he stands in a secure position if Mr. Levitsky's contention is correct. It is not likely that the borrower will be able to produce any documents in his favour or that there will have been any admission by the moneylender. The whole object of the Ordinance would be defective and Courts would be fettered in their inquiries into the real nature of transactions. Sub-section 3 (supra) can only mean that where any transaction is alleged to be a moneylending one, a Court is entitled to disregard the form and to hear the evidence of witnesses as to the realities of the case, even if the moneylender bases his claim on an instrument in writing.

16. In my opinion, it is implicit in the Usurious Loans Ordinance that when a transaction is not in form one of moneylending, but is alleged to be so, the party so alleging should be allowed to call witnesses other than the opposite party to support his allegation, even if the opposite party is relying on a document in writing.

17. Mr. Levitsky's next ground of appeal is that the Court below wrongly admitted evidence on this issue. Three witnesses, who knew nothing whatever about this particular transaction, gave evidence to the effect that on previous occasions they had borrowed money from the Appellant and that on each occasion the transaction took the form of a contract for the sale of oranges. When the loan was repaid the contract was torn up. A fourth witness said he knew the plaintiff and that it was her practice to lend money at interest to conceal the nature of the transaction by negotiating with the debtor a contract for the sale of oranges. This witness also knew nothing of the transaction between the parties in this case. The only other witness was a person who said that the Appellant had admitted to him that the contract was a contract of security. There can be no doubt as to the admissibility of the evidence of this last witness, but there is a legislative enactment in Palestine, Section 6 of the Evidence Ordinance, which forbids a Court to give judgment on the evidence of a single witness. The result would

be that, if the evidence of system was wrongly admitted, the Court below erred in deciding the issue in favour of the respondent.

18. Evidence of system is generally considered in relation to criminal law, but I do not see why it should not be admitted in civil cases on the same principles and for the same reason. In the present case the Appellant seeks damages for breach of contract. The contract is there in writing, admitted by the Respondent. The breach is also admitted but the Respondent's defence is that the contract was a bogus one to cover a loan at usurious interest. The Appellant sticks out for the genuineness of the contract, i.e. she makes herself out as a trader in oranges, innocent of any intention to defeat the object of the law relating to loans at usurious interest. Evidence of system is allowed to rebut allegations of accident mistake or an innocent condition of mind; and in my opinion it was rightly received by the Court below in the present case to rebut the allegation that the transaction was an ordinary one relating to the sale of oranges. If the Court below believed it, as it evidently did, it was entitled to rely on it as corroborating the evidence of the witness who testified that the Appellant had admitted to him that the contract was a contract of security.

19. There were no further grounds of appeal and in my opinion, for the reasons already given, the appeal should be dismissed with costs.

Delivered this 20th day of May, 1937.

LAND APPEAL NO. 18/36.

IN THE SUPR. COURT SITTING AS A COURT OF LAND APPEAL

Before: — Maning S/P. J, Khayat, J. and Abdul Hady, J.

Philip Mayer — Appellant.

v.

Butros Atallah and another — Respondents.

Recovery of possession — Genuine dispute as to ownership.

Extract of Werko registration and Werko receipts not sufficient evidence of genuine dispute as to ownership.

Levin for Appellant. *Bustani* for Respondent.

Appeal from jdgt. of LC, Haifa, dated 21.11.35.

JUDGMENT.

The Appellant took an action against the Respondents in the Magistrate's Court Haifa, asking for an order that they vacate certain land, which he alleged to be his. The Magistrate had before him, in favour of Respondents, only certain extracts of Werko registration and certain Werko receipts. On this he decided that there was a dispute as to ownership and dismissed the action.

We think the Magistrate had not sufficient evidence before him to decide that there was a genuine dispute as to ownership. We there-

fore set aside his judgment and the judgment of the Land Court and order the case to be remitted to the Magistrate's Court for him to hear such evidence as may be adduced on the part of the Appellant and the Respondents and to decide the matter in accordance with law.

Costs to abide the event.

Delivered this 16th day of March, 1937.

CIVIL APPEAL No. 12/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

David Bader and Moshe Lubetkin Administrators of the estate of the late David Brodetsky. Appellants.

v.

Riunione Adriatica Di Sicurta Respondent.

Insurance — Personal status — Jurisdiction of Religious Courts — Consent to such jurisdiction — Palestine Order-in- Council Art. 53(ii).

Certificates of Religious Courts in matters of personal status in which consent of all parties is necessary to clothe Court with jurisdiction must contain an explicit statement that such consent was given.

Smoira for Appellants. *Gorodissky* for Respondent.

Appeal from jdgt. of DC,Jaffa sitting at Tel-Aviv, dated 25.11.1936.

JUDGMENT.

An insurance in the sum of LP. 500 against accidents and diseases was effected by the late David Brodetsky, a foreigner, with the Defendants, the Riunione Adriatica di Sicurta. The deceased paid the full premium for a year and received the cover note which contained a clause that it is subject to the terms and conditions of the Policy.

Clause 3 of the Policy provides that it does not insure against.... any accident of whatever nature occurring while the ensured shall be engaged in fighting, duelling, mountaineering, playing pole or football, *motor-cycling*, racing, etc.

The death of the ensured was the result of severe injuries which he sustained while riding a motor-cycle.

After his death, the Rabbinical Court, on application, appointed the Appellants as Administrators of his estate.

The Administrators on behalf of the estate commenced proceedings in the District Court of Jaffa, sitting at Tel Aviv, claiming the value of the Insurance Policy.

The District Court held that Section 3 of the Succession Ordinance does not empower a Religious Court to appoint an administrator, and that in consequence the Appellants must fail in their case as they had no authority to sue as such.

Although the District Court dismissed the claim on this point, it very judiciously dealt in full with the other points raised before it which makes it possible for us to appreciate all the facts of the case and saves the case being remitted to the lower Court for further findings.

After giving consideration to all the facts of the case and to the arguments of Counsel for the Appellant before us, we come to the conclusion that even if we assume that the Rabbinical Courts had jurisdiction to appoint an administrator, they cannot do so unless all parties to the action consent to their jurisdiction as provided in Article 53 (ii) of the Palestine Order-in-Council.

The certificate appointing the administrators does not contain a statement that the heirs of the deceased have consented to the jurisdiction, and in the absence of such a clear statement in the certificate we cannot assume that the parties consented to the jurisdiction of the Rabbinical Courts. In order to hold that a Religious Court of any one of the specified Religious Communities had jurisdiction to deal with any matter of personal status, other than those specified in Article 53(i) of the Palestine Order-in-Council, it is invariably necessary that certificates issued by such Courts should contain an explicit statement to the effect that all parties have consented to the jurisdiction. Otherwise, no one can tell, in a case such as this, whether administrators have been properly appointed or not.

But the appeal fails on the second ground also. The cover-note states that it is issued subject to the terms and conditions of the Policy, and the Policy expressly excepts the risk of motor-cycling. In his proposal form which forms the basis of an insurance contract the deceased stated in answer to a question that he did not use a motorcycle. When killed, he was motor-cycling and therefore he was not covered by the Policy at the time of his death.

For these reasons the appeal must be dismissed with costs and LP.4 advocate's fees, to be paid personally by the Appellants.

Delivered this 24th day of May, 1937.

CIVIL APPEAL NO. 129/36.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Copland J. and Khaldi J.

Shimon Jacob Shimon — Appellant.

v.

Stanik Maxudian for the estate of Guevont Maxudian — Repondent.

Admission in court — Records of Magistrate's court not signed — Oral evidence by record clerk.

1. An admission made in Court is an admission, no matter

for what purpose it was made.

2. Record taken down by clerk of Court and testified by him on oath as true and his own handwritnig — of same evidentiary value as a signed record.

Levanon for Appellant. *Kamal* for Respondent.

Appeal from the jdgt. of DC, Jerusalem, dated 11.11.1936.

JUDGMENT.

This is an appeal against the judgment of the District Court at Jerusalem, dated the 24th November, dismissing Plaintiff's claim for the amount of two promissory notes.

The plaintiff has appealed to this Court and the points on appeal are quite simple.

In certain proceedings before the Magistrate's Court, there appears on the record an admission by the present Respondent that his client was a merchant and that his signatures on the promissory notes in question proved that he was a merchant.

The District Court rejected this admission on the ground that it cannot be taken as an admission of signature but a statement by an advocate that he was a merchant in order to escape a long prescription.

We hold that the District Court was wrong in its decision as an admission cannot be so lightly dismissed just because it was made to prove that he was a merchant and to enable him to take the benefit of a shorter period of prescription. An admission is an admission and it matters nothing for what purpose it was made, if made in Court.

The District Court took a further point and that is that the record containing the admission had not been signed by the Magistrate.

In this we also disagree with the District Court. The clerk of the Court who took down the record gave evidence on oath before the Court below as to the pleadings of the parties which he recorded. He admitted to have written the record in his own handwriting and testified as to the truth of it, which in our opinion renders his evidence of just the same evidentiary value as a signed record.

The appeal is therefore allowed, the judgment of the District Court set aside, and judgment is entered for the Appellant for the amount claimed with costs and LP.3 advocate's fees.

Delivered this 25th day of May, 1937.

CIVIL APPEAL No. 12/36.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Manning S/P J., Khayat J. and Abdul Hadi. J.

Badri Aidey — Appellant.

v.

Husein Amro — Respondent.

Action on promissory note insufficiently stamped — Question of res judicata. — Decisive oath reserved till after appeal.

1. Failure of action on promissory note because note insufficiently stamped does not preclude Plaintiff from bringing an action on debt which gave rise to the promissory note.

2. Party may renounce his right to call witnesses or to call on opponent to give evidence and may instead tender opponent decisive oath.

3. Party may reserve right of taking decisive oath after his preliminary objections are decided on appeal.

Appeal from the jdgt. of DC. Haifa dated 21.1.1935.

JUDGMENT.

1. The facts giving rise to this appeal are as follows. The Respondent sued the Appellant in the District Court of Haifa for LP.150 due on a promissory note. The note was insufficiently stamped and the two members of the District Court disagreed as to the consequences. Both memebrs agreed that the action could not be brought on the promissory note, but they disagreed as to whether the action might proceed as for a debt of LP.150 without taking the note into consideration. The result was that the respondent's claim was dismissed.

2. The respondent appealed to the Supreme Court. There it was held that the respondent could not recover on an insufficiently stamped promissory note, and that he could not call evidence to prove the debt independently of the promissory note, as the only cause of action was that on the promissory note.

3. The respondent then sued the appellant in the Magistrate's Court, Haifa, for the recovery of LP.150. money lent. The appellant raised the objection that the matter was res judicata. The learned Chief Magistrate was against him on this point. The appellant then made another objection, that no oral evidence was admissible to prove a claim exceeding LP.10. With this the learned Chief Magistrate also disagreed. The respondent's advocate then called upon the appellant to give the decisive oath. The Appellant's advocate said his client would not give the decisive oath until the two objections had been decided on appeal. The learned Chief Magistrate then entered judgment for the respondent for the amount claimed,

4. The appellant appealed to the District Court. The learned President held that the Chief Magistrate's decisions were right. Judge Muhamad Shafic Dajani held that the plea of res judicata was good. The result was that the appeal was dismissed.

5. The learned President granted leave to appeal to this Court on the two questions of law raised by the appellant, viz, the question of res judicata and that of the admissibility of oral evidence in a claim exceeding LP.10.

6. The local provision with respect to res judicata is art. 1837 of the Mejelle. This reads as follows:—

> "It is not permitted to reconsider and hear claims, when there is a decision (hukm) and written judgment (i'lam) in conformity with the principles of the Sharia law, i.e. when the conditions and grounds of the judgment exist".

The only res judicata to be gathered from the decision of the District Court and of the Supreme Court on appeal was that the respondent could not recover on an insufficiently stamped promissory note and there had been no amendment of the claim. All that was decided was that, the note being insufficiently stamped, the respondent could not recover on it. But if the respondent lent money to the appellant, he had a separate cause of action independently of the promissory note. Then he sued the appellant for money lent the issue was whether money had been lent. This issue has not been decided by any Court. Art. 1837 of the Mejelle clearly means that when an action has been followed by a valid judgment, setting out the ration decided then that action cannot be brought again. But it does not mean that when an action on a promissory note fails because the note is insufficiently stamped the plaintiff is precluded from bringing an action on the debt which gave rise to the promissory note. No judgment has been given on the matter of the debt, and no question arises as to bringing the same action a second time. I think that the learned Chief Magistrate and the learned President were right in holding that there was no res judicata.

7. With regard to the second point Section 14 of Evidence Ordinance (Vol. 1, laws of Palestine p. 673) is as follows:

"In a civil case, either party may give evidence on his behalf or be summoned to give evidence for the other party."

8. Article 80 of the Ottoman Code of Civil Procedure is as follows:

> "Claims based upon a contract, agreement, partnership, lease or debt, which by law or custom are reduced to writing and which exceed 1,000 piasters in value must be proved by a sanad.
>
> Every claim disputing liability under a sanad shall be proved by a sanad. Or by the admmission or account books of the defendant, even if the amount in question do not exceed 1,000 piasters".

9. The learned Chief Magistrate held that Section 14 of the Evidence

Ordinance repealed Art. 80 of the Ottoman Code of Civil Procedure. In comming to this conclusion he relied on a decision of this Court in Civil Appeal No. 100 of 1929, in which the facts were somewhat different. In the present case I do not think it is necessary for us to decide whether the learned Chief Magistrate was right in his conclusion. After he had disposed of the two objections the respondent's advocate did not apply to call oral evidence. What he did do was to call on the appellant to give the decisive oath. The relevent articles of the Mejelle are as follows:

> "Article 1818. If the plaintiff proves his case by evidence, the judge shall give judgment accordingly. If he cannot prove it, he has a right to the oath, and if he asks to exercise such right, the judge shall accordingly tender the oath to the defendant.
>
> "Article 1819. If the defendant swears the oath, or if the plaintiff does not ask for the oath to be administered, the judge shall order the plaintiff to give up his claim upon the defendant.
>
> "Article 1820. If the defendant refuses to take the oath, the judge shall deliver judgment based upon such refusal, if the defendant states that he is prepared to swear an oath, after judgment has been so delivered, the judgment shall remain undisturbed".

10. The oath cannot be called for unless the plaintiff is unable to prove his case by evidence. The learned Chief Magistrate had ruled that the respondent might give evidence on his own behalf and also call the appellant as witness. The respondent did not avail himself of this ruling, he chose to call on the appellant to give the decisive oath under Art. 1818 of the Mejelle, thereby renouncing his right to call any evidence in support of his claim. In the course that the action took no question therefore arose as to the right of the respondent to call oral evidence in support of his claim and for this reason I consider it unnecessary for this Court to deal with the second point of law on which leave was given to appeal.

11. The appellant intimated that he was willing to take the oath as soon as the merites of the preliminary objections had been decided on appeal. In the circumstances I think that the proper order to be made is to set aside the judgements of the Magistrate's Court and the District Court and to remit the action to the Magistrates Court with directions that it was right in rejecting the plea of res judicata and that oath is now to be tendered to the appellant (the defendant in the Magistrate's Court) under Art. 1818 of the Mejelle and that the action be decided thereafter in accordance with law.

12. The costs of this appeal (to include LP. 5 advocate's fees) will abide the result.

Delivered this day of May 1937.

CIVIL APPEAL No. 68/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Copland J. and Frumkin J.

Noach Lipmann — Applicant.

v.

Joseph Kirjovsky — Respondent.

Arbitration award — Ground for setting aside award — Liquidated damages.

1. Resignation of third arbitrator after all proceedings over and majority award decided does not vitiate award.
2. Award of arbitrator to pay a certain amount as damages cannot be attacked by adjudged party on ground that it is less than amount stipulated in agreement.

Silberg for Appellant. *Brevdo* for Respondent.

Application for leave to appeal from jdgt. of DC. Jaffa, sitting in Tel-Aviv, dated 10.2.1937

JUDGMENT.

This is an application for leave to appeal to the Supreme Court from the judgement of the District Court of Jaffa sitting in Tel-Aviv, dated 10th February, 1937, whereby the arbitrators' award dated 19th July, 1936, was confirmed and Appellant's opposition dismissed.

The two important grounds on which the application is based are: —

1. That the two arbitrators have given their award without any common consultation with the third arbitrator.
2. The award gives the applicant as damages an amount smaller than that stipulated in the agreement, which is contrary to the provisions of Article 111 of the Civil Procedure Code.

As to the first point, which is a question of fact, the Court below heard evidence and came to the conclusion that the dissenting arbitrator resigned after all the proceedings were over and the majority award was decided.

The application on this point, therefore, fails.

With regard to the second point, as to whether the arbitrators are bound by Article 111 of the Civil Procedure Code, it does not arise in the present case, and we make no decision upon it. The arbitrators gave an award less than the amount claimed for which the Applicant might have been liable. This is in applicant's favour and it is obvious that he cannot appeal on a question such as this.

For these grounds, the application for leave to appeal is refused with costs and LP. 3.— advocate's fees.

Delivered this 14th day of May 1937.

CIVIL APPEAL No. 31/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

Moshe Jacob Rabikoff — Appellant.

v.

Estate of Moshe Golenberg, through Mrs. Zipora Golenberg, heir to the estate and trustee by order of the Rabbinical Court. — Respondent.

Contract of sale of immovable property — Return of money paid on account — Section 11 of Land Transfer Ordinance.

Subject to terms of agreement purchaser of immovable property may always demand return of the money paid by him before registration in Land Registry, vendor being at liberty to claim damages.

Fleisher for appellant. *Silberg* for Respondent.

Appeal from jdgt. of DC., Jaffa, dated 13.9.1936.

JUDGMENT.

Plaintiff (Respondent) raised an action against the Defendant (Appellant) in the Magistrate's Court of Tel-Aviv, for the return to him of a sum of LP. 100 which he paid to the latter in order to transfer to him a piece of land in Afulleh.

The Magistrate's Court accepted Plaintiff's claim and entered judgement in his favour for the sum claimed with legal interest as from 9.7.1936.

The District Court upheld the Magistrate's judgement.

On the application of appellant, the President of the District Court granted leave to appeal to the Supreme Court on the following so-called point of law: —

1. Whether the Respondent was entitled to claim back the purchase price paid in respect of an agreement for sale of a plot in face of the judgment of Supreme Court sitting as a Court of Appeal, C.A. 87/30, 89/30, 50/26, 147/26.

2. Whether the sale of a plot by a person, not being the owner or possessor of it, is to be regarded as a transaction in the meaning of Art. 11 of the Land Transfer Ordinance, 1920, or as an agreement for sale.

3. Whether the refusal to give the Appellant possibility to prove that the parties lodged with the Land Registry Office the Application for Transfer, No. 26/36 in order to show that there was an agreement for sale and not a transaction was contrary to the form and principles of the Law of Civil Procedure.

We are surprised that the leave to appeal should have been granted on these so called points of law. Only one point is really involved and that has been settled law for a long time. More care should be taken in framing points of law for submission to this Court.

It is perfectly clear that, subject to the terms of an agreement, the purchaser of immoveable property may always bring an action for the return of the money paid by him before the registration is effected in the Land Registry. Section 11 of the Land Transfer Ordinance is quite clear on this point, though, of course, the vendor may be at liberty to bring an action for damages.

This is a sufficient answer to the first point for which leave to appeal has been granted.

The other two points, if they be points of law, do not therefore arise.

The appeal is therefore dismissed with costs and LP. 4.— advocate's fees

Delivered this 1st day of June, 1937.

CIVIL APPEAL No. 37/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

David Menouchin Appellant.

v.

E. Bodenheimer and the Joint Liquidators of Phoenix Life Assurance Co., Vienna, in Liquidation. Respondents.

Winding up of insurance company — Different classes of creditors —Loans on surrender value of Policy — Contractual set-off.

1. Where there are different classes of creditors Court should appoint certain creditors to represent their respective classes, it being unfair that the burden of defending the interests of a whole class should fall upon one individual and it being desirable that the rights of the classes of creditors should be settled definitely.

2. Where there is an agreement, express or implied, that one debt was to liquidate the other, there is a contractual set-off.

Horavitz for Appellant. *Kourjansky* and *Doukhan* for Respondents.

Appeal from the jdgt. of the DC. Jerusalem, dated 12.2.1937.

JUDGMENT.

This appeal raises a difficult point of law and one which is by no means free from doubt, because though the English Law on the subject is perfectly clear, this case must be decided on the Law of Palestine, since the winding-up order against the Phoenix Life Assurance Company Vienna (which I will hereafter refer to as the Company), was made prior to the coming into force of the Bankruptcy Ordinance 1936, which brings the Law of Palestine more or less into line with the English Law of Bankruptcy.

The present dispute is in reality between two different classes of creditors, both Policy Holders in the Company, namely, those creditors

who have obtained loans on the surrender value of their policies from the Company, and those who have not so obtained loans. And, in the first place, I think that the District Court was wrong in not appointing certain creditors to represent their respective classes. In a case of this magnitude it was most desirable that this should have been done, and it is the usual practice of English Courts to do so, as it is unfair that the burden of defending the interests of a whole class of creditors should fall upon one individual: and it is also desireable that the rights of the classes of creditors should be settled definitely. The District Court refused to make the appointment, without assigning any reasons for their refusal; in this, as I have said, I think that they were wrong, though I do not think that this refusal would be a sufficient ground for allowing the appeal.

The facts of the case are very clearly set out in detail in the judgment of the District Court and it is not necessary to repeat them. It is sufficient to say that the liquidators of the Company allowed those creditors who had obtained loans on the surrender value of their policies to set off the amount of those loans against the amounts due on their policies — the District Court reversed this decision holding that there was no set-off in the circumstances of this case, since English Law did not apply. They held that at the date of the winding up there was in effect nothing due under the policies, that the policy contracts had not become operative because the events, on the happening of which the policy monies would become due, had not yet happened, and that any liability thereunder was a future and contingent liability. The District Court adopted the reasoning of Warrington L.J. in re City Life Assurance Co.(1926 Ch 191) at p. 208 in commenting on Lee v. Chapman (30 Ch. D. 216). They further held that the policy holders' claims were in essence claims to damages, and that such a claim was not the subject of set off in accordance with Ottoman Law as interpreted by Ali Haidar and by this Court in Ottoman Bank v. Mulki (C.A. 99/34).

We are now asked to say that this decision was wrong and that the liquidators were right in allowing a set-off and that their ruling should be restored.

Since the Bankruptcy Ordinance 1936 was not in force at the date of winding-up order, there can be no questions of any statutory set off under Section 31 thereof. If there exists any equity between the parties, then it must arise out of the contract between them. And that contract in this case is to be found in the loan receipt signed by those policy holders who obtained loans from the Company. The standard form of receipt is in German, and the translation is as follows: —

"Life Assurance Company Phoenix, Vienna,
Branch Palestine.
LOAN,

The Government fee is paid directly by the Company in accordance with the Decree of 15.9.1915. R.G.Bl. Nr. 280.

RECEIPT.

The life Assurance Company Phoenix, Viena, paid to-day to me as person entitled to dispose of the policy No. 385.005 for LS. 2000.— on the life of Mr. Prof. Dr. Andor Fodor, a loan of LS. 60.—.— (sixty English pounds).

I undertake to pay interest on this loan-debt, until its complete repayment, at the rate of 6 (six) %p.a. in quarterly instalments payable in advance which shall be due together with the premiums beginning the 1st September 1932, otherwise the whole loan-debt shall be due immediatly and that part of the assurance the redemption value of which equals the loan together with arrears of interest and collateral fees, if any, shall be deemed to be extinguished by redemption. The loan-debt together with arrears of interest, if any, is to be deducted from any payment upon the Company out of the assurance — (Para 27, V.V.G.).

As security of the loan-debt together with interest and collateral fees I herewith pledge all demands and claims resulting from the afore-mentioned assurance which pledge has been stated on the policy and in the books of the Life Assurance Company Phoenix, Vienna.

Jerusalem, April 5th, 1932.

(—) Prof. Dr. A. Fodor
5/4. 1932
7 mils Stamps".

This is an actual receipt form as signed by one of the policy holders on contracting a loan. This form, we are told, is typical of all the others.

It is noticeable that there is no absolute covenant to repay the amount of the loan. On the failure to pay interest or premiums, it is agreed that "that part of the assurance the redemption value of which equals the loan together with arrears of interest and collateral fees, if any, shall be deemed to be extinguished by redemption": and further the loan-debt is to be deducted from any payment due by the Campany under the assurance. As security for the loan-debt and interest, if any, the policy-holder pledges all demands and claims arising out of the assurnce policy. The only methods for repayment of the loan which are provided in the contract are either by redemption through the surrender value (or redemption value, as it is termed in the receipt) of the policy, or by deduction from the amount of the policy moneys when they become due. This seems, in my opinion, to amunt to a contract that in all events the only fund to be looked to for payment of the debt should be the policy. See per Warrington L.J. in In Re City Life Assurance Co. (supra at p. 220): and Pollock M.R. in the same case at p. 217 said: "Willes J. in the case

of Waston v Mid Wales Railways Co. [1867 — 36 L.J. (C.P.) 285] refers to the difference between the rights which accrue under the Bankruptcy Act and the rights which would give rise to an equity between the parties. He says "It is necessary to show mutual credit: I do not mean in the sense of mutual credit under the statutory provisions of the bankrupt law, but in the sense of there being an agreement or contract made or to be inferred that one debt was to liquidate the other". These words seem to me to fit exatly the present case. In my opinion in this present contract it is a term that the loan debt is to be extinguished by the policy, and by the policy alone. To my mind, it is a case of contractual set-off.

I do not think that the case of Ottoman Bank v. Mulki, C.A. 99/34, has any bearing on this case. The Court there was dealing only with the question of statutory set-off, and the present point does not seem to have been referred to.

I think that the appeal should be allowed and the judgement of the District Court should be set aside and the ruling of the liquidators restored: that is, that those creditors who have obtained loans against the surrender value of their policies should be allowed to set-off the amount of loans against the amount due on their policies. Costs of all parties including LP. 5. Advocate's fees to each to be paid out of the assets of the Company.

Delivered this 11th day of June, 1937.

CIVIL APPEAL No. 36/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

Jacob Battat, Jerusalem — Appellant.

v.

The Attorney General — Respondent.

Bond — Unqualified condition — Notarial Notice — Guarantor.

1. Bond enforceable if clear and unqualified condition broken.
2. No Notarial Notice necessary in case of a guarantor not being under obligation to perform any act.

Olshan, Levy and *Mizrahi* for Appellant. *Salant* for Respondent.

Appeal from the jdgt. of DC. Jerusalem dated 16.2.37.

Copland, J.: JUDGMENT

The facts of this case are very simple. On 26th January, 1936, a Miss Rachel Sobel was granted permission to enter into and remain in Palestine as a traveller for a period of one month, after the Appellant had paid into the Treasury of Palestine the sum of LP. 100 as a guarantee that the lady would not overstay the prescribed period. The Appellant signed a bond to this effect.

On the 14th of February, 1936, Miss Sobel married a Palestinian citizen, and her name was entered by the Imigration Department on her husband's passport. The lady did not leave Palestine before the expiration of the one month allowed her, or at all. The Appellant asked for the refund of the LP. 100 deposited by him on the ground that Miss Sobel was entitled, being now of Palestinian Nationality, to remain in Palestine, but the Migration Department has refused the refund saying that the deposit has become forfeited. The Appellant thereupon brought an action in the District Court against the Attorney General asking for the return of his money.

During the trial it was stated by the Junior Government Advocate that Miss. Sobel had originally applied to enter Palestine as a capitalist, but since the Immigration authorities were not satisfied that the sum of LP. 1000 had in fact been placed at her disposal, she was allowed to enter as a traveller for one month.

The District Court dimissed the Appellan's action, holding that the terms of the bond were perfectly clear and unambiguous, that since the condition that Miss. Sobel should leave the country on or before the 26th February, 1936, had not been fulfilled, the guarantor has forfeited his desposit. The Appellant has now appealed to this court.

I must admit that in the course of the excellent arguments addressed to us by both sides, my opinion has varied, but upon consideration I think that the judgement of the District Court was right. The bond definitely states "that if the said Rachel Sobel leaves Palestine on or before the 26th day of February 1936, then the above written bond shall be void, otherwise it shalll be and remain in full force and the sum of one hundred Palestine Pounds deposited.....shall be forfeited." The bond does not state that if she should remain in the country illegally longer than one month, then the deposit shall be forfeited. It would have been very easy to have said this in the bond, if this had been the intention of the parties. A Court cannot rewrite the terms af a bond. I do not think that the rectical that the lady had applied for and had been granted permission to enter Palestine as a traveller can nullify the condition, the clear and unqualified condition, that she must leave within one month of entry.

And there is this further consideration that the lady's marriage constitutes an evasion of the Immigration laws. I do not say that this marriage is fictitious; I am assuming that it is a genuine marriage, but whether genuine or fictitious the result is the same — the Immigration laws have been evaded. She was given permission to remain in Palestine one month only — she has broken the condition upon which alone she was allowed to enter the country, and the LP. 100 deposit is therefore rightly forfeited.

There is one final argument with which I must deal and that is that a notarial notice should have been served on the Appellant according to

Article 108 of the Civil Procedure Code before the deposit could be retained. I do not think that this is so. The Appellant was not under any obligation to perform any act, and no notarial notice therefore was necessary; and since the bond was not executed by Miss. Sobel, no notarial notice could be necessary in her case as the LP. 100 are not being claimed from her.

For these reasons I think that this appeal fails, and should be dismissed with costs and LP. 5 advocate's fees.

Delivered this 11th day of June, 1937.

Frumkin, J.:

The Appellant in this case entered into a bond for LP. 100 to be forfeited to the Government of Palestine in case a certain Rachel Sobel, who was permitted to enter the country as a traveller, will not leave Palestine before the 20th February, 1936.

2. Before the expiration of that date the said Rachel Sobel who will hereinafter be referred to as the Immigrant, became a Palestinian citizen by marriage and as such was allowed to remain in the country. The Appellant then claimed the refund of the money and failed. Hence this appeal.

3. The main argument on behalf of the Appellant is that it was the intention of the parties concerned that the Immigrant shall not remain in Palestine as a traveller, but if she otherwise obtains permission to remain in the country the bond would be void.

4. This is a matter of interpretation, and we are bound by the general rules of construction of instruments that the intention of the parties is to be ascertained from the terms of the instrument itself and no parol evidence is admissible, although in the case of a bond the conditions are to be interpreted strongly in favour of the obligor.

5. The Appellant relies on the description of the Immigrant as a "traveller" both in the heading of the bond and in the recital of the contions of the bond. This description alone would not carry us any further.

6. The Junior Government Advocate however volunteered information which threw much light on the intention of the parties at the time the bond was executed. In his defence in the Court below the Junior Government Advocate stated:—

> "While on ship the lady held a certificate for a capitalist entry. LP. 1000 held for her by her father. She failed to satisfy the Palestine authoroties that the Lp. 1000 was at her disposal and instead of refusing her entry to Palestine as they could, gave her the opportunity to prove her statement that this LP. 1000 at her disposal is true. For this she was given a period of one month within which to prove the fact and for this purpose this bond was entered into by the lady."

7. It follows without saying, that had the Immigrant succeeded to

prove her certificate for a capitalist entry, she would be allowed to remain in the country and the Director of Immigration would not in that case, enforce the bond. The position at present is that instead of remaining in the coutry in one lawful way she remains in another way which is also lawful. To my mind it makes no difference, since it is clear that the main object of obtaining the bond was to secure that the Immigrant should not illegally remain in the country as a traveller. The Immigrant did not remain in the coutry illegally and the object of the Immigration Department was secured.

8. Some allusion was made by the Junior Government Advocate to High Court No. 1/37 in which this Court refused to grant a remedy to an Immigrant girl who, while in the Lock-up at Haifa tried to evade the law by entering into a form of marriage which I considered to be of a fictitious nature. There was no evidence in the present case as to the form of marriage, nor was it alleged that it was a fictitious one in order to evade the law. It will be too far fetching to presume that any marriage contracted by an Immigrant girl was so done in evasion of the law.

9. I hold, therefore, that the Appellant must succeed, the judgement of the District Court set aside and judgement entered for Appellant.

CIVIL APPEAL No. 35/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Manning S/P J., Khaldi J. and Abdul Hadi J.

Said Awad, and another — Appellant.

v.

Joseph P. Albina. — Respondent.

Appeal — Cross examination of auditor on his report.

Refusal of application to be allowed to crossexamine auditor on his report — sufficient ground for upsetting judgment and remitting case for a new trial.

Sallah for Appellant. *Moghannam* for Respondent.

Appeal from jdgt. of DC., Jerusalem, dated 18.2.1937.

JUDGMENT.

In this case the Appellants had sued in the District Court of Jerusalem for the recovery of money paid by mistake. They were the guardians of the children of Issa Awad, who had been a partner of the Respondent and who died in February 1929. An account had been made and one of the Appellants had paid the Respondent LP. 1055 which he agreed to be due. Subsequently it was alleged that a certain book and certain documents were found which showed that this LP. 1055 had been paid in error. The District Court referred this book and documents to a firm of auditors. The firm made two reports. In the second report, which

was dated November 28th, 1936, the firm suggested that the book was false. The advocate for the Appellants then asked to be allowed to cross — examine the firm on its report, but this application was refused by the Court.

We think the Court erred in so refusing and we therefore order that the judgement of the District Court be set aside and that the case be remitted for a new trial.

Costs to follow the event.

Delivered this 2nd day of June, 1937.

CIVIL APPEAL No. 79/36.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Manning S/P J., Frumkin J. and Khayat J.

Archimandrite Makarious — Appellant.

v.

Issa Cattan. — Respondent.

Promissory note — Stamp duty — Conversion of sums payable in foreign currency.

1. Promissory note made before Stamp Duty Ordinance came into force — admissible in evidence.
2. Sums payable in foreign currency must be paid at rate of exchange prevailing on date of payment.

Nasr for Appellant. *Cattan* for Respondent.

Appeal from the jdgt. of DC. Jerusalem, dated 16.6.1936.

JUDGMENT.

. . . . . .

With regard to the objection by Nasri Eff. Nasr that the order made by the Court as to the rate of exchange is wrong, we are against him on that point. The Rules to which he reffered made in 1918 were mere temporary Rules to guide the inhabitants as to the Rates of exchange on which debts of that date might be liquidated, but there is no reason to depart from the ordinary rule which always prevails in these metters, that is, sums payable in foreign currency in Palestine have to be paid at the rate of exchange prevailing on the date of payment.

With regard to the attachment, we made it clear this morning already that if the Commission on the Finances of the Orthodox Patriarchate had wished to take any objections to the provisional attachment, the law provided a means of doing so. As they did not appear, we do not propose to consider further the objections which have been argued by Nasri Eff. Nasr.

This disposes of the grounds of appeal which have been urged, and the result will be that the judgement of the Court below is var-

ried by making it a jugement for the Plaintiff for 442 French gold pounds, *less 70 Egyptian pounds. These amounts to be converted in the local currency at the rate of exchange prevailing on the date of payment.

The attachment is confirmed and each party will pay its own costs of this appeal.

Delivered this 19th day of April, 1937.

HIGH COURT No. 94/36

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

Before: — Manning S/P J. and Copland J.

Yoseph Weinberg — Petitioner.

v.

Dr. H. Khaldi, ni his capasity as Mayor of the Municipal Corporation of Jerusalem. — Respondent.

Rights of third person — Failure to cite third person.

High Court will make no order affecting position of person not represented at hearing; failure to have such person summoned — fatal to application.

Levitsky for Petitioner. *Cattan* for Respondent.

Application for an order to issue to the Respondent directing him to show cause why he should not abstain from treating certain persons as Councillors of the Council of the Municipal Corporation of Jerusalem and from summoning them as Councillors to the meetings of the said Council and from allowing them to vote at the meeings of the said Council.

ORDER

If the Court were to make any Order in this case, it would amount to a decision that certain councillors of the Jerusalem Municipal Corporation have become disqualified to sit by reason of certain omissions. These councillors have not been represented at the hearing, and in accordance with well recognized principles of law, no order affecting their position in any way ought to be made.

For this reason, we order the Rule to be discharged and we do not think it necessary to deal with any of the other issues that have been raised.

Petitioner to pay Respondent his costs to include LP. 6. advocate's fees.

Given this third day of February, 1937.

CIVIL APPEAL No. 52/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

Ali Kharbutly and another. Appellant.

v.

Ismail Atrak and others. Respondents.

Claim of one partner against other while partnership still in existence — Award of arbitrators — Action as if no award.

1. No claim can be made by one partner against other before winding-up of partnership; Court will not interfere with partnership except for purpose of dissolutoin.
2. Where there is an arbitration award, party should apply for its confirmation and not make a claim as if there were no award.

Appeal from jdgt. of DC. Haifa, dated 13.1.1937.

JUDGMENT.

On 14th July, 1929, Appellants and their father formed a partnership agreement with the Respondents for the purpose of trading in vegetable and fruits for a period of five years.

At the end of the season of 1930 the partnership sustained losses. The Respondents were called upon to pay their share in the losses which they refused to do. The matter was referred to the arbitrators agreed upon in the Deed of Partnership and they gave their award on the 14th June, 1931.

The Appellants have not applied for the confirmation of the arbitrators' award, neither have they submitted an application for the winding-up of the Partnership. Instead, they choose to raise an action in the District Court of Haifa, claiming from Respondents a certain sum which they alleged to be Respondents' share in the losses.

The District Court dismissed the action on the ground that no claim could be made by one partner against another partner before a liquidation has taken place, reserving to the Appellants and the Third Party the right to institute it again after a winding-up of the partnership has taken place.

As the partnership was formed for a period of five years, it has to be presumed still to exist untill the end of the five years unless a winding-up order has been issued by the competent Court.

The District Court was therefore correct in its judgement. It is the established English practice as evidenced in Lindley on Partnership, page 568 et seq, that a Court will not interfere with a partnership except for the purpose of its dissolution. The Court never deals with individual items of disputes in a partnership. It is provided in Section 2 (2) of the Palestine Ordinance that it has to be interpreted by

reference to the Law of England relating to partnerships, and the English rules of equity and common law applicable to partnership shall apply in Palestine, save as far as they are inconsistent with the express provisions of the Ordinance.

This English practice does not seem to be inconsistent with the express provisions of our ordinance and hence this English rule must be considered applicable in Palestine.

With regard to the second point raised before us, that is, that there was an arbitration award, we hold that as the Appellans have not submitted an application to the District Court for the confirmation of the award, the District Court could have equally dismissed the action on this ground also.

The appeal must, therefore, be dismissed with costs and LP. 5.— advocate's fees.

Delivered this 8th day of June, 1937.

CIVIL APPEAL No. 30/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Copland J., Khaldi J. and Khayat J.

Hassan Sidki Dajani — Appellant.

v.

Hashem Abu Khadrah — Respondent.

Agreement — Obligations of parties — Liquidated damages.

No breach of contract if party failed to do something which on true construction of agreement he was under no obligation to do.

Cattan for Respondent.

Appeal form jdgt. of DC. Jerusalem, dated 28.1.1937.

JUDGMENT.

This is an appeal from the judgement of the District Court of Jerusalem dated the 28th January, 1937, where the Appellant (as Plaintiff) claimed from the Respondent the sum of LP. 144.860 together with LP. 500 damages for breach of contract.

The contract entered into between the parties is a quite clear document. The Respondent undertook to deliver 700 boxes of oranges to the order of the Appellant free from all charges on board the ship to be named by Appellant by a registered letter to be adressed by him to the Respondent.

The Appellant did not name a ship, neither did he fix a day for the delivery of the oranges, but instead addressed a registered letter to Respondent requesting him to deliver the oranges in accordance with instructions that he will receive from Abdel Raouf Bitar. In the same letter the Appellant further requested the Respondent that in the event

of his receiving no communication from Abdel Raouf, he should inform him immediately.

Copy of this letter was sent to Abdel Raouf under cover of a personal letter in which the Appellant asked the former to appoint and inform the Respondent the date and the ship for shipping the oranges, but clearly this letter cannot affect the Respondent.

Abdel Raouf Bitar did not communicate with the Respondent and the oranges were not delivered as requested.

The District Court refused Appellant's claim for damages on the ground that he failed to prove a breach of contract as no clear shipping instructions appeared to have been given by him to Respondent, but that he was entitled for the sum of LP. 144,860, which the Respondent admitted to have received, with interest thereon as from date of action and half costs.

The question really is — was the Respondent under an obligation to carry out the instructions contained in Appellant's letter. In our opinion he was not compelled to do so, and on the true construction of the agreement we consider that it was the duty of Abdel Raouf Bitar, as agent of Appellant, to communicate with the Respondent and give him instructions as to the ship and day appointed by him for the purpose.

This he did not do. There was, therefore, no breach of contract on the part of the Respondent.

The appeal must be dismissed and the judgement of the District Court confirmed with costs and LP. 3.— advocate's fees.

Delivered this 26th day of May, 1937.

CIVIL APPEAL No. 72/36.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Trusted C.J., Copland J. and Khayat J.

The Apostolic Throne of St. Jacob. Appellant.

v.

Saba Said, one of the heirs of the late Yakoub Jirias Said, deceased, on behalf of the Said Estate. Respondent.

Evidence — Admission by conduct — Estoppel — Onus of proof.

1. Admission implied from conduct of party, although it may not amount to estoppel, may be evidence against him, strong enough to cast onus of proof upon him.

2. Points not raised in trial Court cannot be taken in Court of Appeal.

Abcarius, Richardson for Appellant. *Eliash* for Respondent.

Appeal from jdgt. of DC. Jerusalem, dated 25.5.1936.

JUDGMENT.

This is an appeal from a judgement of the District Court, Jerusalem, in favour of the Plaintiff in an action brought to recover a debt and interest.

The action was based on a bond dated 16th August, 1916 as follows: —

> "Loaned for the needs of this Throne, from Yakoub Jirias Said of Jerusalem, only 1000 — One Thousand French Liras at an annual interest of 4% (four percent.), and on condition that if he should claim the recovery of the capital on the the expiration of one year he shall notify us three months beforehand, and in confirmation whereof we gave this bond sealed.
>
> (Seal) (Sgd) The Chief of the Holy Throne
> DAVID WARTABET DERDERIAN

The terms of the bond were periodically varied by increasing the interest, and interest was paid until 1931.

The Plaintiff in his statement of claim pleaded that French liras had and could only have the meaning of French gold Napoleons and asked for judgement for £1340 or such other sum as may at the date of payment be the aquivalent of 1000 gold Napoleons at the than rate of exchange, and interest.

The Defendant, in his reply, denied that the note was given in respect of gold Napoleons and pleaded that it was not clear at what rate or on what basis the sum of £1340 was calculated, and requested further particulars of such rate and basis. He did not plead that, if he was liable, he was not liable at the current rate of exchange. He reserved his right to counterclaim for over-payments but did not actually do so.

The case came before the District Court on 9.4.36. The plaintiff's case was that the Defendant was stopped from saying the transaction was not gold by the payments which were made and accepted on account of interest, these showing that the parties must have treated the loan as gold. This was done by showing that the payment of interest was calculated at the tariff rate under a public notice dated 12th December, 1918, on the basis that the interest was payable on a gold loan.

The Defendant argued that the transaction could not have been gold as there was then no gold coin in circulation and that if it was in gold the transaction was void — gold transactions being forbidden by law. He went on to say there was a definite issue of fact between the parties as to whether the transaction was gold.

The case was adjourned and the Defendant put in a copy of a Turkish Ordinance on Bank Notes published 22/4 August, 1914. He also drew attention to a decree of the Turkish Ministry of

Finance, dated 17/30 November, 1916 but this was later in date than the bond.

He also, so far as he was concerned, for the first time referred to Tariff rates which it was stated had no true relationship between gold values, and he stated that after the Treaty of Versaille payments of interest on the tariff basis were continued by him by mistake until 1931, when the Plaintiff refused to accept payment at those rates.

Upon these issues the District Court in a brief judgment held:

> "The defendant is bound by the loan document and his subsequent admission by payment of interest on the basis of gold loan.
>
> Following decision in C.A. No. 85/32 the judgment must be given for Plaintiff amount of debt 1000 gold napoleons at rate of exchange upon date of payment with interest from 21st August, 1931, as agreed to date of payment provided the interest does not exceed the principal.
>
> "Costs, advocate's fees LP. 3.—"
>
> 29th April, 1936.

In my opinion the District Court was right in directing its mind to the question, what was the actual transaction. It is clear that admissions may be implied from the conduct of a party, and that although they may not amount to an estoppel, they may be evidence against him strong enough to cast the onus of proof upon him. I think the principle is as was stated by Bayleh, J. in Heane v. Rogers 9 B. & C. at 586:—

> "There is no doubt but that the express admissions of a party to the suit, or admissions implied from this conduct, are evidence — and strong evidence — against him; but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and that he is not estopped or concluded by them, unless another person has been induced by them to alter his condition: in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him) and that transaction; but as to third persons he is not bound".

I think that the fact that interest had been paid for a number of years upon a basis compatible with the loan being gold cast the onus of proof upon the defendant and it is clear that he made no effort by the production of his books or otherwise to discharge that onus, and although I do not think, upon the evidence, that the Defendant was estopped from denying that the loan was gold, I think the District Court was entitled, in the absence of any evidence by the Defendant to hold that it was gold. This disposes of the first point raised for the Appellant before us by Abcarius Bey, i.e. that the onus was on the Respondent (Plaintiff) to prove that he gave gold.

The second point raised by Abcarius Bey was that the loan agreement was illegal and consequently unenforceable by reason of the

Turkish Bank Notes Ordinance of 22/4, August, 1914. That Order made Ottoman Bank notes legal tender and I do not think it invalidates a transaction whereby a loan of gold was made.

Abcarius Bey's third point, and that upon which he laid the greatest stress, was that, having accepted interest at a tariff rate, the Plaintiff, assuming the loan was gold, was estopped from claiming repayment at any other rate.

This was not pleaded by the Defendant in his reply, and throughout the proceedings before the District Court his case was that the loan was not gold. It is difficult therefore to see in what way he has changed his position or acted to his own detriment by reason of the acceptance by the plaintiff of such interest, and unless he has done so there can be no estoppel.

It was not suggested by the Appellant that if the loan was gold, and he was wrong in his contention as to estoppel, the District Court was wrong in giving judgement at the rate of exchange upon the date of payment — and as I have already stated, this also was not pleaded by the defendant.

In my judgement this appeal should be dismissed with costs, Advocate's fees LP.

Delivered this 14th day of May, 1937.

HIGH COURT No. 6/1937.

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

Before: — Copland J. and Khayat J.

Michael Rabinowitz — Petitioner.

v.

The Chief Execution Officer and another — Respondents.

Execution — Imprisonment for debt — Attachment of salary.

Where it appears that employee has some other means of livelihood, whole (and not only one third) of his salary may be attached to satisfy his judgment debt.

Gorodisky for Petitioner.

Application for an Order to issue to the First Respondent directing him to show cause why he should not refrain from ordering Petitioner's arrest as per his order in Execution File No. 7792/36, and why his decision of the 13th November, 1936, should not be set aside.

JUDGMENT.

This is an application for an Order to issue to the First Respondent directing him to show cause why he should not refrain from ordering Petitioner's arrest as per his order in Execution File No. 7792/36. and why his decision of the 13th November, 1936, should not be set aside.

2. The petitioner was ordered by the Chief Evecution Officer of Tel-Aviv, to pay in execution for the Second Respondent the sum of LP. 27, being his monthly salaries for the months of August, September and October as from the 17th November, 1936, and afterwards to pay every month the sum of LP. 9 from the 1st day of December, 1936. This sum was not paid by Petitioner.

3. He now comes to this Court stating that he is under an obligation to pay his monthly salary to his employers to whom he owes the sum of LP. 88.— and cannot, therefore, pay anything to the judgement creditor. Alternatively, he asks that he should be allowed to pay one-third of his salary to the judgement-creditor.

4. The Court is of opinion that from the fact that he has been able to support himself all the past period when he had to pay his salary to his employers, it is evident that he must have some other means of livelihood.

5. The Chief Execution Officer knew all the facts and circumstances of the case when he made his order and we see no reason why we should go behind his order.

6. The application for an Order Nisi is, therefore, refused.

Delivered this 9th day of April, 1937.

CIVIL APPEAL No. 77/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Trusted CJ., Copland J. and Frumkin J.

Yehuda Blum — Appellant.

v.

Estate of Alfred M. Sursok and another — Respondents.

Contract of lease — Impossibility to use the premises — Termination of contract.

If practically impossible for tenant to use premises he may treat contract of lease as terminated as from date when interference first arose.

Wilner for Appellant.

Appeal from jdgt. of DC., Jaffa, dated 25.3.1937, confirming jdgt. of MC., Tel-Aviv dated 27.1.1937.

JUDGMENT

This Appeal arises out of a contract of lease of certain premises in Jaffa.

Owing to the conditions which prevailed in Jaffa last year during the term of the lease it became practically impossible for the Appellant to use the premises.

It was decided by this Court in Civil Appeal 43/33 in which the facts

would appear to have been similar to those in this case, that in such circumstances the provisions of the Mejelle apply and the tenant is relieved of his obligations to pay rent.

The Megistrate held in this case that the tenant (Appellant) was relieved of his obligation to pay as from the commencement of the interference. The District Court held that he was relieved only from the date when he cancelled the lease.

Against the decision of the District Court the Appellant appealed.

The Respondent has not appeared and has made no application to cross appeal from the main finding, i.e. that the lease was terminated.

While expressing no opinion as to this main point we are of opinion that if the facts were such as to make the provisions of the Mejelle applicable the tenant was entitled to treat the contract as terminated from the date when the interference first arose, and the appeal is allowed and the judgement of the District Court set side and that of the Magistrate restored, with costs Advocate's fees LP. 4.

Delivered this 15th day of June, 1937.

HIGH COURT No. 18/37.

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

Before: — Copland J. and Frumkin J.

Abed Rabbo — Petitioner.

v.

The Chief Execution Officer, Jerusalem. and others. — Respondents.

Execution proceedings — Sale by public auction — Claim of possession — Exercise of rights within reasonable time.

Parties must not sleep on their rights but must exercise them within reasnable time.

Application for and Order to issue to the First Respondent directing him to show cause why his order dated the 15th June, 1935, in Execution File No. 2177/34, should not be set aside.

ORDER

This is a return to a rule nisi in an execution file dated 1934.

In April, 1935, the present Petitioner applied to the Chief Execution Officer to stay sale proceedings of a plot of land, claiming possession thereof.

On the 14th May, 1935, the Chief Execution Officer made an order giving the Petitioner fifteen days to apply to the appropriate Court to prove his title.

On he 18th May, 1935, this Petitioner again petitioned the Chief Execu-

tion Officer on the terms of his previous petition asking that his Order of the 14th May, 1935, be reversed.

On the 15th June, 1935, the Chief Execution Officer made an order that the fact that this order of the 14th May, 1935, not having been complied with, execution must proceed, with sale proceedings. Then went on various extensions of time, but Petitioner took no further step until April, 1937.

The Petitioner says that he was not bound to come to the High Court until the Chief Execution Officer had given his final order for sale. I have much doubt if he could do that.

The main point in this case is that for nearly two whole years the Petitioner did absolutely nothing to secure his rights. Regarding the lapse of time, it has been held on many occasions by this Court that parties must exercise their rights within a reasonable time and that they must not delay to exercise these rights merely wih the idea of causing damage to others.

In a case we had the other day before this Court where a person claimed possession of a house and he slept on his rights for a period of about two years, it was decided that he could no longer enforce those rights.

It is obvious that we have no option but to decide that the Petitioner must fail in this action.

The rule Nisi will be discharged with costs and LP 4.— advocate's fees.

Given this 15th day of June, 1937.

CIVIL APPEAL No. 63/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

Huda, daughter of the late Michael Kassab, in her capacity as one of the heirs. Appellant.

v.

Ahmad Mustafa El Masri and another. Respondents.

Appeal — Service of judgment — Certified copy.

Copy of judgment appealed from must be a certified one and served together with Notice of Appeal, otherwise appeal will fail (unless good cause shown for delay).

Goitein for Appellant. *Moghannam, Mahmud Modi* for Reepondents.

Appeal from jdgt. of LC, Nablus, dated 10.7.1936.

JUDGMENT

One of the series of preliminary points put forward by Counsel for the Respondents was that no properly certified copy of the judgement appealed from was served upon them with the original appeal filed on 5th September, 1936.

The Respondents drew the attention of the Appellant to this omission

in their Statement of Reply dated the 6th April, 1937. This deficiency was thereafter remedied within eight days.

There have been a number of conflicting judgements given by this Court in this regard. To a certain extent, of coure, each case must be governed by its own facts and circumstances, but during the last few months this Court appears to have followed a uniform practice by requiring that the copy of the judgement served should invariably be a certified one, and that it should be served with the Notice of Appeal, unless good cause can be shown for not so serving.

In the present case, the judgement appealed from was delivered on the 10th July, 1936, and more than eight months have elapsed before a certified copy of it was served on the Respondents.

As no good cause could be shown for this long delay, we hold that the appeal must be dismissed on this preliminary point, with costs and LP. 4.— advocate's fees.

Delivered this 10th day of June, 1937.

CIVIL APPEAL No.44/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

Simon Rosenberg — Appellant.

v.

Cecilie Bermann — Respondent.

Contract of sale of house — House found built not in accordance with building permit.

Purchaser of a house entitled not to accept transfer if house not built in accordance with building permit.

Editorial Note:

The relevant passage in the judgment of the District Court which the Court of Appeal confirms in this case is as follows:

"The Court does not think it was for the Plaintiff to speculate as to the extent of Defendant's breach of the law or what consequences might flow from it. On the other hand the Court is of opinion that the non-compliance of the building with the building permit is a defect within Articles 336 and 337 of the Mejelle". (as per L. E. Evans and A. Atalla J. J.).

Levitski for Appellant. *Buxbaum* for Respondent.

Appeal from jdgt. of DC., Jerusalem, dated 26.2.1937.

JUDGMENT

This an appeal from the judgment of the District Court of Jerusalem whereby the claims of both the Plaintiff and Defendant were dismissed. The District Court rejected the claim of the vendor as it held that the House which he undertook to transfer to the purchaser, the Respondent, was defective and it dismissed the Respondent's claim as it found as a fact

that she was not willing and ready to accept the transfer of that house.

2. The District Court found as a fact that the said house was not built in accordance with the building permit and that was a defect which entitled the Respondent not to accept the transfer.

3. We agree with the District Court and we cannot usefully add anything to its judgement.

The Appeal is dismissed with costs and LP. 4.— advocate's fees.

Delivered this 11th day of June, 1937.

CIVIL APPEAL No. 48/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

Ihsan Agha Nimer — Appellant.

v.

Casem Agha Nimer — Respondent.

Jurisdiction of Land Court as to non-interference with possession of land.

Land Court competent to issue orders for non interference in enjoyment of a person's possession of his share.

Gotein for Appellant. *Eliash* for Respondent.

Appeal from jdgt. of LC., Nablus, dated 27.2.1937.

JUDGMENT.

This is an appeal from the judgment of the Land Court of Nablus, dated the 27th February, 1937, ordering Appellant to refrain from interfering with Respondent's enjoyment of his share of the land in dispute which he alleges to have inherited from his grandfather, and prohibiting Appellant from registering same in his name in the Tabu.

The judgement of the Land Court of Nablus contains in detail the grounds upon which the Court based its conclusions, and we agree with the whole judgment of the lower Court for the reasons given by them. We do not, therefore, find it necessary to add anything thereto.

There is, however, one point which should be made clear and that is with regard to the jurisdiction of the Land Court to deal with cases of non-interference. The Appellant argued before us that a Land Court is not empowered to issue orders for non-interference and cited L.A. 73/28 in support thereof. We must observe here that this case deals only with orders issued to restrain a person from trespassing on another person's land.

Two cases were cited to us by Respondent, viz., L.A. 51/36 and 52/36 and which are much later in date than that quoted by Appellant, the second of which is quite clear as to the jurisdiction of a Land Court to issue orders for non interference in the enjoyment of a person's possession of his share.

The Appeal must be dismissed with costs and LP. 5.— advocate's fees.

Delivered this 8th day of June, 1937.

CIVIL APPEAL No. 164/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Manning S/P J., Frumkin J. and Khayat J.

Jacob Bluvstein and others — Appellants.

v.

Y. Grazowski and other executors of the estate of the late Isaac Leib Bluvstein. — Respondents.

Confirmation of will — Succession, administration and distribution of estate — Jurisdiction — Creation of Wakf.

1. Jurisdiction in matters of administration and distribution of estate includes jurisdiction to pronounce as to validity or otherwise of any testamentary disposition.

2. Creation as Wakf of a thing not yet in existence when dedicated — void by Jewish Law.

3. Exclusive Jurisdiction conferred by art. 53(iii) and art. 54(iii) of the Palestine Order-in-Council 1922 upon Jewish (and Christian) Religious Courts over any case as to constitution etc. of Wakf or religious endowment does not extend to wakf purporting to have been created by a will, where question arises whether it has been validly created.

Smoira, Bar Shira, Hoffman for Appellants. *Ben-Ari* for Respondents.

Appeal from jdgt. of DC., Jaffa, dated 19.3.1935.

JUDGMENT

1. Isaac Leib Bluvstein, hereinafter referred to as the testator, died on January 13th, 1924. He left a will disposing of his property, and appointed as executors the persons who are the Respondents to the present appeal. The will was confirmed by a Rabbinical Court at Tel-Aviv and on appeal by the Supreme Rabbinical Court of Jerusalem, but the latter Court, in confirming the will, declared invalid certain dispositions of the testator.

2. On the 13th July, 1932, on the application of Jacob Bluvstein, a son of the testator, the administration of the deceased's estate was transferred from the Rabbinical Courts to the jurisdiction of the District Court of Jaffa.

3. On the 10th Jenuary, 1934, an application for distribution was made by five of the present Appellants. In the application it is stated that the testator had attempted in his will to create a waqf of miri land, that this was contrary to the law of Palestine, that there was therefore an intestacy as regards such land and that it should be registered in the names of the heirs of the deceased. It was also asked that the executors render accounts with respect to this land. The other Appellants subsequently joined in this application.

4. The District Court considered it had no jurisdiction to decide the question with respect to waqf. It refused to make an order for distribution

of the estate on the ground that the time for distribution had not yet arrived.

5. The Appellants have appealed. When the appeal came up for argument before us the Appellant Jacob Bluvstein had died, but all parties agreed that the appeal should proceed although his estate was not represented. The appellant David Bluvstein did not appear, although he had been legally served with notice. The other appellants were represented by advocates and Mr. Ben-Ari, who appeared for the respondents, took a preliminary objection that the relevant powers of attorney were not in order. They had been granted in Russia and Mr. Ben-Ari said they had not been authenticated in accordance with Section 18 of the Evidence Ordinance. I have examined these powers of attorney and I find that the provisions of the Section have been substantially complied with. The preliminary objection should, in my opinion, be over-ruled.

6. Before dealing with the various grounds of appeal, it may be useful to refer to certain provisions of the law relating to succession. The testator was a Palestinian citizen and a member of the Jewish Community. Article 53 (i) of the Palestine Order-in-Council, 1922, confers upon the Rabbinical Courts exclusive jurisdiction in the matter of the confirmation of the wills of members of the Jewish Community other than foreigners. In the present case the Rabbinical Court had therefore exclusive jurisdiction so far as the confirmation of the will of the testator was concerned.

7. Section 7 (2) of the Succession Ordinance reads as follows: —

> "(2). The certificate of the Court of the community confirming a will shall be deemed to be conclusive ecidence that the will is valid in form and that the testator had capacity to make the will and was not affected by mistake, fraud or undue influence, but confirmation by a Court shall not make valid any disposition of property thereby which is contrary to law".

In its judgment confirming the will of the testator the Rabbinical Court did declare valid, as will be seen later, a disposition which was contrary to law. In view of the above sub-section such a declaration was ineffective and it must be regarded as a nullity.

8. There is another exclusive jurisdiction conferred on a Rabbinical Court, by Article 53(iii) of the Order-in-Council, and that is an exclusive jurisdiction over any case as to the constitution or internal administration of a waqf or religious endowment constituted before the Rabbinical Court according to Jewish Law. The wording is important. The case must be one as to the constitution or internal administration of a waqf and that waqf must itself have been constituted before the Rabbinical Court. This part of the article can therefore have no reference to the case of a waqf purporting to have been created by a will, where the question arises whether it has been validly created. I am strengthened in this opinion by the fact that wills are expressly mentioned in Article 53 (i), and that the exclusive jurisdiction of the Rabbinical Court is confined to confirming them.

9. I have already referred to the fact that in July, 1932, the administration of the testator's estate was transferred from the jurisdiction of the Rabbinical Court to that of the District Court. The relevant Section is Section 9(1) of the Succession Ordinance which is as follows: —

> "The President of a District Court may, upon the application of any person interested in the estate of a deceased person and if he deems it just or convenient, make an order prohibiting the Court of any of the religious communities from taking cognizance of, or from dealing further with, the succession of any deceased person, and from the date of such order the administration and distribution of the estate shall be within the exclusive jurisdiction of the Civil Courts, and any proceedings which may be pending shall be forthwith transferred to the District Court".

10. The words "the administration and distribution of the estate" are important, because they show that the District Court, as soon as the order of transfer has been made, has the jurisdiction to administer and distribute, i.e. a jurisdiction similar to that of Chancery Division in England, as distinct from the jurisdiction of the Probate Divorce and Admiralty Division. This consideration disposes of the ground on which the learned President of the District Court decided that he had no jurisdiction to determine the question with respect to the waqf. He said: "This is a question which I, sitting as a Probate Court, cannot decide"; The learned President was not, however, sitting as Probate Court; the will had already been confirmed; he was sitting as a Court to give directions as to the administration and distribution of the estate, and this included a jurisdiction to pronounce as to the validity or otherwise of any testamentary disposition, and should there be an intestacy as to any part of the testator's estate, to determine the succession.

11. With regard to the dispositions made by the testator of his immovable property, the matter has to be considered from two standpoints. At the time of his death he possessed immovable property of the mulk category in Lilienblum Street, Tel-Aviv. This property yielded an income, and by his will he dedicated this income for a charitable purpose, i.e. he created a waqf with respect to it. This was an invalid disposition, it is not allowed by the Jewish Law, and the Chief Rabbinate for Palestine dealt with the matter correctly when it came before it. To quote the words of the judgement: —

> "But the part of the waqf consisting of the income of the houses which the deceased has built during his lifetime for himself and the revenue of which he has dedicated, as this waqf is a thing which was not yet in existence when dedicated, it shall be void and is at the disposal of the heirs of the deceased."

12. The testator bequeathed his mulk property to the executors directing that the income should be devoted to a charitable purpose. This direction being invalid, the income remains undisposed of. But the invalidity of this disposition has a further effect. It is clear from the

will that the testator had no intention of devoting the property itself to a charitable purpose. He made arrangement that his widow and his children should occupy the property, the children paying a rent; and the executors were empowered to let any part of the premises that might be vacant. The property itself was never to be sold — the testator tied up so that the income might be available for a charitable purpose. This charitable intention has failed, and I do not see in the circumstances how the bequest can be made divisible. The testator in effect said: "I bequeath my property A to my executors and their successors for ever, directing them to pay the income arising therefrom to X.". The direction with regard to income being invalid, it follows that the whole bequest fails. The purpose for which the property was tied up has turned out to be contrary to law, and the property itself therefore remains undisposed of.

13. The testator possessed other immovable property in Mazeh Street, Tel-Aviv. This property was registered in the name of one Levontin, but there is no dispute as to the fact that it belonged to the testator. It was of the miri category and by the law of Palestine it could not be disposed of by will. In spite of this the testator created a waqf with respect to it. This disposition was therefore also invalid. In the judgment to which I have referred, the Chief Rabbinate declared this to be a valid waqf. I have already held that this declaration was a matter outside its jurisdiction, and that it must be regarded as a nullity. The disposition of the miri property was invalid, and this property also is at the disposal of the heirs of the deceased.

14. With regard to this miri land, the matter is a little complicated owing to the fact that the executors have already erected buildings on it, in order to carry out the charitable intention of the testator. According to the law these buildings also acquire the character of miri land and are at the disposal of the heirs of the deceased. But I do not think it fair that the executors should be out of pocket as regards any money they may have expended on these buildings, and in the order which I propose should be made I shall embody a provision for their protection.

15. There was a further sum of LP. 1,600 which the testator dealt with, bequeathing it to the executors for the same charitable purpose as the other bequests, viz., the erection of a shelter for the orphans in Tel-Aviv. This was a valid bequest, but the land on which it was intended to erect the orphanage and the buildings already erected are no longer available, owing to the failure of the devise already referred to. I do not think that this bequest of money should fail altogether and I shall make an order with regard to its disposal.

16. There has been an intestacy with respect to the property both in Lilienblum Street and in Mazeh Street. This being the case, there is

nothing in the contention of the executors that the time for distribution has not yet arrived.

17. One of the directions in the will was that the widow of the testator should be allowed to reside during her lifetime on the upper floor of the house described as No. 6, Lilienblum Street and to let any rooms therein. An order to secure this will be embodied in the order which should, in my opinion, be made. That order is as follows: —

IT IS ORDERED:—

(a) That, notwithstanding any testamentary disposition of the testator, his successors according to law are entitled to succeed to the testator's immovable property situated in Lilienblum Street and Mazeh Street, Tel-Aviv.

(b) That, during the lifetime of Nechama Mushe, widow of the testator, the said Nechama Mushe has the right to occupy the upper floor of the house situated at No. 6, Lilienblum Street, Tel-Aviv, and to let any rooms comprised in the said upper floor.

(c) That the executors are not to sell the said house situated at No. 6, Lilienblum Street, Tel-Aviv, without seeing that the rights of the said Nechama Mushe to the upper floor during her lifetime are fully secured.

(d) That out of the estate of the testator an amount of sixteen hundred pounds be paid to the executors, to be used by them, under the supervision of the Chief Rabbinate of Tel-Aviv, for providing shelter to orphans in Tel-Aviv.

(e) That within three months from this date the executors do submit to the District Court of Jaffa accounts as follows: —

(i) An account of all revenue received by them arising out of the immovable property situated in Lilienblum Street and in Mazeh Street, Tel-Aviv.

(ii) An account of all movable property, including cash and securities, belonging to the testator, other than the revenue referred to in (i), which has come into the hands of the executors since the death of the testator.

(iii) An account of all sums owing to the testator at the time of his death and in particular of all sums owing by any of the Appellants in this case.

(iv) An account of all disbursements made by the executors out of the estate since the death of the testator.

(v) An account of all moneys borrowed by the executors for the purpose of carrying out any ostensible intention (whether valid or otherwise) of the testator, showing repayments and payment of interest, if any.

(vi) Any further accounts that may be ordered by the District Court.

(f) That if out of any moneys borrowed by the executors as mentioned in (e)(v) above there remain any sums due to the lenders, such sums shall be repaid out of the estate to the executors in trust for the said lenders.

(g) That the judgment of the District Court be set aside and that the matter be remitted to it:

(i) To determine the succession to such part of the testator's estate as has not been dispsoed of by will;

(ii) To deal with the accounts submitted by the executors and to make any consequential orders thereon.

(iii) to make any order necessary to give effect to this order.

Liberty to all parties to apply.

18. The costs of all parties, here and below, will be paid out of that part of the estate which has not been disposed of by will — such costs in this Court to include an advocate's fee of LP. 15.— for each advocate who appeared before us.

Delivered this 25th day of June, 1937.

CIVIL APPEAL No. 25/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Manning S/P J., Frumkin J. and Khayat J.

Abraham Rindzunsky — Appellant.
Noach Havkin — Respondent.

Procedure in court — Right to plead.

Court not to make any order affecting rights of party without hearing argument of his advocate in full.

Harari for Appellant. *Livay* for Respondent.

Appeal from jdgt. of DC. Jaffa, dated 8.5.1936.

JUDGMENT.

In this case the Appellant sought before a District Court to have an award set aside. The District Court, without hearing the whole argument of Appellant's advocate, ordered the case to be remitted to the arbitrators. We are of opinion that the District Court should not have made any order affecting the rights of the Appellant without hearing the argument of his advocate in full. The order of the District Court must therefore be set aside and the matter remitted to it for a fresh hearing.

Costs will follow the event.

Delivered this 1st day of June, 1937.

CIVIL APPEAL No. 111/36.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

A. M. Freund & Co. and others — Appellants.

I. A. Mansour — Respondent.

Procedure — Contract of sale of land — Refund of money paid on account of purchase price — Claim of damages — Counter-claim.

1. Refund of money paid in advance on account of purchase price of land can be claimed together with damages for breach of contract, without necessity of an independent action.
2. To retain as damages part (or whole) of money received on account of purchase price of land a claim must be properly filed.
3. Court not bound to give decision as to necessity or otherwise of filing a counter-claim.

Misrahi for Appellant. *Marein* for Respondent.

Appeal from jdgt. of DC. Jerusalem, dated 28.9.1936.

JUDGMENT

This is an appeal from the judgment of the District Court of Jerusalem, in A. M. Freund and others v. I.A. Mansour.

On the 19th December, 1934, Appellants and Respondents entered into an agreement for the sale of a certain plot of land from the Appellants to the Respondent. A clause in the agreement stated that the transfer at the Land Registry was fixed for a date not later than 20th November, 1935.

For some reason or other the parties did not meet in the Land Registry until the 30th December, 1935, and this date was accepted by both parties to transfer the said land.

It is true that the plot of land to be transferred was described as a plot the area of which is approximately 780 pics and the parties agreed that the area may be a little more or a little less. This plot turned out to be from 45% to 50% more than the area described.

Respondent refused to accept the transfer and in our opinion he had a right to do so. This right does not entitle him to claim demagaes if he alleges the Appellants committed a breach of the agreement.

After the expiration of the period stipulated for the transfer, the second party (the would-be purchaser) brought an action against the first party (the would-be vendor), claiming the refund of the sum of LP. 300 contending that the first party has committed a breach of the agreement by refusing to effect the sale.

The District Court gave judgment against the Defendant for the refund of LP. 300, but dismissed Plaintiff's claim for the LP. 100 damages.

Both parties appealed against this judgment.

As regards the appeal by the Plaintiff agaist the judgment refusing to award LP. 100 damages, we hold he cannot succeed in this appeal as he declined to purchase the land under the agreement in its correct area which appeared to be about 50% more than the area estimated by both parties. It appears to us, as it also appeared to the District Court, that the parties, when they made the agreement, did not intend that the increase in the area would be so great.

As regards the appeal by the Defendants against the LP. 300, we hold this appeal must fail. The Plaintiff, so long as the transaction of the sale had not been completed and so long as he has claimed the refund of the LP. 300 when he filed his claim for damages, has the right of the refund of that money which he paid in advance without the necessity of bringing an independent action thereon.

As regards the claim for LP. 100 damages, we hold they cannot succeed in this claim as they did not file a claim in the District Court. The statement made by their Counsel during the pleadings, that he is prepared to pay the fees in respect of a counter-claim for LP. 100, if the District Court finds it necessary to file a counter-claim, does not bind that Court to give a decision on this point.

For these reasons, we hold that both appeals must be dismissed.

No order as ot costs.

Delivered this 17th day of June, 1937.

CIVIL APPEAL No. 87/36.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Manning S/P J., Frumkin, J. and Khayat J.

Furman O. Baldwin, in his capacity as guardian of Ethel, Grace, and Edward Baldwin. Appellant.

Frederick Vester Respondent.

Probate of Will — Jurisdiction of District Court in succession matters — Administration of estate of deceased — Capacity to dispose by Will — Law applicable to foreigners.

1. Not necessary for petitioner for probate to file inventory with respect to miri land, he cannot claim such land as executor and it is for the Court to say who are entitled to same.

2. Even if will has been admitted to probate, District Court has jurisdiction to declare that notwithstanding any testamentary disposition the property is to descend in a certain way.

3. Administration of property whether movable or immovable (other than miri land) of a foreigner in Palestine and his capacity to dispose of it by will are governed by deceased's natoinal law in its restricted sense (even though his national law in its wider sense imports law of domicile).

4. Provision of Ottoman Law restricting capacity to dispose by Will to only one third of property — not applicable to foreigners whose national law knows of no such restriction.

Cattan for Appellant. *Horovitz* for Respondent.

Appeal from jdgt. of DC. Jerusalem, dated 1.7.1936.

Manning S/P J.: JUDGMENT.

1. Susanna Jane Henwood, an English lady living in Palestine, died on the 26th March, 1931. Eight days before her death she made a will leaving all property to certain persons not named, but described, therein, and appointing one Frederick Vester sole executor.

2. The deceased had at the time of her death three grandchildren. Nothing had been left to them by the will. Their guardian, one Furman Baldwin, did nothing in conection with the succession until the 6th June, 1935, on which date he applied to the District Court of Jerusalem for an order "declaring the succession of Susanna Jane Henwood".

3. Meanwihle the executor of the will had also been idle. He had taken no steps to obtain probate of the will. But, as soon as Baldwin applied for the declaration of succession, he entered an opposition to it in the Court, and on the 10th Jenuary, 1936, he applied for probate of the will. In his application he stated that the testatrix left movable property and also immovable property of the mulk category in Palestine. He did not, however, produce any inventory of either species of property, as he was required to do by Rule 5 of the Succession Rules (Vol. III, Laws of Palestine, p.2382); nor did the District Court insist on this provision being observed as it was bound to do under Section 14 of the Succession Ordinance (Vol. II, Laws of Palestine, p.1384). During the arguement before us Mr. Horovitz, advocate for the executor, said in answer to the Court, that no inventory had been filed for the simple reason that the testatrix had left no property. This was in strange contrast with the statement in the executor's application that the deceased had left movable and immovable property.

4. The District Court heard the opposition and the petition for probate at the same time. A number of witnesses were heard, and there was a lengthened argument by the advocates on each side. The Court, in a very brief judgment granted probate of the will to the executor and a certificate of succession to the grand-children.

5. Baldwin has appealed to this Court, and Mr. Cattan, who argued the appeal on his behalf, based his opposition to the judgment on three grounds. His first was that the will was made in general terms without specifying what property was to be excluded. He alleges that some of the immovable property left by the deceased was miri land and that, as such land cannot be disposed of by will, it should have been specifically excluded from the disposition of porperty made in the will. The answer to this is that, if the deceased left any miri land, such land is excluded

by law from any disposition made by the deceased, and the certificate of succession granted by the Court entitled the grandchildren to succeed to such land. It is not necessary for a petitioner for probate to file any inventory with respect to miri land, he cannot claim such land as executor and it is for the Court to say who are entitled. The Court has done so in this case.

6. The Second ground of appeal is that the devises and bequests in the will were made to an unincorporated body which has ceased to exist. The devise is in the following words: "to the other members of the American Colony, equally, who, for the purpose of this my last will and testament, are understood to be the members of the 'Majority Group' referred to in the submission to the arbitration of Charles Harold Perrott, of Cairo, made on the 23rd June 1930". This submission was in evidence and contains the names of forty four persons, referred to as the "Majority Group". The will is clear, the testatrix wished her property to be divided equally among these forty four persons. There is no question of an unincorporated company and there is no uncertainty as to the persons whom the testatrix intended to benefit.

7. The third ground of appeal is that the testatrix could not disinherit her heirs ,but that if she could do so, she could do so with regard to one third of her property only. This ground is based on certain provisions of the Ottoman Law, which are said to have been in force in Palestine on November 1st, 1914, and therefore to be still law here. Mr. Cattan also relied on Art. 879 of Mejelle, which refers to gifts to non-heirs made in mortal sickness, and renders invalid all such gifts exceeding one-third of the estate. It may be said at once that I do not think this Article applies to wills, unless there is an understanding that the gifts are to take effect only after death.

8. Mr. Horovitz, for the executor, says that the local Succession Ordinance provides a complete code for determining questions such as this, and that under it there can be doubt of the power of the testatrix to dispose of all her property by will. He cited the case In Re Ross 1930, I. Ch. 377, and In Re Askew 1930, 2 Ch. 259, and relied on certain passages in Cheshire's Private International Law. He maintained that the Ottoman Law referred to is not in force in Palestine. He said that the will had been proved in solemn form and that it was not open to the Appellant to attack it in any way.

9. I shall deal briefly with this last argument first. Under the Succession Ordinance I think a District Court, in matters relating to wills, is invested not only with Probate Jurisdiction, but also with all matters relating to succession. Even if a will has been admitted to Probate, a District Court has jurisdiction to declare that notwithstanding any testamentary disposiion, the property is to descend in a certain way. That is, it combines the jurisdiction of the Probate, Divorce and Admiralty Di-

vision in England (so far as probate and administration are concerned) with that of the Chancery Division. As regards this part of the case the appellant is in effect seeking a declaration that, despite the dispositions in the will, the minor grandchildren of the testatrix are entitled to two-thirds of her property. A District Court execising jurisdiction under the Succession Ordinance has jurisdiction to make such a declaration.

10. In considering the main question, I propose to consider the local legislation dealing with the point. It is curious that neither Mr. Cattan nor Mr. Horovitz referred to the provisions of he Palestine Order-in-Council (hereinafter referred to as Order-in-Council), on the subject. The relevant Article is Article 64 (i) and (ii). It reads as follows: —

> "(i) Matters of personal status affecting foreigners other than Moslems shall be decided by the District Court, which shall apply the personal law of the parties concerned in accordance with such regulations as my be made by the High Commissioner, provided always that the Courts shall have no jurisdiction to pronounce a decree of dissolution of marriage until an Ordinance is passed conferring such jurisdiction.
>
> (ii). The personal law shall be the law of the nationality of the foreigner concerned unless that law imports the law of his domicile, in which case the later shall be applied.".

11. Matters of personal status are defined in Article 51 of the Order-in-Council and include suits regarding successions, wills and legacies. No regulations under the Article appear to have made by the High Commissioner.

12. There is no dispute as to the facts that the testatrix was a foreigner and that her nationality was English. There was no finding by the District Court on the question of domicile, in fact the District Court, despite a lengthened argument by Mr. Cattan, gave no decision at all on the point which I am now deciding. In the District Court Mr. Cattan asserted that the domicile of the tetatrix was Palestine. Mr. Horovitz assented to this and before us he agreed that for the purpose of this case the domicile of the testatrix should be taken to be Palestine.

13. I assume that, as stated by the executor, the testatrix has left movable and immovable property in Palestine, and that we are not concerned with any property, movable or immovable, situated elsewhere than in Palestine.I shall deal with her will as regards the movable property first. Her capacity to dispose of this is regulated by her personal law, that is the law of her nationality, English Law. According to English Law, "the efficacy of testamentary dispositions is determined by the law of the country in which the testator was domiciled at death" (see Cheshire page 428). The English Law does therefore import the law of the domicile, and in accordance with Article 64 (ii) of the Order-in Council (supra) the law of the domicile is to be applied.

14. The problem is somewhat different with regard to immovables.

Here English Law does not import the law of the domicile. The English Law is stated in Cheshire page 449 as follows: —

> "With regard to wills of immovables the rule of the common law is that it is the lex situs, and the lex situs exclusively, which decides.....whether the testator has an unlimited or only a restricted power of disposition and whether the interest devised is essentially valid. The law of the testator's domicile has no effect on these matters.....".

English Law has therefore to be applied, and English Law is the lex situs, that is the law of the place where the immovable property is situated that is, the Law of Palestine.

15. Thme conclusion to be drawn then, from the application of Article 64 (i) and (ii) of the Order-in-Council, is that the question whether the testatrix had an unlimited or restricted power of disposition is to be decided, as regards movables, by the law of her domicile at the time of her death, that is the law of Palestine; and, as regards immovables, by the lex situs, also the law of Palestine.

16. I now pass to consider the relevant provisions of the Succession Ordinance. They are set out in Section 4 (iii) and are as follows: —

> "(iii). Where the deceased was either a foreigner or, not being a foreigner, was neither a Palestinian citizan nor a member of one of the religious communities, the following rules shall apply: —
>
> (a) mulk land and movables of the deceased shall be distributed in accordance with the national law of the deceased;
>
> (b) the validity in form of any will left by the deceased and his capacity to make the tetamentary disposition shall be determined in accordance with his national law.
>
> Provilded that, if the will is made in civil form under this Ordinance, it shall, in all cases, be held valid;
>
> (c) Where the national law imports the law of the domicile or the religious law or the law of the situation of an immovable, the law so imported shall be applied.
>
> Provided that, if the national law imports the law of the domicile and the latter provides no rules applicable to the person concerned, the law to be applied shall be his national law".

17. According to (b) the capacity to make testamentary disposition is regulated in accordance with the national law, that is, English Law. "Capacity" includes the question whether the testatrix had an unlimited restricted power of disposition. With regard to (c) it has been seen that English Law imports the law of the domicile, in the case of movables; and the lex situs, in the case of immovables. Leaving the proviso aside for the moment, the same result is reached as was arrived at by the application of Article 64 the Order-in-Council, viz., that the issue is to be determined in the case of movables, by the law of the domicile, and in the case of immovables, by the law of the lex situs, that is in both cases by the Law of Palestine.

18. Before dealing with the proviso I shall consider the authorities cited by Mr. Horovitz and certain provisions of the Ottoman Law.

19. In the case in Re Ross — Ross v. Waterfield (supra) the testatrix was a lady of English Nationality domiciled in Italy and by her will she left nothing to her son. The son sought a declaration in the Chancery Division, that notwithstanding the testamentary dispositions of his mother he was entitled to a certain share in her movable and immovable property. There was expert evidence that according to Italian Law the English Law as to movables was applicable and that Law was the law which would be applied to an English national domiciled in England. As regards the immovables there was expert evidence that the Italian Courts would decide the succession to it in the same manner as an English Court would determine it if such immovable property belonged to an Englishman and was situated in England. The Court accepted this evidence and the son's claim consequently failed. The Court applied the law of domicile in the case of the movable property and the lex situs in the case of the immovables, i.e. Italian Law in both cases; and the Italian Law was that the question at issue should be decided as if the testatrix was domiciled in England and as if the immovable property was situated in England.

20. In the second case cited by Mr. Horovitz, In Re Askew, Marjoribanks v. Askew,(supra), Askew had obtained a German domicile in 1911, and in the same year obtained from a German Court a dissolution of his marriage with his then wife. In January 1911, he had become the father of an illegitimate child and he married the mother in 1912. According to English Law the illegitimate child could not become legimate on the subsequent marriage of its parents as her parents could not have legally contracted a marriage at the date of her birth. There was, however, evindence before the Court that according to German Law she would become legimate on the subsequent marriage of her parents, and the Court held that the lex domicilii must prevaile. The case is only an authority for the proposition that in matters coming before English Courts and depending on foreign domicile the law of the domicile must prevail. It is difficult to see how it can apply to the circumstances of the present case.

21. The testatrix was a member of the Established Church of England, and was consequently not a member of any of the religious communities whose Courts are given jurisdiction in matters of personal status by Art. 51 of the Order-in-Council, Her power of disposition by will must therefore be regulated according to the general law in force in Palestine. Since the British Occupation there has been no legislation dealing with this subject, and in accordance with the provisions of Article 46 of the Order-in-Council, the question has therefore to be determined in accordance with the Ottoman Law in force in Palestine on

November 1st, 1914. That law is stated as follows in Young's Corps de Droit Ottoman, Vol. 1, page 307, as follows: —

"La capacité de tester est limitée au tiers de biens du de cujus".

And in footnote 2 on the same page it is said: —

"Les biens 'mirié' et vakoufs ne peuvent pac étre légués par testament".

That is, a testator was not allowed to dispose of more than one-third of his property by will and could not dispose of his miri land by will at all. It remains now to be seen how the Ottoman Law applied these provisions to foreigners.

22. I shall deal first with the movable property. Young, in the same Volume, page 329, says: —

"Les biens meubles d'un sujet étranger établi en Turquie reviennent à ses parents, suivant la loi de son pays".

In footnote 1 the following words occur: —

"D'aprés un principe général de jurisprudence, la succession est régie par la loi du domicile du de cujus,

Ainsi un étranger établi en Turquie est censé garder son domicile d'origine".

The interpretation I place on these words is that in determining the succession to the movables of a foreigner the Ottoman Law applied the low of that foreigner's nationality, and that even though the foreigner were domiciled in Turkey, he was notionally regarded as being domiciled in his country of origin. Nothing is said about wills and I have not been able to find in Young any reference to wills of foreigners as regards movables. I presume, however, that the same principles apply. The result, therefore, as regards the capacity of the testatrix to dispose of her movable property works out as follows: We first go to the law of her Nationality, that is English Law. That law, as regards movables, imports the law of the domicile, that is, the law of Palestine, in the circumstances, Ottoman Law. Ottoman Law says the law of the nationality is to be applied , that is English Law. The same result is reached as was arrived at the Chancery Division in the case of In Re Ross (supra), but in that case the result depended on evidence, while in this case is a matter of judicial notice. The evidence in that case was that the Italian Courts would determine the case on the footing that the English Law applicable is that part of the law which would be applicable to an English national domiciled in England. From the passages cited above from Young an Ottoman Court would have decided in the same way, and would have held that the testatrix had an unrestricted power of disposition as regards her movable property.

23. With regard to the immovable property the Ottoman Law is set out in the same volume of Young at page 341. It is as follows: —

"Le sujet étranger à la faculté de disposer par donation ou testament de ceux de ses biens immeubles dont la disposition sous

cette forme est permise par la loi. Quant aux immeubles dont il n'aura pas disposé ou dont la loi ne lui permet pas de disposer par donation ou testament, la succession en sera reglée conformément à la loi ottomane".

24. I have consulted my brothers Frumkin and Khayat as regards the effect of this passage. They were both resident in Palestine before November 1st, 1914, and were conversant with the manner in which the Ottoman Law dealt with the testamentary capacity of British subjects as regards immovable property. Were I left to my own interpretation I would construe the passage as restricting the capacity; that is, I would construe the words "la loi" to mean the Ottoman Law in its strict sense as already set out, prohibiting all dispositions of miri land, and restricting disposition of mulk land to one-third. But my brethren inform me that this is not so, but "la loi" refers to the part of the Ottoman Law which conferred special privileges on foreigners, and, inter alia, allowed the property of the deceased foreigner, including British subjects, to be administered by Consular Courts. They inform me that this privilege extended to immovable as well as to movable property, and that for the purposes of administration, and of determining capacity, the immovable property was regarded as if it was situated in the country of origin of the de cujus. That is, the Ottoman Law dealt with the matter in exactly the same way as it was proved that the Italian Law did in the case of In Re Ross (supra). There was only one exception, and that was the prohibition as to miri land, the dominion in that was vested in the State, and it could not be disposed of by will, even by a foreigner.

25. I naturally accept the opinion of my brethren on this subject, and turn now to consider the effect of the proviso at the end of Section 4 (iii) of the Succession Ordinance (supra). It refers to movable property only, as it is only in the case of movable property that English Law imports the law of the domicile; in the case of immovables, it imports the lex situs. The law of the domicile is in this case the Law of Palestine, and it has been seen that that law, i.e. the Ottoman Law in force on November 1st, 1914, did provide special rules as regards the movables of foreigners, including Englishmen.

26. The general result arrived at is, therefore, with one exception, the same as that reached by the Chancery Division in the case of In Re Ross (supra). Mrs. Henwood had, at the time of her death, an unrestricted capacity to dispose by will of her movable property and of such part of her immovable property as was of the mulk category, but she had no capacity to dispose of any part of her immovable property of the miri category.

27. The wards of the Appellant are entitled to a declaration, that, notwithstanding any testamentary disposition of the testatrix Susanna Jane Henwood, they are entitled to succeed to such part of her immovable

property as was of the miri category. The judgment of the District Court is confirmed but there should be added to it a declaration as above. The costs of all parties should be paid out of the estate (to include LP. 15 advocate's fees for each advocate).

Delivered this 11th day of June, 1937.

CIVIL APPEAL No. 33/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Manning S/P J., Khaldi J. and Abdul Hadi J.

Yacoub Hanna Halabi — Appellant.

v.

Jamileh Abdul Malik and another — Respondents.

Appeal — Procedure — Evidence.

Court not bound to hear evidence if after perusing statement of claim and hearing advocate for Plaintiff decides that Plaintiff had no case.

Moghannam for Appellant. *Cattan* for Respondents.

Appeal from jdgt. of DC. Jaffa, dated 26.1.1937.

JUDGMENT

The Land Court of Jaffa dismissed a claim by the Appellant for the cancelling of the registration of certain properties in the name of the Respondent Jamileh. The main ground of appeal is that the Land Court decided the case without hearing evidence. It is quite clear that the Land Court, after perusing the statement of claim and hearing the advocate for the Appellant, decided that the Appellant had no case. As to this we are entirely in agreement with the Land Court, and we order that the appeal be dismissed with costs to include LP. 3.— advocate's fees.

Delivered this 2nd day of June, 1937.

CIVIL APPEAL No. 65/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

Alberto Farran — Appellant.

v.

Miss Josephine Anker — Respondent.

Custody of child — Discretion of Court.

1. Custody of child — a matter wholly within discretion of Court.

2. If no grounds adduced to show that lower Court exercised discretion unreasonably, its decision stands.

Atallah for Appellant. *Sanders* for Respondent.

Appeal from jdgt. of DC. Jerusalem, dated 19.3.1937.

JUDGMENT.

The District Court of Jerusalem appointed the Appellant, Respondent and Mr. W. H. Chinn, the Probation Officer, guardians over the child Mary Tewfik. The Court further ordered that the child should be kept in the custody of the Respondent and granted the Appellant reasonable access to visit the child.

2. This appeal is directed against that part of the order granting custody of the child to the Respondent.

3. The question of custody is a matter wholly within the discretion of the District Court. The Respondent to whom the custody of the child was given, is of the same religious belief, and the child's father, during his life-time, granted her the custody of the child.

4 The Appellant adduced no grounds to show that the District Court exercised this discretion unreasonably.

For the above reasons, the appeal is dismissed.

No order is made as to costs.

Delivered this 11th of June, 1937.

CIVIL APPEAL No. 69/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

Fahmi Husseini, Mayor of Gaza on behalf of the Municipal Council of Gaza. Appellant.

Ismail Abu Lufti. Respondent.

Contract — Illegal consideration — Voidness of contract.

If part of consideration of contract illegal and proportion of contract price in respect of such part unascertainable, whole contract is void.

Abcarius for Appellant. *A. Shehadeh* for Respondent.

Appeal from jdgt. of DC. Jaffa, dated 15.3.1937.

JUDGMENT.

I have had the advantage of reading the judgment just delivered by my brother Majed Bey, and I agree with the conclusions arrived at by him.

When once it is realised that these rates, which the Municipal Corporation has levied and which the Respondent has been collecting, were illegally imposed, since the Appellants had no power to levy them, it seems to me that it follows that the Appellants cannot claim money paid in respect of a contract giving power to the Respondent to collect such illegal rates, since the law will not help anyone to collect the proceeds of illegality.

And since it is impossible to say what proportion of the contract prices were paid by the Respondent for the right to collect illegal rates, the whole contracts must be held to be void and incapable of enforcement. As the District Court remarked at the end of their judgment, the Appellants may bring any claim they choose against the Respondent to recover money collected by him — I would add "legally" collected by him — on their behalf.

I woud further say that I entertain very considerable doubt, though I am not prepared to dissent on this point, as to the right or power of a Municipal Corporation to farm out taxes or rates, I cannot find any legal enactment authorising them to do so, though it seems that such a power deemed to exist from the provisions of the Ottoman Municipal Tax Law 1329, and in particular Art. 40 thereof.

With these observations, I agree that the Plaintiff's case fails, and this appeal should be dismissed with the consequences indicated by my brother Majed Bey.

Delivered in the 30th day of June, 1937.

In the result, by a majority, the appeal is dismissed with costs and LP. 4. advocate's fees.

Abdul Hadi, J.:—

1. This is an appeal from the judgment of the District Court of Jaffa, dated 15th March, 1937, in the case raised by the Municipality of Gaza against the Defendant, claimnig from him the sum of LP. 948.720 mils as the balance still owing by him out of the original sum of LP. 3490 under the following undertakings:—

A. Ground rent from fruit and vegetable sellers and auction fees in the town of Gaza for 15 months beginning as from 1.1.32 to 31.3.33.

B. Sale of animal fees for same period.

C. Ground rent from fruit and vegetable sellers and auction fees for a period of 12 months beginning from 1.4.33 to 31.3.34.

2. The Plaintiffs produced in the District Court, in support of their claim, three contracts signed by the Respondents: the first of these contracts dated 28.12.31 the second dated 29.11.31, and the third dated 1.4.33.

3. After hearing the case the District Court dismissed the claim for the reasons mentioned in its judgment which is the subject matter of this appeal.

4. After hearing the pleading of Counsel for Appellants and Counsel for the Respondent, I am of the opinion that the three farming out contracts, regarding the power of the Municipality to delegate the collection of taxes to other persons by way of farming out, were valid, as such contracts are of the kind of agreements mentioned in Ar. 64 of the Code

of Civil Procedure and I can see nothing therein to conflict with the provisions of that Article.

5. With regard, however, to the second point mentioned by the Defendant, which was one of the grounds for the dismissal of the claim and that is that the three contracts are void, because, as the Counsel for Appellant states, they contain cerain fees which the Municipality (the Plaintiff) itself has no right to levy, I am of opinion that the contracts do contain certain fees which the Municipality has no right to levy as the Respondent states, such as, for example, the fees for the sale of animals, even those sold in any place within the Municipal boudary, which expression, namely, "in any place within the Municipal boundary", is wider than what could be implied by the first paragraph of Art. 11 of the Law regarding Municipal Fees referred to by Counsel for the Appellant and which prescribes fees on the sale of animals only in the places mentioned in that paragraph.

With regard to second paragraph of Art. 11, however, I believe that its terms apply only to sales and purchases other than animal sales mentioned specifically in paragraph 1. Under this category there comes also the fee levied upon every one who contravenes the terms of the contract — the amount of which has been fixed at four times the original fee. No authority has been quoted to us giving the Municipality power to collect such a fee.

If the Municipality has no right itself to collect such fees, it has no right to claim from the Respondent the value of the fees in question which he also has no right to collect, for, should we consider that the Respondent has undertaken to pay the whole of the value of the contract in consideration of all the fees mentioned therein (including fees on animals wherever they be sold and four times the usual fee to be paid by the one who contravens the contract); and should we also consider that the Respondent has no right to collect those fees as it is likewise not for the Municipality to do so; it will be a part of the farming out contracts wich the Respondent undertook to collect, the amount of which cannot be specified and is therefore without the legal considaration.

For these reasons, the appeal must be dismissed.

Delivered this 30th day of June, 1937.

Khaldi, J.:—

I am of opinion that the contract was accepted by the Respondent in toto, and although some of its terms cannot be executed, the Respondent has not proved that damage was caused to him by the non execution of these terms. Moreover, he has not proved that he tried to enforce it on the individuals concerned and that he has thereafter failed. In any event he had the choice of either to rescind the contract, or, when damage

occurs, to apply for a reduction in the value of the farming out. On the contrary, by paying some of the instalments which fell due, he must be asu-sumed to have accepted the contract with all its defects. I therefore hold that the Respondent should be held liable under the contract.

As to the legality of some of the terms of the contract, besides what has been provided for in the laws as to the validity of the transactions and taxes which were collected by the Municipality in accordance with the custom as set out in Art. 25 of the Municipal Law, this objection is for the tax payer to make and there is no necessity to discuss it in relation to the present contract as it was not proved that there was difficulty or damage in its actual execution.

The judgment of the lower Court, should, therefore, be set aside and the case remitted to them to give judgment on the merits of the case. Costs to follow the event.

Delivered this 30th day of June, 1937.

CIVIL APPEAL No. 39/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before:— Copland J., Green J. and Frumkin J.

Jacob Lubitz — Appellant.

The General Insurance Office Ltd. — Respondent.

Workmen's compensation — Insurance — Liability of broker and agent.

Insurance broker or his agent, not being insurers themselves — under no liability towards insured unless for damages for any breach of warranty by them.

Bar-shira for Appellant. *Seligman* for Respondent.

Appeal from jdgt. of DC. Jaffa, dated 9.12.1936.

JUDGMENT

In this case Appellant sued the Respondents in the District Court asking for the enforcement of an arbitration award.

The District Court dismissed the application on the grounds that the Respondents were not the proper parties to the application.

The Appellant had effected a Workmen's compensation Assurance Policy through the Respondents with Lloyds Underwriters London, and the point in this appeal is whether the Respondents are the agents here of Lloyds in this country, so that they can be sued here on behalf of Lloyds or as being personally liable under the Policy.

There seems to be a certain amount of misconception as to the exact nature and function of Lloyds Underwriters. They are not a company nor a partnership — they are an institution, composed of individuals, who in their personal capacity take up shares in risks submitted to them, but

each individual is separately responsible only for his shares of the risk, and assumes no liability for any other individual underwriter's share. These individuals sometimes form groups, and these groups accept risks offered to them by brokers, each individual in the group taking his particular share of the risk.

The Respondents act in this country as agents for a firm of brokers in England, who place business with Lloyds. On the 11th April, 1935, they issued to the Appellant a document referred to in these proceedings as Exhibit 1. A large amount of argument before us has been devoted to the question whether Ex 1. is a cover note or a policy.

I have no doubt that it is a cover note. It is addressed to the Appellant and is in these words: —

> "We hereby certify that we have on your behalf effected the following insurnace with Lloyds London covering you for the sum of Palestine Pounds six hundred (LP.600) from 11th April, 1935, to 11th April, 1936 noon) against risks of Workmen's Compensation Ordinance 1927".

It is clear from the wording that the Respondents acted as agents for the Appellant.

Attached to this cover note is a sheet headed "Conditions" .It has been strenously argued by Mr. Barshira for the Appellants that by these conditions the Respondents became permanent agents for Lloyds in all particulars, and that they held themselves out as such agents. But, as remarked by Mr. Seligman, most of the conditions in which the name of the Respondents occurs are routine matters, such as the giving of notices or sending of communication to be given or made under the Policy, notices of accidents, commencing of litigation, furnishing of information, renewal of premiums, and so no. In any case where the question of liability under the Policy arises, or the making of any admission or settlement, the sole authority rests with Lloyds Underwriters, and information must be given to Lloyds Underwriters to enable the latter to resist or settle any claim made under the Policy — see especially conditions 3, 7 and 8.

Further, it has been stated to us, and not contradicted, that the Respondents have contracts with brokers in London and that they hold a cover note from the brokers covering them. It seems to me that the most that can be made of the situation is that the Respondents are agents for the brokers and that it is the latter who place the risks with Lloyds Underwriters. This cannot make the Respondents agents for Lloyds in the sense contended for by the Appellant.

And finally, I think that it is quite clear that a broker is under no liability since he is not an insurer unless for damages for any breach of warranty by him. And if this is so for a broker, then it is equally so for an agent of the broker. And Mr. Seligman pointed out that liability cannot be created by letters stating that liability was denied.

For these reasons I think that the District Court was right and the

persons to be sued under the Policy are the Underwriters who signed it. The Policy was actually issued on 12th August, 1935.

It has been pointed out that if this is so, then an insured person may find it very difficult, if not imposibble, to sue underwriters in this country, since their number on any particular Policy may run into hundreds, — in this case actually there were sixty.

But an insured has still the right to sue in England, and is in no worse position than he was before Lloyds' Policies issued to persons in this country were amended by deletion of the clause confining any disputes arising under the policies to the jurisdiction of the English Courts.

I think that this appeal fails and should be dismissed with costs and LP. 5.— advocate's fees.

Delivered this 30th day of June, 1937.

Frumkin, J.:—

The Appellant sued the Respondent Company under the policy or cover note whatever it may be in order to make it personally liable under it. In this the Appellant could not succeed.

Giving the special conditions attached to the document the best possible constructions in favour of the Appellant, the most that could be said is that by the very wide powers given to the Respondent Company, the Appellant might have been misled in considering those powers to include Respondent's authority to represent the Lloyds Underwriters in an action brought against them, but the Appellant did not sue the Respondent Company as agents but as principles. No undue hardship will be caused to the Appellant in suing the Lloyds Underwriters since this particular group of Underwriters accepted the jurisdiction of the Palestine Courts and are represented by Counsel in this Country.

For this reason, I agree that the judgment of the District Court be confirmed and the appeal dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 30th day of June, 1937.

LAND APPEAL No. 52/36.

IN THE SUPR. COURT SITTING AS A COURT OF APPEAL

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

Abdul Rahim Ibn Sheikh Rashid Danaf on behalf of the estate of his father. Appellant.

v.

Abdel Afu Ibn Sheikh Said Danaf as sole heir of his mother Rukieh and his brother Yusuf and another Respondents.

Land Court — Jurisdiction.

In view of provisions of Land Courts Ordinance, Land Court has jurisdiction to order non-interference in enjoyment by claimant of his share.

Abcarius for Appellant. *Hassan Hawa* for Respondents.

Appeal from jdgt. of LC., Jerusalem, dated 10.10.36.

JUDGMENT

Plaintiffs (Respondents) claimed ownership with Defendant in two houses by way of inheritance from their ancestors, and that after having enjoyed the possession of their shares for many years the Defendant started to interfere with their possession.

Several documents were produced in the Court below, including Kushans and Werko receipts, in support of Plaintiff's claim, but the Defendant (Appellant) claimed that the Kushans were forged.

The Land Court stated in its judgment that there was no evidence before it to prove that the Kushans were forged.

On the evidence and documents produced, the Court below was satisfied that the Plaintiff's own shares in the two houses in claim by way of inheritance through their ancestors, and ordered the Defendant to refrain from interfering with the ownership of Plaintiffs.

The Counsel for Appellant argued before us that the Land Court had no jurisdiction to order the non interference by Defendant (Appellant) in the enjoyment by Respodents of their shares in the houses, but the Court does not see its way to entertain his argument in view of the provisions of the Land Courts Ordinance.

The only other real point raised on appeal was the question of the alleged forgery of the kushans. The Court below went into this question in detail and very carefully, and decided on the documents and evidence produced that forgery of the kushans was not established. This is a question of fact and there does not appear to us to be any reason for interfering with the finding of the Court below with regard to this question. We, therefore, dismiss the appeal with costs and LP. 3.—

Delivered this 28th day of April, 1937.

CIVIL APPEAL No. 97/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Manning S/P J., Frumkin J. and Abdul Hadi J.

Abdul Fattah El-Haj Daoud el Jahyousi Appellant.

v.

The General Manager of the Palestine Railways. Respondent.

Crown Action — Limitation — Commencement of action.

Filing in Court of petition to High Commissioner for his consent to a Crown Action is to be considered commencement of action.

Hazou for Appellant. *Fawzi Ghussein* for Respondent.
Appeal from jdgt. of DC. Nablus, dated 1.11.1936.

JUDGMENT

The Appellant desired to sue the General Manager of the Railways for damage to his crops by fire. The cause of action arose on the 10th June, 1935. Section 42(4) of the Railways Ordinance — (Laws of Palestine, Vol. II, page 1289) — which was the relevant Law at the time, provided that actions must be commenced within six months of the cause of action. Section 4 of the Crown Actions Ordinance (which applies to such proceedings) provides that an action is commenced by the filing of a petition in Court. This clearly means the filing of a petition to the High Commissioner for his consent.

In the present case, this petition was filed on November 26th, 1935, in the District Court, Nablus. This date must, therefore, be taken as the commencement of the action: and it was within the prescribed period of six months.

The District Court erred in holding that the suit was barred by limitation.

We therefore order that the judgment of the District Court be set aside and the case remitted to it for a new trial.

Costs to abide the event.

Delivered this 29th day of June, 1937.

HIGH COURT No. 17/1937.

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

Before: — Copland J. and Frumkin J.

Michael Binia — Petitioner.

v.

1. The Chief Execution Officer, Jerusalem.
2. Estate of the late Nicola Akel, through his widow as heir and administratrix Shafiqa Akel. — Respondent.

Execution — Costs — Renouncement of right to execution — Judgment.

Party renouncing his right to execution of judgment cannot ask for enforcement of subsidrary part which is only incidental thereto.

Application for an order to issue to the first Respondent directing him to show cause why his order in Execution File No. 3245/30 dated the 19.6.1936, should not be set aside, and why the second Respondent should not be ordered to pay to Petitioner the sum of LP. 73.— which forms the costs and Advocate's fees.

Goldberg for Petitioner.

ORDER

This is an application for an Order to be directed to the Chief Execution Officer of Jerusalem to order him to execute that part of the judgment of the District Court of Jerusalem relating to the costs awarded by it in case No. 338/28.

The mortgage-deed which Petitioner received from the late Nicola Akel in security for the loan, did not provide for interest on the money lent, but seperate bills were made to provide for the interest on the loan.

The amount of the bills not having been paid on date of maturity, the Petitioner brought an action in the District Court of Jerusalem and obtained judgment on the amount of the bills and costs.

Before the execution of this judgment, the mortage fell due and Petitioner obtained an order from the Chief Execution Officer for the foreclosure and sale of the mortaged property to settle the amount of the loan and interest.

Having received an order for the payment of interest on the mortage deed, the Petitioner has given up his claim to the execution of the judgment of the District Court regardnig the interest and asked the Chief Execution Officer to order the exeution of the second part of the judgment regarding the costs of the case.

The Chief Execution Officer rightly refused this application, and we cannot see any reason to interfere with his decision. If a party renounces his right to the execution of a judgment, he cannot ask for the enforcement of that subsidiary part which is only incidental thereto.

Moreover, the alleged order which the Petitioner seeks to set aside is dated 19th June, 1936. He has thus slept over his alleged right for a year.

For the above mentioned reasons, we are not inclined to give him the Order he seeks.

Delivered this 9th day of July, 1937.

CIVIL APPEAL No. 49/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

Mustafa Yusef Ehzein and others. — Appellants.

v.

Israel Nesson — Respondent.

Land registered and purchased as mulk — Claim by third party that land is waqf — Immunity of title of bona fide purchaser.

Title of purchaser of land registered as mulk and purchased as such in good faith cannot be defeated by claim that the land is waqf.

Appeal from jdgt. of LC., Jerusalem, dated 11.6.1935.

JUDGMENT

This is an appeal from the judgment of the District Court of Jerusalem dated 11th June, 1935, ordering Defendants (Appellants) to refrain from interfering with Plaintiff's (Respondent's) enjoyment of a piece of land bought by the latter in February 1923 and situated in Ain Karem.

Counsel for Appellants argued before us that the land in dispute did not belong wholly to the vendor and that the plan did not contain the signatures of the Huzein family but that the signatures were of another Huzein family, and that the Respondents knew that the land was not the property of the vendor in toto.

We are satisfied that all these facts have been carefully considered by the District Court when it gave its detailed and reasoned judgment with which we are in full agreement on this point.

Counsel for the Third Party claimed that the land in dispute is waqf and cannot be alienated even if purchased in good faith.

This land is registered in the Land Registry as mulk and was purchased as such by the Respondent.

The Land Court held that even if this land were waqf it made no difference because the Respondent purchased the land in dispute in good faith with the boundaries as shown in the title deed and in support of their decision they quoted the decision of this Court in Sheikh Sadeq Anabtawi and others v. Fares Ahmad and others, Land Appeal No. 173/26.

The reason which this Court gave in Land Appael No. 173/26 was as follows: —

> "To hold the contrary would imply that no purchaser of registered mulk property could satisfy himself that he was obtaining a good title, however carefully he might investigate the entries in the Register and the facts as to possession. Until the period of limitation of thirty-six years prescribed by Art. 1661 of the Mejelle had expired, his title might be set aside on proof that the property sold to him was waqf by virtue of a dedication of which he had and could have no notice."

In the present case, the Land Court found that the Respondent had purchased the land without any knowledge that the property was waqf, especially as it was registered in the Land Registry as mulk. Nothing having been said to the contrary in this appeal, no exception could be taken to the reasons or to the conclusions to which they arrived.

The appeal must, therefore, be dismissed with costs and LP. 3.— advocate's fees to be paid by the Appellants jointly and severally.

Delivered this 11th day of May, 1937.

CIVIL APPEAL No. 77/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Trusted C. J., Khaldi J. and Frumkin J.

Abdel Raouf Abu Laban — Appellant.

v.

Raoufeh Abdel Majid Malakha — Respondent.

Mutawalli claiming rent alleging, while Defendant denying, that land is waqf — Nececcity of first determining nature of land.

District Court (or Magistrate's Court) cannot entertain claim for rent by Mutawalli in respect of land, where Defendant denies that the land is waqf, before competent Court determines the nature of the land.

R. Dajani for Appellant. *Moghannam* for Respondent.

Appeal from jdgt. of DC. Jaffa, dated 17.1.1935.

JUDGMENT

The Appellant in this case, as Mutwalli of a Waqf, entered an action in the District Court claiming rent for certain property which he alleges to be Waqf land. The Defendant denies that the land is Waqf.

Hence, before deciding the claim for rent, it is necessary that the nature of the land be first determined. This is a question of title to land clearly not within the jurisdiction of a District Court.

For this reason the judgment of the Court as it appears is correct and must be confirmed.

The appeal is therefore dismissed with costs and LP. 2.— advocate's fees.

Delivered this 1st day of February, 1937.

CIVIL APPEAL No. 146/1935.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Manning S/P J. and Frumkin J.

Hamed el Kashash — Appellant.

v.

Erich Ney — Respondent.

Partial breach of agreement for delivery of goods — Purchaser suing for damages — Plea by seller that non-delivery is due to non-payment of part of purchas price.

Where seller failing to deliver part of goods contracted for says it was due to purchaser's failure to pay price of goods already delivered and Court finds that sum unpaid was a comparatively small one and could not be the proper cause for non-delivery, it may award purchaser damages for breach of contract.

Kanafani for Appellant. *Chakron* for Respondent.

Appeal from jdgt. of DC. Jaffa, dated 26.5.1935.

JUDGMENT

The parties in this case entered into an agreement on the 28th December, 1933, under which the Appellant undertook to deliver to the Respondent, during the month of January, 1934, three thousand boxes of oranges. The goods had to be delivered free to the Bonded House of Jaffa or Waggons at buyer's option. The Respondent was to pay the price against Ware House receipts. The Appellant further undertook to pay to Respondent 100 mils as damages for each box short of three thousand not delivered within the prescribed time.

The Appellant altogether delivered 1637 boxes, partly during the prescribed month and partly in February. We have not got any evidence as to actual dates of delivery, but it is admitted by the Appellant that at least 301 boxes were delivered in February.

There were a series of claims and counterclaims between the parties, one of them a claim by Respondent for the sum of LP. 136.300 mils damages for non-delivery of 1363 boxes. We are only concerned with this last claim.

The Appellant argues that he is not liable for damages because non-delivery on his part was due to the fact that the Respondent did not pay the price of some of the goods delivered.

As a matter of fact Appellant sued Respondent for money due on account of goods delivered. Respondent pleaded that he paid certain amount to other by authority of Appellant but failed to prove such authority to the satisfaction of the Court which therefore found as a fact that Respondent owes Appellant LP. 123.565 mils and deducted it from the sum claimed as damages. Out of this sum of LP. 123.565 mils it we deduct the price of 301 boxes not delivered until February which certainly was not due at the end of the period of agreement, the maximum due by the end of January could not exceed the sum of LP. 20.—

I do not think that the non-payment of this comparatively small amount could seriously be alleged to be the proper cause for the non-delivery of the remaining cases. It clearly did not stop Appellant from delivering goods afterwards. The Appellant was to deliver the goods and the Respondent was to pay upon production of receipts from the Ware House. No evidence was forthcoming to prove that such receipts were produced and not honoured.

I therefore hold that the Appellant committed a breach, and the judgment of the District Court must therefore be confirmed and the appeal dismissed with costs to include LP. 3.— advocate's fee and travelling expenses.

Delivered this 10th day of February, 1937.

CIVIL APPEAL No. 170/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Manning S/P J. and Abdul Hadi J.

Shoshanna Levin — Appellant.

v.

Ibrahim Hassan El-Haj As'ad and others. — Respondents.

Assignment of agreement for sale of land — Question of stamp duty on assignment.

Assignment — not a promissory note; a promissory note must contain a provision to pay a sum of money.

Hamburger for Appellant. *A. Salah* for second Respondent.

Appeal from jdgt. of DC. Jaffa, dated 9.7.1935.

JUDGMENT

The Appellant was the assignee of an agreement for the sale of land made by the Respondents, and the Respondents having failed to transfer the land she sued them for return of part of purchase-price paid and for damages for breach. The Court below did not go into the merits. A point was raised as to the stamp necessary on the assignment. The Commissioners of Stamps decided this, and the assignment was duly stamped in accordance with his decision. After this the Court below was divided in opinion, Judge Izzat Nammar holding that the assignment was a promissory note and could not be legally stamped after execution. Judge Salim Shehadeh disagreed with this. The Court proceeded no further with the case and the action was dismissed.

Whatever the assignment was, it was not a promissory note, a promissory note must contain a provision to pay a sum of money.

The decision of Judge Izzat Nammar was not correct.

We therefore order that the judgment of the lower Court be set aside and the case be remitted to it for hearing.

Costs to abide the event.

Delivered this 28th day of Jenuary, 1937.

CIVIL APPEAL No. 199/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Manning S/P J., Frumkin J. and Khayat J.

Samuel Sachs — Appellant.

v.

Karim George and another — Respondents.

Agreement re land providing for map to be signed by all neighbours — Failure to obtain signature of Government though also a neighbour — Question of construction of clause of contract.

Court on finding that in the circumstances it must have been clear to parties to agreement that clause in question could mean what it says, may construct it in other, more proper, way.

Olshan for Appellant. *Bustani* for Respondents.

Appeal from jdgt. of DC. Haifa, dated 15.10.35.

JUDGMENT

Frumkin, J.:— This case depends upon the construction of clause 7 (b) of the agree ment entered into between the parties to this appeal. The point being as to whether the Governmnt was also to be regarded as one of the neighbours under that clause to sign the map. Technically speaking the Government, which has control over the Tashliq land forming one of the boundaries of the land, is a neighbour and at first sight it appeared to me that the clause under construction meant what it said, namely that the signature of the government should also have been obtained within the period prescribed in that clause. But after a more thorough examination of the contract as a whole I am satisfied that it must have been clear to the parties that it would be impossible to obtain the signature of Government within such a short period as by its signature the correction of area would already have been disposed of. The correction of the area requires more time and longer periods have in fact been provided for that purpose in the agreement. I therefore hold that the Appellant cannot succeed on his claim for damages and the appeal on this point is dismissed.

2. He can only succeed in his claim for the sum actually paid by him. The appeal on that point is allowed and there will be a judgment against the Respondents for LP. 200.— plus legal interest from the date of action.

Delivered this 17th day of March, 1937.

Khayat, J.: —

1.. The point to be decided in this appeal is what is the correct construction of the word "neighbours' which is referred to in paragraph 7 (b) of the contract of sale, as one of the boundaries of the land in respect of which this contract was made, is "Tashliq" that is rocky and by law is owned by Government.

2. It was argued on behalf of the Appellant, who was the plaintiff in the Court below, that the word "neighbours" in the contract included the Government's representative.

3. The Respondent, who was the defendant in the Court below, argued that it did not include the Government, for the following reasons:

a) that the Government is not one of the neighbours as it does not own a plot of land which is registered and has boundaries and which is known as "State Domains". There was a plot of land which could not be used for cultivation purposes. The mere fact that this is Government land, does not make the Government a neighbour.

b) Paragraph 11 of the contract provided that the period for the

correction of area and obtaining Government consent is six or eight months, while the period given for obtaining the signatures on the map is 14 days. In case Government signed the map, it will not be necessary to carry out the correction of area and there would be no necessity for this clause.

4. I am of the opinion that the parties did not intend that Government should be included in the word "neighbours" in paragraph 7. They intented that it should include owners and persons who are in possession. Further paragraph 3 provided for two transactions and provided for obtaining the consent of the neighbours first and then provided for obtaining a separate consent of the Government and a separate period was provided for in paragraph 11.

5. I therefore hold that the judgment should be entered in favour of the appellant for the return of the sum of LP. 200.— paid by him on account of the purchase price, and that his claim for damages be dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 17th day of March, 1937.

CIVIL APPEAL No. 200/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Trusted C.J., Khaldi J. and Abdul Hadi J.

Moshe Dahan — Appellant.

v.

Muhammad Khalil Lafi and others. — Respondents.

Agreement for sale of land signed by all but one member to party — Ineffectiveness of subsequent ratification in an action for damages upon breach of contract.

1. Agreement not signed by all members of parties to it — not valid, not binding any person who signed it and can be no basis for judgment for damages, not even against those of signotaries who did not appear to contest validity of agreement or deny liability.

2. Subsequent ratification of agreement by member to party who did not sign — of no avail to a claim of damages for breach, if not effected within period fixed for completion and no notification, within same period, to other party that agreement validated by ratification.

Kehaty for Appellant. *Haddad* for Respondents 1,6,11,20.

Appeal from jdgt. of DC, Jerusalem, dated 29.10.1935.

JUDGMENT

The Appellant lodged this action against the Respondents claiming from them damages owing to their commission of a breach of the terms of the agreement under which they undertook to transfer to him a certain land in accordance with the terms agreed upon in that agreement.

The legal point that was raised before the District Court and was the basic ground for dismissing the action is that the said agreement was not signed personally by Halimeh bint Suleiman who is one of several persons who constitute one party to the agreement, but that it was signed by Ismail, one of her two agents, who was not authorised to sign alone without associating with him the second agent Yusef.

At a subsequent hearing to that at which this legal point was raised, Counsel for Appellant submitted two exhibits, M.D.1 and M.D.2, stating that these two exhibits were a ratification of the agreement, one of them from Halimeh herself and the other from the second agent, Yusef, but the District Court did not consider these two ratifications for the reasons stated in its judgment and dismissed the action. Plaintiff appealed against this judgment which is the subject of this appeal.

This Court of Appeal has ruled in several cases, one of which is Civil Appeal No. 176/34, that every agreement that is not signed by all the members of the parties to that agreement cannot be considered as a valid agreement binding to the obligations consequent upon a breach of its terms.

The agreement which is the subject matter of this action does not bear the signature of Halimeh, nor that of one of her two agents, Yusef, The other agent, Ismail, is not entitled to represent and sign for Hamileh except in association and jointly with the other agent. We accordingly hold that the two documents of ratification, M.D.1 and M.D.2, both of which are undated and which were submitted by Counsel for Appellant during the hearing of the action at the District Court, do not make the Respondents liable for the damages agreed upon: —

(1) because the Appellant claims from the Respondents damages for non-performance of the terms of the agreement within the period prescribed for the performance thereof. It was not proved to the District Court that the ratification had taken place before the stipulated period had expired to enable them to argue that at that time the agreement became binding and the Respondents became responsible for its due performance;

(2) because there was no evidence before the District Court to show that the Respondents were notified, before the expiry of the period stipulated for the performance of the terms of the agreement on which Halimeh's signature was lacking, of the ratification of the agreement either by Halimeh herself or by her second agent, Yusef, so as to allow it to be stated that the Respondents had committed a breach of the terms thereof, by their non-compliance with its terms within the stipulated period, while knowing at that time, that they were bound by a valid agreement and responsible for the due performance of its terms.

We do not agree with the contention of Counsel for Appellant that the District Court erred in not giving judgment for damages against

those Respondents who did not appear before it and who made no objection to the agreement as to the absence of Halimeh's signature, because an agreement which cannot be considered as evidence against those of the Respondents who were present at the hearing of the action, cannot also be considered as evidence against those who did not appear merely because they did not appear at the hearing.

We accordingly hold that the judgment of the District Court is in accordance with the law, and the appeal must therefore be dismissed with costs against Appellant.

Delivered this 22nd, day of April, 1937.

CIVIL APPEAL No. 205/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Manning S/P J., Frumkin J. and Khayat J.

Jacob Salomon and another. Appellants.

v.

Fatmeh bint Muhd. Haj Saleh Abu Layeh and others.

Respondents.

Party to agreement consisting of two members — First party paying whole amount to one of the two members of second party.

Where agreement provides payment of certain amount to two members constituting second party, payment of that amount to either member fulfils the obligation.

Olshan, Eisenberg for Appellants. *F. Abdul Hadi* for Respondents.

Appeal from jdgt. of DC. Jerusalem, dated 20.11.1935.

JUDGMENT

This appeal arises out of an action for damages for breach of contract. The agreement provided that LP. 10 had to be paid by the Appellants to the two Respondents Fatmeh and Safiyeh. There was evidence before the Court below that this LP 10.— had been received by Fatmeh. The Court, without determining whether the LP. 10.— had actually been paid, found that payment to Fatmeh alone did not comply, with the condition and for this reason rejected the Appellants' claim for damages.

We think that this ruling of the Court below was incorrect. The clause in the agreement provided that second party (i.e. Appellants) should pay first party (Fatmeh and Safiyeh) LP. 10.—, and payment to either of the first party clearly fulfilled the obligation.

The Court below did not deal with other issues that arose. We are therefore unable to determine the appeal and we order that the judgment of the Court below be set aside and that the case be remitted to them for re-hearing, to be dealt with according to law, and in particular that they deal with the issues as to whether the LP. 10.— was actually paid

to Fatmeh and as to whether the payment of the LP. 10.— was an essential condition of the agreement.

Costs to abide the event.

Delivered this 10th day of February, 1937.

CIVIL APPEAL No. 50/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

Fadil Abbas El Fahoum and another. Appellants.

v.

Riziq Mahmud Muhammad Khalaf and others. Respondents.

Matter referred by Land Court to arbitration — Application to Land Court for authentication of award — Award not confirmed by Land Court within 6 months — Meaning of "shall" in sec. 6(2) of Land Courts Ordinance — Natural justice — Limits of binding force of precedent.

1. Land Court has full power to authenticate award given in dispute referred by it to arbitration.

2. Rule of later date prevails in event of inconsistency with any previous Rule.

3. a) Whenever a statute declares that a thing "shall' be done, the natural and proper meaning is peremptory, but, in certain cicumstances, it may be regarded as merely directory.

b) "Shall" in sec. 6(2) of Land Courts Ordinance — directory only i.e. that authentication should be given, if possible, within six months but failure to do so by the Court does not render the award null and void.

4. Where a party has done, and with great diligence, everything in his power to get a decision of a Court, it would be negation of natural justice if he were denied his rights owing solely to Court failing to decide his application within prescribed limit of time.

5. Court of Appeal may consider itself untrammelled by previous decision, if it appears to them that in previous case attention of the Court was not drawn to authoritative decisions in similar cases, or if new argument is advanced which was never before considered.

O. Saleh, Cattan for Appellants. *Bustani* for Respondents.

Appeal from jdgt. of LC. Nablus, dated 9.3.37.

JUDGMENT

This is an appeal from a judgment of the Land Court of Nablus dismissing the Appellants' claim to confirm an arbitration award, on the grounds, first, because the authentication of the award was not made within six months of the Publication of the award as required by Section 6(2) Land Courts Ordinance (Cap. 75, Laws of Palestine),

and, secondly, because by Rule 2 of the Judgments by Default (District and Land Courts) Rules, 1926, the right to renew a case, after it has been struck out, has been abolished.

The facts of the case are as follows.

On 1st October, 1933, the Appellants filed their claim in the Land Court asking for the Respondents to be prohibited from trespassing on their land. After various hearings, both parties to the action, on 17th June, 1935, asked that the matter might be referred to arbitration to an arbitrator named by them, and it would seem that the Court thereupon referred the matter to the named arbitrator, since on 8th January 1936, the Court ordered the "case to be struck out with liberty to parties generally to apply when award has been published". On 9th March, 1936, the award was issued, and on 12th March, 1936, three days after that issue, the Appellants applied for confirmation of the award. The case was set down for hearing on 8th April, 1936, but on the parties not appearing, the case was struck out a second time. On 9th April, 1936, the case was renewed by the Appellants and was fixed for hearing on 28th April, 1936. On that day, however, owing to the disturbances which had broken out in Palestine, no President District Court and therefore no Court was available, and the case was adjourned, the parties being so informed. It was not untill 9th March, 1937, that the case was again set down to be dismissed for the reasons I have stated above.

The relevant provisions of the Land Courts Ordinance are: —

> "6. (1). A Land Court may, with the consent of the parties, refer to arbitration any dispute arising before it in any matter under this Ordinance.
>
> (2). Subject to the powers set out in subsection (3) and (4) as to remitting or setting aside the award, a Land Court shall, within six months of its issue, authenticate the award ,and the award, when so authenticated, shall have the effect of a judgment of a Court and shall be executory".

On this appeal, Mr. Cattan, for the Appellants, in addition to submitting that the two conclusions as to the law made by the Land Court were wrong, has argued that the confirmation of this award lies within the sole jurisdiction of the District Court under the Arbitration Ordinance. To this I do not agree. The reference to arbitration was made by the Land Court under Section 6(1) of the Land Court Ordinance, and by Section 6(2) the Land Court has full power to authenticate such an award when it has been issued.

As to the finding by the Land Court that there is no right now to renew an action which has been struck out, I think that the Land Court was wrong. Rule 2 of the Judgments by Default Rules gives a right to enter a fresh action when a case has been struck out for non-appearance, but rule 13 of the Court Fees Rules 1935, undoubtedly contemplates the

renewal of an action which has been similarly struck out. Both sets of Rules are of equal legal validity as against each other, and I do no think that they are contradictory when read together. And in any case the Court Fees Rules are of later date and should prevail in the event of inconsistency with any previous Rule.

I come now to the most important point in this appeal: namely, if the Court does not authenticate an award within six months of its publication, does the award lapse and become incapable of authentication?

The answer to this question depends partly on the meaning to be assigned to the word "shall'.

The law on this point is summarised in Stroud's Judicial Dictionary, Second Edition, page 1851, in these terms: —

> "Whenever a statute declares that a thing 'shall' be done, the natural and proper meaning is that a peremptory mandate is enjoined. But where the thing has reference to the time or formality of completing any Public act, not beeing a step in a litigation, or accusation,.....the enactment will generally be regarded as merely directory, unless there be words making the thing void if not done in accordance with the prescribed requirements".

A very large number of cases are cited in Stroud. None of them seems to throw much light on the present case, except Re Tharlow (1895, 1 Q. B. 729) where it was held that the words "shall adjudge" in Section 20(1) Bankruptcy Act 1883, did not deprive the Court of the power to adjourn given by Section 105(2). And in Mayer v. Harding (L. R. 2 Q. B. 410) it was held that where a party had done all that he could in order to comply with a statute he should not be penalised because the condition in the statute was, in the circumstances of the case, impossible of performance, owing to the Court Offices being closed. Meller J. said: "As regards the conduct of the parties themselves, it (i.e. lodging in due time a case) is a condition precedent. I think it cannot be considered strictly a condition precedent where it is impossible of performance in consequence of the offices of the Court being closed. Here all that was possible was done, and I think that is sufficient".

Applying the principles in these cases to the present problem, it seems to me that the Appellants have done all that they could possibly do. They had applied for confirmation of the award within three days of its issue — different considerations might well have applied if they had waited until the last week of the six months, thereby rendering it impossible for the Court to adjudicate within the prescribed limit. I do not see what else the Appellants could have done, for I know of no method in this country to compel a Court to adjudicate or to sit; and Section 6(2) does not contain any words which could be construed as rendering the award void if not confirmed within the prescribed limit.

The point, however, has previously come before this Court. In L.A. 58/28 this Court confirmed a judgment of the Land Court of Jerusalem

of 19.5.28. The Land Court had held by a majority, stating that they did so with regret and reluctance, that the word "shall" in Section 6(2) was peremptory, and that therefore an award which was not authenticated within six months of its issue must be considered as null and void. The Supreme Court merely dismissed the appeal without assigning any reasons. It would not appear that the attention of either Court was drawn to the cases which I have cited: nor to the fact that the word "shall" may, in certain circumstances, be directory and peremptory. This argument was never considered.

In these circumstances, I consider myself free to express my own opinion, untrammelled by the previous ruling. It seems to me, that there a party has done everything in his power, and with exceptional diligence, to get a decision of a Court, that it would be a negation of natural justice if he were denied his rights, owing, solely to a failure on the part of the Court, to decide his application within a prescibed limit of time. I think that the word "shall" in Section 6 (2) is directory only, that is that authentication should be given, if possible, within six months, but that a failure to do so by the Court, does not render the award null and void.

For these reasons, I think that this appeal should be allowed, the judgment of the Land Court set aside and the case remitted for re-trial.

Delivered this Day of June, 1937.

CIVIL APPEAL No. 72/1937.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

Nijmeh Muhammad Abdul Qader Appellant.

v.

Zahra Muhammad Ahmad Nasr Respondent.

Action in Land Court for rectification of registration — When is settlement of a particular plot completed ?.

a) Settlement of a particular plot is completed when Schedule of Rights containing that plot has been posted; fact that settlement of whole village lands has not been completed — immaterial.

b) Once settlement of particular plot completed remedy provided by sec. 66 of Land Settlement Ordinance (rectification of registers) can be resorted to.

Kanfani for Appellant. Z. *El Div* for Respondent.

Appeal from jdgt. of LC, Jaffa, dated 23.3.37.

JUDGMENT

The present Respondent brought an action in the Land Court of

Jaffa under Section 66 of Land (Settlement of Title) Ordinance, 1928, for the rectification of the registers.

2. That Section gives the Land Court power to order the rectification of the registers where it is satisfied that the registration of any person in respect of any right to land has been obtained by fraud or that a right recorded in the existing registers has been omitted or incorrectly set out in the register.

3. We hold that the Land Court was correct in its judgment that the provisions of this Section are wide enough as to include the facts in this case.

4. As regards the question raised that the Respondent did not appeal from the judgment of the Settlement Officer within the period prescribed, since settlement was not completed, we hold that settlement of a particular plot is completed when the Schedule of Rights containing that particular plot has been posted. The fact that settlement of the whole village lands has not been completed is immaterial. In this case, the setllement of this plot was completed before the Appellant was in a position to appeal from the Settlement Officer.

5. For these reasons, the appeal should be dismissed with costs to include LP. 4.— advocate's fees.

Delivered this 14th of June, 1937.

CIVIL APPEAL No. 79/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

Abdul Rahim Rashid Danaf El Ansari Appellant.

v.

Abdul Qader Ahmad Es-Siksik. Respondent.

Admission in writing by Defendant's agent — Court hearing oral evidence and dismissing case on disbelieving witnesses — Effect of documentary evidence.

1. Believing or disbelieving witnesses — a matter for trial Court, but where a document is produced containing an admission and that document is not rebutted by any admission on the part of the adversary, nor contradicted by any documentary evidence, Court has no option but to give judgment in favour of party relying on that document.

2. Court of Appeal may grant and confirm provisional attachment.

Kamal for Appellant. *Hennigman* for Respondent.

Appeal from jdgt. of DC., Jaffa, dated 20.4.1937.

JUDGMENT

This appeal must be allowed.

The District Court dismissed the Appellant's case on the ground that

they did not believe the evidence of the Appellant, nor the evidence of the person who appeared in the lower Court as second Defendant. That would have been a perfectly sound reason provided that that was the only evidence before the District Court. Unfortunately, it was not. There was the actual document in which the second Defendant, who was the agent of the Respondent admitted that he received the LP. 600.— That being so, that document being in existence, it is difficult to find out how the Court below came to the conclusion to which it did.

I admit that cases of fraud and collusion would be extremely difficult to prove, but in view of this document, not rebutted by any admission on the part of the Appellant or of the second Defendant, not contradicted by any documentary evidence, the District Court had no option but to give judgment in favour of the Appellant.

The appeal must be allowed, the judgment of the District Court quashed, and judgment entered for the Appellant for LP. 600.— with costs and LP. 3.— advocate's fees.

The provisional attachment granted by this Court on 25th May, 1937, is confirmed.

Delivered this 21st day of June, 1937.

CIVIL APPEAL No. 85/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Copland J. and Abdul Hadi J.

Khadra Muhammad Abdul Aziz and others. Appellants.

v.

Jubran Fouad Sa'ad, on behalf of his late father's Fuad Sa'ad's estate. Respondent.

Claim to land based on inheritance coupled with possession — Court refusing to allow oral evidence against registered title of bona fide purchaser.

1. Claim to land based on possession coupled with title by inheritance prevails, in absence of anything to the contrary, against a claim based solely upon registration.

2. Court right in refusing to allow Plaintiff to adduce oral evidence against registered title to land, if he allowed long period to lapse during which the land was transferred and defendant bought in good faith.

Atallah, Zuhbi for Appellants. *Asfour* for Respondent.

Appeal from jdgt. of LC., Nablus sitting at Nazereth, dated 17.4.1937.

JUDGMENT

The present Appellants brought an action in the Land Court of Nablus claiming that they inherited certain plots of land from their an-

cestor Muhammad Abdul Aziz, who was the registered owner of these lands. They further alleged that in 1922 one of the heirs of Muhammad Abdul Aziz fraudulently obtained a registration of these lands into his name to the exclusion of the other heirs. They further alleged that notwithstanding the fact that 14 plots of these lands were sold and transferred in the Land Registry twice, they have been and still are in possession. They asked that the Court below should hear evidence regarding their possession and order the registration of these 14 plots in their names.

2. The lower Court refused to allow oral evidence to be tendered against a registered title and dismissed their action.

3. Mr. Hanna Atalla, who appeared for the Appellants, relied on a passage in the judgment of this Court in Land Appeal No. 34 of 1928. This passage reads as follows: —

> ".....The Appellants' case is based not merely on possession, but upon title by inheritance, which is one of the three grounds of ownership; and in the absence of anything to the contrary, such a claim, if established, would prevail against a claim based solely upon registration.....".

4. I entirely agree, if I may say so, with all respect, with this passage, but in the present case there was something very much to the contrary. There were at least two transfers effected in respect of the lands in dispute and the present Respondents bought in good faith. For these reasons, Appellants cannot, after such a long period, come to Court and ask it to set aside the registration of the Respondents.

5. The appeal must be dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 16th day of June, 1937.

CIVIL APPEAL No. 91/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Manning S/P J., Copland J. and Frumkin J.

Mordka Kleinmann — Appellant.

v.

Aguda Hadadit Bait Ve Nahla Bi-Bnei Brak Be'eravon Mugbal, and another. — Respondents.

Creditor of co operative society served with notice to attend meeting of creditors ordered by court — Creditor not attending meeting and entering third party opposition to order sanctioning compromise.

> A creditor of a co-operative society served with notice to attend a meeting of creditors ordered by Court becomes a party to the proceedings and cannot, if he failed to attend, enter third party opposition to order of court sanctioning compromise reached with creditors.

P. Goldberg for Appellant. *A. Levin* for Respondents.
Appeal from jdgt. of DC., Jerusalem, dated 30.4.1937.

JUDGMENT

In this case a co-operative society, under the provisions of Section 117 of the Companies Ordinance applied to the Court in connection with a compromise with a certain class of creditors. The Court ordered a meeting of this class of creditors and gave certain directions. The Appellant was served with notice to attend this meeting, but did not attend.

A compromise was arrived at and sanctioned by the Court. The appellant entered a third party opposition to this order, but the Court held that no such opposition lay.

We are of opinion that the Court below was right on the ground that the Appellant, as soon as he was served with notice to attend the meeting ordered by the Court, became a party to the proceedings, and consequently could not enter a third party opoosition.

The appeal is dismissed with costs, to include LP. 5.— advocate's fees.
Delivered this 23rd day of June, 1937.

CIVIL APPEAL No. 13/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

Maurice Goldenthal Morrison — Appellant.

v.

Antoine F. Albina — Respondent.

Arbitration — Application for, and opposition to, confirmation of award — Contents of judgment — Error on face of award.

1. If Court of Appeal finds that trial Court has dealt sufficiently with arguments advanced by parties, it will not interfere merely because that Court has not dealt with every point raised.
2. Allegation that there was not evidence to support arbitrator's findings — not an error on face of award.

Smoira for Appellant. *Kehaty* for Respondent.
Appeal from jdgt. of DC., Jerusalem, dated 1.11.1934.

JUDGMENT

By an agreement dated the 15th November, 1928, Appellant, (a property owner) and Respondent (a Real Estate Agent) agreed to act in partnership from that date until the end of 1929 in all transactions pertaining to immovable property.

A dispute arose between the parties to the agreement which was referred to an arbitrator.

The Respondent submitted an application for the confirmation of the award, and the appellant opposed such confirmation and asked that it

should be set aside. The District Court, however, after hearing the advocates of both parties, stated in its judgment that it did not see any legal ground which would prevent the confirmation of the award nor any ground which would necessitate the setting aside of that award. It thereupon confirmed the award.

Application for leave to appeal having been granted the appellant now requests this Court to set aside the judgment of the District Court referred to above and dated 1st November, 1934 on the following grounds:

(1) That the judgment appealed against did not contain any reasons.

(2) That the arbitrator misconducted himself in adjudicating upon matters beyond the limits of the submission, and that accordingly his award should not be enforced and/or should be set aside.

(3) That the arbitrator misconducted himself in stating a case before the District Court of Jerusalem in an improper manner, and in proceeding to give his award, though the questions raised in the case stated were never validly decided by the said Court.

(4) That the arbitrator had no evidence before him on which he could award to Respondent the amount he did.

With regard to the first ground, we are of opinion that the Judgment of the District Court deals quite sufficiently with the arguments advanced by the parties. If the lower Court finds it unnecessary in its judgment to deal with every point raised, it will be a mere waste of time to require it to do so and in our opinion it will serve no useful purpose.

As to the second point, we believe that the arbitrator's award is an excellent one. We went through it carefully and cannot see how he has gone beyond the limits of submissions.

We did not see anything in the third point at all; and the allegation that there was no evidence to support the arbitrator's findings is not an error on the face of the award.

No defects appear to be on the face of the award, and the District Court before confirming the award heard both parties to the dispute.

We cannot see any merits whatsoever in the appeal.

The appeal must, therefore, be dismissed with costs and LP. 5.— advocate's fees.

Delivered this 3rd day of June, 1937.

LAND APPEAL No .35/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before: — Copland J. and Khaldi J.

Ghanimeh bint Salameh and another — Appellants.

v.

Ma'dan Abu Yehia and another — Respondents.

Action re possession of land — Application of Art. 24 of Magistrates' Law — Irregular procedure.

1. In cases of possession the provisions of Art. 24 of Ottoman Magistrate's Law requiring production of "sanad" (document) must be strictly applied.

2. (*Obiter*) Though a Court may of itself raise such questions as pertain to Court fees or jurisdiction, it is irregular procedure if of its own initiative it applies a law which the parties have not adverted to and without giving parties opportunity of arguing the case on this basis.

R. Muhtadi for Appellants. *S. Shawa* for Respondents.

Appeal from jdgt. of LC., Jerusalem, dated 31.1.34.

JUDGMENT

This is an appeal by way of leave against the judgment of the Land Court dated 31.1.34.

The point of law on which leave was granted is whether Art. 24 of the Ottoman Magistrate's Law or Sec. 20 of the Proclamation dated 1918, aplies to the facts of this case.

There are several previous decisions of this court to the effect that in cases of possession the provisions of Art. 24 of the Ottoman Magistrates' Law requiring the production of a "Sanad" (document) must be strictly applied.

This is in substance what the Land Court in its appellate capacity observed and the appeal against its judgment must therefore be dismissed with costs and advocate's fees assessed at LP. 2.—.

It is to be noted in this connection, though the point does not arise before us, that the Land Court had applied Art. 24 of the Ottoman Magistrates' Law on its own initiative, without giving the parties opportunity of arguing the case on this basis.

Such procedure seems to be irregular, for though a Court may of itself raise such questions as pertain to Court-fees or jurisdiction, it is doubtful whether a Court is empowered to apply a law which the parties have not adverted to.

We are not called upon to decide this point for the determination of this case, but we do desire to lay down the proper procedure for the future guidance of the Courts.

Delivered this 12th day of January, 1937.

LAND APPEAL No. 5/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before: — Copland A.S/P J. and Khayat J.

Ma'mur Awqaf of the Northern District, Acre. Appellant.

v.

Attorney General Respondent.

Claim against Government re land registered as "miri" — Land Court Judges disagreeing on preliminary point of prescription — Case wrongly dismissed.

1. Mere fact that land in dispute is registered as "miri" not sufficient for dismissing claim against Government on ground of prescription, if Plaintiff claims he can prove by documents that Defendant admitted that this registration was erroneous.

2. Better procedure for Court to hear whole case and make its finding or findings of fact, instead of deciding it hurriedly on preliminary points.

Madi for Appellant. *Solicitor General* (*Rose*) for Respondent.

Appeal from jdgt. of LC., Nablus, dated 31.12.1935.

JUDGMENT

Copland, J.:—

I agree with the judgment that is about to be read by my brother Khayat, and would only add a few words.

There is a tendency in District and Land Courts to decide cases rather hurriedly on preliminary points. In this case now before us, in particular, the accuracy of the preliminary point of prescription was debatable seeing that the learned judges in the Court below disagreed on it. It would have been much better, therefore, if the Court had heard the whole case and made their finding or findings of facts thereon, when of course it would have been quite possible that the plea of prescription would have been irrelevant. In any case, all the facts would have been before us, and we could then have given a final judgment and the case would have ben finished, instead of the present result which is unavoidable.

I agree that there must be a new trial.

Costs to await final judgment.

Delivered this 28th day of January, 1937.

Khayat, J.:—

I am of the opinion that mere registration of the land in dispute as "Miri" in the Tapu registers, is not by itself sufficient justification for dismissing the claim on the ground of prescription, if the Plaintiff is able to prove that the Defendant had admitted that this regisration was in fact untrue.

The lower Court should have therefore examined the documents filed by the Plaintiff, and called upon him to prove same, in order to ascertain whether or not they amount to an admission by the Government that the land in dispute are Waqf of the "untrue" category, and having determined that point to see whether Plaintiff had neglected his rights for a period exceeding the period of prescription laid down for such cases.

I hold, therefore, that the judgment of the Lower Court should be quashed and the case remitted to the Land Court to hear the action and give judgment accordingly.

Delivered this 14th day of January, 1937.

LAND APPEAL No. 17/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before: — Manning S/P J., Frumkin J. and Khayat J.

Ahmad Jibril Gheith and others — Appellants.

v.

Hadya Salah Saleh and others — Respondents.

Masha'a land — Village custom — Prescription.

Where land is cultivated by registered owners according to number of shares held by them and not in trust for the villagers and there is no custom to apportion each year the village lands among the adult male inhabitats, ordinary law of prescription applies.

Gotiein for Appellants. *Moyal* for Respondents.

Appeal from jdgt. of LC., Jaffa, dated 13.1.36.

JUDGMENT

We need not trouble you, Mr. Moyal.

The Appellants claimed before a Settlement Officer a right to three and a half suhums out of 72 suhums of the masha'a land in Bashit village. The settlement Officer rejected their claim because the respondents had been in possession since 1902. His decision was upheld by the Land Court.

In arguing the appeal before us, Mr. Goitein relied on the authority of Salameh and others v. Ismail, Law Reports of Palestine 1920 — 33 p.234. That case referred to lands in the vilage of Beit Lid which were registered in the names of 20 persons who held it in trust for the villagers, and where the custom was to apportion each year the lands of the village among the adult male inhabitants. In the present case there was no such custom, the land was cultivated by the registered owners according to the number of shares held by them. Consequently, the ordinary law of prescription applies and the argument of the appellants on this point fails.

The Appellants were unable to put forward any legal excuse which would defeat the defence of prescription.

No other ground of Appeal was argued before us and we order that the appeal be dismissed.

The Respondents to have the costs of this appeal to include LP. 5.— advoctae's fees.

Delivered this 29th day of April 1937.

LAND APPEAL No. 37/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before: — Manning S/P J., Khayat J. and Abdul Hadi J.

Sol Gorfinkel and another — Appellants.

v.

Eliezer Feinstein and others — Respondents.

Land declared by Settlement Officer to be a public way — Jurisdiction of Land Court.

Land Court has jurisdiction to entertain action taken by a person to assert public right against other person who disregards Settlement Officer's decision declaring certain land to be a public highway, this being a dispute as to rights in or over land.

Ben-Shemesh for Appellants. *Turtledove* for Respondents.

Appeal from jdgt. of LC., Jaffa, dated 21.5.36.

JUDGMENT

The facts in this action are that there was a decision of a Land-Settlement Officer declaring certain land to be a public highway. The Appellants disregarded this declaration and the Respondents took this action in a Land Court to assert the public right. The Appellants object that the Land Court has no jurisdiction but we are of opinion that there was a dispute as to rights in or over the land and that the Land Court has jurisdiction.

The Appellants had a second ground of appeal. They had applied under Sec. 66 of the Land Settlement Ordinance for rectification of the Register and they now urge that the present action should not have been decided till that application had been dealt with. They call in aid Articles 23 and 113 of the Code of Civil procedure, but we do not think either of them apply to the facts.

The appeal is dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 26th day of April, 1937.

LAND APPEAL No. 50/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before: — Manning S/P J., Frumkin J. and Khayat J.

Fayez Odeh Elias — Appellant.

v.

Bishara Odeh Elias — Respondent.

Action for rectification of registration in Land Registry — Claim that plot bought and house thereon built jointly with Defendant, who registered whole in his name solely — Question of proof against registered title.

1. Land Court not bound by provisions of art. 80 of Ottoman Civil Procedure Code, and oral evidence can be adduced against registered title.

2. In absence of a provision in Ottoman Law whereby a written document can be contradicted on ground of fraud English Law may be resorted to; under it where a party's allegation, if true, would mean that his adversary was a trustee and committed a fraudulent breach of trust, such party — entitled to all witnesses as to the circumstances of the case.

Appeal from jdgt. of LC., Jerusalem, dated 5.10.1936.

JUDGMENT

In this case the Appellant sought the rectificattion of a document, namely a certificate of registration in the Land Registry. He alleged that he and his brother, the Respondent, had jointly purchased land and had contributed jointly to building a house thereon, that they had agreed that they should jointly own the house and land, Appellant as to one third, respondent as to two thirds. The Respondent, however, he said, registered the house in his (the Respondent's) name solely and refused to acknowledge that the Appellant owned any part of the house and land. The Respondent being registered as owner, the Appellant has no title unless he succeeds in his claim for rectification.

The Land Court heard the evidence of the parties but refused to hear the evidence of witnesses whom the Appellant wished to call in support of his claim. The Land Court apparently relied on Article 80 of the Ottoman Code of Civil Procedure and considered it was precluded from hearing the evidence of witnesses to contradict the effect of a document. It held that there was "no fraud against this kushan" and that no admissions had been proved, and dismissed the Appellant's case.

We think that the Land Court was wrong in considering itself bound by Article 80 of the Ottoman Code of Civil Procedure. Section 8 of the Land Courts Ordinance provides that a Land Court is not bound by the rules of evidence contained in that Code.

Further and on broader grounds we think that the Land Court should have heard the witnesses whom the Appellant desired to call. If the Appellant's story is true he has an equitable right to one-third of the house and land, and the Respondent is a trustee as to that one third. If the Respondent, by registering the land in his own name, intended to deprive the Appellant of his right, he was committing a fraudulent breach of trust. If there is no provision in the Ottoman Law by which a written document can be contradicted on the ground of fraud, then Article 46 of the Palestine Order-in-Council has to be resorted to and English Law may be applied. There can be no doubt that under that Law the Appellant was entitled to call witnesses as to the circumstances

under which the land was bought and the house erected.

Lastly, even if the rules of evidence contained in the Ottoman Code of Civil Procedure are resorted to, it seems that the effect of Article 82 is to lay down that Article 80 does not apply when the parties are brothers, as they are in this case.

We are of opinion that the Land Court erred in refusing to allow the Appellant to prove his claim by the oral evidence of witnesses, and we order that the judgment appealed against be set aside and the case remitted to the Land Court with directions to hear the evidence of any witnesses whom the Appellant may desire to call in support of his claim and the evidence of any witnesses the Respondent may desire to call in reply and to decide the case in accordance with law.

Costs of this appeal will abide the event.

Delivered this 30th day of April 1937.

HIGH COURT No. 91/36.

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

Before: — Copland J. and Abdul Hadi J.

Taha Salem 'Uthman — Petitioner.

v.

The Chief Execution Officer, Jerusalem and others. — Respondents.

Prescriptive possession.

Prescriptive possession, though available as defence, insufficient by itself to sustain a claim for ownership.

R. Haddad for Petitioner. *N. Nasr* for Respondents.

Application for an order to issue to the First Respondent directing him to show cause why his Order dated the 23rd October, 1936, in Execution File No. 3158/34 should not be set aside.

ORDER

This is not a simple case. The difficulty arises from the fact that it has become an established principle of this court, laid down in several judgments, that prescriptive possession, though it may constitute a valid defence, is by itself insufficient to sustain a claim for ownership.

Thus, in granting the applicant in this case a delay to enable him to refer to the competent Court, the Chief Execution Officer was in fact asking him to do something which he could not possibly do in the face of the above principle.

This order does not, of course, affect the question as to whether applicant is or is not actually in possession but if it appears in the result that he is, then he is entitled to a remedy.

The Court therefore makes the Order Nisi issued on the 8th day of October 1936, absolute, and orders a stay in the execution proceedings pending further order with costs and advocate's fees assessed at LP. 2.—.

Given this 12th day of November 1936.

HIGH COURT No. 91/36.

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

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

Taha Salem 'Uthman — Petitioner.

v.

The Chief Execution Officer Jerusalem and others — Respondents

Aplication by the Chief Execution Officer of Jerusalem for directions under Art. 6 of the Law of Execution.

ORDER

1. The order of stay given by this Court really refers to the execution of the judgment, and not the order of temporary stay granted by the Chief Execution Officer on 23rd October, 1935, for though the application was to set aside this latter order, the grievance actually was that the judgment should not be executed, and that the temporary stay was of no avail to the Petitioner (claimant of possession).

2. This Court referred to the previous decisions as laying down an established practice and it is of no consequence to the execution matter in question, for the Court to lay down definitely whether it agrees with those decisions or not.

3. In saying that the Petitioner is entitled to a remedy, this Court cannot necessarily have meant that he must act as plaintiff. On the contrary, this Court stated in the order, that in view of past decisions, Petitioner could not successfully plead as Plaintiff.

4. It is not for this Court to lay down in advance the source of the "further order" referred to, and it is sufficient to say that it must be a competent authority.

5. With reference to the quarantee the question is exclusively for the Chief Execution Officer, because it is outside the ambit of this Court's Order and might be the subject of litigation.

19th February, 1937.

HIGH COURT No. 22/37.

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

Before: — Trusted C.J. and Greene J.

The Cellular Clothing Co. Ltd. Petitioner.

v.

Registrar of Trade marks and another. Respondents.

Test as to probable result of registering rival trade marks..

If Court considering all the circumstances comes to the conclusion that if each of the two rival trade marks is used in a normal way for the goods of their respective owners there will be confusion in the mind of the public, which will lead to confusion in the goods — not necessarily that one man will be injured and other will gain illicit benefit — it must refuse registration.

Richardson for Petitioner. *Hamburger* for Respondents.

Application for an order to issue to the First Respondent, directing him to refuse the registration of the Trade Mark of the Second Respondent.

ORDER

This is an application for an Order to issue to the First Respondent, directing him to refuse the registration of a Trade Mark for which an application is made by the Second Respondents.

The Second Respondents, that is, Aronson Brothers, made application to register a trade mark consisting of word "Artex" in connection with goods in class 34 which is the class including all kinds of woollen stuffs.

The Petitioners that is the Cellular Clothing Company Ltd., who are already the registered proprietors of a trade mark "Aertex" in connection with goods in class 38, that is clothing shirts, collars, hose, pyjamas etc. objected to that application for registration and applied to this Court.

The question which falls for our decision is a very simple one, that is, whether in the circumstances, the Second Respondents are entitled to have their word registered.

Neither party has produced any evidence, but we have been shown specimens of the actual goods concerned each bearing their particular mark, and it is admitted by the Second Respondents that the goods, the manufacture of the Petitioner, are sold here in a commercial sense and, in fact, a specimen of the goods of the Petitioner was shown to us by the Respondents.

The section of the law applicable is Section 8 of the Trade Marks Ordinance which lays down various restrictions on the registration of trade marks and sets out in paragraphs certain marks which are not capable of registration as trade marks.

Paragraph (d) prevents the registration of: —

> "marks which are or may be injurious to public order or morality, or which are calculated to deceive the public; or marks which encourage unfair trade competition or contain false indications of origin;"

and paragraph (l) refers to: —

> "a mark identical with one belonging to a different proprietor which is already on the register in respect of such goods or description of goods or so nearly resembling such trade mark as to be calculated to deceive."

The principles to be applied were set out in a judgment of this Court in the Noxzema Chemical Company v. Atallah Salem Bordcosh, High Court No. 84/36, and that judgment incorporated a judgment of Lord Justice Parker in Pianotist Company Ltd.'s application, 23 R.P.C. 774 which indicated the principles which a Court is to apply in a case such as this. I may refer again briefly to the Lord Justice's judgment which contains the following: —

> "You must take the two words. You must judge of them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy these goods. In fact, you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be a confusion— that is to say, not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be a confusion in the mind of the public which will lead to confusion in the goods — then you may refuse the registration, or rather you must refuse the registration in that case."

Having regard to paragraph (d) and (i) to which we have referred and applying the above principles, we are of opinion that the second Respondent is not entitled to the registration which he seeks, this application is therefore allowed with costs, advocate's fees LP. 5.—.

Delivered this 14th day of May 1937.

CRIMINAL APPEAL No. 174/36.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL.

Before: — Manning S/P J., Greene J. and Khayat J.

Yousef Shehadeh Bannour and others . Appellants

v.

Miryam widow of Yousef Abdullah and another. Respondents.

Diyet — Compensation in lieu of diyet.

1. Person applying in Criminal Court for diyet or compensation in lieu thereof need not serve accused with notice of the application.
2. While sec. 6(1) of Civil and Religious Courts Jurisdiction

Ordinance refers to Moslems only, sec. 6(2) gives Criminal Court power to award compensation at request of person entitled to diyet, no matter to what denomination the parties may belong.

Appeal from jdgt. of DC., Jaffa, dated 24.9.1936, whereby the Appellants were ordered jointly and severally to pay the sum of LP. 300 to the civil claimants.

JUDGMENT

In this case the appellants, having been convicted by the District Court of Jaffa of wilful murder, were ordered to pay compensation in lieu of diyet.

Mr. Mughannam has appealed to this Court on their behalf against this order and his first ground of appeal is that he was not served in the Court below with any notice of the application to claim diyet. As regards this we do not think any notice was necessary. The terms of Section 6 (2) of the Civil and Religious Courts Jurisdiction Ordinance are quite clear, the sub section speaks of compensation in lieu of diyet and gives a Criminal Court power to award such compensation at the request of a person entitled to diyet.

Mr. Mughannam had another ground of appeal viz., that Section 6(2) refers to non-Moslems only and that the parties here concerned are Moslems. We do not agree. Section 6(2) is an additional provision to Section 6(1) which refers to Moslems only, and confers a jurisdiction on a Criminal Court, no matter to what denomination the parties may belong.

A third ground of appeal was that the appellants did not themselves commit the homicide, but were only aiding and abetting. The answer to this is that they were found guilty of wilful murder.

The appeal is dismissed with costs to include LP. 3.— advocate's fees.

Delivered this 29th day of May 1937.

CRIMINAL APPEAL No. 27/37 and 28/37.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL.

Before:— Trusted C. J., Manning S/P J. and Khayat, J.

Abraham Litvak and another — Appellants.

v.

The Attorney General — Respondent.

Magistrate remitting criminal case to District Court after prosecution opened the case.

Magistrate is empowered to remit case to District Court under sec. 3(2) of Magistrates' Courts Jurisdiction Ordinance not only before proceedings started but also after prosecution opened the case.

Abcarius for Appellants. *M. Alami* for Respondent.

Appeal from jdgt. of DC., Jaffa, sitting at Tel Aviv, dated 9.1.1937, whereby the First Appellant was sentenced to twelve months' imprisonment, and the Second Appellant to three months' imprisonment.

JUDGMENT

This in an appeal from the judgment of the District Court of Jaffa sitting at Tel Aviv, dated the 9th January, 1937, by two accused persons, Dr. Abraham Litvak and Hirsh Feldman, who were convicted by that Court under Article 203 of the Ottoman Penal Code.

The District Court in trying this case was exercising its summary jurisdiction and it refused leave to appeal to this Court. Application was made to me as Chief Justice and I granted leave to appeal.

The case was originally brought before the Chief Magistrate Tel-Aviv, and the Chief Magistrate, acting under Section 3 (2) of the Magistrates' Courts Jurisdiction Ordinance, 1935, remitted it to the District Court, taking the view that the facts were so serious to warrant its remission to the District Court.

The first ground of appeal before us was that the Magistrate was wrong in so doing, in that the prosecution had opened the case and it is urged on behalf of these accused that when any step has been taken, other than taking the plea from the accused, the Magistrate no longer has power to remit, and that he can only exercise his power under that subsection before the proceedings have started.

With that view we do not agree. In our view the Magistrate was right and empowered to remit the case to the District Court and that Court was properly seized with this case.

The second ground of Appeal is that Article 203 is not altogether clear in its terms and did not extend to an offence such as was alleged in this case. We are of opinion that the case was properly brought under that Article of the Ottoman Penal Code.

It is further argued on behalf of these Appellants that upon the facts the District Court should not have convicted them. We are concerned only with the facts in so far as they are referred to in argument before us and it is not for us, at this stage, to comment on them — it is sufficient for us to say that, taking the evidence as a whole, we are of opinion that the District Court was justified in the view which it took. The appeal therefore fails.

We feel that, although this case is a very serious one, in the circumstances, the sentence of one year's imprisonment imposed upon accused No. 1 might be reduced to imprisonment for a term of six months.

Delivered this 19th day of March, 1937.

CRIMINAL APPEAL No. 35/37.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL.

Before: — Trusted C.J., Copland J. and Khayat J.

Wakim Yousef Abu Amsha — Appellant.

v.

The Attorney General — Respondent.

Charge and conviction of premeditated murder — Verdict of guilty signed by all Judges of Assize Court, while death sentence by President alone.

Where verdict finding prisoner guilty of premeditated murder is signed by all Judges of Assize Court, Criminal Code Ordinance providing for murder one sentence only, fact that death sentence only signed by President causes no miscarriage of justice.

G. Salah for Appellant. *F. Ghussein* for Respondent.

Appeal from jdgt. of C. of Criminal Assize sitting at Jerusalem, dated 23.3.1937, whereby Appellant was convicted under Section 214(b) of the Criminal Code Ordinance 1936, and sentenced to death.

JUDGMENT

The Appellant was convicted of murder with premeditation contrary to section 214 of the Criminal Code Ordinance, 1936, by the Court of Criminal Assize sitting in Jerusalem and was sentenced to death.

The facts are simple. The murdered man was engaged to marry the prisoner's sister and on the 18th January, 1937, the prisoner and the murdered man, after some conversation with reference to the engagement, set off together to the home of the prisoner's father. The prisoner was carrying a rifle, and it is not suggested that he was doing so legitimately. On the way prisoner shot the deceased — three shots benig fired — from behind and caused his death. There were signs that an attempt had been made to hide the body and when enquiries were made as to the deceased's whereabouts the prisoner gave evasive answers.

There is no evidence of any motive for this shooting. It was stated in evidence by the girl who was engaged to the deceased man that she went with him to Bethlehem in order to be photographed but no photograph was taken, and a witness (Anton Elias) stated, "a fiancée should not, according to custom, go about alone with her fiancé," from which it may have been intended to suggest that the visit angered the prisoner, but the suggestion was not developed, and the girl stated that she did not know if her brother heard of the visit and that her brother did not question her about it. Both she and the witness Anton stated that the prisoner and the deceased were dear friends.

The evidence against the prisoner is based to some extent upon a statement which he made to the police on 2.2.37. In that statement

he admits that he was carrying a rifle and that he actually shot the deceased but says he did so accidentlly and then ran away and concealed the rifle. He only admits to firing one shot. His story is corroborated by the finding of the rifle with one empty cartridge in the breach and six live rounds in the magazine, in a spot which he pointed out to a police officer, and by technical evidence that the three empty cartridge cases, found at the scene of the crime, were fired from that same rifle.

It is clear from the medical evidence that the deceased was shot at short range from behind and that three shots were fired.

The defence was that the killing was accidental, but the Court of Assize, having regard particularly to the fact that three shots were fired, found that the killing was deliberate.

Before this Court it was argued by George Eff. Salah on behalf of the prisoner, firstly, that the sentence of death was only signed by the President of the Court of Assize. This is true, but all the judges signed the verdict finding the prisoner guilty, and by section 215 of the Criminal Code Ordinance, one sentence only can be pronounced when a man is found guilty of murder, and we are satisfied that the omission causes no miscarriage of justice.

It was also argued before us that the prisoner's statement was a confession and it was inadmissible in that Section 9 of the Evidence Ordinance, which deals with the admissibility of confessions, had not been complied with.

The circumstances in which the statement of 2.2.37 were made are set out in the statement itself and are stated in the evidence of Ibrahim Jarjoura, the Police Inspector. The proceedings record that no objection was taken to the statement, and the prisoner, in a statement from the dock said: "The statement I made to the Police is the same as I make to-day. That's all". That presumably had reference to the statement which had been put in evidence. It is true that in cross-examination the Police-Inspector said that the prisoner had made an earlier statement in which he denied any knowledge of the crime, but the prisoner in his statement from dock did not deny having committed the crime and we do not think therefore he can have been referring to that earlier statement. We are of opinion that the statement was admissible.

The third ground of appeal was that the requirements of section 216 of the Criminal Code Ordinance were not satisfied.

By section 214 of the Criminal Code Ordinance, to constitute the offence of murder death must be caused *inter alia* with premeditation, and Section 216 sets out the three ingredients of premeditation, and the onus is upon the prosecution to show that they are present.

For the purposes of this case there must be a resolution to kill; the killing must be "in cold blood without immediate provocation in circum-

stances in which he was able to think and realise the result of his actions"; and there must be some preparation by the accused person of himself or of the instrument used.

The Assize Court drew the inference from the number of rounds fired and the carrying of the rifle that the accused has resolved to kill the deceased. We think that it was entitled to do so.

The Assize Court found, "There is not the slightest ground to infer that there was any provocation" (Then follows a discussion as to whether the incident of the girl going with the deceased to Bethlehem could be immediate provocation, which it clearly could not be), and the Court goes on to state: "We are entitled to infer from the circumstances that the accused, at the time of the shooting was able to think and to realise the result of his action."

The form of the first of these statements may be open to some criticism. The question is, was there evidence from which an inference could be properly drawn that the prisoner killed the deceased in cold blood, etc, which is substantially the form in which the second statement of the Court was framed.

We are of opinion that from the evidence — including the evidence that the deceased was shot from behind, of which the Assize Court makes no express mention — that that Court was justified in drawing the conclusion that Section 216(b) had been satisfied.

The Court found that the carrying of the rifle was the necessary preparation which we think it was entitled to do.

In the result, we are of opinion that there was evidence before the Court of Assize upon which it could come to the conclusions to which it did, and this appeal is dismissed.

Delivered this 15th day of May, 1937.

CRIMINAL APPEAL No. 65/37.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL.

Before: — Trusted C.J., Greene J. and Frumkin J.

Zaki Hamza Zeid — Appellant.

v.

The Attorney General. — Respondent.

Two charges based upon same facts — Conviction on one charge and, after appeal by Attorney-General, other conviction on second charge.

Where it appears that accused has already been convicted of an offence on certain facts, any subsequent conviction under a different statute on same facts cannot stand.

Hanna Atalla for Appellant. *Kantrovitch* for Respondent.

Appeal from jdgt. of DC., Haifa, dated 15.4.1937, whereby appellant was convicted under Emergency Regulations 8A as amended by the Emergency Regulation 3 (b) (i) and sentenced to five years' imprisonment.

JUDGMENT

This is an unusual case which has been brought about by an unusual combination of circumstances.

It seems that the Accused was originally charged before the District Court in Haifa for two offences: (1) of being in possession of explosives without authority contrary to section 8A of the Emergency (Amendment) Regulations, (No. 5) of 1936, and (2) of being in possession of ammunition without a licence contrary to Section 26(2)(b) of the Firearms Ordinances 1922—36.

When the matter first came before the District Court, Haifa, for reasons into which it is unnecessary to go, that Court struck out the charge under Section 8A of the Emergency Regulations and convicted the Accused of the charge under the firearms Ordinance, and imposed a short term of imprisonment and a fine.

The matter came before this Court differently constituted on appeal by the Attorney General (the date is important) on the 23rd December last; the judgment of this Court was as follows: —

> "In this case the Respondent was charged with an offence under Section 8A of the Emergency Regulations. The Court below, without taking any plea or hearing evidence, struck out the charge. This was irregular.
>
> The case, as regards the charge, must be remitted to the Court below to be tried in accordance with law.
>
> Delivered this 23rd day of December, 1936."

The case then went back to the District Court and came before that Court on 6.2.37., and it is clear that the learned President appreciated that he was in a difficulty, as in his judgment he says: —

> "I therefore hold I am to treat the order of the Supreme Court as a direction for retrial setting aside on gounds of irregularity the whole of the proceedings which took place before this Court at the original trial. It necessarily follows that the accused's original plea of guilt and the sentence passed in regard thereto are to be set aside; I don't think I can pay any regard to the fact (unfortunate as it may, or might be) that the accused has served a term of 3 months' imprisonment as a result of his plea of guilt. If he is finally acquitted, this will be a matter for the consideration of other authorities."

It is quite clear that the judgment of this Court did not quash the conviction under the Firearms Ordinance and that conviction therefore stood.

There can be no doubt that the facts upon which both charges were based were the same, as the Assistant Government Advocate, at the

second hearing by the District Court, stated: "Yes, there were two charges but same facts constituted these charges."

Whatever may have been the law at the time when the judgment of this Court was given, to the date of which I have expressly called attention, there is no doubt that the law applicable after the 1st day of January 1937, when the Criminal Code Ordinance came into force, is to be found in Section 21 of that Ordinance.

Therefore, we have the position that the Accused has already been convicted of an offence on certain facts. Upon those same facts, he was again put on his trial and convicted, which was contrary to the provisions of Section 21 of the Criminal Code Ordinance which by then had been brought into force.

This appeal must therefore be allowed, and the conviction quashed.

Delivered this 30th day of June, 1937.

CIVIL APPEAL No. 121/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Manning S/P J. and Abdul Hadi J.

Muhammad Mustafa Jaser — Appellant.

v.

Darwish Salim el Jamily — Respondent.

Evidence — Constitution of Court.

1. Party making no application to hear witnesses and acquiescing in procedure followed by trial Court in deciding the case on the documents submitted and arguments of advocates cannot complain on appeal that Court below heard no evidence.

2. a) A civil action commences on date when Plaintiff's claim is filed and not on date when hearing in Court begins.

b) An amending Ordinance regarding constitution of Court does not affect case filed priod to date on which the amendment came into force.

3. An agreement for sale of land — not a disposition of land within meaning of Land Transfer Ordinance.

George Elia for Appellant. *F. Shawa* for Respondent.

Appeal from jdgt. of DC, Jaffa, dated 17.4.1935.

JUDGMENT

1. On the 17th April, 1935, judgment was given in the District Court of Jaffa against the Appellant for LP. 1030 damages for breach of contract. He has appealed to this Court and George Eff. Elia, who appeared to argue the appeal, has been at great pains to show many reasons why the judgment of the Court below should be set aside. He urges firstly that the Court below heard no evidence, but decided the

case merely on the documents submitted and the arguments of the advocates. The Appellant's advocate in the Court below acquiesed in this procedure and made no application to call witnesses. This ground of appeal must fail.

2. The second ground of appeal is that the Appellant did not commit any breach of contract. The reply to this is that the breach was admitted and the Court below declined to accept the excuses offered by the Appellant. We see no reason to think they were wrong and this ground also fails.

3. This disposes of two other grounds of appeal, viz. that the Respondent was not ready and willing to carry out his part of the agreement and that 15 days was not a reasonable period within which to ask Appellant to fulfil his agreement.

4. A fifth ground of appeal is that the notarial notice asked the Appellant to comply with unnecessary conditions. We have perused the notice and consider that it was a demand to comply in substance with the conditions of the agreement and that the Appellant had no reason to complain on this score.

5. A sixth ground of appeal was that one of the judges had no jurisdiction to sit. Nothing whatever could be said by the advocate in support of this contention.

6. The seventh grund of appeal was that the Court was improperly constituted as under Section 11 of the Courts Ordinance, as amended by Section 5 of Ordinance No. 18 of 1935, the case should have been tried by the President of the District Court and one Judge, while it was actually tried before two judges, i.e. the President did not sit. This amendment came into force on the 16th April, 1935, and he hearing of the action commenced on the 17th April, 1935.

7. Section 9 of the amending Ordinance is as follows:

> "9. Nothing in this Ordinance shall be deemed to affect the jurisdiction of any Court to try any civil action or criminal prosecution commenced before the coming into force of this Ordinance, and such action or prosecution shall be tried as though this Ordinance had not come into force."

8. In our interpretation of this section we hold that a civil action commences on the date when the plainiff's claim is filed and not on the date when the hearing in Court begins. In this case the claim was filed on the 25th December, 1934, and consequently the amending Ordinance cannot apply to these proceedings.

9. An eighth ground of appeal was that the agreement was invalid as the consent of the Government required by the Land Transfer Ordinance had not been obtained. As to this all we need say is that an agreement for the sale of land is not a disposition of land within the meaning of that Ordinance.

10. The ninth and last ground of appeal is that the land was not

sufficiently described in the agreement. The situation, names and boundaries of the plots are given and we cannot understand why a frivolous argument of this kind is put froward.

11. All the grounds of appeal fail. The appeal is dismissed with costs to include LP. 4.— advocate's fees.

Delivered this 16th day of February, 1937.

CIVIL APPEAL No. 155/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before:— Copland A.S/P J. and Khayat J.

George Hanna Mansour — Appellant.

v.

Andria Elias Hanna El-Kassis — Respondent.

Claim in person sought to be amended as being on behalf of partnership.

Where according to deed of partnership any partner can sue on behalf of Firm, claim can be made by partner in his own name instead of in name of Firm.

Olshan for Appellant. *Cattan, Atallah* for Respondent.

Appeal from jdgt. of DC., Jerusalem, dated 29.7.1935.

JUDGMENT.

The Appellant in this case sued before the District Court on two promissory notes. The action was originally entered in the name of George Hanna Mansour in person. During the first hearing, however, he sought to sue personally on behalf of the partnership 'Mansour Hanna Mansour & Bros.'. The Court heard evidence as to the validity or otherwise of this representative capacity, but failed to make an interlocutory ruling thereon.

The Court proceeded with the hearing of the case, and when judgment was given, the Judges disagreed as to the permissibility or otherwise of the proposed amendment of the Statement of Claim and, as a result, Plaintiff's case was dismissed.

In doing so, the Lower Court erred, for having rejected the representative capacity of the Plaintiff, they should have asked him whether he would not proceed in his personal capacity.

Further, the Lower Court seems to have overlooked the fact according to the deed of partnership produced any partner can sue on behalf of the firm — which renders the question of the amendment of the statement of claim immaterial.

For these reasons, the judgment of the District Court is quashed, and the case is remitted for a fresh hearing on the merits.

The attachment previously laid is to remain in force.
Costs to await final judgment.
Delivered this 27th day of January, 1937.

CIVIL APPEAL No. 160/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Manning S/P J., Frumkin J. and Abdul Hadi J.

Abdul Aziz Karim Sheikh Ibrahim and others Appellants.

v.

Yehoshua Hankin Respondent.

Agreement not signed by all members of party — Addendum to original agreement binding its signatories although not signed by other party — Liquidated damages.

1. a) Agreement not signed by all persons shown to be a party to it — not an agreement even as regards those who did sign.
b) Clause providing for joint and several liability of all members of party to agreement cannot become operative until all members of that party have signed.

2. Where persons who signed an agreement while other members of same party did not sign, by an addentum constitute themselves a party independant of the others, they are bound by the two documents, which form one agreement.

3. Where addentum containing undertakings by one party only incorporates original agreement which was signed by signatories of agreement and by other party, absence of latter's signature on addentum does not invalidate addendum or agreement.

4. Court of Appeal will decline to hear argument on point not raised in trial Court nor mentioned in written grounds of appeal.

Auni Abdul Hadi for Appellants. *Eliash* for Respondent.

Appeal from jdgt. of DC, Jaffa, dated 31.3.1935.

JUDGMENT

Manning S/P. J.:

1. In June 1927. a document was drawn up in which seventeen persons, described as the first party, undertook to sell and transfer to the respondent, described as the second party, a certain area of land. The document contained a large number of clauses, by one of which a year was given "beginning with the date of this agreement" for the execution of the necessary transfer. The document was signed by nine members of the first party, and by the Respondent as second party.

2. Nothing further was done until the 13th July, 1928, when an addendum was affixed to the document, by which the period for execution of the transfer was extended to 30 days from that date. This was signed by three only of the nine persons who signed the original docu-

ment, and by the Respondent, and also by two members of the first party who had not signed the original document.

3. Then on the 15th August, 1928, another addendum was drawn up. The terms of this are important and it is necessary to set it out in full:

> "Whereas we could not, despite the extention of the period for 30 days, carry out our obligations of the contract, and whereas some of the members of the first party, whose names were mentioned at the beginning of this agreement, have not yet signed the agreement we hereby collectively decide the expansion of the period for the execution of the terms of this contract for 30 more days beginning with the date recorded hereunder. In this consequence we the undersigned, who signed the agreement, hereby declare that we had disregarded the participation of the rest of the members, whose names are mentioned in the preamble of the agreement, but nevertheless did not sign it, in the matter of execution of the terms of this agreement; and we further agreed to consider this agreement as concluded between us, the undersigned jointly and severally irrespective of those whose names are mentioned in it, but who did not sign it, and we are ready to bear the consequence of this agreemnt and the responsibility of fully executing its terms. We also declare that the mentioning of the names of persons who did not sign this agreement does not the least affect the reality of the agreement and the execution of its terms."

4. This was signed by seven of the nine persons who signed the original document, but was not signed by the Respondent.

5. The land was not transferred and the Respondent sued the nine persons who signed the original document for damages for breach of contract. The District Court of Jaffa held that the original document was a valid contract and the two addenda were valid contracts and awarded damages against the seven defendants who signed the addendum of the 15th August, 1928.

6. The original document was intended to be an agreement between seventeen persons constituting the first party and the Respondent constituting the second party. A perusal of its contents shows that the undertakings by the first party were joint, there are no words of severance. There is one clause only which throws any doubt on this construction, and this is as follows (is comes at the end of the document):

> "Each member of the first party declares that he had guaranteed and insured his other partner for all the contents of this agreement and for the payment of all sorts of compensation and recovery of what had been received from the second party on account of the price, especially because members of the first party are under joint and several obligations. One of them or part of them can be sued for all the obligations prescribed in this agreement, and the second party has the choice to claim his rights from the one he pleases."

7. It is clear to me, however, that this clause cannot become operative until the whole of the first party have signed. The position remains

the same, the agreement was intended to be between seventeen persons and the Respondent, and until these seventeen persons sign, there is no agreement. I think the Court below came to an incorrect conclusion when it decided that the original document was a valid contract.

8. I now turn to consider the effect of the addendum of August 15th, 1928.

9. The seven persons who signed it constituted themselves the first party in the original document instead of the seventeen who were named. The addendum must be looked upon as erasing, in effect, the names of the ten who did not sign from the heading of the original document. The original document and the addendum are therefore an agreement, not a new agreement, because there had been no agreement before. The only difficulty I have had is the fact that Respondent did not sign this addendum. I have, however, come to the conclusion that as the addendum incorporates the original document, and as that was signed by the Respondent, it was not necessary for him to sign the addendum. The undertakings on his behalf in the original document are signed by him, and there is no undertaking by him in the addendum.

10. It is a fair inference from all the circumstances that he assented to the alteration of the persons with whom he was contracting, and to the extention of the period for completion. I therefore hold that the original document plus the addendum of August 15th, 1928 constituted a binding agreement between the seven persons who signed the addendum and the Respondent. These persons clearly committed a breach and the Respondent was entitled to damages.

11. Auni Bey Abdul Hadi, who argued the appeal on behalf of the six defendants who appealed, raised the question that the damages were excessive. The Court below awarded the Respondent the sum of LP. 10000.— which was fixed in the agreement as liquidated damages in the event of breach. The Respondent claimed this amount as liquidated damages. There was no argument in the Court below as to how this part of the agreement should be construed, and in consequence, there was no evidence as to the actual damages sustained by the Respondent. The written grounds of appeal did not contain any averment that the damages were excessive. In these circumstances we declined to hear Auni Bey on the question of damages.

12. In my opinion, for the reasons given, the appeal should be dismissed with costs, to include LP. 4.— advocate's fees.

Delivered this 17th day of March, 1937.

Frumkin, J. :

1. A number of persons, including the Appellants, were stated to be the first party to the agreement which is the subject matter of this action. Only the Appellatns and two others actually signed the agree-

ment, while the other members of the party did not sign.

2. It is settled law that had the matter remained at that state there would be no agreement even as regards those who have signed it, because the agreement could only be completed by the signatures of all the persons shown to be first party to it.

3. At a later stage, however, the Appellants added an addendum to the agreement to the effect that notwithstanding the fact that the other persons did not sign the agreement, they are willing to act thereunder without the association of the others as the first party taking upon themselves all the responsibilities as such.

4. We are called upon to decide whether by so doing the agreement becomes binding upon them as the only persons constituting the first party .

5. When two or more persons decide to enter into an agreement with another and one of them at the last moment changes his mind, there is nothing to prevent the willing persons to stick to the agreement and to carry it out themselves. The better way of doing it is of course by writing out a fresh agreement omitting the name of the person who has changed his mind and refused to sign.

6. It could, however, also be done in another form, say by striking out, with the consent of all parties concerned, the name of the refusing person, properly initialling the alteration in the agreement and thus puting the agreement in a state as if it were originally drafted to exclude the refusing person.

7. That being so I fail to see why the willing partners should not be able to express their intention by endorsing the original agreement with an appropriate addendum.

8. The Appellants have chosen that latter form and the only argument which could be put up against this form is that it is a new agreement and as such must have been signed also by the second party.

9. With this argument I cannot agree; even if we looked at the addendum as a new agreement, it cannot become invalid for the lack of the signatures of the second party to whom it was duly delivered properly signed and who could affix his own signature at any time.

10. The addendum incorporated the entire original agreement which thus became binding on the Appellants as the sole persons constituting the first party and on this ground I hold that he District Court was right in arriving at the conclusion it has reached.

11. The breach is undisputed and the judgment of the District Court must be confirmed and the appeal dismissed with costs.

Delivered this 17th day of March, 1937.

CIVIL APPEAL No. 169/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Trusted C. J., Greene J. and Frumkin J.

Nasralla S. Khoury — Appellant.

v.

Syndic of the bankruptcy of the firm S. N. Khoury. and another — Respondents.

Leave to appeal to Privy Council.

Practice followed in the past to file an application for leave to appeal to Privy Council where amount involved exceeds LP.500 should not be changed without some reasons for the change.

Ginzberg for Appellant. *Mu'ammar, Abcarius Bey* for Respondents.

Application for provisional leave to appeal to Privy Council from jdgt. of Supreme Court of Palestine, dated 3.2.1937.

JUDGMENT

This is an application for leave to appeal to His Majesty in Council from a decision of this Court, dated the 3rd February, 1937.

It has been pointed out in argument that the provisions regulating appeals to the Privy Council are not altogether clear. It seems to me that there may be a conflict between the Palestine (Appeal to Privy Council) Order-in-Council, 1924, regulating such appeals, which lays down in Article 3, that appeals under LP. 500 should be by way of special leave and appeals above LP. 500 should be as of right, and Rule 2 of the Judicial Committee Rules, 1925, which appears to contemplate that all appeals shall be brought either in pursuance of leave obtained from the Court appealed from, or in the absence of such leave, in pursuance of special leave to appeal granted by His Majesty in Council upon a petition in that behalf presented by the intending Appellant.

The practice in the past, and so far as I know no objection has been taken to it in the Privy Council, has been to file an application for leave to be granted when the amount exceeds LP. 500. When such leave is granted, conditions being imposed.

Mrs. Ginzberg, on behalf of the Appellant, stated that her client had been illegally made bankrupt, but it appears from the judgment of this Court that her client was guilty of a series of delays in presenting his case to this Court and on the last occasion, when his case came before this Court, he did not appear at all. Further, Mrs. Ginzberg has not questioned, except in the general terms I have stated, the decision which was given by this Court in the absence of her client.

We feel that the practice which has been followed in the past should not be changed without some reasons for the change. We are satisfied that the amount involved exceeds LP. 500, as there is no doubt that the

total amount of the bankruptcy exceeds that sum, and we therefore grant leave to appeal, subject to the provisions of Article 6(a) and (b) of the Palestine (Appeal to Privy Council) Order-in-Council, 1924, being complied with within six weeks, the guarantee to be for the sum of LP. 300.

Delivered this 21st day of May, 1937.

CIVIL APPEAL No. 180/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Copland J. and Khaldi J.

Ibrahim Qamar — Appellant.

v.

Salim Haddad — Respondent.

Undertaking to re-transfer land to vendor — Consideration for undertaking.

1. Undertaking, whether before or after transfer of land, to re-transfer it to vendor on certain specified terms — not in contradiction to transaction of sale nor need it be made before Land Registry.
2. Signature of one party suffices for an undertaking.
3. If interest is payable by vendor against undertaking to re-transfer the land to him, such interest constitutes consideration.

B. Joseph for Appellant. *Cattan, Ousta* for Respondent.

Appeal from jdgt. of DC., Jerusalem, dated 11.9.1935.

JUDGMENT

The present appeal is both simple and clear.

The Respondent (Plaintiff) sold to the Appellant (Defendant) a piece of land before the Land Registry, for a sum of LP. 300 being the debt due from the former to the latter. On the day of transfer, whether before or after the transaction is immaterial, the Appellant undertook in writing that he would re-transfer the land to Respondent on payment by him within a year of the debt with interest, 'so that he may benefit from a rise in the price of land'.

Within the said period the Respondent tendered the debt with the interest as agreed, but the Appllant refused to accept same or to effect transfer. Thereupon, the present Respondent brought an action before the District Court, claiming from the Appellant the difference between the sale-price and the actual value of the land at the time. Judgment was given for Plaintiff by default and upon opposition was confirmed in presence.

It is against this judgment that the present appeal was filed.

Appelant's first ground is that having taken place outside the Land

Registry and being in contradiction to the transaction of sale, the undertaking is null and void. The answer to this is that the undertaking is an independent collateral agreement, which far from contradicting the sale is made in express reference to it, and we know of no provision in the law, which requires that such undertaking be made before the Land Registry.

The second point raised is that the undertaking is defective firstly because it is signed only by one party and secondly because there is no consideration to it. This ground also fails because the signature of one party suffices for an undertaking, and as to consideration the Court holds that the interest payable under the undertaking consitutes same. For these reasons, the appeal is dismissed with costs and advocate's fees assessed at LP. 3.—.

Delivered this 28th day of January, 1937.

CIVIL APPEAL No. 181/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Copland J. and Khaldi J.

Esther Sobelson and another — Appellant.

v.

Leah Sobelson — Respondent.

Testamentary disposition of debt secured by mortgage on miri land.

Clause "registered interest in land" in Succession Ordinance does not apply to a mortgage not being a right in land but merely a security for a debt.

Ben Ahron for Appellant. *Rotenstreich* for Respondent.

Appeal from jdgt. of DC., Jerusalem, dated 6.9.1935.

JUDGMENT

This is an appeal against a judgment of the President of the District Court of Jerusalem in a Succession case, wherein it was held that a mortgage is a 'registered interest in land' under the Succession Ordinance 1923, and that the the land being of the 'miri' category in that particular case, 'the mortgage was subject to the Ottoman Law relating to Succession of Immovable property, notwithstanding any disposition made by will or otherwise'.

Counsel for Respondent has argued that the appeal is out of time, because the original judgment in which the above decision was enunciated was given on the 22nd of February, 1935. The Appellant to this argument, failed to appeal within thirty days of the said date, and instead waited until the judgment of the 6th day of September was given, which was made in pursuance of the previous judgment.

The preliminary point is over-ruled, because the Court holds that the present appeal is really against the latter judgment and was thus filed in time.

With regard to the point raised on the merits, this Court having heard the advocates for both parties, holds that the clause 'registered interest in land', which occurs in the Succession Ordinance, 1923, does not apply to mortgages and was intended to cover such rights in land and not a mortgage which is merely security for a debt.

For these reasons, the appeal is allowed with costs and advocate's fees assessed at LP. 2.—.

Delivered this 28th day of January, 1937.

CIVIL APPEAL No. 194/35.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Manning S/P J., Frumkin J and Khayat J.

The Municipality of Jerusalem — Appellants.

v.

Shimon Mizrahi — Respondent.

Objection regarding power of attorney — Construction of sec. 131 of Municipal Corporations Ordinance.

1. Party claiming that judgment of lower Court void because advocate's power of attorney did not authorise him to appear in that Court is precluded from raising the point on appeal if he took no objection in that Court.

2. Sec. 131 of Municipal Corporations Ordinance 1934 — merely permissive, allowing a corporation to appear, if it wishes, by its own clerk, or an official or councillor duly authorised, but it does not take away its right to be represented by an advocate in legal proceedings.

Olshan for Appellant. *Ben-Ahron* for Respondent.

Appeal from jdgt. of DC., Jerusalem, dated 17.10.1935.

JUDGMENT

On the 30th October, 1936, the District Court granted the appellant leave to appeal against its decision in the above case. The leave was granted on two points of law, which were both specified.

On the appeal coming before us on the 31st July, 1936, Mr. Ben-Aharon, who appeared on behalf of the respondent took two preliminary objections. The first of them was that Mr. Olshan, who had appeared for the appellant in the District Court, had not a power of attorney to appear, and that therefore the judgment of the District Court was void. In support of his contention, he cited a decision of this Court, Alfred Levy v. Yusuf Abdel Fattah Salim, reported on page 675 of the Law Reports of Palestine, 1920 — 33. In that case it was decided

that as the advocate who appeared for an appellant before a District Court had no express power of attorney authorising him to present the appeal, there was no appeal before the District Court, and the judgment of the District Court was accordingly set aside. It was not stated whether any objection had been taken in the District Court by the advocate appearing on behalf of the respondent.

In reply, Mr. Olshan submitted that his power of attorney covered all the proceedings in which he had appeared. If it did not, he relied on a decision of this Court in Civil Appeal, No. 127/32, Yonah Dinevitz v. Halvaa-Vehisachon Cooperative Society Ltd., and another. In that case the appellant put forward as a ground of appeal that the advocate who represented the respondents in the District Court had not a proper power of attorney and that in consequence the proceedings in the District Court were void. The appellant had not raised the point in the District Court. This Court decided that he must, therefore, be deemed to have waived any objection on this score, and that this ground of appeal failed.

In the present case no objection was made in the District Court and the relevant authority is that relied on by Mr. Olshan. Even assuming that the power of attorney did not cover the proceedings in the District Court, the respondent is precluded from raising the point here and this preliminary objection is overruled.

The ground of Mr. Ben-Aharon's second objection is Section 131 of the Municipal Corporations Ordinance, 1934. The relevant part of this Section is as follows:

> "Notwithstanding anything in any Ordinance or law contained any municipal corporation or council may institute proceedings in and appear before any court or may appear in any legal proceedings by their town clerk, or by any official or councillor authorised generally or in respect of any special case or proceedings by resolution of the council,....."

Mr. Ben Aharon says that the effect of this Section is that no one can appear on behalf of a municipal corporation, as the appellant is in this case, except the town clerk, or a duly outhorised official or councillor. No advocate can appear. We need not consider Mr. Olshan's arguments on this point. It is clear that the Section is merely permissive, allowing a corporation to appear, if it wishes, by its town clerk, or an official or councillor duly authorised, but it does not take away its right to be represented by an advocate in legal proceedings.

This objection is also overruled. The appeal must proceed to hearing.

Delivered the 16th day of September, 1936.

JUDGMENT

Ottoman Municipal Tax Law — Validation of Ottoman Law.

1. An Ottoman Law passed after 1.11.1914 may be brought into force either by a Public Notice or by an Ordinance.
2. Sec. 2 of Ottoman Municipal Tax Law Validation Ordinance 1933 — not ultra vires.

1. The Respondent was assessed to pay rates to the Municipality of Jerusalem, hereinafter referred to as the Municipality, for the year 1930. He refused to pay on the ground that the Makhnaim Quarter, in which he lived, was not within the municipal area of Jerusalem. On being threatened with execution proceedings he paid under protest, and took proceedings against the Municipality for the recovery of the amount paid. The Chief Magistrate decided that in 1930 the Municipality had no jurisdiction over the Makhanaim Quarter, and gave judgment for the Respondent.

2. Leave was given to appeal to the District Court. The Court reversed the finding of the Chief Magistrate as to the jurisdiction of the Appellant over the Makhnaim quarter, but affirmed his decision on other grounds. It then gave leave to appeal to this Court on two points of law which are as follows: —

> "1. Were the Appellants empowered in law in the year 1930 to demand and collect the Municipal Tax known as the Municipal House Rate Tax?
>
> 2. If they were not so empowered, do the provisions of Section 3 of the Ottoman Municipal Tax Law Validation Ordinance 1933, estop the Respondent from recovering the amount paid to the Appellant?".

3. Sections 2 and 4 of the Ottoman Municipal Tax Law Validation Ordinance, 1933, hereinafter referred to as the Ordinance, are as follows: —

> "2. Save as provided in Section 4 of this Ordinance, the Ottoman Municipal Tax Law of the twenty-sixth day of February, 1330, shall be deemed to be and always to have been validly applied in Palestine and of full effect except in so far as any part thereof has been expressly or impliedly repealed by any Ordinance.
>
> 4. Any Municipal house rate assessed by or on behalf of any Municipal Council under the Ottoman Municipal Tax Law of the twenty-sixth day of February, 1330, and charged upon any occupier of immovable property shall be deemed to be and always to have been lawfully assessed, imposed and charged, notwithstanding any provision in such law contained and such rate shall continue to be imposed and charged upon such occupier".

4. It is interesting to note that this Ordinance came into force after the decision of the Chief Magistrate had been delivered. It was, how-

ever, in force at the time of the decision of the District Court and was considered by it. That Court held that Section 2 was ultra vires, and that in consequence Section 4 was ineffective, as the statutory law on which it is based was non-existent.

5. The grounds on which the District Court proceeded were as follows. Article 46 of the Palestine Order-in-Council enacts that the Ottoman Law operative in Palestine is to be that law as it existed in Palestine on the 1st November, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice. The Ottoman Municipal Tax Law referred to in Section 2 of the Ordinance came into force in 1915. It was declared to be in force by an Ordinance and not by a Public Notice. It is therefore ultra vires.

6. I cannot agree with this reasoning. Under Section 17(1) of the Order-in-Council, as amended by the Palestine (Amendment) Order-in-Council, 1923, the High Commissioner is empowered to promulgate such Ordinances as may be necessary for the peace, order and good government of Palestine. If it is necessary to enact that a certain Ottoman Law shall be in force, the High Commissioner is not tied down to the procedure by Public Notice. That procedure is merely intended to do away with the necessity for an Ordinance, but it does not in any way detract from the powers of the High Commissioner to promulgate Ordinances for the purposes mentioned.

7. In the present case an Ordinance was necessary as the provisions of the relevant Ottoman Law were to be deemed to have been in force as from the date of their enactment. On this point I have no hesitation in deciding that an Ottoman Law passed after the 1st November, 1914, may be brought into force either by a Public Notice or by an Ordinance. I do not agree that Section 2 of the Ordinance is ultra vires.

8. Section 2 of the Ordinance enacts that the Ottoman Municipal Tax Law of 1330 (i.e. 1915) shall be deemed to be and always to have been validly applied in Palestine. The effect of this is that this Ottoman Law was in force in Palestine in 1930, and according to Section 4 of the Ordinance the municipal house rate assessed under that law must be deemed to have been lawfully assessed, imposed and charged. The result is that the Municipality was empowered in law to demand and collect the Municipal House Rate in 1930.

9. The first question of law should be answered in the affirmative and, this being so, it is unnecessary to answer the second question.

10. In my opinion the judgments of the District Court and the Chief Magistrate should be set aside and the appeal should be allowed with costs to include LP. 10.— advocate's fees.

Delivered this 24th day of February, 1937.

CIVIL APPEAL No. 34/36.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Trusted C. J., Greene J. and Abdul Hadi J.

Eiga Genia Rosenberg — Appellant.

v.

Paulina Beham-Seligson and another — Respondents.

Jurisdiction in matters of diyet and compensation in lieu thereof.

If claim for compensation in lieu of "diyet" is made in criminal Court, that Court is bound to consider it. Words "may, if it sees fit", in sec. 6(2) of Civil and Religious Courts Jurisdiction Ordinance do not give Court a discretion to refuse to hear the matter but a discretion to grant or refuse relief.

J. Levy for Appellant.

Z. *Argaman* for Respondents.

Appeal from jdgt. of DC., Haifa, dated 18.3.1936.

JUDGMENT

This appeal concerns a civil claim for LP. 250 brought in connection with criminal proceedings before the District Court, Haifa.

In its judgment of 9.6.35 the District Court stated: —

> "With regard to the civil claim for compensation, the claimant may institute a case for it separately, and when filing the same, the Court fees which she has paid shall be credited to her".

The matter was then brought before the British Magistrate who held that it was, in the circumstances, one for the District Court.

The provisions of the law, now section 6 of the Civil and Religious Courts Jurisdiction Ordinance, are clear and the Magistrate must have addressed his mind to the question, was this a claim for compensation which could only be granted by the Criminal Court which tried the case — or in other words, was this a case with which the District Court was already seized — or was this a claim for "diyet" within his jurisdiction. His decision must have been based on the former ground; as the date of the proceedings being after commencement of the Magistrate's Courts Jurisdiction Ordinance, 1935, and the claim being for LP. 250.— there could be no doubt as to his jurisdiction in a separate claim for "diyet".

An appeal was made to the District Court from this decision of the Magistrate which in the result, owing to a disagrement, was dismissed. I entirely fail to follow the reasoning of the learned A/President.

The case was therefore reinstated in the District Court by a statement of claim dated 15th January, 1936. It is true that that statement of claim asks for "diyet" (not compensation) but it asks for LP. 250 and it is endorsed "fees paid in case No. 46/35 and 110/35 misdemeanour."

The District Court dismissed the claim on the ground that it was a claim for "diyet" for LP. 250 and therefore not within its jurisdiction but within that of the British Magisrate.

In my opinion, the matter having been raised in the first instance in a criminal court (and not in a civil court under section 6(1) of that Ordinance) it was the duty of the criminal court to consider it. I do not think that the words "may, if it sees fit" in line 1 of subsection (2) give the Court a discretion to refuse to hear the matter, but that they give it a discretion to grant or refuse the relief.

I am of opinion that, having regard to the Magistrate's decision and to the fact that no fees were paid when the matter last came before the District Court, the true position was that that Court was exercising a jurisdiction in a matter of which it was already seized by the criminal proceedings.

This appeal is therefore allowed with costs, and the case remitted to the District Court in order that it may hear and consider the claim for compensation in lieu of "diyet" which is, I think, the real matter before the Court. Advocate's fees LP. 5.—.

The powers of the criminal court with regard to the exercise of this discretion were discussed by this Court in Criminal Appeal No. 118/33.

If, owing to the difficulty of bringing a claim for compensation under Section 6(2) of the Ordinance before the District Court after this long delay, for which I fear the Courts are partly to blame, the Plaintiff instead cares to bring a claim for "diyet" under Section 6(1), and is prepared to pay the necessary fees, I see no reason why she should not do so. The Court having jurisdiction will depend upon the amount of the claim, and, in my opinion, is not affected by the date of the criminal proceedings. I express no opinion as to the merits of such a claim.

Delivered this 7th day of June, 1937.

CIVIL APPEAL No. 42/36.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Copland A.S/P J. and Frumkin J.

L. Kahn and another — Appellants.

v.

Messrs. Spinney's Ltd. — Respondents.

Sale of goods held under hire-purchase agreement — Question of purchase in market overt in Palestine.

Law of market overt does not apply in Palestine, and a bona fide purchaser of movable property from other than true owner does not acquire a good title against latter.

Grosman, Luchinsky for Appellants. *Papo* for Respondent.

Appeal from jdgt. of DC., Jerusalem, dated 30.3.1936, by way of leave granted on 16.4.36.

JUDGMENT.

This is an appeal, by way of leave granted by the President District Court, Jerusalem, on the following point: —

"In view of the provisions of Article 378 of the Mejelle, does a person, who purchases goods in good faith from another, acquire a valid title to the goods against the true owner thereof, although the vendor himself had no such title, but merely held the goods under a hire-purchase agreement from the owner, the terms of which he failed to fulfil in regard to payment of certain instalments".

The facts of the case may be summarised as follows:—

The second Appellant bought a refrigerator from the First Appellant, who had it in his possession by virtue of a hire-purchase agreement with the Respondent.

The appeal before us is limited to one point only, as framed above by the President District Court, Jerusalem.

This Court holds that under Articles 365 and 378 of the Mejelle, only the true owner, or his agent may effectively alienate property to another person. The Second Appellant has endeavoured to show that his title is based on a bona fide purchase in market overt. Unfortunately, however, there is nothing in the Mejelle touching on a bona fide purchaser.

Articles of merchandise bought in the City of London, are said to be purchased in market overt and the purchase cannot be contested by the true owner, but that is not the rule in Jerusalem and the law of market overt as it is called, does not apply in this country. For these reasons the appeal is dismissed with costs and LP. 3. — advocate's fees.

Delivered this 4th day of January, 1937.

CIVIL APPEAL No. 56/36.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Trusted C. J., Frumkin J. and Khayat J.

Mohammad el Bitar — Appellant.

v.

Assyoun Lusteff — Respondent.

Musa el Bitar — Third Party.

Judgment ultra vires Magistrate's jurisdiction — Stamps on Power of Attorney.

1. If it is found that Magistrate, in order to give judgment as

to rent for immovable property, went into question of ownership, his judgment will be quashed *).

2. Power of attorney for a case in Magistrate's Court bearing 150 mils stamps and authorising advocate to appeal — good for appearance in Supreme Court in an appeal from appellate judgment of District Court.

Said Zein ed-Din for Appellant. *Cattan* for Respondent.
Kanafani for Third Party.

Appeal from jdgt. of DC., Jaffa, dated 19.2.1936, confirming the jdgt. of MC., Jaffa, dated 9.10.1935.

JUDGMENT

This is an appeal by leave of the President of the District Court, Jaffa, from a decision of that Court allowing an appeal from a judgment of a magistrate's court.

The claim before the Magistrate's Court was for rent, but it is clear from the proceedings before that Court, and from the judgment of the learned Magistrate, that, in order to give his decision, he went into a question of title.

The Magistrates' Courts Jurisdiction Ordinance, 1935, which reproduced a similar provision of an earlier ordinance, expressly provides that:— "No criminal proceeding or civil action or counter-claim, which involves a decision as to the ownership of immovable property, may be heard by a Magistrate."

We are of opinion, therefore, that the District Court was right in allowing the appeal, and this appeal is therefore dismissed with costs. Advocate's fees LP. 3.—.

In the course of the proceedings before this Court Mr. Cattan, for the Respondent, objected to the appearance of Said Eff. Zein ed-Din, who appeared for the Defendants, on the ground that his power-of-attorney only bore a stamp for 150 mils, and that therefore that power was bad and did not authorise him to appear before this Court.

This objection does not appear to be well-founded having regard to the proviso of Item 31(1) of the Schedule to the Stamp Duty Ordinance.

Delivered this 21st day of April, 1937.

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*) Ed. Note. Both headnote and judgment must now be read in the light of sec. 3(b) of the Magistrates' Courts Jurisdiction Ordinance, 1939, which confers upon Magistrates jurisdiction in matters, including ownership of immovable property the value of which does not exceed the amounts specified in the said section.

CIVIL APPEAL No. 63/36.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before: — Trusted C. J., Frumkin J. and Khayat J.

Rayan Muhammad Rayan and another — Appellants.

v.

Menashe Isaac Saad — Respondent.

Arbitration — Belated objection that there was no submission duly stamped — Grounds for setting aside award.

1. If contract between parties contained an arbitration clause and parties acted upon that clause, appeared before arbitrator and argued their case, and thereupon an award was made, they cannot, when confirmation of award is sought, raise the thechnical objection that there was no proper submission duly stamped.

2. Court dealing with an award is not acting as a Court of Appeal from arbitrator's decision and will only set aside award where arbitrator misconducted himself or award improperly procured.

Goitein for Appellants. *Mizrachi* for Respondent.

Appeal from jdgt. of DC., Jerusalem, dated 24.1.1936.

JUDGMENT

This is an appeal by leave from a judgment of the District Court confirming an award. The Appellants who were not satisfied with the award did not take steps to have the award set aside, but waited until the Respondent applied for its confirmation, and then brought forward their objections which the District Court over-ruled.

One of the grounds of appeal is that there was no proper submission duly stamped. The contract entered into between the parties contained an arbitration clause. The parties acted upon that clause, appeared before the arbitrator and argued their case, and they cannot, therefore, at this stage, take this technical objection. The appeal on this point must fail.

Another ground of appeal was that the award was bad in law on the face of it and the other grounds are merely elaborations of that ground to show why the award was bad on the face of it, such as that the arbitrator did not deal with the counterclaim and disregarded a waiver of a breach.

The Disrict Court, in dealing with an award, is not acting as a Court of Appeal from the arbitrator's decision and will only set aside an award where an arbitrator has misconducted himself or the award has been improperly procured. What the Appellants actually did in objecting to the enforcement of the award, was a roundabout way of asking for the award to be set aside. No allegation of misconduct was ever made, nor was it alleged that the award was improperly procured.

But even assuming the Appelants are allowed to oppose the enforce-

ment of the award on the ground that it was bad on the face of it, I do not see that their request is warranted.

The arbitrator clearly dealt with the counter-claim which was that the Respondent committed a breach. By deciding that the breach was committed by the Appellants he clearly decided against them on the counter-claim. On the alleged waiver of a breach on the part of the Respondent, the arbitrator not only held that the Certificate of Inheritance which the Appellants had to produce within ten days from the date of contract was not produced within that period, but that it was not produced at all, even at any time after the extended period.

I am, therefore, of opinion that there are no merits in the appeal which must be dismissed with costs, to include LP. 3.— advocate's fees.

Having decided against the Appellant it is not necessary to deal with the preliminary objection of the Repondent that the appeal is out of time.

Delivered this 26th day of May, 1937.

CIVIL APPEAL No. 115/36.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

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

Shlomo Ben Shimon — Appellant.

Department of Customs, Government of Palestine. — Respondent.

Sale of imported goods as "unclaimed goods" — Discretionary powers of Director of Customs.

1. Director of Customs has absolute discretion, with which the Court will not interfere, as to whether he should employ sec. 131 or sec. 147 of Customs Ordinance.

2. On proper and true construction of the relevant sections of Customs Ordinance Director — entitled to insist on collecting the ad valorem duty on value as assessed under sec. 131 and only course open to importer is that provided in sec. 154 of the Ordinance.

3. (*Obiter*) Where negotiations are still going on between importer and Director of Customs regarding amount of customs duty payable, better course for Director, before selling the goods as "unclaimed goods" to serve importer with a written warning of the contemplated action.

N. Levy, Amdur for Appellant.

Junior Government Advocate (*Salant*) for Respondent.

Appeal from jdgt. of DC., Jerusalem, dated 30.9.1936.

JUDGMENT

This is an appeal from the judgment of the District Court of Jerusalem where the Plaintiff, a merchant, raised an action against the Customs

Department claiming the value of certain goods on which he had refused to pay Customs duty and which were eventually sold as unclaimed goods.

The District Court of Jerusalem gave judgment against the Appellant on the ground that the Director of Customs has entire discretion as to which particular Section of the Customs Ordinance he should employ.

The only point in this appeal is whether the Director of Customs should apply the provisions of Section 131 or Section 147 of the Customs Ordinance to a case such as this.

We think the the District Court judgment is correct and we really can add very little to the statement made by them that on a proper and true construction of the relevant Sections of the Ordinance the Director is entitled to insist on collecting the ad valorem duty on the value as assessed under Section 131 of the Customs Ordinance, and that if the importer is not satisfied with the assesment then the only course open to him is to pay under protest in accordance with Section 154 of the Ordinance and thereafter to bring an action for the recovery of any alleged excess in duty in accordance with Section 154(2) and (3).

We agree with the District Court that the Director of Customs has absolute discretion as to whether he should employ Section 131 or Section 147 of the Ordinance, and we cannot interfere with such a discretion.

The appeal is, therefore, dismissed with costs and LP. 3.— advocate's fees.

We, however wish to place on record that as there were negotiations still going on between Appellant and the Director of Customs with regard to the amount of customs duty payable on the goods in question, the Director of Custms would have been better advised had the Appellants been served with a written warning of the contemplated action of the Department before the goods were sold as "unclaimed goods".

Delivered this 18th May, 1937.

LAND APPEAL No. 68/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before: — Manning S/P J., Khaldi J. and Frumkin J.

Mamour Awkaf Jaffa — Appellant.

v.

Government of Palestine — Respondents.

Claim regarding category of land — Limitation of actions relating to untrue wakf.

Art. 20 of Ottoman Land Law (limitation of actions re miri land) also applies to a claim that land registered as miri is in fact Tahsisat Wakf.

Appeal from jdgt. of LC., Jaffa, dated 19.10.1935.

JUDGMENT

1. The land in dispute is since the year 1326 registered in the Land Registry as Miri land. The Appellant applied to the Land Settlement Officer to have the said land registered as wakf of Hasky Sultan.

2. At first the Appellant, in the written application, claimed that the land is mewkouf of a takhsisat nature, namely, an untrue wakf, but later pleaded that it is a true wakf.

3. Both the Land Settlement Officer and the Land Court disregarded the later plea on the ground that the Appellant must stick to the original claim, and dealt with it as if it was a claim regarding untrue wakf.

4. On appeal the Appellant does not, and very rightly, insist on the point that the land is true wakf. Apart from the reason given by the Land Settlement Officer and the Land Court this land has admittedly been subject to numerous transactions in the Tabu by way of transfer and inheritance, at least since 1309, and no lawyer with an elementary knowledge of Wakf law could seriously suggest that true wakf could possibly be subjected to such transactions.

5. The dispute between the parties is therefore whether the land is ordinary Miri land, as registered or Mewkouf of the Takhsisat nature which, under Article 4 of the Ottoman Land Code, is another category of Miri land and as such subject to all the provisions governing Miri land, and hence also to the provisions of Article 20 of the Land Law which provides that no action relating to land possessed by tabu deed can be heard after ten years.

6. It is to be noted that the article does not deal with an action for the possession of land but with any action relating to land so possessed.

7. Counsel for Appellant very ingeniously argued that what was dedicated in this case was not the land but the tithes and other revenue of the land, and his claim is therefore as to the main wakf for which the period of prescription is 36 years under Article 1662 of the Mejelle.

8. I fail to see any point in this argument because any claim independent from the land is not within the jurisdiction of the Land Settlement Officer who could have nothing to do with it.

9. In order to succeed in any claim relating to the land the Appellant must prove the nature of the land, namely that it is mewkoufe land. As stated above any claim relating to such land is barred after ten years and the appeal must be therefore dismissed. Respondent to have costs of this appeal to include LP. 3.— advocate's fees.

Delivered this 22nd day of April, 1937.

LAND APPEAL No. 71/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before: — Manning S/P J., Khaldi J. and Frumkin J.

Aref Faris Khalil and others — Appellants.

v.

Hashem Ali Jassir and others — Respondents.

Raising in Court of Appeal points not raised in appellate Court —Appellate Court leaving part of grounds of appeal undecided — Evidential value of old Sharia Court judgment — Practice and Procedure before Settlement Officer.

1. Preliminary objection that notice of appeal described Respondents as A.B. and partners without mentioning all partners by name — a frivolous objection*).

2. *a*) Appellant in Court of Appeal — precluded from putting forward objections in point of law to judgment of trial Court not submitted for decision of District Court in appellate capacity.

b) Appellant can argue before Court of Appeal any question of law submitted to lower appellate Court, whether such question has or has not been decided by later Court.

3. A judgment of a Sharia Court prior to 1296 A.H. cannot be accepted as giving rights in or over land without supporting proofs.

4. Where party before Land Settlement Officer consists of scores of persons and Settlement Officer has sufficient evidence before him of their prescriptive possession he may rightly find it unnecessary to subject each individual person to an examination as to his specific acts of possession.

Olshan for Appellants 1—9 and 12;*Ben-Shemesh* for Appellants 10—11. *A. Salah* for Respondents 1—10; 12—25; 27—34; 37—55; *W. Ahmad* for Respondent 56.

Appeal from jdgt. of LC., Jaffa, dated 21.10.1933.

JUDGMENT.

1. This is an appeal from a judgment of the Land Court of Jaffa, affirming the judgment of the Land Settlement Officer. Abdul Latif Bey Salah, on behalf of the Respondents, took a preliminary objection that the notice of appeal to the Land Court had described the Respondents as Osman Salim Boshnaq and partners, whereas the other 66 Respondents should have been mentioned by name. I regard this as a frivolous objection and in my opinion it should be over-ruled.

2. There were four grounds of appeal before the Land Court. The

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*) Ed. Note.: It would appear more than doubtful whether this still holds good in view of Rules 313 and 314 of Civil Proc. Rules, 1938. See also e.g. C.A. 72/40 (8 CtLR 10) and C.A. 89/40 (8 CtLR 150) and notes thereto.

Land Court left three of them undecided. The fourth one, namely that there can be no prescription between co heirs, it decided against the Appellants, holding that "the doctrine of no prescription between co-heirs cannot possibly be extended to deal with such a case" (i.e. a claim relating to matters extending back for more than 150 years). It decided the appeal on the ground that the Settlement Officer believed the Respondents' witnesses and did not believe the Appellants' witnesses.

3. The Appellants have appealed to this Court and before us they are restricted to grounds of appeal on questions of law only. It has also to be remembered that the appeal is an appeal from the judgment of the Land Court and not from the judgment of the Settlement Officer. It follows from this that the Appellants are restricted to arguing before us only such questions of law decided, or which ought to have been decided, on the appeal as it was before it. They cannot be permitted to put forward in this Court objections in point of law to the judgment of the Land Settlement Officer which were not submitted for the decision of the Land Court.

4. The first ground advanced by the Appellants' advocates was that the Land Settlement Officer decided the dispute by reference to Section 54 of the Land (Settlement of Title) Ordinance (Cap. 30), whereas the appropriate sections were 51 and 55. I cannot find any allusion to this as a ground of appeal in the grounds submitted to the Land Court — and in view of what I have said above, the Appellants are precluded from putting it forward here.

5. The second ground of appeal was that the Settlement Officer was wrong in refusing to consider certain documents as a register of title. A perusal of the judgment of the Settlement Officer shows that he went carefully into the nature and evidential value of such documents as were produced. He was not satisfied that they proved anything. I do not think this ground involves any question of law, but so far as it does, I see no reason to hold that the Settlement Officer was wrong.

6. A third ground of appeal was that the Settlement Officer refused to give any weight to a judgment of the Sharia Court of Nablus dated 3 Rajab 1290. It is clear from his judgment that one of his reasons for doing so was that the Appellants themselves admitted that a judgment of a Sharia Court given prior to 1296 could not be accepted as giving rights without supporting proofs. This ground of appeal fails.

7. A fourth ground of appeal concerned the only point dealt with by the Land Court. The Appellants had contended that they and the Respondents were all heirs of a certain Jabra who had owned the land and died more than 150 years ago. The Settlement Officer makes it clear that there was no evidence before him that this was so. He went on to say that even if it were true the docrine of prescription would still apply because Jabra's title had not been registered in the Tabu.

There was, however, no necessity for him to give any ruling on this question of law — he had no evidence before him in support of the Appellants' statement, and he was quite justified in refusing to consider it.

8. Another ground of appeal was that the Settlement Officer was wrong in considering the title of the Respondents collectively. It was urged that each Respondent should have proved his own specific possession; where, when and how he cultivated. I conceive that in the circumstances the Settlement Officer did not consider this necessary. He had sufficient evidence before him to determine that the Respondents were in uncontested possession for more than ten years prior to 1927, which simply means that they were recognised as the owner and that there were no adverse claims before that date. I can see no reason why he should have burdened his proceedings by subjecting each Respondent to an examination as to his individual acts of possession.

9. The last ground of appeal is that the claims of two of the Appellants are not barred by lapse of time, being insane and the other having been absent from Palestine for a prolonged period. These pleas were before the Settlement Officer but were not dealt with by him. They were not included in the grounds of appeal to the Land Court, and consequently cannot be urged before this Court.

10. In my opinion the judgment of the Settlement Officer and the Land Court should be affirmed, and the appeal of the Appellants should be dismissed with costs to include LP. 5.— advocates' fees.

11. I have referred to the fact that the Land Court gave no decision on three of the grounds of appeal put forward by the Appellants. In my opinion this is unfair to litigants, but I think it is largely brought about by the curious state of the law which permits appeals to be decided by Judges in the privacy of their chambers and without hearing the parties. Appeals to the Land Court may be on questions of fact as well as questions of law, while to this Court they are allowed on questions of law alone. In these circumstances it almost amounts to a denial of justice to allow appeals to be decided by the Land Court without giving either party an opportunity of being heard.

Delivered this 22nd day of April, 1937.

LAND APPEAL No. 60/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:— Manning S/P.J., Khaldi J. and Abdul Hadi, J.

Nimer Abd el Khader el-Jeriri and another — Appellants.

v.

Abd el Fattah Ahmad el-Jeriri — Respondent.

Action regarding possession of land — Proof of genuineness of document relied on.

1. Land Court in its appellate capacity cannot order dispossession if they have no material evidence warranting such order; proper course — to remit case to Magistrate.

2. Court cannot take into consideration a document purporting to be a lease from Mutawalli, without proof as to its genuineness; if Mutawalli is dead his successor must be summoned.

F. Nashashibi for Appellants. *Mubashir* for Respondent.

Appeal from jdgt. of LC, Jaffa, dated the 29.10.1936.

JUDGMENT

The Respondent brought an action in a Magistrate's Court to dispossess the Appellants. The Magistrate held that there was a genuine dispute as to ownership and dismissed the action. The Land Court, on appeal, reversed the decision of the Magistrate, ordering dispossession of the Appellants, but granted leave to appeal.

We think that the Land Court had no material evidence before it on which it could have ordered dispossession of the Appellants and that its proper course was to have remitted the case to the Magistrate for evidence to be heard. Further, the Respondent had produced a document to show his title, but had failed to prove the genuineness of this document in any way. The document purported to be a lease from the Mutawalli of the Waqf and the Magistrate had ordered him to be summoned to prove the boundaries, but reversed this order on hearing that the Mutawalli was dead.

We think the Magistrate ought to have summoned the successor of the Mutawalli and that in the circumstances the Land Court should not have taken the document into consideration in proof of the Respondent's claim.

We therefore order that the judgment of the Land Court be set aside and that the case be remitted to the Magistrate's Court with directions that evidence of the parties be heard as to possession and that the Respondent be called on to prove the validity of the lease on which he relies.

We allow the Appellants LP. 2.— advocate's fees as costs in this appeal. Other costs to abide the event.

Delivered this 18th day of May, 1937.

HIGH COURT No. 11/35

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

Before:— Trusted C.J. and Khayat J.

Abdel Fattah Asady, Mutawalli of the Asady Waqf
Petitioner.

v.

Asst. District Commissioner, Galilee Division Nazareth and others
Respondents.

Jurisdiction of High Court.

a) High Court will not grant a remedy where one may be sought in some other Court.

b) High Court will not interfere with order made by District Commissioner under Land Disputes (Possession) Ordinance 1932—34, where questions affecting the land, the subject of such order, may be referred to Settlement Officer.

Application for an Order to issue to the First Respondent directing him to show cause why his order dated the 24th October, 1934, made under Section 2 of the Land Disputes (Possession) Ordinances, 1932—34, should not be set aside.

Ouni Bey Abdul Hadi for Petitioner.

Eliash for Respondents Nos. 2, 3, and 4.

ORDER

This is a return to a rule nisi directed to the Assistant District Commissioner, Nazareth, directing him to show cause why an order made by him on 24th October, 1934, under Section 2 of the Land Dispute (Posssession) Ordinance, 1932—1934, should not be set aside.

For various reasons these proceedings have been unduly delayed, and it now appears from the evidence which was called before us that the land to which the Asst. District Commissioner's order related is subject to settlement under the Land (Settlement of Title) Ordinance and that settlement has actually begun.

Article 43 of the Palestine Order-in-Council provides that "The Supreme Court, sitting as a High Court of Justice, shall have jurisdiction to hear and determine such matters as are not causes or trials, but petitions or applications not within the jurisdiction of any other Court and necessary to be decided for the administration of justice."

This provision has been implemented by the Courts Ordinance to which I will later refer, but it has been held by this Court that a remedy will not be granted hereunder where one be sought in some other Court.

Questions affecting the land, the subject of the Assist. District Commissioner's order, may now be referred to the Settlement Officer and for this reason we hold that the rule nisi should be discharged.

I wish, however, to add a word as to the jurisdiction of this Court in applications of this kind. As I have already stated the order issued in this case was directed to the First Respondent calling upon him to show cause why his order should not be set aside. With all respect to the Court which issued this order I am of opinion that it is too wide in its terms.

The article of the Order-in-Council, to which I have already referred, is implemented by Section 6 of the Courts Ordinance para. (b) of which provides for "orders directed to public officers or public bodies in regard to the performance of their public duties and requiring them to do or refrain from doing certain acts."

In my opinion orders issued under this provision should set out clearly the duty which a public officer is called upon to perform or the act which it is desired to restrain him from doing. Generally speaking, I do not think that the power vested in this Court should be exercised when the act in question has been carried out unless it is clear that some grave injustice has been done. Persons who seek the remedies given by the section in question should move quickly and obtain their order nisi the object of which is to prevent the doing of the act temporarily until such time as this Court has had an opportunity to consider the matter.

These observations should not be considered as a final judgment upon the interpretation of the provision in question as its meaning was not fully argued before us and it is a matter upon which, no doubt, the Attorney General might wish to be heard, but I desire to indicate, as far as I am at present advised, the view which I take of the provision.

Costs and LP. 3 advocates fees.

Delivered this 9th day of March, 1937.

HIGH COURT No. 27/36.

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

Before:— Copland J. and Frumkin J.

Rachel Hari — Petitioner.

v.

1. Chief Execution Officer, Haifa.
2. Haim Hari — Respondents.

Judgment of Rabbinical Court of Appeal signed by two Judges only.

Judgment of Rabbinical Court of Appeal must be signed by at least three Judges; if signed by two only — not binding.

J. Levy for Petitioner. *H. Asfour* for Respondent No. 2.

Application for an Order to issue to the First Respondent directing him to show cause why his order dated the 11th January, 1936, should not be set aside.

JUDGMENT.

The parties in this case appear before this Court for the second time after a short interval in the very same matter of alimony claimed by Applicant from her husband, the second Respondent.

In the first action the present second Respondent was Applicant and he objected to the execution of an interlocutory judgment against him issued by the Rabbinical Court of Appeal ordering him to pay, as a temporary measure, pending a final judgment, certain sums as alimony to his wife. Against that judgment he produced what purported to be another judgment of the Rabbinical Court of Appeal signed by two Judges only, other than those of the three Judges who signed the judgment in favour of the wife. The Chief Execution Officer had then ordered the execution of the judgment signed by the three. The husband applied to the High Court for an order for stay of execution and his application was refused for reasons not stated in that Order.

Since then the wife obtained the final judgment from the Rabbinical Court of Appeal which she put into execution. The husband again produced a fresh order from the two Judges of the Rabbinical Court of Appeal referring to their previous decision that the husband is not liable to pay any alimony. The Chief Execution Officer now refused execution for reasons which he considered self evident but are not shown in his order.

This time the wife applied to this Court, and obtained an order nisi, of which this is the return date.

The main issue in this case is whether or not there are in fact two contradictory judgments or two sets of judgments issued by the Rabbinical Court of Apppeal. In order to decide this point it is only necessary to decide whether two Judges alone do form a properly constituted Rabbinical Court of Appeal. The Chief Rabbi Meir, who is one of the Presidents of the Rabbinical Council of Palestine, in a letter to the Chief Execution Officer stated that a Court of Appeal may be constituted of at least three members, and it is a well known rule of Jewish Law that any Rabbinical Court, even sitting in first instance, must always be composed of three Judges.

Moreover, the two Judges when signing what is said to be a judgment in favour of the Second Respondent, apparently, being aware of the fact that a judgment signed by two Judges only is not binding, relied on a previous decision given with the authority of the late Chief Rabbi. But this does not alter the fact that as against a judgment

issued by a properly constituted Court, the Second Respondent relied upon a document which is clearly no judgment at all.

The order nisi is therefore made absolute with costs to include LP. 5.— advocates fees.

Delivered this 11th day of January, 1937.

HIGH COURT Nos. 104/36 and 105/36.

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

Before:— Acting Senior Puisne Judge and Khayat, J.

1. "Maccabi" Histadrut Arzit le Tarbut Hagoof b'Erets-Israel S'nif La Histadrut Ha'olamit "Maccabi".
2. Agudat Macabiah. Opponents

v.

1. The Registrar of Trade Marks
2. Max Khalef, trading under the style and firm of the Laboratories and Cosmetics Works "Nered". Respondents.

Opposition to registration of Trade Mark.

Opposition to registration of a name as a trade mark must fail if it is a historic term which all alike may use, or not identical with opponent's name but merely a part thereof.

A. Levin for Opponents.

Application for an order to issue to the First Respondent directing him to show cause why he should not refrain from the registration of the above Trade Mark.

ORDER

This is an opposition filed by the two Opponent Societies under Section 9(1) of the Trade Marks Ordinances 1921 and 1935, against the registration of the trade mark "Macabiah". The petitions were filed under separate actions, but the Court decides to consolidate them, as the points raised in both are the same.

The second Respondent, Max Khalef, has applied to the First Respondent, the Registrar of Trade Marks, for registration of the said Trade Mark, for cosmetic and toilet articles which he manufactures.

In July, 1934, the Second Respondent entered into an agreement with one of the Opponent Societies, whereby he was authorised to produce goods bearing the mark "Macabiah" under certain conditions, including payment of fixed acounts to the Society. It appears that he has failed to pay the said amounts and hence the present application.

We are of the opinion that the Opposition must fail first because the word Macabiah" is a historic term which all alike may use, and secondly, because at any rate the name adopted is not identical with

that of the Opponent Society, but is merely a part thereof.

For these reasons the Opposition is refused.

Delivered this 8th day of January, 1937.

CIVIL APPEAL No. 87/37.

IN THE SUPR. COURT SITTING AS A COURT OF CIVIL APPEAL.

Before:— Trusted, C.J., Greene J. and Frumkin J.

Israel and Moshe Blumenfeld — Appellants.

v.

Imperial Chemical Industries (Levant) Ltd. — Respondent.

(*Per Frumkin, J.*):

1. Invariable practice of Ottoman Courts and also established practice in Court of Appeal — that plea of payment set up against a document cannot be proved by oral evidence, whatever the amount of the alleged payment.

2. *a*) Evidence of parties may be accepted and acted upon only in cases where oral evidence is admissible.

b) Where there is no allegation of fraud or duress, maker of promissory note cannot prove lack of consideration by his own evidence, oral evidence being inadmissible against document.

3. Defence that endorsement on bill was made in breach of faith can, like fraud and duress, be proved by oral evidence.

4. Even where oral evidence inadmissible, either party may call his opponent as witness, thus getting a chance of proving his case by an admission extracted from opponent.

JUDGMENT *)

(*Frumkin J*):

The Law governing theadmissibility or otherwise of parol evidence in this Country is laid down in Article 80 of the Ottoman Code of Civil Procedure as amended.

2. There being certain discrepancies in the two published English translations of that article, some of them affecting its true meaning, I have prepared what I consider to be an accurate translation of this article from the Turkish which reads as follows: —

> "80. Claims relating to all sorts of undertakings and contracts which are customarily reduced to writing, and to partnerships, farming out and loans which exceed Pt. 1,000 must be proved by a document.
>
> A defence set up against such documents even if it does not exceed Pt. 1,000 must be proved by a document or by the admission of the opponent or by his books."

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*) This judgment of Frumkin J. has been ommitted by inadvertance from Volue II of the "Current Law Reports".

3. The first part of this article describes the nature of the transactions which must necessarily be proved by documentary evidence and hence no parol evidence would be admissible. The second part of the article provides that any defence against any such transaction, even if the value of that defence would be less than Pt. 1,000 must also be proved by documentary evidence to the exclusion of parol evidence.

4. It is to be noted that the provision of this law is much narrower than the corresponding provision in English law where parol evidence is inadmissible only to contradict a document or to vary its terms as appear on its face. Here any defence of whatever nature, even if not contradicting the document or varying its terms, would not be admissible. So for instance, when a defence of payment is set up against a deed, English law would allow parol evidence to prove it, but it has been the invariable practice of the Ottoman Courts supported by numerous decisions of the Court of Cassation that payment set up against a document cannot be proved by oral evidence even if the amount of such alleged payment were less than Pt. 5,000 as the article stood before its amendment and Pt. 1,000 as it now stands. This practice has always been followed by this Court.

5. I realise the harshness of the strict application of this rule, as there are many cases, such as fraud and mistake, where parol (sic) evidence could not be adduced, and it is far from me to advocate the propriety of this rule. But we have to apply the law as it is until it is altered. Meanwhile a certain measure of latitude must be allowed when not inconsistent with the plain wording of the law. In fact in Agassi v. Abutbul — Civil Appeal No. 149/35 — where, in addition to want of consideration, fraud and duress was alleged, this court directed that oral evidence be allowed to prove the circumstances under which a cheque was made and negotiated.

6. There is of course this much to be said in favour of the Ottoman Law in this respect, namely: that it was intended to apply, and is in fact applicable in places where a vast number of witnesses, sometimes subconsciously, fail to distinguish between fact and fiction, truth and imagination. It is no good relying too much on the discretion of a Court in considering the weight of evidence. Judges and Magistrates are after all human beings, and some of them, in the early period of their experience in this country, may be swept away by the smartness or apparent innocence of a skilled or trained witness.

7. The Law of Evidence Amendment Ordinance, now embodied in the Evidence Ordinance, has not altered the law in this respect. Its object was not to widen the scope of the admissibility of oral evidence but to increase the category of persons who may be heard as witnesses. Prior to the promulgation of this Ordinance certain persons, including parties, were not allowed to be heard as witnesses. Now

they may be so heard, but their evidence would have no more value than the evidence of any other witness; that means that it will be accepted and acted upon only in cases where oral evidence is admissible but will not be so, where oral evidence is not admissible.

8. In this respect the number of witnesses is not material at all. If a party is composed of two or more individuals and if they all join in giving evidence on a certain point, if that point is such that it could not be proved by oral evidence the point will still remain unproved.

9. All this does not mean that a defence against a document can only be proved by documentary evidence. Article 80 in its second part provides for two other means to prove such defences namely: the admission of the opponent and his books.

10. I would like at this stage to point out that the actual words used in the Turkish text are "Da'wa" and "Mudda'i ale", technically meaning "action" or "claim" and "defendant", but in the Turkish legislation the word 'Da'wa' is often used also for 'defi da'wa' meaning counterclaim or defence. It has been previously held by this Court and recently supported in Shlank v. Bahoul — Civil Appeal No. 80/36 —that 'defendant' in this section has a wider meaning and extends to such person against whom a counter-claim is brought even if he were a plaintiff in the nomenclature of the case. So for instance, if 'A' as plaintiff brings and action against 'B' as defendant, 'B' sets up some defence, he is regarded as claimant or counter-claimant in relation to that defence and his defendant or opponent is 'A' the plaintiff in the action. If follows that when a defence is put up against a deed which defence could not be proved by oral evidence and written evidence is not available, the party putting up this defence may prove it by the admission of the other side or its books. We are not now concerned with the books of the opponent and I shall deal only with the point as to admission.

11. On this point the Evidence Ordinance is very useful as it gives the party an opportunity to extract 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 an 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 based not on oral evidence but on the admission of the other side.

12. Having now stated the law as to the admissibility or otherwise of oral evidence as it appears to me to be the law of the country, I will turn to the present action.

13. The respondent company sued under a promissory note endorsed to them by the Levant Agencies Ltd., and signed by the first appel lant as promisor and by the second as guarantor par aval. The appellants set up a defence of a twofold nature (a) that the promisor received

no consideration, and (b) tha the promisee endorsed it to respondent company in breach of faith.

14. On the point whether any defence against the respondent Company could be brought at all, I concur in the view of the learned Chief Justice that in view of the fact that the respondent, not having relied upon section 29 of the Bills of Exchange Ordinance, assumed the burden to anticipate the defence which might be made against the endorser and in view of the relationship between the endorser and the endorsee, the Magistrate was right in holding that the respondent company was to be regarded as holder by notice and consequently any defence which the respondent may bring against the Levant Agencies Ltd., may be brought against the respondent company.

15. Endorsement in breach of faith is a defence which, by analogy to fraud and duress, might be proved by oral evidence, this being a matter which could never have been foreseen by the parties and there could be no possibility of proving it by written evidence. But this defence in the present case lost its relevance the moment we came to the conclusion that the respondent company stands in the shoes of the Levant Agencies Ltd. Because even if the endorsement was not made in breach of faith the appellants could still set up against the endorsee any legal defence they may be able to set up against the endorser. The only defence they are relying upon against the endorser is want of consideration, and the only question is how could they prove this defence.

16. The appellants, before the Magistrate wanted to prove it by their own evidence. This, as stated before, they cannot do. This case is distinguishable from Civil Appeal No. 149/35 referred to above, as here there is no clear or even implied allegation of fraud or duress.

17. The only remedy, therefore, open to the appellants, failing production of any written evidence to support their defence, is the admission of the books of their opponent. In the light of the broader interpretation of the technical meaning of "defendant" and in view of the fact that in the present case the respondent company stands in the shoes of the Levant Agencies Ltd., I am of opinion that the appellants should be given an opportunity to call the managers or responsible members of the staff both of the Levant Agencies and the ICI (Levant) Ltd., who were directly concerned with the transaction and endorsement, and only if the appellants' defence as to failure of consideration is admitted they will have to successd in their case.

18. For these reasons I am of apinion that both the judgment of the District Court and that of the Magistrate's Court must be set aside and the case remitted to the learned Magistrate to complete the case as above and to give a fresh judgment accordingly. Costs to abide the event.

HIGH COURT No.1/37.

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

Before: — Manning S./P.J. and Frumkin J.

Rivka Zilberstein and 2 others. Petitioners.

v.

Constable in Charge of the Police Lock-up, Haifa and another Respondents

Detention in look-up of persons who were refused permission to enter Palestine — Woman in Lock-up going through form of marriage with Palestinian citizen — Testing validity of order of High Commissioner re detention of persons who are refused permission to enter Palestine.

1. Introduction of words "by order" into sec. 8(2) of Immigration Ordinance added nothing to the substance of the law and is not a repeal of anything previously enacted; notice published prior to the amendment was and remains a valid direction under that section.

2. Omission to specify manner of detention does not invalidate order of High Commissioner regarding detention of persons who are refused permission to enter Palestine.

3. A person doing something with sole object to evade the law cannot ask Court to assist him in what amounts to defiance of the law.

Shapiro for Petitioners.

JUDGMENT.

The three Petitioners are confined in the Police Lock-up at Haifa and the present proceedings came before us on rules nisi directed to the person in charge of that lock-up to show cause why writs of habeas corpus should not be issued. The Solicitor-General appeared to argue against the rules and from the affidavits filed it appeared that Petitioners were and are still detained by virtue of Sec. 8(2) of the Immigr. Ord.

2. The relevant order of the High Commissioner is to be seen in Vol. III of the Revised Laws p. 1767.

3. ...the three Petitioners are persons who have been refused permission to enter Palestine. They are, therefore, prima facie, detained in accorance with the Law, but Mr. Shapiro, has urged that their detention is irregular because there is no valid order of the High Commissioner as to the place and manner of their detention. The order which I have referred to was, he says, a mere notice published in the Gazette of 14.9.1933, the words "by order" were not introduced into the Section until 1934 (by Ordinance No. 30 of 1934), and no order has been made since the amendment. He attacks the actual notice on the ground that it fails to set out the manner in which persons are to be detained.

4. These are ingenious arguments but they are much too technical in their nature to be of any avail to the Petitioners. The notice was a valid direction under the Section when it was made, the introduction of the words "by order" added nothing to the substance of the law except perhaps the necessity of publication in the Gezette. The amendment was not in any way a repeal of anything previously enacted, the old notice stood, and it is mere hair-splitting to suggest that it is not an order.

5. It is true that the order is silent as to the manner of detention, but this cannot affect the validity of the confinement. No doubt, the order ought to have made it clear that the detention should be a mere detention and not imprisonment of a penal nature, but there has been no suggestion that there has been anything irregular. The omission to specify the manner of detention does not invalidate the order.

6. ...

7. It is further urged that the Petitioner Sura Mizrahi, while in the Haifa Lock-up, contracted a valid marriage with a Palestinian citizen — she is therefore now a Palestinian citizen and cannot be detained under the Section. There is a certificate of marriage and an affidavit intended to show that a marriage took place. Affidavits have been put in by the other side to show that it was impossible that any marriage could have taken place. I do not intend to inquire whether a form of marriage took place or, if it did, whether it was a valid marriage. Sura Mizrahi was refused permission to enter Palestine and was consequently detained. If, as is alleged, she has contracted a marriage while in the Lock-up, she did so with no other object than to evade the Immigration Law. She cannot ask a Court to assist her in what amounts to a defiance of the Law. As far as this Court is concerned, she still remains a person who has been refused permission to enter Palestine, she has been lawfully detained, and she remains lawfully detained. If she is to obtain any relief on account of the Palestinian citizenship she says she acquired during her detention, she must seek it from the administration.

8. In my opinion the rule nisi should be discharged in all three cases.

Delivered this 29th day of January, 1937.

Current Law Reports

Editor: M. LEVANON, Advocate, Jaffa Road, Jerusalem

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LIST OF ABBREVIATIONS

AG, Attorney-General
Applt, Appellant
AszC, Assize Court
CA, Court of Appeal
Co, Company
Coop. Cooperative
CPR, Civil Procedure Rules
Cr. Criminal
CXO, Chief Execution Officer
DC, District Court
Dept, Department
Dfdt, Defendant
Eccles, Ecclesiastical
Ex, Execution
HC, High Court
Jurisd, Jurisdiction
Jdgt, Judgment
LC, Land Court
L Reg, Land Registry — Registrar
LS Ord, Land Settlement Ordinance
LSO, Land Settlement Officer
Mag, Magistrate
MC, Magistrate's Court
NP, Notary Public
OCCP, Ottoman Civil Procedure Code
O. in C., Order in Council
OLL Ottoman Land Law
Ord, Ordinance
P/A, Power of Attorney
Pal, Palestine, Palestinian
PC, Privy Council
PDC, President District Court
Pltf, Plaintiff
P/n, Promissory Note
Proc, Procedure
Reg, Regulation
RR Rent Restrictions
Respdt, Respondent
Soc, Society
SC, Supreme Court
UPT, Urban Property Tax
WC Ord., Workmen Compensation Ordinance
XO, Execution Office, — Officer

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