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CIVIL APPEAL NO. 235/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Copland, J. Khayat, J.

In the appeal of:—

Cherif and Alami — Appellants.

v.

Lodzia Textile Co. Ltd. — Respondent.

Application for leave to appeal from judgment of District Court — Leave to appeal granted on application not made by motion with notice. Civil Procedure Rules 305, 306, 307 — C.A. 191/38 CtLR. 185.

Application for leave to appeal to Supreme Court must be made by motion with notice (unless delay caused by notice being given would cause serious damage); if this method of procedure not adopted appeal will be dismissed.

Rashid Haddad for Appellants.

Rosental for Respondent.

Appeal from judgment of District Court, Tel-Aviv (in its appellate capacity) dated 18.7.1938.

JUDGMENT.

In this appeal a number of preliminary objections have been urged by Mr. Rosental on behalf of the respondent. We think it necessary to deal with one only of these objections, namely, that leave to appeal was not obtained in accordance with the new rules of Civil Procedure. This objection is based on a recent decision of this Court laying down certain procedure as being necessary for obtaining leave to appeal from the presiding judge of a District Court. The decision is the case of Rubin v. Kaufmann Civil Appeal No. 191/38*). In that case it was laid down by this Court that an application for leave to appeal must be made by motion with notice, unless the delay caused by notice being given would cause serious damage. It is clear from the record in the present case that the application for leave to appeal was not made by motion at all, and consequently not by motion

*) 4 CtLR 185.

with notice. In the Rubin case to which I have just referred, it was laid down that if this method of procedure has not been adopted the effect is fatal to the arguing of the appeal before this Court and that the appeal must be dismissed. The case laid down a definite rule of procedure and this procedure must be followed. As a result this preliminary objection succeeds and the appeal is dismissed with costs to include LP. 15 fees for attendance at the hearing.

Delivered this 15th day of December, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 233/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Copland, J. and Khayat, J.

In the appeal of:—

Banco di Roma — Appellant.

v.

Madame Marie Michel Morcos — Respondent.

Drawings from bank deposit by forged receipts — Depositor acknowledging statement of bank account after having complained about shortage created by unauthorised drawings — Action by depositor against bank for refund of unauthorised drawings — Estoppel under Ottoman and under English Law — Mejelle, Art. 1647 — *Greenwood v. Martins Bank Ltd.* 1933 *A.C.* 51.

1. Where there are provisions in Ottoman Law dealing with facts of the case English Law not to be applied.

2. Acknowledgment of account after complaining of a shortage therein creates an estoppel against a subsequent claim of the shortage if no satisfactory explanation given of contradiction involved between previous acknowledgment and claim.

3. Under English Law deliberate abstention of depositor from informing depositary of forgeries py which third person drew moneys from deposit will amount to representation that forged receipts or cheques were in order, and if detriment was caused to depositary by such representation depositor estopped from suing him for drawings made by third person.

Horowitz for Appellant.

Ibrahim Kamal for Respondent.

Appeal from decree of District Court, Jerusalem, dated 21.9. 1938, in Civil Case No. 149/37.

JUDGMENT.

The facts as found by the Court below were as follows:— The respondent was a customer of the appellant bank (hereinafter referred to as the bank,) and on the 31st of December, 1934, had a balance on current account of LP. 2,408,340 mils. Drawings on this account were not made by cheques but by receipts signed by the respondent. During the year 1935 17 sums amounting in all to LP. 650 were drawn out on receipts which purported to be signed by the respondent but were not signed by her or by any person with her authority. It is not known who signed these receipts but the bodies of the receipts were written in by one Lorenzo Anton, an employee of the bank and a cousin of the respondent, and a certain number of the payments were made to him.

2, At the beginning of 1936 the bank sent to the respondent a statement of her account showing the balance to her credit at the end of 1935. Owing to the forged receipts this amount was LP. 650 less than it ought to have been. The respondent went to the bank to complain about the shortage The bank offered to investigate her complaint but the respondent decided to withdraw her complaint and to decline any investigation. She signed an acknowledgment that the correct balance of her account on the 31st December, 1935, was LP. 1.479.500 mils that is LP. 650 less than it ought to have been.

3. No sums were drawn out or paid into the account during 1936 and at the end of that year the bank sent to the respondent a statement of her balance on the 31st of December, 1936. This balance was LP. 1,523.855 mils, that is the balance as it stood 12 months previously, plus interest. The balance was still LP. 650 less than it ought to have been, but the respondent again signed an acknowledgment that it was correct.

4. In April or May 1937, Lorenzo Anton, the cousin of the respondent already referred to, retired from the service of the bank with a gratuity. The respondent then began a correspondence with the bank claiming that her account was short. The bank investigated the matter. The various receipts were produced and it was found that 17 of them to a total value of LP. 650 had been forged. The bank refused to credit this amount to the respondent. She then took action in the District Court.

5. The District Court found that the bank had been negligent in paying on the forged receipts. It found further that the bank had been negligent in paying some of the receipts to an unauthorised person, that is Lorenzo Anton, The bank sought to evade liability by pleading adoption and estoppel. The District Court considered these

defences; rejected them, and entered judgment for the respondent.

6. In the appeal before us, Mr. Horowitz, for the bank, abandoned the argument on the question of adoption he relied solely on estoppel. Before dealing with the argument, I wish to refer to the finding of the District Court that the respondent was not aware of any forgery until the 17 receipts were produced. It was this finding which led the District Court to pronounce against an estoppel. In my opinion this finding was a misdirection. It is true that the respondent was not aware of the details of the forgeries until the forged receipts were produced, but when the respondent saw her balance at the beginning of 1936, she knew well that a large sum had been drawn out on a receipt or receipts which she had not signed. It could not have entered her head that the reduced balance was due to faulty accounting or a mistake on the part of the bank, as if this had been her impression, she would have insisted on an investigation. She was aware that someone had forged her name, she declined any investigation and she certified her balance as correct. It is implicit in the findings of facts as found by the District Court that she was trying to shield some person from the effect of an investigation and the facts point to the probability that that person was her cousin Lorenzo Anton. Some of the money payable on the forged receipts was paid to him; the bodies of these receipts were filled in by him; as long as he was in the employ of the bank she was willing to certify her balance as correct; and she refused any investigation into the shortage in her account. She did not challenge the correctness of her balance until her cousin had retired from the bank with his gratuity.

7. The ruling of the District Court on the question of estoppel was based on a misdirection. It is necessary for us to examine the facts to see whether the bank is entitled to succeed in its defence. The Ottoman Law contains provisions dealing with estoppel in Book 14, Section IV, of the Mejelle. Art 1647, (I am using Tysers's translation) lays down that an antecedent statement of the plaintiff contradicting his claim, prevents an action for ownership. One of the examples given is, "after someone has said 'I have no claim against such a person' if he brings an action claiming something from that person, it is not heard." This principle covers the facts of this case. The respondent by signing her balance as correct at the end of 1935 acknowledged that she had no claim against the bank other than for the balance as set out in the acknowledgment. She in fact said she had no claim against the bank for whatever shortage there was in her account. A year afterwards she made the same acknowledgment.

She now seeks to repudiate that acknowledgment. Under Art. 1657 of the same section of the Mejelle she can only do so if she can give some satisfactory explanation of the contradiction involved between her previous statements and her present claim. Her explanation was that she paid no attention to the contents of the statements. That is obviously untrue; It is entirely inconsistent with the facts that before signing the first acknowledgment she went to the bank and complained of a shortage, that the bank then and there promised an investigation, that she then declined any investigation and decided to sign the acknowledgment. Under the Ottoman Law the respondent is estopped from claiming the amount from the bank, and the bank is entitled to suceeed in this appeal.

8. The court below dealt with the question of estoppel on the lines of English Law; and Mr. Horowitz cited before us certain cases decided in England. As there are provisions in the Ottoman Law for dealing with the facts I do not think English Law should be applied. In reference however to the judgment of the Court below and to the argument of Mr. Horowitz, I propose to deal briefly with the case from the standpoint of English Law. The only case to which I need refer is the last one cited by Mr. Horowitz, namely, Greenwood v. Martins Bank Ltd., 1933 A.C. 51. In that case Greenwood's wife had forged his name to a large number of cheques. Greenwood found out the forgery but deliberately abstained from informing the bank until after the death of his wife. The bank refused to credit Greenwood with the amount of the forged cheques and Greenwood suceeded in an action against it, tried before a Commissioner of Assize sitting at Manchester. The bank succeeded in having this decison reversed both before the Court of Appeal and the House of Lords. The leading speech in the House of Lords was delivered by Lord Tomlin. He analysed the essentials of estoppel and came to three important conclusions. Firstly that the deliberate abstention of Greenwood from imforming the bank of the foregries amounted to a representation that the forged cheques were in order; secondly, that detriment was caused to the bank because if it had known of the forgeries before the wife's death it might, under the law as it then stood, have sued her in tort and joined her husband as a defendant; and thirdly, that it was no answer for Greenwood to say that the detriment would not have occured unless the bank had been initially negligent. The present case differs from Greenwood's case in that the bank here has been guilty of a further act of negligence by paying amounts to an unauthorised person, and in that the identity of the forger is so far unknown. I do not think that the degree of negli-

gence is relevant. The facts show that the respondent must have been aware that some receipts were forged, and that she deliberately abstained from having the matter sifted. Her signature of her two acknowledgments of her balance amounted to a representation to the bank that the forged receipts were in order. The question is what was the detriment to the bank? Some of the forged receipts were paid to the cousin of the respondent already mentioned. The bodies of these receipts were in his handwriting. He was an employee of the bank. In 1937 he was able to retire from the bank with a gratuity. If the respondent had refused to acknowledge her balance either at the end of 1935 or 1936 there must have been an enquiry. Whether the respondent's cousin was the actual forger or not, facts would have been revealed connecting him with the forgeries in so intimate a manner that one can have little doubt that instead of being able to retire with a gratuity, he would in the end have been dismissed, and would had to disclose facts which might have identified the forger. He is, of course, still alive and may be sued by the bank, but so much time has been allowed to elapse that it is not certain how much money he received on some of the forged receipts. Grave doubt may be also reasonably exist on the part of the bank's advisers as to what form the cause of action should take and even as to the possibilty of success in any proceedings. The detriment to the bank may be found, in my opinion, in the fact that by the conduct of the respondent, in acknowledging her balance and refusing an investigation, the bank lost any chance it had of discovering the forger and of recovering the sums paid in the forged receipts and also lost the gratuity paid to Lorenzo. I think it is entitled to succeed in this appeal if the matter falls to be decided according to English Law.

9. In my opinion the appeal should be allowed and the judgment of the District Court should be set aside. The bank should have its costs here and below. The fee for attendance at the hearing in the Court below is fixed at LP. 5.— and before us at LP. 15—.

Delivered this 29th day of November, 1938.

Senior Puisne Judge.

CRIMINAL APPEAL NO. 84/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J., and Frumkin, J.

In the appeal of:—

The Attorney General — Appellant.

v.

Mohammad Mustafa Kleibo Respondent.

District Court fining accused for stealing electricity — Appeal by Attorney General from judgment of District Court on ground that punishment insufficient — Court of Appeal ordering payment of compensation in addition to fine.

If Court of Appeal of opinion that fine imposed by trial Court inadequate punishment it may increase it by ordering accused to pay (in addition to fine) compensation to injured party.

Salant for Appellant.
Respondent in person.

Appeal from judgment of District Court, Jerusalem, dated 11. 10.1938, whereby the Respondent was convicted of an offence under Section 285(1) of the Criminal Code Ordinance, 1936, and sentenced to a fine of LP. 5.

JUGDMENT.

This is an appeal by the Attorney-General on the ground that the punishment awarded was insufficient in a case in which the accused person was convicted by the District Court of stealing electricity and sentenced to a fine of LP. 5 or two months imprisonment.

This Court recently pointed out that stealing electricity is a felony, and that persons committing it might find themselves condemned to imprisonment; although no doubt, the offence in this case was committted before those observations were made.

It is clear from the facts of this case that a deliberate and ingenious swindle was going on for a considerable time.

The Accused was fortunate in receiving to light a punishment, and in the circumstances we consider that it should be increased, and by virtue of the provisions of Section 37(d) of the Criminal Code Ordinance, we direct that the Accused pay the sum of LP. 40 (in addition to the fine) by way of compensation to the Jerusalem Electric and Public Service Corporation, Ltd., which sum will be recoverable in accordance with Section 43 of that Ordinance.

Delivered this 30th day of November, 1938.

Chief Justice.

PRIVY COUNCIL LEAVE APPL. NO. 15/38.
(C.A. NO. 215/38)

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J. and Khayat, J.
In the application of:—
Yehoshua Hankin — Applicant.

v.

1. Zaki Rashid Ash Shanti
2. Muhammad Amin Rashid Ash Shanti
3. Farid Rashid Ash Shanti
4. 'Abd Ar Rauf Rashid Ash Shanti
5. Ribhi Rashid Ash Shanti
6. Fauzi Rashid Ash Shanti
7. Zarifa Rashid Ash Shanti
6. Fatma Mahmud Al Hassan

Application for conditional leave to appeal to Privy Council from judgment remitting case to Settlement Officer — Possibility of raising before Privy Council any point of law taken before Supreme Court — P.C.L.A. 4/35 2 PLR 423.

1. Judgment of Supreme Court remitting case for a new trial, not being a final judgment, cannot be appealed from to Privy Council.

2. Any point of law may be raised before Privy Council which has already been taken on appeal to Supreme Court or which may be taken on fresh appeal to it.

Edit. Note:—Compare C.A. 76/38 3 CtLR 220 and C.A. 173/32 P. Post 17.2.33.

Eliash for Applicant.
Cattan and *Germanus* for Respondents.

Application for conditional leave to appeal to His Majesty in Council from judgment of the Supreme Court, in Civil Appeal No. 215/38,*) dated 24.11.1938.

JUGDMENT.

In this case conditional leave must be refused, since the judgment of this Court, from which it is desired to obtain leave to appeal, is not

*) 4 CtLR 209.

a final judgment, since it remitted the case for a new trial before the Settlement Officer. See Palestine Jewish Commission Association and another v. Village Settlement Committee Arab Infiat. P.C.L.A. 4/35 (P. L. R. II. 423), where exactly the same point arose.

Mr. Eliash for the Applicants has stated that he is afraid that if and when the case should again come up, and if he should have to ask for leave to appeal, he may not be able to raise the points of law before the Privy Council which he may desire to do. So far as we can see, that fear is not justified — it seems to us that he will able to raise any point he may wish which has already been taken before this Court, or which may be taken if there should be another appeal, since the first judgment of this Court was not a final judgment, as it did not finally determine the rights of the parties.

The application for leave to appeal is therefore refused, with LP 10 costs (to include advocate's fees) to the Respondent.

Delivered this 11th day of January, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 229/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Copland, J. Khayat, J.

In the appeal of:—

1. Ayed Ibn Hilou el Nusayrat
2. Muhammad Ibkheet
3. Rizek el Mansour
4. Shoubash Ibn Nasrallah
5. Zein Ibn Saleh el Attiyat — Appellants.

v.

1. Haj Saad Ibn Hussein el Najoum
2. Ibrahim el Saleh

3. Subhi Abdallah el Dajani
4. Fuad Yehia Inseibeh — Respondents.

Action on behalf of village re land used for grazing, cutting wood etc. — Evidence adduced by parties contradictory to one another — Court ordering all houses erected by defendants on village pasture land to be demolished — Court of Appeal varying order of lower Court so as not to exceed claim.

1. A finding of fact made after hearing contradictory evidence adduced by both parties cannot be attacked on appeal, as it is for trial Court to say on which side the balance of probability lay.

2. Where it is shown on appeal that trial Court ordered something in excess of statement of claim, Court of Appeal may, while dismissing appeal, very order of lower Court so as not to exceed claim.

Farajallah for Appellants.
Ibrahim Kamal for Respondents.

Appeal from judgment of Land Court, Jerusalem, dated 30.9.1938.

JUDGMENT.

In this case the respondents took action against the appellants before the Land Court of Jerusalem. The statement of claim showed that they took the action on behalf of the inhabitants of El Auja and they claimed that the inhabitants had been using these lands from time immemorial for the purposes of pasture, cutting wood, camping and planting, and they complained that the appellants had built certain houses on the land and were claiming the right of possession to part of the land without any legal justification.

The appellants made a general denial of the claim of the respondents alleging that they had a right to the part of the land on which they built the houses, and the Land Court having heard a large number of witnesses and perused certain documentary evidence found that the disputed plot of land was land used for grazing and wood collecting on which the Ka'abne Arabs, together with the owners and cultivators and other Arabs living in the vicinity, including the present appellants, were entitled to graze cattle and gather wood, and also found that the land was not capable of cultivation with the exception

of a few parts. The Land Court also came to the conclusion that the appellants had no legal right to erect any buildings on the land. Having come to this conclusion the Land Court ordered the appellants to refrain from interfering with the rights of the respondents which have been described above and made a further order that any private buildings erected by the appellants on the land should be demolished.

The appellants have appealed and Mr. Farajallah on their behalf has attacked the findings of fact made by the Court below. In an appeal from a Land Court to this Court the appellant is confined to arguing questions of law. When Mr. Farajallah's attention was called to this, he argued that there was no evidence before the Court below to justify its conclusions. A perusal of the record shows that there was evidence before the Court below. This evidence was of a contradictory nature, some on one side some on on the other; it was the province of the Court below to say which side the balance of probability lay. As far as this ground is concerned the appeal must fail.

Another ground of appeal was that the third and fourth respondents who were among the plaintiffs in the Court below had no right to represent the people of Auja. This objection was overruled in the Court below, and we see no reason now to think that the Court below erred in overruling this objection.

A third ground of appeal was that the Court below should not have ordered the demolition of all the private houses erected on the land by the appellants because the statement of claim mentioned four houses only. We agree with this point and think that the order of the Court below should have been confined to the four houses mentioned in the statement of claim.

For these reasons we think that this appeal must be dismissed but the order of the Court below must be varied to the extent that instead of all private buildings having to be demolished there will be substituted an order that the four houses mentioned in the statement of claim shall be demolished. The respondents will have the costs of this appeal and the fee for the attendance of the hearing is fixed at LP. 15.—.

Delivered this 29th day of November, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 232/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Copland, J. Khayat, J.

I. In the appeal of:—

1. Muhammad Haj Khalil Muhammad Taha
2. Omar Haj Khalil Muhammad Taha, on behalf of the estate of their late father — Appellants.

v.

1. 'Ali Hassan Skeirik
2. Mustafa, son of Haj Khalil Mohd. Taha, on behalf of the estate of his late father — Respondents.

and

II. In the appeal of : —

Mustafa Haj Khalil Muhammad Taha, in his capacity as heir of his late father — Appellant.

v.

1. Ali Hassan Skeirik
2. Muhammad Haj Khalil Muhammad Taha
3. Omar Haj Khalil Muhammad Taha (the latter two in their capacity as heirs of their late father) — Respondents.

Allegation on appeal that trial Court was wrongly constituted — Point not raised either in Court below or in Grounds of Appeal — Denial of signature — Trial Court refusing application to be allowed to produce further evidence.

1. Determination of question of jurisdiction and of constitution of Court depends on actual amount of claim not on sum involved in subject matter of claim.

2. Point not raised in grounds of appeal will be rejected, if Court sees no reason to grant permission to raise it when arguting appeal.

3. District Court has discretion either to grant or to refuse party's application to allow him to produce further evidence, and Court of Appeal will not interfere where discretion exercised properly.

I. *Elia* for Appellants No. 1 and 2.
Cattan for Respondent No. 1.
Atalla for Respondent No. 2.

II. *Atalla* for Appellant.
Cattan for Respondent No. 1.
Elia for Respondents No. 2 and 3.
Appeal from Decree of District Court, Haifa, dated 29.10.1938.

JUDGMENT.

Copland. J.

The first point taken in this appeal is that the District Court which tried this case was wrongly constituted. The Court was composed of two judges and it is said that as the subject matter of the claim involved a sum of LP. 1000 the case should have been tried by the President and one Judge. This point is one which is continually coming before us, but the essential thing to remember, when considering the question of jurisdiction, is the actual amount of the claim. According to the statement of claim the amount in dispute was the the sum 250 French gold pounds. That sum does not exceed LP. 50; it was more than LP. 250, at any rate, at the time when the claim was entered; and therefore we think that the Court which tried this action was properly constituted.

This point, at any rate, will be rejected because it was not raised in the grounds of appeal and we see no reason to grant permission to raise it now. In any case we think that it is a point which should have been raised in the Court below.

The next point is with regard to the method of proof adopted by the Court as to the genuineness or otherwise of the disputed signature of Haj Khalil Mohammad Taha. It was argued by the Appellants that the provions of Art. 97 of the Civil Procedure Code were applicable. The new Civil Procedure Rules of 1938 came into force in the 5th of May of this year, that is to say after this particular action had been entered in the District Court. It is true that on the 7th of November, 1937, in the course of one of the many hearings of this case, the Appellants did ask that the provisions of Art. 97 should be applied. The Court, as appears from the order on the record, never refused at that particular moment to apply Art. 97 but ordered the Defendants, that is to say, the present Appellants, applying Art. 56, to go to the Examining Magistrate and prove the forgery. There is no doubt that the intention of the new Civil Procedue Rules is that the Ottoman Civil Procedure Code should be repealed, and that intention is quite clear from the proviso to Rule 1. When this case came up for trial after the Examining Magistrate had found there was no charge of forgery for which Respondent should be committed for trial, the new rules of Procedure were then in force.

We do not think that the Interpretation Ordinance has the effect of reviving this particular Art. 97 of the Civil Procedure Code. That Article is a rule of procedure and it is the general rule that measures affecting procedure are retrospective unless the contrary intention should appear, and we think that Art. 97 was not in force in July, 1938, and was not revived for the purposes of this particular action.

The rest of the appeal was largely concerned with the weight of the evidence. It is said that there was no proper proof of the handwriting and no proper proof of the documents which were produced. We think that these arguments fail. Photographic copies of signatures of the late Haj Khalil Mohammad Taha were made of the undisputed signatures appearing in the Land Registry books and in the Notary Public's books. These photographic copies were properly proved, they were produced to the Court and were before the Court, and we must presume that the Court looked at them and considered them before coming to a conclusion. These photographs copies were supported by the testimony of witnesses. The question as to whether one set of witnesses should have been believed in preference to another set of witnesses is a matter entirely left for the Court which hear those witnesses. The Court came to the conclusion that the disputed signatures were genuine signatures and undoubtedly there was evidence to support that finding. It is not therefore for us to interfere.

Finally the Appellants complain that they asked the District Court to allow them to produce further evidence and the District Court refused. We think that the District Cour came to a perfectly correct decision on this matter. After many hearings and after many witnesses had been heard, and when the Court had intimated that the parties could put in pleadings summing up their arguments, it was not the correct time to make an application for further evidence. The District Court exercised their discretion in this matter perfectly properly. In the result all the Appellants' arguments fail. Both appeals should be dismissed with costs, for respondent No. 1 assessed to be LP. 15 for each appeal.

Delivered this 22nd day of November, 1938.

British Puisne Judge.

I concur

Senior Puisne Judge.

I concur

Puisne Judge.

CIVIL APPEAL NO. 183/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Copland, J. and Khayat, J.

In the appeal of:—

1. Saleem Cotran
2. Dr. Naim Cotran
3. Nahil Cotran — Appellants.

v.

Iskandar Cotran — Respondent.

Claim of title of land acquired as per arbitration deed and irrevocable power of attorney executed before war — Declaratory judgment of Land Court that land belonged to Plaintiff but dismissing claim, as land was transferred to a bona fide purchaser — Action for recovery of value of land wrongfully sold to third person — Liability (joint and several) of heirs.

(*Per Copland and Khayat, J. J.*)

1. Heirs not trustees in respect of each other's shares; their liability for value of property wrongfully appropriated and disposed of by them not joint and several

2. If trial Court finds that Plaintiff as witness was incoherent in all his answers and although he stated he does not claim anything from certain Defendant did not mean to waive his claim against him, Court of Appeal will not interfere with appreciation of lower Court who saw the witness and were in a position to determine what value had to be attached to his evidence.

3. In an action for recovery of value of land wrongfully appropriated and sold to third person not open to Defendant to prove that price of land he admitted in Land Registry to have received was not the real price.

4. Interest on money claimed as value of land wrongfully appropriated and sold to third person runs from date of entry of this action not of a previous action regarding title to that land.

5. Court right in considering a deed of arbitration and an irrevocable power of attorney both executed before the war as deeds sufficient to convey ownership to land and not as merely an agreement entitling Plaintiff to claim damages.

Edit. Note:—As to 1 see: C.A. 204/37 2 CtLR 153; C.A. 44/28 1 PLR 328.

As to 2 see: C.A. 174/37 2 CtLR 159 and Edit. Note thereto.

As to 3 see: C.A. 130/38 4 CtLR 37 and Edit. Note thereto.

As to 4 see: C.A. 95/38 3 CtLR 282; C.A. 10/38 ibid. 144; C.A. 39/32 2 C o J 662.

As to 5 see: L.A. 135/23 4 C o J 1489; L.A. 51/26 ibid. 1491.

Appellant No. 1 in person. — *Assal for* Appellant No. 3.

Eliash for Appellant No. 2. — *Horowitz* for Respondent.

Appeal from decree of District Court, Jerusalem, dated 8.6.1938.

JUDGMENT.

Copland, J.

In the action before the District Court, out of which this present appeal arises, the Respondent (then Plaintiff) claimed from the Appellants (then Defendants) together with another brother Tewfik Cotran, who is not a party to this appeal, the sum of LP.1589,640 mils being the value of 8 shares out of 24 in certain lands which he alleged had been wrongfully appropriated and disposed of by the Defendants.

The facts of this case and of a previous action, No. 27/29 in the Land Court of Haifa, out of which this present case arises, are set out in great detail in the judgment under appeal and in the judgment of the learned Chief Jutice which I have had the privilege of reading. They are not seriously disputed and it is not necessary for me to repeat them here. The District Court, from the evidence before it, was satisfied that this land was not in possession of the Appellants for a period of prescription as claimed by them — and in this it confirmed the previous finding on this point by the Haifa Land Court — and that the documents produced by the present Respondent were in its opinion sufficient to convey ownership. In spite of the very able and lenghty arguments addressed to us on behalf of the Appellants, I think that the District Court was right, except in regard to one minor point with which I will deal later, and I also think that it was right in holding that the Appellants in the circumstances of this case were in the position of trustees. That being so, no question of damages arises — as trustees they are responsible for the value of the properties wrongfully appropriated and disposed of by them, and that value cannot be better assessed than by the amount entered in the Land Registry as the amount of the consideration obtained from the sale by the Appellants.

But I think that the District Court went wrong in finding the Appellants jointly and severally liable. I do not think that they can possibly be held to be trustees in respect of each other's shares, merely because they are heirs of their late father — they can only be trustees each in respect of his or her individual share, and the liability therefore is not joint and several.

As to the third Appellant, Nahil Cotran, there is one further point, namely, whether the Respondent in the course of the trial before the District Court waived his claim against her. It is stated on the record that the Respondent at the close of his evidence, said — "I do'nt claim anything from Nahil". The District Court, however, made a remark on the record, that the Respondent was obviously

incoherent in all his answers, and it seems that they came to the conclusion that the Respondent did not mean to waive his claim against Nahil. The District Court saw this witness, and were in a position to determine what value had to be attached to his evidence and I do not think that this appreciation can be interfered with now on appeal.

In the result, I think that the appeal should be dismissed, but that the judgment of the District Court should be varied and judgment entered against each of the Appellants severally for the sum of LP. 397.410 mils, together with legal interest from the date of entry of the action in the District Court, and together with one fourth of the costs and advocate's fees as awarded by the District Court. The Respondent should have costs of this appeal assessed at LP. 10, to include advocate's fees.

The cross appeal must be dismissed with no costs to either side. Interest is properly payable from the date of entry of the action in the District Court. There is no basis for the claim for interest from the date of entry of the original Land Court action in 1929.

Delivered this 30th day of November, 1938.

British Puisne Judge.

JUDGMENT.

Khayat, J.

The Plaintiff (the Respondent here), Iskander Cotran, brought an action before the District Court, Jerusalem, claiming from the Defendants, Tewfic, Selim, Naim and Nahil Cotran, his cousins, the price of 8 kirats out of 24 kirats in a plot of land, situated in the vicinity of Haifa. He alleged that the aforementioned persons had sold to him their shares in the said land, which devolved on them from their father, as per two deeds, the first being an Arbitration Deed, dated the 20th of Kanun Thani, 1304, the second a Power-of-Attorney made before the Sharia Court, dated the 16th of Ramadan, 1314; and as the aforementioned persons had sold what he owned, as per the said two documents, to Kaiserman, for the sum of LP. 1589.640 mils, he therefore prayed that a judgment be given against them, jointly and severally, in the said sum, with interest, as they held the said sum by way of trust for him.

On the transfer being effected in the Land Registry, in the year 1929, the Plaintiff brought an action in the Land Court, Haifa, against the aforementioned Defendants, Mr. Kaisermann and Lord Melchett,

claiming ownership on the strength of the said two documents, and asking for the cancellation of the registration in the name of Kaisermann and that of Lord Melchett after him. As a result of the trial the case was dismissed, as it was not proved to the Court that the purchasers had bought mala fide. The right of the Plaintiff, however, to claim by legal means the value of the land, was recognised in principle. The Defendants (Appellants now) appealed against the said judgment, and the appeal was dismissed by the Court of Appeal, on the ground that it had no connection with the ownership of the land in dispute, but allowed Defendants the right to submit any objection they desired when the Civil Case came up for hearing, viz., the present case, which is now before us on appeal.

The District Court in its judgment dated the 8th of June, 1938, found — (1) that the Hijjeh was sufficient to establish ownership; (2) that there was an excuse that interrupted prescription; (3) that the value of the land coincided with the sale price registered at the Land Registry; (4) that the Defendants were jointly and severally liable; and (5) that the Defendants had not possessed the land for the period of prescription.

The summary of the appeal submitted by the Defendants Selim and Naim is:—

(1) that the deeds were prescribed;
(2) that a Power-of-Attorney does not transfer ownership;
(3) that the Respondent is entitled to damages only;
(4) that there was no joint and several liability;
(5) that the value mentioned in the Tabu Deed does not represent the real price.

Attorney for the Appellant, Nahil, relied on Plaintiff's admission (Respondent here) before the Court below in that he waived his right against her. As the District Court before which the Plaintiff was a witness weighed this evidence and refused to accept it as an admission, owing to his condition before it, I see no reason to interfere with such finding.

The Respondent submitted a cross-appeal, claiming interest from the date of the action in the Land Court.

As to the appeal I hold that the District Court had before it the two documents, executed before the war, and was right in accordance with Section (8)1 of the Land Courts Ordinance, in considering such documents as capable of transferring ownership, and that there was no need to deal with the question of prescription under such circumstances after it was established as a fact that the Appellants had not possessed the land for the period of prescription.

As to the price of the land registered in the Land Registry, the Appellants are not entitled, after their clear admission as to the amount they received, to ask to prove the contrary.

With regard to joint and several liability I am of opinion that no such liability exists, for even if we adopt the principle of trust then there is no trusteeship in the price between the co-owners, for the one is considered as a stranger to the other in respect of his share.

As to the point that Respondent is entitled to damages only and not to the price received, I do not hink it necessary to deal with it after the ownership to the land was established, the price fixed, and the transaction considered a sale and not an agreement to sell.

As to the cross-appeal there is no claim for interest prior to filing the present action in the District Court, and the case before the Land Court cannot be considered as being connected with a claim for interest. Wherefore it should be dismissed.

I am therefore of opinion that the appeal should be dismissed, and a judgment be given against each of the Appellants — Selim, Naim and Nahil — in one-fourth of the amount of LP. 1589.640 mils with legal interest from date of filing the action in the District Court.

As regards costs, I agree with my brother Copland on this point.

Delivered this 30th day of November, 1938.

Puisne Judge.

JUDGMENT.

Trusted, C. J.

This is an appeal from the District Court, Jerusalem, and there is a cross appeal. In my judgment the appeal should be allowed and the cross-appeal dismissed.

It seems that many years ago three brothers — Jirius, Suleiman and Nasr Katran — were the joint owners of a piece of land situated at Haifa. In 1877, Suleiman, the second brother, died, and by operation of law his share of one-third passed to his heirs — Tewfik, Saleem, Naim and Nahil. By a family arrangement made in 1889, which took the form of an award by arbitrators, these heirs, for the consideration therein stated, agreed to transfer half their shares in the land to their uncles — Jirius and Nasr. If the original holding is regarded as being divided into twenty-four shares, these heirs, by inheritance, acquired between them eight shares, and by the arbitration agreed to transfer four shares. In 1896 the heirs entered into a further agreement to transfer four shares to their uncles, and executed an irrevocable power-of-attorney for this purpose. It is said, and

presumably the District Court was satisfied as to this, that the right, subject to the matters discussed in this action, to these eight shares became vested by purchase in Iskander (Nasr's eldest son, and consequently a cousin of Tewfik, Saleem, Naim and Nahil).

It seems that in 1907 Nasr took steps to establish his possession of the land before the Court at Acre, that the proceedings subsequently went to the Court of Cassation, and that in the result Iskander failed. It also appears that at some time before 1897 a claim was made to the land by the Waqf, which, many years afterwards, was held to be unfounded.

The land, which was on the outskirts of Haifa, with the growth of that town became of commercial importance and of considerable value, and in 1929, one, Kaiserman, acquired the various shares in the land, and eventually sold the whole to Lord Melchett. In the course of that transaction, by virtue of a certificate of succession, dated 23.11.25, on the 22nd of May, 1929, Suleiman's heirs, for the first time, became registered as owners of their father's share of the land, as to one-twelfth each (i.e. a total of eight-twentyfourth), and on the same date, by sale, they transferred their shares of the land (i.e. a total of one-third) to Kaiserman, according to the entry in the Land Registry, for LP. 1589.640.

In December, 1929, Iskander brought an action in the Land Court, Haifa, (Land Case No. 27/29) against the heirs of Suleiman, one Kamil Kotran(representing Nasr's estate), Kaiserman and Lord Melchett. The substance of his case was that Suleiman's heirs had wrongfully purported to transfer property which belonged to him, and in his statement of claim he said:—

> "I pray for hearing of the action, passing a judgment for plaintiff's ownership of the disputed property, (i.e. the eight shares) and cancellation of the sale transaction made to defendants 6 and 7 (i.e. Kaiserman and Melchett)."

The action was heard by the Land Court, and apparently on the termination of the proceedings the President of the Court stated:—

> "In the circumstances it is obvious that the Plaintiff cannot prove bad faith on the part of either Lord Melchett or Kaisermann; and as regards them the action is dismmised with costs to include advocate's fee LP.5.
>
> As regards the remaining Defendants, there will be a declaration that the Plaintiff owned 16 shares out of 24 in the land in question. The heirs of Suleiman Kotran, i.e. Defendants (1), (4) and (6) must pay the Plaintiff's costs including advocate's fee LP. 10."

When, however, the formal judgment was published, it was in a different form, the most material parts being as follows:—

> "As a result of the hearing it appeared that the plea of

prescription, submitted by Counsel for the Defendants, is irrelevant, because the Plaintiff did not file the documents which he produced in order to execute them but produced them in order to prove what had taken place at the time in support of this claim. The Court is satisfied from all these documents, from the evidence heard, and from the admission of the (rest) of the Defendants that the Plaintiff did actually own 16 Kirats out of 24 Kirats in the whole of the plot of land claimed, situated in the locality known as "El Ballan" Haifa, and registered in the Tabu under 416 of 25.7.21, which he owned in the manner described in his claim. Had the share of Suleiman Kotran remained registered in his name in the Land Registry, and was not transferred by his heirs to others, it would have been possible to cancel that registration and have it registered in the name of the Plaintiff, as it has been established that it was sold to him in a lawful manner, but as the whole of the said share has been transferred by the heirs of Suleiman Kotran and registered officially later in the name of Lord Melchett, and Counsel of the Plaintiff, even though he stated that the purchasers, had knowledge of the fact of his client's ownership, he later on stated that he has nothing to show that Lord Melchett himself (the person to whose name the whole land was transferred and in whose name it was registered in the Land Registry) had knowledge that his client was previously the owner of the said share at any time.

We therefore unanimously dismiss this action. Plaintiff has the option to resort to the legal means to collect the value of this share from the said heirs of Suleiman".

Three of the Defendants — Saleem, Naim and Nahil, appealed to this Court in Land Appeal No. 74/32. Judgment was delivered on the 7th of July, 1933, as follows:—

"This appeal arises out of an action brought in the Land Court of Haifa by the Respondent Iskander Nasr Kotran who claimed a declaration of title to 8 out of 24 shares in a certain piece of land which shares he alleged had been purchased by his father from Suleiman Kotran.

"The Respondent further alleged that the present Appellants, who are the heirs of Suleiman, sold the shares to one, Nathan Kaiserman, by whom they had been resold to Lord Melchett.

"The Land Court found in favour of the Respondent that he had acquired title to the shares in claim, but dismissed his action on the ground that there was no evidence proving that Lord Melchett had knowledge of the Respondent's previous ownership.

"The present Appellants were joined with Lord Melchett as Defendants to the action though there does not appear to be any ground for this, as the only question before the Court was that of the title to the land and the Appellants clearly have no claim to be the owners.

"The Appellants have brought this appeal, not on the ground that they object to the judgment dismissing the Respondent's claim, but because they are aggrieved by the finding of the Court that the Respondent was formerly the owner of the shares in dispute.

"We hold that this is not a ground upon which an appeal can lie.

"Unless a party desires that a judgment shall be set aside or varied, he is not entitled to appeal against that judgment merely because he is of opinion that one of the issues before the Court was wrongly decided.

"The Appellants have stated that the reason for which they have filed this appeal is that they fear that the Respondents may bring an action against them for the value of the shares and may rely upon the finding of the Land Court as to his former ownership.

"If, however, such an action is brought, it will be for the Court which hears that action to decide all the neccessary issues including that of the Respondent's former title to the shares.

"The appeal is dismissed with costs."

The present action was brought by Iskander against the heirs of Sueliman, in the Haifa District Court, but by an Order of the High Court, the venue was changed to Jerusalem on the ground that upon the facts the Defendants would be prejudiced if the case was tried in the Haifa District Court.

In his statement of claim Iskander says:—

"The Plaintiff now claims, on the basis of the said judgment in the Haifa Land Court, to recover from the Defendants the value of the said shares wrongfully transferred by them",

and he puts the value of LP. 1589.640. In the alternative he says that the eight shares sold were his property wrongfully appropriated and disposed of by the Defendants. He sets out the facts and goes on to say —

"The said sale (i.e. to Kaiserman) was made fraudulently in derogation of the Plaintiff's rights and with the full knowledge of the Defendants of those rights."

and in paragraph 5 of his statement of claim he formulates his actual claims as follows:—

"(a) Under the said judgment of the 14th of July, 1932, payment by the Defendants and each of them, jointly and severally, to the Plaintiff of the said sum of LP. 1589. 640 mls.

(b) Alternatively, payment by the Defendants and each of them, jointly and severally, to the Plaintiff of the said sum of LP. 1589.640 mils. as being moneys had and received by the Defendants to the use of the Plaintiff.

(c) Such other or further relief as to this Honourable Court may seem just and proper."

On the 20th of January, 1935, the Defendants filed a reply in which they referred to the judgment in the Court of Appeal mentioned above (Land Appeal 74/32). They said that —

> "documents which have not been enforced or executed for a period exceeding the time of prescription cannot be used as a basis for establishing any right"

and they attacked the validity of the original arbitration proceedings.

The Plaintiff filed a further pleading, setting out some additional facts, and in paragraph 4 pleaded —

> "By reason of the premises it is submitted that, if (contrary to the contentions of the plaintiff) prescription can apply to documents at all, yet in the present instance no prescription can attach to the Hujje Sheria of 1312, inasmuch as all transactions in the said land were prevented by orders of competent authorities from 1320 until 1926, and in November, 1929, the plaintiff instituted his proceedings in the Land Court of Haifa for recovery of the area in issue in the present case. Therefore, in November, 1929, the period of prescription had not expired and in the course of that action it was discovered that the defendants had parted with the property to third parties, thus making it impossible for the authority given to the attorney under the said Hujje Sheria to be exercised. Therefore, there has never been a period of fifteen years during which action could have been taken effectively on the Hujje Sheria and the same cannot be prescribed."

The Defendants filed a further pleading in which they discussed the question of the possession of the land and also the damages which would flow from a breach of the agreements. They also stated that the Plaintiff, in a letter of 1922, had acknowledged the Defendant, Salim's ownership of the land.

In this unsatisfactory state the matter first came before the District Court on 3.4.35. There appear to have been eight hearings and six adjournments without hearing, and judgment was eventually delivered some time after the 6th of April, 1938. It is not surprising, therefore, that the issue tended to become obscured, and I can only hope that the new Civil Procedure Rules will do something to prevent so long a delay in the hearing of an action and to insure that issues are clarified.

At the conclusion of a lenghty judgment the District Court held —

> "We are satisfied that the Plaintiff was in fact the owner of the 8 shares in dispute, which the Defendants wrongfully sold to N. Kaiserman, and as they were in the position of trustees, we enter judgment against them, jointly and seeverally, for LP. 1589.640 plus legal interest from the date of this action, with costs and advocate's feer LP. 10."

Whether the Plaintiff was the owner of the enght shares must be

a question of law, and in my judgment he never was the owner, and I do not think the Defendants were ever in the position of trustees.

It is necessary to follow the proceedings with care to discover precisely what case the Plaintiff was procceding to make. At the hearing of 24.5.35 it appears from the notes that the Plaintiff put his case in the following way:—

> Suleiman and his heirs were in a position of Trust. They had disposed of their interest for good and proper consideration. Cause of Action arose in 1929 and is not prescribed, when Defendants transferred to Kaiserman and refused to account for value.
>
> Not using documents except to prove the ownership operation of a document is prescribed not the Document.
>
> This came up in 1929. Plaintiff was the true owner.
>
> Now claiming the proceeds not the ownership.
>
> No cause of Action until 1929. Can further prove possession and Werko receipts.
>
> Validity of Documents unquestionable.
>
> They are certified copies from Competent Court."

It also appears that the Defendant made no admission that the documents were properly made, and relied chiefly on prescription. The Court then gave an interlocutory judgment, as to which I will refer later, and at the hearing on 28.6.35, it appears from the record that Mr. Horowitz, on behalf of the Plaintiff, stated:—

> "that documents and judgment give prima facie case. The Defendants as Trustees have got themselves registered for the purpose of disposing and in fact have disposed of those shares and pocketed the proceeds — breach of trust — claim the amount of value declared in Tabu LP. 1589.640.
>
> Consequently claim interest from 1st Claim in Land/C November, 1929, against the Defendants jointly and severally. Not claiming under Mejelle not a joint debt in ordinary cause (sic), but on footing of breach of Trust. Unlawful conversion and registration wrongfully as joint owners and entitled to go against them as one individual, but must apply doctrine of English Equity. Clear Breach of Trust by Joint Trustees. They are jointly and severally liable."

and he went on to rely on Lewin's Law of Trusts and on Halsbury, Vol. 28.

It appears that at the hearing on 10.12.37 Mr. Horowitz submitted —

> "Turkish documents were in fact a conveyance of the land, and due to attachment were not registered and judgment of Land Court finding of facts.
>
> "Alternatively can rely upon the documents."

But it may be noted, that at the hearing on 1.4.38, it appears from the record —

"that Plaintiff still relied on res judicata",

and later —

> "Case based on breach of trust by trustees, it is quite clear, trustees are jointly and severally liable. Halsbury, Vol. 28, para. 378, (187) Estoppel, Lewin on Trusts, 11th Edition, Remedy for Breach of Trust."

There can be no doubt that Mir. Horowitz, on behalf of the Plaintiff (apart from any question of res judicata) was making then substantially the same case which he now makes before this Court, that is, that as a result of the transcations in 1889 and 1896 the Plaintiff, Iskander, was in the position of a purchaser who had paid the purchase price but had not had the property conveyed to him, and that the heirs of Suleiman were in the position of vendors who had received the purchase price but had not conveyed the property, and consequently, by the application of a principle of English Equity, they became constructive trustees for Iskander. For this purpose he was not suing upon the documents themselves, but using them only as evidence of the state of affairs for which he contends.

Alternatively, as I have said, he submitted he could rely upon the documents, but for what purpose is not clear, and I am satisfied that this case was as I have stated.

The District Court, in its judgment, after setting out the facts, stated —

> "After consideration we point out that the judgment of the Land Court, dated 14th July, 1932, No. 24/29, contains the following declaration:—
>
> "As regards the remaining Defendants, there will be a declaration that the Plaintiffs owned 16 shares out of 24 in the land in question. The heirs of Suleiman Kotran must pay costs including Advocate's fee LP. 10.'
>
> from which it infers that Iskander Kotran, the Plaintiff in that action, owned 16 out of shares in the land in question, which declaration became final by decision in Land Appeal 74/32.
>
> "In conformity with the directions contained in the last para. of said judgment, we proceeded with the case to decide whether or not the Plaintiff in this action is now entitled to recover from Defendants the purchase price of the 8 shares (out of the said 16 shares referred in Land Court Judgment, dated 14th July, 1932, No. 24/29)."

and it goes on to say —

> "This Court, on the 28th June, 1935, issued the following Interlocutory Judgment:—
>
> In view of the fact that —
>
> (1) The action is based mainly on a Hijjeh during the Turkish Regime which constituted an irrevocable Power of Attorney to transfer the shares in dispute for a consideration paid at the time;

(2) The sequestration placed on the land by the Turkish authorities as a result of a claim of the Wakf, constitutes a good defence for not using the document during the period of sequestration;

(3) It was a transaction between members of the same family, which indicates that the Degendant held the position of a trustee;

(4) We are of opinion that there is no prescription on the document produced and we decide to go into the merits of the case.

"The said sequestration was not removed until 1926. No forgery was alleged against the Hijjeh. As the case of the Plaintiff is based upon written documents, upon which the Land Court 24/29 decided that the Plaintiff was entitled to 16 out of 24 shares, it was for the Defendant, if he claims possession title, to prove same with right to the Plaintiff to bring rebutting evidence.

"The Defendant now claims possession and Court proceed to hear evidence for the Defendant."

It then discussed the evidence as to possession by the Defendant and stated:—

"From the evidence before us we are satisfied that the land was not in possession of the Defendants for a period of prescription as claimed by them, and that the documents produced by Plaintiff are in our opinion sufficient to convey ownership.

"The Plaintiff is therefore entitled to the value of 8 shares out of the 16 shares out of 24 mentioned in the judgment of the Land Court 24/29. As regards the value of these 8 shares, the Defendants as heirs to Suleiman Kotran who had sold to the Plaintiff must be considered in the position of trustees for the Plaintiff."

As I have already said, the Court went on to hold that as the Defendants were in the position of trustees their liability was joint and several, and it gave judgment for LP. 1589.640, the figure appearing in the Land Registry upon the transfer to Kaiserman.

It is clear that the District Court was under a misapprehension as to the terms of the actual judgment of he Haifa Land Court, and it is also clear from the earlier judgment of this Court to which I have referred in full — particularly paragraphs 4, 8 and 9 — that no issue in the present proceedings was res judicata, nor was any estoppel between the parties to the present proceedings created thereby.

While reserving my judgment as to whether an action may be brought in a District Court upon a judgment of another Court of this Territory, I am satisfied that the present Plaintiff could not bring an action upon the judgment (nor upon the basis of the judgment) of the Haifa Land Court.

As to the interlocutory judgment of the District Court on the 28th of June, 1935, which is incorporated in the judgment, as I have stated, I do not think that the Plaintiff ever based his claim on the Hijjeh. Had he done so the question would have arisen as to how far his right to base a claim upon it had become prescribed by lapse of time — and I desire expressly to reserve my opinion as to how far, if at all, any sequestration placed upon the land could have effected that right. I do not think that under Ottoman Law a transaction between members of the same family, per se, creates a trust, and I am of opinion that on any view of the case, and even if the Defendants were in the position of trustees for the plaintiff, each would only be a trustee of his own shares, which he could have transferred independently of the other Defendants, and I fail to see how their liability could be joint and several.

It would appear that the District Court treated the case, although I find no mention of the Ordinance, as though it was an action before a Land Court brought under Section 8 of the Land Courts Ordinance, Chapter 75, and to have assumed that if the Plaintiff could have established his title in such proceedings a trust would have been created. How far a Court, other than a Land Court, can avail itself of the proviso to section 8, may be a matter of argument, but apart from this, and assuming, contrary to my opinion, the Court was right in so approaching this case, I am of opinion that it misdirected itself in holding —

> "As the case of the Plaintiff is based upon written documents, upon which the Land Court in case 24/29 decided that the Plaintiff was entitled to 16 out of 24 shares, it was for the Defendant, if he claims possession title, to prove same with right to the Plaintiff to bring rebutting evidence."

The Judgment of the Land Court is not very clear, but in my view it never decided that the Plaintiff was entitled to 16 out of 24 shares, but if it did so it was not justified in so deciding without determining the fundamental issue of prescription. I have already referred to this Court's view of the effect of that judgment.

It follows that the District Court wrongly cast upon the Defendant the onus of proving possession.

Mr. Horowitz, on behalf of the Respondent (Plaintiff) did not suggest that a trust could be created by the section but fell back upon a doctrine of English Equity. To this it seems to me there are two answers. Firstly, what is the English principle which must be applied. It is discussed in Lysaght v. Edwards, 2 Ch. D., page 499, and at page 510, Jessel M.R., after reviewing the authorities, states —

> "It must, therefore, be considered to be established that the venodr is a constructive trustee for the purchaser of the estate from the moment the contract is entered into."

The collary to introducing into the law of Palestine an equitable right must be the introduction of the appropriate equitable remedy, and the Courts must consider whether the Plaintiff has been prompt in seeking his remedy. In a Privy Council case, Beckford v. Wade, Sir William Grant stated —

> "It is certainly true that no time bars a direct trust as between cestui que trust and trustee; but, if it is meant to be asserted that a Court of Equity allows a man to make out a case of constructive trust at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be; so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into a Court of Equity to seek that relief."

which pronouncement is quoted with approval in Soar v. Ashwell, 1893, 2 Q.B.D., page 401, and see Taylor v. Davies, 1920, A.C., at page 61.

In the present case the Plaintiff took no efective step to establish his equitable right until he brought this action in 1934. It is clear that he was making no equitable claim before the Land Court, as is pointed out in the judgment of this Court on Appeal, which, as I have already said, states —

> "The only question before the Court was that of title to the land."

In my judgment, assuming that the Plaintiff's right had not already been decided by Ottoman Law, he was too late in seeking his equitable remedy.

Mr. Horowitz contended that no cause of action arose until there was a breach of trust. In my view this is a falacy. As soon as the equitable right arose the appropriate equitable remedy existed, and to postpone an application to the Court to enforce it, is to create the mischief to which Sir William Grant refers.

Secondly, the doctrines of equity in force in England are invoked under Article 46 of the Order-in-Council. Its provisions may be open to arguement, but in my opinion, these doctrines do not apply when the local law is clear.

Despite the difficulties which have arisen in the present case, where a contract for the sale of land was entered into before the British occupation and the purchaser did not obtain the property, the local law gives him, subject to the limitations on bringing actions, two remedies. He can avail himself of section 8 of the Land Courts Ordinancee, which would seem to have been passed expressly to meet that situation (see L.A. 88/25 Rotenberg V., p. 1777) or, despite the fact that he has failed to avail himself of those provisions, he may bring an action for damages.

In Civil Appeal No. 136/33, Rotenberg, Vol. IV, 1415, where the facts were similar to this case in that there had been an unregistered sale before the British occupation and a subsequent sale to a third party, this Court held that the remedy was damages, and although it does not appear from the judgment, it appears from the record of the argument at which I have looked, that the question of breach of trust was raised. I may perhaps add that it does not appear that in that case the question of limitations was raised, and that since that judgment the question of the quantum of damage for breach of a contract to sell land has received further consideration by this Court.

Whether, on the facts of the present case, the Plaintiff could have succeded if he had brought an action under the Land Courts Ordinance before the property was resold, and whether, having failed to do so, he could on the facts recover any, and if so what damages, it is not for me now to decide. I am satisfied that insofar as the Plaintiff's claim had not been affected by limitations, the local law gave him aedquate remedies, and not having availed himself of them I do not think he can successfully invoke the principles of English Equity.

As the other members of this Court do not agree with me the result will be as indicated by my brother Copland at the end of his judgment.

Delivered this 30th day of November, 1938.

Chief Justice.

MISC. APPL. NO. 63/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J., Greene, J. and Frumkin, J.
In the application of:—

1. Jacob Minzberg
2. Tova Minzberg — Applicants.

v.

1. Moshe Kreizer
2. Hava Kreizer — Respondents.

Leave to appeal from judgment of Land Court granted by Presiding Judge — Application for extension of time to file notice of Appeal.

Inability to raise necessary sum for payment of fees on appeal not a reasonable excuse for delay in lodging appeal,

Edit. Note:—Compare C.A. 23/38 3 CtLR 130; C.A. 21/25 1 C o J 144; L.A. 18/30 4 C o J 1560; C.A. 170/32 4 C o J 1564; C.A. 103/33 2 PLR 239.

Korngold for Applicants.
Eisenberg for Respondents.

Application under Rule 324 of the Civil Procedure Rules, 1938 for extension of time.

ORDER.

We need not trouble you, Mr. Eisenberg.

We all agree that this application fails. In our opinion inability to raise the necessary sum for payment of fees on appeal is not a reasonable excuse for delay. We would also observe that the judgment of the District Court is dated the 14th October, 1938, and the order by the Presiding Judge granting the present applicants leave to appeal is dated the 17th November. Therefore there was ample time for making the necessary arrangements for getting the money for the fees for lodging the appeal, and the contention that the ten days allowed for filing the appeal are insufficient does not count.

The application is therefore dismissed with costs assessed at LP. 10 to include advocate's fees

Delivered this 10th day of January, 1938.

Senior Puisne Judge.

CIVIL APPEAL NO. 237/38.

Before:—The Senior Puisne Judge (Manning, J.) Copland, J. and Khayat ,J.

In the appeal of:—

Max Guttman Appellant.

v.

Max Wallaach Respondent.

Complaint of slander referred to arbitration — Finding made by arbitrators that words complained of were justified — Arbitrators ordering complainant to pay a sum of money to some institution of public utility.

If arbitrators make a finding within scope of reference but then order beyond it one of parties to pay a sum of money to a stranger, this second part of award being a nullity will on application, to which stranger need not be a party, be set aside.

Edit. Note:—Compare C.A. 246/37 3 CtLR 52 as to divisibilty of contracts.

Nussbaum for Appellant.

For Respondent — no appearance.

Appeal from judgment of District Court, Haifa, (39/38), dated 25.9.1938.

JUDGMENT.

In this case the appellant complained that he had been slandered by the respondent. The matter was referred to arbitrators, one selected by each party, and a third selected by these two arbitrators. The result of the abitration was that the arbitrators unanimously found that whatever words had been used by the respondent concerning the appellant were justified. The arbitrators, however, went beyond this finding and ordered the appellant to pay LP. 10 to the Jewish National Fund. The appellant then sought to have the award set aside before the District Court.

The District Court mistakenly came to the conclusion that the Jewish National Fund should have been a party to the application and consequently dismissed it. The appellant obtained leave to appeal to this Court, and the only order we propose to make is that that part of the award which orders LP. 10 to be paid to the Jewish National Fund should be set aside. The award is clearly divisible; in fact only the first part of it has been legally made, the second part being a nullity; and no argument has been addressed to us making it necessary to interfere with the first part.

The appeal is therefore allowed. The second part of the award is set aside, but in the circumstances we make no order as to costs.

Delivered this 16th day of January, 1939.

Senior Puisne Judge.

CIVIL APPEAL NO. 199/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Copland, J. and Frumkin, J.

In the appeal of:—

"Hamanchil" Co. Ltd. Appellants.

v.

Jacob Halperin Respondent.

Agreement to transfer land — Sum fixed in contract as liquidated damages — Vendor failing to transfer the land within time given by purchaser in notarial notice — Finding of Court that sum stipulated in contract is liquidated damages and not penalty.

1. Court may award sum stipulated in contract in case of breach if, having regard to all circumstances of case, it finds sum to be liquidated damages and not a penalty.

2. No interest payable on sum awarded as damages for breach of contract.

Edit. Note:—As to 1 see: C.A. 191/37 2 CtLR 169; C.A. 28/38 3 CtLR 84; C.A. 126/38 4 CtLR 34 and Edit. Note thereto.

As to 2 see: C.A. 114/26 2 CtLR 47; C.A. 53/32 2 C o J 435; C.A. 86/32 2 C o J 437.

Dr. Dunkleblum for Appellants.

Greenbaum for Respondent.

Appeal from judgment of District Court, Jaffa (Civil Case 136/38), sitting in Tel-Aviv, dated 8.7.1938.

JUDGMENT.

This appeal arises out of a contract between the appellant company and the respondent. The appellant company agreed to transfer certain land at Haifa to the respondent for the sum of LP. 300, LP. 112 of the amount had been already paid and the agreement provided that the respondent should pay a further LP. 88 and the balance of LP. 100 at the time of the issue of the kushan. The time for the issue of the kushan was fixed for the 1st of May, 1934, and it was provided that if the company repented from the sale they were to pay back LP. 200, part of the purchase money received and a further LP. 200 as compensation agreed to beforehand. This agreement was

made on the 20th of November, 1933. Nothing was done in connection with the transfer until the 11th of October, 1935, when the respondent's advocate wrote to the company calling upon it to transfer the plot of land within two weeks. The transfer was apparently not effected and on the 31st of March, 1938, we find the respondent serving a notarial notice on the company to transfer the plot of land by the 10th of April, 1938. The company replied to them saying that LP. 40 further was due to them and that they would not transfer the land until that amount was paid, and there was another letter from the company dated the 8th of April, 1938, alleging that the time fixed for the transfer of the land was insufficient. The land was not transferred and the respondent took action in the District Court sitting at Tel-Aviv claiming LP. 200, part of the purchase money paid and LP. 200 as damages. The company set up a defence stating firstly, that the balance of LP. 100 had to be paid before the transfer; secondly, that the time given for transfer was insufficient; thirdly, that the company had never repented from the agreement; and fourthly, that the damages stipulated were actually a penalty. In its judgment the District Court dealt with all these points. It found that there was no stipulation that the LP. 100 had to be paid before the transfer and that there was not any undertaking by the respondent to pay LP. 40 in connection with the building of a road. It further found that the letters and documents produced in Court contained no reference whatever to an extension of time, and it decided that there was no difference whatever between repenting from the execution of an agreement and a breach of that agreement.

On the question of penalty it took the facts at the time of the contract into consideration including the fact that LP. 112 had been paid 8 years previously by the respondent and it found that the LP.200 agreed on were liquidated damages. The company has appealed to this Court and Mr. Dunkleblum on its behalf has urged the same points which he urged before the Court below. All we need say with regard to this, is that we are in full agreement with the findings of fact and the rulings of law in the Court below and we can add nothing useful to their judgment. Mr. Dunkleblum took a further point, objecting to the award by the Court below of interest from the date of action on the LP 200 awarded as damages. Mr. Greenbaum for the respondent did not press for the award of this interest, and we think that the Court below erred in awarding it. In the result the order will be that the appeal is dismissed, but that the judgment of the Court below must be varied so that legal interest from the date of action is awarded on LP. 200 only and not on LP. 400. The

respondent will have the costs of this appeal and the fee for attendance at the hearing is fixed at LP. 15.

Delivered this 24th day of November, 1938.

Senior Puisne Judge.

CIVIL CASE NO. 136/38.

IN THE DISTRICT COURT OF TEL-AVIV.

Before:—Many, J. and Korngruen, J.

Jacob Halperin — Plaintiff.

v.

"Hamanchil" Co. Ltd. — Defendant.

The claim in this case is for LP. 400 constituted of LP. 200 paid by the Plaintiff on account of a plot of land bought from the Defendant and of LP. 200 as damages fixed by the parties in case of breach of agreement between the parties.

In the letter by the Company dated 20.11.33, Exh. 1, reference is made to an old contract between the parties of 27.2.25 regarding the sale of a plot of land, to an undertaking to transfer to the Plaintiff a plot of land in Haifa at the price of LP. 300 instead of the plot referred to in the contract of 27.2.25, to giving the Plaintiff a Kushan on 1.5.34, and to an admission of receipt of LP. 200 on account of the plot of land.

Plaintiff contended that there was a breach of the agreement of 20.11.33, Exh. No. 1 by the Defendant having failed to transfer the plot of land on the fixed date, i.e. on 1.5.34, in spite of his request in a registered letter dated 10.11.35, Exh. No. 2 and the Notarial Notice dated 31.3.38, Exh. No. 3.

Defendant argued a) that the Plaintiff did not pay the balance of LP. 100 due from him on account of the plot nor did he pay his share in the building of the road on his plot amounting to LP. 40, b) that the Company was prepared to transfer the plot of land as requested by the Plaintiff in his notice of 31.3.38, but the Plaintiff refused to agree to an extension of time, which, if was alleged by the Defendant, was justified in view of the special situation of work at the Land Registry in the month of April, and he also refused to shaw to an official of the Company the agreement of 23.11.33 that is the letter of the Company which was in hanwriting and a copy of which was not found in the office, c) that the Company did not repent to transfer the sold plot and that it was still prepared to do so, and there was no room for the claim for return of money, and damages, dealing on the difference between repentance and breach, d) that the compensation contained in the agreement was a penalty

and not damage, in view of the decrease of the value of the plot.

After consideration of the letters produced in this case and after hearing the witnesses, I find:—

(a) that the letter of the Company of 20.11.33, Exh. No. 1 contains no stipulation that the Plaintiff must pay the balance of LP. 100 before the transfer at the Land Registry, but on the contrary, it is expressly written that the said amount should be paid by the Plaintiff at the time the Kushan is delivered, and also there is no undertaking in the said letter by the Plaintiff to pay LP. 40 for the building of the road.

(b) That the letters and Notice filed in the Court contain no reference whatsoever for a request of extension or of the desire of the Defendant to see the contract, and the company itself has in its letter of 8.4.38, Exh. No. 5 expressly written that no time was stipulated for the transfer of the plot of land.

(c) As to the contention of the Defendant that it did not repent, and it is still ready o transfer the land, I find that that contention has no legal ground, and there is no difference between repentance and breach. It is merely a play of words, and failure to transfer the plot on the fixed date is deemed to be repentance.

(d) And as to the contention of the Defendant that the amount of LP. 200 is a penalty and not damages, it was established by the evidence before us that the value of the plot was from LP. 400 to LP. 500 i.e. exceeding the amount claimed, and taking into consideration the fact that part of the price was paid more than ten years ago, I find that LP.200 fixed in the contract is but a compensation fixed an foreseen by both parties.

Therefore I decide to order the Defendant to pay the Plaintiff LP. 400, costs, and legal interest from the date of action, and LP. 3.— as advocate's fees.

Judgment delivered in the presence of counsel of both parties, and in open Court this 8th day of July, 1938.

Judge.

CIVIL APPEAL NO. 244/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Copland, J. and Khayat, J.

In the appeal of:—

1. Heinz Graetz
2. Elsie Graetz — Appellants.

v.

Hanna Weiller — Respondent.

Money deposit bearing interest — Part payment of deposit with interest — Denial of privity of contract — Ground of appeal that trial Court did not make a finding on issue.

1. Payment of interest by bailee of deposit does not prove that amount was not a deposit.

2. Ground of appeal that privity of contract between parties was denied and no finding made by Court below on this issue will not succeed, as fact that Court after hearing evidence on behalf of both parties gave judgment in favour of Plaintiff (Respondent) shows that Court found there was such privity.

Kouriansky and *Ussishkin* for Appellant.
Levanon for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 3.11.1938.

JUDGMENT.

We need not trouble you, Mr. Levanon.

In this case the respondent took action in the District Court of Jerusalem against the appellants claiming that she had deposited with the female appellant a sum of LP. 900 to be delivered on her behalf to the male appellant. She alleged that LP. 600 of this amount had been returned to her and she claimed the balance of LP. 300. The answer of the appellants was a complete denial. They said they received no monies from the respondent and that they never had any relations of any kind with her. Evidence on behalf of both parties was heard by the District Court.

The District Court came to the conclusion that the respondent had made out her case and judgment was given in her favour for the amount claimed. The Appellants have appealed and Mr. Ussishkin on their behalf has urged that the judgment of the District Court is erroneous on three grounds.

The first ground was that the respondent claimed this amount as a deposit, that it could not have been a deposit because when she received back the LP. 600 she received another LP. 100 as interest. Mr. Ussishkin says that the fact that interest was paid shows that the amount was not a deposit. We see no reason why the bailee of a deposit should not pay interest on it, if he wishes to do so, and we do not think that the fact that interest was paid disproves the truth of the respondent's story.

The second ground of appeal was that there was no finding by the Court below on the issue of privity of contract between the parties.

The fact that the Court below after hearing evidence gave judgment in favour of the respondent shows that the Court below did not believe the contention of the appellants that there had never been any relations between the parties.

The third ground of appeal is that the statement of the respondent was uncorroborated and that, therefore, she could not succeed in the action. We are satisfied that the evidence of the witness called from the Anglo Palestine Bank was sufficient to corroborate the statement of the respondent. None of the grounds of appeal are successful.

The appeal will therefore be dismissed with costs and a certified fee of LP. 15 for attendance at the hearing.

Delivered this 12th day of January, 1939.

Senior Puisne Judge.

CIVIL APPEAL NO. 247/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Copland, J. and Khayat, J.

In the appeal of:—

Syndicate Eretz Israel Lebinian Ltd. Appellant.

v.

Fishel Breitmann Respondent.

Dispute referred to single arbitrator — Second award made by arbitrator after first published — Scope of powers given to arbitrators in Arbitration Ordinance to amend award.

1. Once arbitrator's award published any other award made by him in same arbitration between same parties — a mere nullity, and no application necessary to have it set aside.

2. Correction of clerical error or accidental slip or omission in award must be made on award itself; abitrator has no power to cancel his first award and issue a second one.

3. After finding that award entirely ineffective, question of calling arbitrator as witness or remitting award to him entirely a matter for discretion of Court.

Krongold for Appellant.

Amikam for Respondent.

Appeal from judgment of District Court, Haifa, (122/38), dated 13.10.1938.

JUDGMENT.

We need not trouble you Mr. Amikam.

This appeal arises out of the following facts. There was a dispute between the parties as to the cost of the bulding of a house and the dispute was referred to a single arbitrator. The arbitrator made his award

on the 9th of November, 1937. After making his award, something occurred which made him think that he had not awarded a sufficient amount to one of the parties, and he issued a second award on the 21st of November, 1937. We have no doubt that in law this second award was a mere nullity and entirely ineffective. The present appeal arises out of an application to set it aside, and it was contended by Mr. Krongold for the appellant, that this application was out of time and he referred the Court to Order 64 Rule 14 of the Rules of the Supreme Court of Judicature. On the view we take the moment the Court has cognizance of how the award of the 21st of November came to be made, it must hold that it was not an award at all, and no application should be necessary to have it set aside.

It was argued by Mr. Krongold that in publishing the award of the 21st November, the abitrator was merely exercising his powers under Section 8 of the Abitration Ordinance which empowers him to correct any clerical error or any accidental slip or omission in the award. These powers are quite clearly given to arbitrators, but if they exercise them it must be clear to the Court that they did exercise them by amending the award in whatever way it needs amendment. The Section does not empower an arbitrator to cancel his first award and to issue a second award. In the present case the award published on the 9th of November, 1937, was the arbitrator's award and if he wished to correct a clerical error or to remedy any accidental slip or omission, that should have been done on the award itself.

A further ground urged by Mr. Krongold was that the arbitrator should have been called as a witness by the Court below and another ground was that the Court below should have remitted the award to the arbitrator. It was entirely within the discretion of the Court below as to whether the arbitrator should have been called as witness, and we think that in the facts no useful purpose could have been served by so calling him. If the Court below could have made any order as to remitting this ineffective document to the arbitrator, that also was a matter for its discretion, and no appeal can succeed on a ground of this kind.

For these reasons we think that the judgment of the Court below was correct. The appeal is dismissed, the respondent will have the costs and we certify a fee of LP. 15.— for attendance at the hearing.

Delivered this 18th day of January, 1939.

Senior Puisne Judge.

CIVIL APPEAL NO. 240/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J. and Khayat, J.

In the appeal of:—

Pro-Palestine Bank Ltd. — Appellant.

v.

Registrar of Companies — Respondent.

and

"Egged" Cooperative Society Ltd.

Opposer and Respondent.

Petition for confirmation by Court of alterations in Company's Memorandum of Association — Converting Bank into Loan Fund — Opposition by a shareholder to alteration of Memorandum of Association — Abandonment of main purpose and object of Company.

If Court refuses petition to confirm alterations in Memorandum of Association on finding that they constitute abandonment of real object and purpose of Company and might act as a means for defeating express intention of Legislature, Court cannot be said to have unreasonably used discretion vested in it.

Sharf for Appellant.

Respondent in person.

Jacob S. Shapiro for Opposer and Respondent.

Appeal from judgment of District Court, Haifa (147/38), dated 31.10.1938.

JUDGMENT.

We need not trouble either of the Respondents.

In this case the District Court of Haifa has given a long and very conmprehensive and able judgment and we entirely agree with it, and see no reason to interfere with it. There is nohting in the arguments to induce us to think that the District Court has unreasonably used the discretion vested in it in the matter.

The appeal is therefore dismissed with costs to include advocate's fees assessed at LP. 15 to the second Respondent, the first Respondent having waived his claim to costs.

Delivered this 5th day of January, 1939.

British Puisne Judge.

CIVIL CASE NO. 147/38.

IN THE DISTRICT COURT OF HAIFA.

Before:—The President (Sherwell, J.) and Shehadeh, J.

JUDGMENT.

This is a petition by the Pro-Palestine Bank Ltd., praying the confirmation by the Court of a special resolution altering the provisions of the Company's Memorandum of Association, and allegedly passed unanimously on 30th May, 1938, at an Extraordinary General Meeting of the Company in accordance with the Banking Ordinance, 1936-1937.

The petition appears to have been filed on behalf of the Company on the 18th of July, 1938, though it is dated the 26th of June 1938.

On the 21st September, 1938, an opposition to this petition was filed on behalf of the Egged Co-operative Society Ltd., which Society is the holder of 90 (ninety) shares of LP. 1.— each in the said Company. The total Share Capital of the Company is LP. 3,100, divided into 3,000 ordinary shares of LP. 1.— each and 100 preference shares of LP. 1.— each.

The petition is presented under section 20(1) of the Companies Ordinance, Chapter 22 — as amended (Vol. I Laws of Palestine pages 177-178) and the opposition is lodged in accordance with the proviso to sub-section (3) of section 20.

Since the filing of the petition it appears that the Petitioner has changed its name from Pro-Palestine Bank Ltd., to Kupah Lemaan Eretz Israel, or from a "Bank" to a "Loan Fund". A certificate of change of name, dated 8th day of September, 1938, and purporting to be signed by the Registrar of Companies has been filed in proof thereof, but that is the only proof that has been tendered to the Court that all or any of the provisions of section 25 of the Ordinance have been complied with.

It is somewhat remarkable that no affidavit of any kind has been filed by either the Petitioner or the Opposer. Be that as it may — we will assume here that the usual formalities have been duly complied with by the Petitioner in addition to the due publication made in the Gazette and local press of notice of the hearing of this application.

We will assume further, in the absence of any evidence on this point, that the Opposer had notice of the extraordinary general meeting of the Company alleged to have been held on the 30th May, 1938.

Then on these assumptions, and giving the petition the benefit of any doubts that might have arisen as to the facts of the case — we

must take it that everything that has been alleged on behalf to the Petitioner as regards these facts is correct.

From the legal arguments submitted to the Court on behalf of the parties — two main points arise for our consideration —first, whether the alterations in question fall within the meaning and intention of subsection (e) of section 20, as Petitioner submits and Opposer denies, and secondly — if they do, then — whether the Court has any discretion in the circumstances and should refuse its consent thereto as Opposer submits it should — having regard particularly to the terms of subsection (3) of section 20.

Now section 7 of the Ordinance reads as follows:—

> "A company may not alter the conditions contained in its memorandum except in the cases and in the mode and to the extent for which express provisions is made in this Ordinance."

and the relevant portion of section 20 is as follows:—

> "(1) Subject to the provisions of this section, a company may, by special resolution, alter the provisions of its memorandum with respect to the objects of the company so far as may be required to enable it."
>
> "(e) to restrict or abandon any of the objects specified in the memorandum; or
>
> "(2) The alteration shall not take effect until and except in so far as it is confirmed on petition by the Court and authorised by the High Commissioner."
>
> "(3) Before confirming the alteration the court must be satisfied; (a) that sufficient notice has been given to every holder of debentures of the company and to any persons or class of persons whose interest will, in the opinion of the court, be affected; etc ..."

and these provisions by reason of subsection (2) of section 2 "shall be interpreted by reference to the Law of England relating to Companies." Therefore we must turn to the English Law to ascertain, if possible, the principles applicable to the questions which are before us.

Various authorities have been quoted to us by the parties but none of them appears exactly to fit the facts and circumstances of this case.

After carefully considering the alterations which we are asked to sanction, in their relation to the remaining articles of the memorandum of association of the Petitioner, we are fully satisfied that the former will necessitate the formal abandonment of what was one of the real objects of the Petitioning Bank, whose main object or purpose was clearly that of carrying on the ordinary and normal business of banking. By constituting itself into a so-called Loan Fund and maintaining merely as its "main objects" several of the enterprises and businesses more commonly associated with ordinary banking — it hopes to

carry on at least a considerable portion of its former business activities, and to avoid, as has been frankly stated on its behalf, complying with the provisions of the Banking Amendment Ordinance, 1937.

Although there may be some doubt whether in circumstances such a vital change in its memorandum, by the institution or abandonment of certain objects specified in the Petitioner's memorandum can be said to have been envisaged and contemplated by the legislature when framing section 20(1) and particularly (e) therof — it is not absolutely necessary for us to decide this point in view of the conclusions which follow later.

It must be remarked, however, that in the case of in re Scientific Poultry Breeders' Association Ltd., the Court of Appeal in sanctioning the alterations in the memorandum of association of the Society, appears to have paid considerable regard to the fact that the alteration there "was of a nature and quality to enable the association to carry on its business more economically and efficiently, or to attain its main purpose by new and improved means. It was not the alteration or the abandonment of its main purpose and system or a vital part thereof." The then Master of the Rolls went on to say later at page 232 — top — "but it would appear plain enough that the object with which this association was founded is still the main purpose of it. There is no intention to alter its system or to affect its main object": and again later on — "One still has to see whether or not the main object of the association is maintained, and to see whether or not while that object is maintained there is something inserted ancillary to that object — namely, a better method of carrying that object into operation." Again Lawrence L. J. at pages 234-235 appears to have abstained from holding that "if the alteration is of such a character as substantially to alter the main object for which the Company was formed" — the Court could or should sanction such alteration assuming it might come within the words of any relevant part of the Section — e.g. that which corresponds in the English Companies Act, to para. (e) of Subsection 20(1) of this Ordinance.

We have come to the very definite conclusion, therefore, that the Court has a discretion in this matter supposing the alterations here do fall within the ambit of paragraph e. But in view of what we have said before and the obvious fact that these alterations if followed and sanctioned by the Court will defeat the real object and purpose of the memorandum of association and might act as a cloak or means for defeating the express intention of the Legislature as set out in Section 4 of the Banking (Amendment and Further Provisions) Or-

dinance No. 27 of 1937, we feel unable to accede to the prayer of the Petitioner.

It is to be regretted that the Registrar of Companies who was duly served with notice of this application, does not deem it fit in the circumstances to take any part in these proceedings.

The Petition therefore must be dismissed and the Petitioner must pay the costs of the Opposing Society and LP. 3 advocate's fees.

Delivered this 31st day of October, 1938.

President.

CIVIL APPEAL NO. 242/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J. and Frumkin, J.

In the appeal of:—

The Attorney General, on behalf of the General Manager, Palestine Railways — Appellant.

v.

Abdul Fattah Haj Daoud Jayousi — Respondent.

Damage caused to crops by sparks or cinders emitted from railway engine — Non-liability of Railway Administration for damage done by sparks etc. unless failure to take reasonable precautions proved — Facts raising presumption that no reasonable precautions were taken — Shifting of burden of proof — Interest awarded although not claimed in statement of claim.

1. If according to special law defendant not liable for damage unless proved that he failed to take reasonable precautions and Court finds that facts of case raise a presumption that such precautions were not taken, Court right in holding that burden of proof shifted on to defendant.

2. Interest on amount adjudged must be disallowed, if not claimed in statement of claim.

Edit. Note:—As to 1 see: C.A. 200/38 4 CtLR 201; C.A. 163/37 2 CtLR 115; C.A. 221/37 3 CtLR 51; C.A. 188/38 4 CtLR 223.

As to 2 see: C.A. 213/37 3 CtLR 13.

Omar Waari (J. G. A.) for the Appellant.

Respondent in person.

Appeal from judgment of District Court, Haifa (49/35), dated 31.10.1938.

JUGDMENT.

When this case first came on appeal before this Court, it was not clear from the record where the boundary of the Railway actually lay. It was essential to know this, because if the fire which destroyed the Respondent's crops had started at a point within eight metres from the boundary of the Railway, then under Sec. 41(1) of the Railway Ordinance, Cap. 125, the Appellant would not be liable for the damage. The case was therefore remitted to the District Court to make a finding as to the position of the boundary, and at the same time to hear the evidence of an additional witness whom the Appellant wished to call.

It is, I think, clear from the first judgment of this Court that the only point at issue, in our minds, was where the fire started in relation to the Railway boundary. The District Court reopened the case, and has found that there were boundary marks, and that the fire started at a distance of more than eight metres outside those marks. The Court also heard the evidence of the fireman of one of the locomotives of the Railways and found that his evidence was of no use as to the identity of the locomotive which caused the fire. With these findings we agree.

Section 41(2) of the Railways Ordinance provides that the railway administration shall not be liable for any damages done by sparks or cinders emitted from an engine used on the railway, unless it is proved that the administration failed to take reasonable precaution to prevent such emission.

The District Court in its first judgment, which it confirmed when the case was heard the second time, found that the fire started at a distance of about twenty metres from the rail, and that it spread to the Respondent's crops which were some seventy metres from the railway. It was not disputed that the fire was caused by sparks or cinders emitted from an engine used on the railway. The District Court held that the fact that the fire started at a distance of twenty metres from the line suggested an abnormal emission of sparks and cinders from the engine, that the fact of such an emission from such a distance shifted the burden of proof onto the Appellant to prove that reasonable precautions were taken to prevent emission In our opinion, the fact that sparks or cinders were emitted from the engine to such a distance raises a presumption that reasonable precautions were not taken by the railway administration and that the District

Court rightly held that the burden of proof was thereby shifted. That burden the Appellant in no way discharged and the District Court were right therefore in finding for the Respondent.

The appeal is dismissed as regards the sum of LP. 90 but the judgment for interest which the District Court passed must be disallowed, as the Respondent did not claim it in the original statement of claim. The Respondent will have all the costs incurred by him and awarded in the District Court and he will have also LP 20 (to include advocate's fees) to cover the costs of the two appeals to this Court in which in the result he has been successful.

Delivered this 10th day of January, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 231/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J. and Khayat, J.

In the appeal of:—

Abdel Raouf Jaber Shahin, in his personal capacity and on behalf of the heirs of Mohammad Jaber Shahin — Appellant.

v.

Yehuda Blum — Respondent.

Refusal by Chief Registrar of application for exemption from Court fees — Unsuccessful application to Supreme Court for exemption — Application for extension of time in connection with delay to pay fees.

1. If, after deducting period(s) between date(s) of application(s) for exemtpion from appeal fees and date(s) of notification of refusal(s), more than 30 days pass from date of judgment till payment of fees, appeal out of time.

2. Court of Appeal has no power to grant extension of time, when default consists in non-payment of prescribed fees.

Edit. Note:—See Misc. Appl. 63/38 5 CtLR 31; Misc. A. 23/38 4 CtLR 153; Misc. A. 48/38 ibid. 157; Misc. A. 56/38 ibid. 196.

Elia for Appellant.
Wilner for Respondent.

Appeal from judgment of District Court Jaffa, sitting at Tel-Aviv (84/35), dated 20.6.1938.

JUDGMENT.

In this case a preliminary objection has been taken, that the appeal was lodged out of time.

The judgment in the District Court was given in the presence of the parties on 20th June, 1938, and the appeal should have been filed not later than 20th July. On 18th July an application was filed by the Appellant, with the Chief Registrar for exemption from Court fees, and on that day 28 days from the date of judgment had already passed. The Chief Registrar heard the application on 12th September, 1938, refused it and his decision was served on the parties on 17th September. On 18th September, an application was made to the Supreme Court for exemption from fees, and that makes a total of 29 days. On 12th October, 1938, the Supreme Court refused the application for exemption.

On the 15th October the appeal fees were paid, that is, after 32 days, and it would appear, therefore, that the appeal is out of time.

An application has been made to us now to extend the time for paying the fees on the appeal. This application should have been made within 30 days after the expiration of the period of appeal, for an extension of time, see Rule 234 of the Civil Procedure Rules, 1938. By Rule 333 the Court has no power to grant an extension of time, when the default consists in non-payment of the prescribed fees.

The appeal, being out of time, is therefore dismissed with costs and advocate's fees assessed at LP 10.—.

Delivered this 5th day of January, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 237/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Greene, J. Frumkin, J.

In the appeal of:—

The Attorney General — Appellant.

v.

The heirs of Prince Mohammed Selim, son of the late Sultan Abdul Hamid II of Turkey — Respondent.

Claim by heirs to share in land, originally in name of Sultan, registered under Land (Settlement of Title) Ordinance in name of High Commissioner in trust for Government of Palestine — Disagreement of two Judges of Land Court — Effect of Establishment of Courts Order on Rule 2 of Land Courts Rules — Interpretation of Rule 2 of Land Courts Rules — Admission in Court below as to construction of rule — Burden of proof in cases regarding title of land registered under (Settlement of Title) Ordinance.

1. No legislation must be taken to be impliedly repealed unless manifestly inconsistent with some subsequent legislation.

2. Rule 2 of Land Court Rules (making provision to meet case of disagreement when Land Court constituted of two judges) not ultra vires and not impliedly repealed by Establishment of Courts (Amendment) Order 1937.

3. Procedure laid down in Rule 2 of Land Court Rules (calling in a third judge in case of disagreement) not discretionary, and any judgment given not in consistence with it at a time when Rule was still in force — not according to law.

4. Admission made by party in lower Court as to interpretation of a certain rule cannot preclude Supreme Court from declaring proper construction of rule when necessary to decide procedure that should have been adopted in the circumstances, nor does it estop party from putting before Supreme Court argument against interpretation of Court below.

5. A rule cannot be held to be abrogated by considerations of the kind that it is inconvenient and leads to delay and expense.

6. A person registered as owner of land after investigation of Settlement Officer — entitled to retain his status of owner

until some other person adduces facts making out a prima facie case for annulment of registration.

Edit. Note:—As to 2 & 3 see: L.A. 33/36 1 CtLR Rep. 27; C.A. 18/38 3 CtLR 153; C.A. 46/38 ibid. 185; L.A. 20/23 2 C o J 482.

The Attorney General and *Kantrovitch* (*J. G. A.*) for Appellant.
Dr. Weinshall and *Ginzburg* for Respondents.

Appeal from judgment of Land Court, Jaffa, dated 18.11.1937.

JUDGMENT

1. The land in dispute in this case was in the year 1932 registered in the name of the High Commissioner for Palestine in trust for the Government of Palestine under the Land (Settlement of Title) Ordinance. In the year 1934 a predecessor in title of the respondents took action in the Land Court of Jaffa claiming a declaration that he was entitled to a share in the land. This predecessor died and the action was continued in the names of the respondents. The case was heard before a Court composed of the President of the District Court and a Judge of the District Court. Separate judgments were delivered on the 30th of July, 1937. The President delivered judgment in favour of the respondents, the Judge delivered a judgment dismissing the action. They then decided that as the burden of proof was on the Government of Palestine, the consequence was that the respondents succeeded in the action.

2. The Attorney General for Palestine has appealed on behalf of the Government and the first question that arises is as to the procedure to be adopted when a Land Court is constituted of two Judges and they differ in their conclusions. Rules had been made under the Land Courts Ordinance shortly after it became Law in 1921. These rules are to be found on p. 2368 of Volume III of the Laws of Palestine. Rule 2 reads as follows:—

> "2 (1) The land court shall, save as hereinafter provided, consist of a British judge as president and a Palestinian member.
>
> (2) In case of disagreement, the Court may call in any magistrate or member of the district court or a kadi as a third member."

The effect of this rule was considered by the Court below and it came to several conclusions. Firstly, that it was ultra vires; secondly, that it had become obsolete; thirdly, that the procedure under it was discretionary; and fourthly, that it was inconvenient in its application. The Attorney General has cited to us certain decisions of this Court in which it was decided to remit the action for the rule to be complied with when the two judges of a Land Court had disagreed.

Dr. Weinshall for the respondents has cited a case in which this Court in similar circumstances refused to remit the action as it found it could decide the issues itself. This however is the first occasion on which the question of the validity and interpretation of the rule has been fully argued.

3. The rule in question was made by the Legal Secretary by virtue of powers conferred on him by Section 1 of the Land Courts Ordinance. No argument has been addressed to us to the effect that the Legal Secretary exceeded his powers in making the rule. We are of opinion that no case has been made out either by the Court below or by the advocate for the respondents for treating the rule as ultra vires. The argument of Dr. Weinshall for the respondents is in reality a contention that the rule has been impliedly repealed by subsequent legislation. The argument may be divided into two parts. By the Establishment of Courts Order which came into force on the 23rd of January, 1937, it was provided that a Land Court may be constituted by a President or Relieving President of a District Court and one or more Judges of a District Court. There can be no doubt that the effect of this part of the Order was to repeal by implication rule 2(1) of the Land Courts Rules. Dr. Weinshall says that in repealing the first part of the rule the order must of necessity be taken to have repealed the second part. The second part was enacted to deal with eventualities that might arise from the constitution of the Court as prescribed in the first part and if the first part has disappeared owing to subsequent legislation the second part must follow it. Cessante ratione, cessat lex.

4. We are unable to agree. Rule 2(2) was made to meet the case of a disagreement when a Land Court consists of two judges. Under the Establishment of Courts Order a Land Court may still be constituted of two judges and the necessity for the rule remains. No legislation must be taken to be impliedly repealed unless it is manifestly inconsistent with some subsequent legislation. Rule 2(2) is not so inconsistent and provides a method of obtaining a majority decision in land disputes.

5. The second part of Dr. Weinshall's argument may be put as follows:— The Establishment of Courts Order prescribes the description of judicial officers who may sit on a Land Court. They must be Presidents or Relieving Presidents or Judges of a District Court. Under Rule 2(2) of the Land Court Rules a magistrate or a kadi may be called in to adjudicate, and this makes the rule inconsistent with the Order. As to this, we take the view that the Order prescribes in what manner a Land Court is to be constituted when it sits to

hear a land dispute, and that the rule provides what is to be done when a Land Court properly constituted of two members cannot agree. The Order provides for the original constitution of the Court and there is nothing inconsistent in providing for a different class of judicial officers in case of a disagreement. Dr. Weinshall's argument in fact goes too far and if it were adopted would make rule 2(2) inconsistent with rule 2(1) of the Land Court Rules.

6. It is next said that the procedure laid down in rule 2(2) is discretionary. Stress is laid on the fact that the word used is "may". We are of opinion that this is an inaccurate interpretation. The main consideration is the object of the rule. Its meaning is that in the case of a disagreement it is necessary that a method should be prescribed to ensure that there shall be a majority decision. Power has to be conferred on the Court to call in a third member and the word "may" is used to express the conferring of the power. It is a clear case of the power being coupled with a duty and it is intended that the power is to be used in case of a disagreement.

7. Dr. Weinshall objected to the Attorney-General arguing before us that the rule was not discretionary on the ground that in the Court below he had admitted that it was discretionary. The interpretation of the rule is a question of law and whatever position the Attorney-General took up in the Court below cannot preclude this Court from declaring the proper construction of the rule, once it is necessary to decide the procedure that should have been adopted in the circumstances. The opinion of the Court below had to be considered, and the Attorney-General fulfilled a duty by putting before us the arguments which might prevail against Dr. Weinshall's contention.

8. Lastly it is said that the rule is inconvenient and leads to delay and expense. The answer to this is that considerations of this kind cannot be held to abrogate a law.

9. An attempt has also been made to show that the rule is no longer law as it did not appear in a compilation of the Laws of Palestine made in 1926. This compilation was unofficial and of no legal effect. Recent legislation shows that the rule is still in force. Section 1 of the Land Courts Ordinance under which the rule was made was repealed by the Statute Law Revision Ordinance in 1934, but it was provided that the repeal should not affect any rules made under it. The rules are published in the revised edition of the Laws of Palestine and Section 8 of the Revised Edition of the Laws Ordinance enacts that the revised edition is to be sole authentic text of the Ordinances of Palestine in force on the 31st of December, 1933. By the Interpretation Ordinance the word Ordinance includes any

regulations made under an Ordinance, and therefore includes these rules.

10. We are therefore of opinion that rule 2(2) of the Land Court Rules is not ultra vires, that it has not been impliedly repealed, that it is not discretionary and that there are no other grounds for deeming it to have been otherwise than of full force and effect when the judgments of the Land Court were delivered on the 30th of July, 1937. In these circumstances it was the duty of the Land Court to comply with the procedure laid down in the rules and its failure to do so meant that the judgment delivered in favour of the respondents was not according to law.

11. By arrangement no argument was addressed to us on the merits of the dispute but both the Attorney-General and Dr. Weinshall argued the question as to the burden of proof. The Court below placed this on the appellant. The appellant was registered as the owner of the land in the new register set up by the Land (Settlement of Title) Ordinance. The respondents were seeking to have this registration anulled and to have their names registered as owners. We desire to say as little on the merits as possible but we have no doubt that in the circumstances the burden of proof was on the respondents. A person in possession of land by a registered title in the new register is entitled to retain his possession and his status of owner until some other person adduces facts making out a prima facie case for the annulment of the registration, and it may result in injustice if the person who has been declared the owner after the investigation of a Settlement Officer is forced into the position of a plaintiff claiming the land. We think that the Court below fell into an error on this point and that this is another ground for making the order we propose to make.

12. The Land Court Rules were repealed in 1938 and we cannot therefore remit the case for rule 2(2) to be complied with, but for the reasons mentioned we think there should be a new trial and we express the opinion that it would be advisable that the Land Court trying the case should consist of a President or Relieving President and two Judges of the District Court. We therefore order that the appeal be allowed, that the judgment of the Court below in favour of the respondents be set aside, and that there be an new trial. The costs both here and in the Court below will abide the event, and we certify a fee of LP. 15 for attendance at the hearing.

Delivered this 12th day of January, 1939.

Senior Puisne Judge.

CIVIL APPEAL NO. 246/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Copland, J. and Khayat, J.

In the appeal of:—

Maria Theresa Serra du Cassano, in her own capacity and on behalf of the Estate of the late Alfred Sursock, her husband, and as guardian of her daughter Ivonne Sursock — Appellant.

v.

1. George Neggiar, on behalf of his late mother Labibeh, daugther of Mussa Sursock wife of the late Antoine Neggiar
2. Gabriel F. Debbas on behalf of the Estate of his late mother Rosa, daughter of Mussah Sursock, wife of Fedallah Debbas — Respondents.

Interlocutory order of Land Court made after completion of case allowing a party to call evidence to prove particular issue — Leave to appeal from interlocutory order.

After parties closed their cases and made their final submissions Court to deal with action and deliver judgment and not to give any party a further opportunity of proving something which he should have proved when leading his evidence.

Edit. Note:—See C.A. 139/37 2 CtLR 97; Rule 189 of the Civil Procedure Rules, 1938.

Weinshall for Appellant.

For Respondent — no appearance.

Appeal from order of Land Court, Haifa, (50/36) dated 24.5.1938.

JUDGMENT.

This is an appeal from the Land Court of Haifa. In the hearing in the Court below both parties closed their cases and final submissions were made by the advocates on each side. The Court below then made an order that the Respondents should be allowed to call evidence to prove a particular issue. The Appellant has appealed against that order on the ground that the case was completed and that

all that remained was for the Court to deliver judgment in accordance with the evidence and the arguments of the advocates.

We are in agreement with the contention of the Appellant. Whatever issue had to be proved by the Respondents it should have been proved by them when they had the opportunity when leading their evidence. We think that the Court below erred in giving the Respondents a further opportunity of filling in something that had been omitted.

The appeal is therefore allowed, the interlocutory order of the Court below is set aside, and the action is remitted to the Court below to deal with it according to the law.

The appellant will have the costs and we certify a fee of LP.15 for the attendance at the hearing.

Delivered this 18th day of January, 1939.

Senior Puisne Judge.

CRIMINAL APPEAL NO. 89/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Frumkin, J.

In the appeal of:—

The Attorney General — Appellant.

v.

Rousseau, Ticket Cashier of the "Aviv" Taxi Service, Jerusalem — Respondent

Charging less than fares laid down in Rules made under Road Transport Ordinance — Acquittal because no penalty imposed by law for incriminated act.

1. No criminal offence where no penalty expressly imposed.

2. Expression "this Ordinance" in sec. 18 of Road Transport Ordinance, particularly having regard to its context, does not include Rules made under the Ordinance.

Salant for Appellant.

Levitzky for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 8.6. 1938, whereby Respondent was acquitted of the charge brought against him under Rule 11A of thhe Road Transport (Routes and Tarrifs) (Amendment) Rules, 1937, (Rule 6 thereof) in charging less than the fares laid down thereunder.

JUDGMENT.

This is an appeal by the Attorney-General from a decision of the District Court, Jerusalem, discharging the Respondent who was alleged to have committed an offence against Rule 11A of the Road Transport (Routes and Tariffs) Rules, 1934, which is set out in Rule 6 of the Road Transport (Routes and Tariffs) (Amendment) Rules, 1937, the Court holding that because there was no penalty imposed there was no offence.

The rule in question was made by the High Commissioner by virtue of the powers conferred upon him by the Road Transport Ordinance, Cap. 128, and it does not expressly provide a penalty for its breach.

It is argued that the provisions of Section 18 of the Ordinance cover this case. That section provides— "Any person who (a) fails to comply with any of the provisions of this Ordinance.... is guilty of an offence, and is liable to imprisonment for one month..." And is is urged by Mr. Salant for the Appellant — that "this Ordinance", by virtue of the provisions of the Interpretation Ordinance, Cap. 69, includes rules made thereunder.

That Ordinance defines "Ordinance" as meaning —

> "....any enactment by the legislature of Palestine, and includes orders by the High Commissioner in Council, orders of the High Commissioner, and regulations or orders made under an Ordinance, and an Ordinance may be cited for all purposes by its short title, if any".

and by it "regulations" includes rules and bye-laws.

When the word "Ordinance" is used in a general sense this wide meaning clearly applies, but we do not think the expression "this Ordinance" in the relevant section of the Road Transport Ordinance includes rules made under the Ordinance, particularly having regard to its context. We do not think, therefore, that any penalty is expressly imposed by the Road Transport Ordinance.

In the District Court an argument was based on Section 7 (b) of the Interpretation Ordinance, but it is clear that no penalty was imposed under that section.

It may be that the provisions of Section 382 of the Criminal Code Ordinance are applicable to this case, but as to that we express no opinion.

The appeal is dismissed. No order as to costs.

Delivered this 12th day of January, 1939.

Chief Justice.

HIGH COURT CASE NO. 66/38.

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

Before:—Copland, J. and Khayat, J.
In the application of:—
Isser Malmoud — Petitioner.
v.
1. Chief Execution Officer, Haifa
2. Irgun Ephraim
3. Itzhaq Levy — Respondents.

Judgment confirming provisional attachment without mentioning third party nor amount attached — Refusal of Chief Execution Officer to execute judgment as against third person.

Where judgment confirms provisional attachment with third party but does not state its amount and neither Statement of claim nor Judgment indicates the 3rd party, judgment cannot as regards latter be executed.

Nishri for Petitioner.
For Respondent No. 1: No appearance — served.
Levitzky for Respondent No. 2.
For Respondent No. 3: No appearance — served.

Application for an order to issue to the 2nd Respondent directing him to show cause why his order in Execution File Haifa No. 5007/37, dated 21.9.1938 should not be set aside.

JUDGMENT.

Many points have been taken by the 2nd Respondent in this return to the order nisi previously granted by this Court, but in the view that we take of the case, it is only necessary to deal with two of them.

The first of these two points is that this judgment cannot be executed, because there is no mention of the 2nd Respondent either in the Statement of Claim or in the Judgment as a 3rd party in the action, that is to say, the Judgment itself states that the Defendant, one Isaac Levy is to pay the sum of LP. 75 for costs and interest and confirms a provisional attachment and its expenses. It does not say against whom this provisional attachment is confirmed and it does not state its amount.

The second point is really included in the first, that is that no definite sum is mentioned in the Judgment, and therefore no Execution officer knows what he is to execute. On both these grounds, therefore, we think that the rule will have to be discharged. The 2nd Respondent will have costs assessed at LP. 10.— to include advocate's fees.

Delivered this 30th day of January, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 248/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Frumkin, J.

In the appeal of:—

Philip Mayer & Co. — Appellants.

v.

Max Lewin — Respondents.

Agreement for advance of money to be repaid with interest and profits — Mortgage given as collateral security — Bankruptcy notice issued upon failure to comply with judgment — Application to set aside bankruptcy notice — Receiving Order applied for and obtained by secured creditor.

1. An agreement providing for re-payment of money advanced together with interest and profits not in itself an agreement for usurious interest.

2. If Court, after hearing evidence as to value of collateral security, makes a Receiving Order upon application of secured creditor, it cannot be said to have exercised its discretion wrongly.

Gavison for Appellants.
Shapira for Respondent.

Appeal from order of District Court, Haifa, dated 5.12.1938.

JUDGMENT.

This is an appeal from a decision of the District Court, Haifa, whereby a Receiving Order was made against the Appellants.

In August, 1935, an agreement was entered into between the Appellants, a registered partnership, and Mr. Max Levin, — the petitioning creditor and the Respondent before us.

By the agreement Mr. Levin was to advance to the partnership a sum of six thousand pounds in order that he might have an interest in certain land transactions, and the agreement provided for the repayment of this sum together with interest and profits.

The firm also gave Mr. Levin a mortgage on certain properties as collateral security.

This was an agreement between business men for the purpose of a business transaction, which, at that time, there was every reason to suppose would prove profitable. There was no suggestion of a moneylender lending money to a necessitous borrower. I mention this, as in the course of the proceedings a suggestion was made that usurious interest had been charged. Prima facie, I see no ground for that suggestion.

The firm failed to comply with its obligations under the agreement, and proceedings were instituted in the District Court, Haifa. The parties reached an agreement, and on the 16th of February, 1937, that agreement was made an Order of Court. By it the firm agreed to repay the amount due, with interest. There was then no suggestion of usurious interest.

The Appellants failed to comply with the judgment, and a bankruptcy notice was issued on the 16tth of March, 1938. An application was made to set aside this notice, which was dismissed, but it is said by the Appellants that no extension of time was granted by the Court for complying with the notice, and that the three months, within which proceedings should be taken, had expired before the Receiving Order was made.

The matter came before the Court on the 29th of April, when the Appellants undertook to make certain payments, and the learned Relieving President noted on the record as follows.—

> "Failing any one of these conditions this application to set aside the bankruptcy notice will be dismissed and the notice confirmed. Adjourned to a date to be fixed by Registrar after 5.6.38, with liberty to Respondent to apply for earlier hearing".

We are of opinion that the effect of this was to extend the period. The Appellants failed to comply with the conditions and the Receiving Order was made.

The Appellants also contended before us that by reason of the collateral security which had been given it was inequitable that the Receiving Order should be made. The rights of a secured creditor are clearly set out in the Bankruptcy Ordinance. In so far as the Court should take into consideration the question of security when making a Receiving Order, it is clear that in this case the Court heard evidence, which was conflicting, as to the value of the security and we

do not think it can be suggested that the Court exercised its discretion wrongly.

The appeal is dismissed with costs which we assess at an inclusive figure of LP. 15.—.

Delivered this 17th day of January, 1939.

Chief Justice.

CIVIL APPEAL NO. 245/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

Gan Shmuel Kvuzat Poalim
Lehityashvut Shitufit Ltd. — Appellants.

v.

Local Council, Hedera — Respondents

Letter of Village Committee containing admission of liability — Question whether transaction a transfer of indebtedness under Mejelle or assignment of debt under Debt (Assignment) Ordinance — Local Council successor in rights to Village Committee.

1. Where there is a clear admission of indebtedness, question whether it is or is not a transfer of indebtedness under Mejelle or an assignment of debt under Debt (Assignment) Ordinance — irrelevant.

2. Admission of indebtedness given by Village Committee before Local Council assumed office makes latter liable thereon.

Bar Shira for Appellants.

Miss Frumkin and *Eizenberg* for Respondents.

Appeal from judgment of District Court, Haifa, dated 20.11.1938.

JUDGMENT.

Whatever else the letter of the 4th February, 1936, sent by the Village Committee of Hedera to the Appellants, may be, whether it is or is not a transfer of indebtedness under the Mejelle, or an assignment of a debt under the Debt (Assignment) Ordinance, Cap. 47, it is not necessary for us to decide, because we are unanimously of opinion that it is a clear admission of indebtedness by the Village Committee to the Appellants. The words in the letter — "We have credited the account of Gan Shmuel (the Appellants) in the above sum" — i. e. the amount of LP. 86.700, make this clear beyond doubt.

Whether the Respondents, the Local Council of Hedera, are respon-

sible for this liability of the Village Committee of Hedera depends upon the date when the Local Council commenced to function, and nobody can tell us what that date is. If the admission of the 4th February, 1936, was given after the date the Local Council assumed office, then clearly the latter will not be liable. If it were given before the Local Council assumed office, then the debt would be a liability of the Village Committee, and the admission of indebtedness would have been validy given, and the Respondents would be liable thereon.

The appeal must be allowed and judgment of the District Court set aside. The case is remitted to the District Court to ascertain the above date and to give a fresh judgment, in view of the rulings given by this Court on this appeal. Costs to abide the result of the fresh judgment.

Delivered this 30th day of January, 1939.

British Puisne Judge.

CRIMINAL APPEAL NO. 5/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

John Mansell — Appellant.

v.

The Attorney General — Respondent.

Conviction by Assize Court of causing grievous harm — Circumstances justifying Police constable shooting at escaping prisoner.

1. Any Court including Assize Court has power to convict on the facts proved before them of a lesser offence than that with which accused was charged.

2. Police constable entitled to use all reasonable means to prevent escape of prisoner charged with serious offence.

If, considering all circumstances, firing the only reasonable means to prevent prisoner's escape, Police constable justified in taking this last resort.

Goitein for Appellant.

Crown Counsel (*Bell*) for Respondent.

Appeal from judgment of Court of Criminal Assize sitting at Jerusalem, dated 11.1.1939, whereby the appellant was convicted of the offence of an attempt to do grievous harm contrary to Sections 238 & 30 of the Criminal Code Ordinance, 1936, and sentenced to one years' imprisonment.

JUDGMENT.

The two Appellants in this case were convicted by the Assize Court sitting at Jerusalem. The Appellant Wood was convicted of attempted manslaughter and sentenced to 3 years' imprisonment. The Appellant Mansell was sentenced to one years' imprisonment for an attempt to inflict grievous harm and has appealed by leave.

The two Appellants together with two other police constables were detailed by their superior officer to bring a prisoner, one Mohammad Haddad, from Tel-Aviv to Jaffa in order to be charged with the offence of carrying fire-arms and ammunition. The prisoner was duly charged in Jaffa and the same four men were then ordered to take him back to the lock-up in Tel-Aviv in which he was detained for reasons of public security. On the way back the car in which they were travelling broke down and by some means or other the prisoner got out of the car unobserved and had proceeded for a distance of about 20 metres before the fact was discovered by any of the four police officers in charge. When his absence was discovered, from the evidence which was accepted by the Trial Court, a warning shot was fired by Constable Mansell, and when the prisoner did not stop moving towards the German Colony in Jaffa, Mansell and the other men with him opened fire once each — two with pistols and two with rifles which they were carrying. The man fell to the ground — I am leaving for the moment consideration as to whether the second shot of the firing took place later after the man had fallen to the ground and I am dealing now purely with the first incident. The man was later put on a truck and taken to the Jaffa Municipal Hospital where he eventually died as a result of the wounds which he received in his attempt to escape.

It is, I think, implicit from the evidence of the Assize Court that the prisoner was attempting to escape. No question therefore arises on that.

I am dealing now first with the appeal of constable Mansell. Mr. Goitein has taken a considerable number of points, but his principal point in defence on the appeal is that Mansell was justified in firing, in the circumstances, to prevent the escape of this prisoner.

I will just deal with the other points. First is the question of jurisdiction — that Assize Court had no jurisdiction to convict a prisoner of causing grievous harm. I agree that the Assize Court would have had no jurisdiction to try a person who was charged before it with such an offence. Of course the jurisdiction is confined, with certain exceptions as to circumstances which do not arise here, to try persons charged with offences that are punishable by death. The Appellants

were properly triable before the Assize Court because the Appellants were charged with the offence of premeditated murder, but section 52 of the Trial Upon Information Ordinance undoubtedly gives power to any Court, including an Assize Court to convict of any lesser offence, the necessary ingredients to prove which are covered by the facts proved before them.

Another point is that the Appellant was wrongly convicted of an attempt to cause grievous harm, because it was impossible to say that the shot fired by him had caused any grievous hurt to the man who was killed, and because one of the wounds was merely a bruise on an ankle. There is nothing in that point and I do not think I am doing Mr. Goitein an injustice in saying that I do not think that the thought there was.

With regard to the question of the non-identification of the deceased we think that argument fails because there is no doubt on the evidence that the body of the man who had been shot by these four men was the body which was delivered by the police to the hospital and was the body on which the post mortem was performed by the doctor, and in respect of which the doctor gave his evidence before the Assize Court. Neither is there any real prejudice to the Appellant by reason of the fact that the coroner may or may not have been negligent in his duties. As I said the main point on which the appeal is to be decided is the question whether the police were justified in firing at the escaping prisoner, bearing in mind all the circumstances which surrounded them.

Now, in spite of the somewhat depreciatory remarks that we have heard made with regard to the Amendment of the Police Manual, we think that on the whole it gives a very fair resumê of the circumstances in which a police officer is entitled to use fire-arms. It may not have been put in strict legal language but it certainly does give them a guide, and a more or less correct guide, as to what they can do or should not do. There is practically no English Law on the subject, and what there is, as has been pointed out by Mr. Goitein, is derived from comments of learned judicial personalities who have been dead for some hundreds of years. There are no modern examples to be found from the Law Reports of England. Putting it generally a police constable is entitled to use all reasonable means to prevent the escape of a prisoner who has been charged with a serious offence such as was the case here, and if firing is the only means or reasonable means available to him, then he is entitled to fire — but the means must be reasonable — circumstances must be such that if this last resort of firing be not taken then there is a reasonable proba-

bility of the prisoner escaping. That I think is a fair summary of the law derived from the text books.

From this it is apparent that every case has got to be considered on its own merits, with regard to the surrounding circumstances. Now the Appellant, and the others who were charged with him, stated in justification of what they did in firing — that the man Haddad had got a start before his escape was observed, that it would have been dangerous in the circumstances to follow him, and if he could have gone a further distance of some 30-40 metres it would have taken him to a quarter which would have brought him to the Mustaqim Quarter, and in all probability he would have got away.

The Assize Court arrived at the following conclusion. They stated that fully to understand these arguments it was necessary to bear in mind that at the time in question a section of the population in Jaffa was in revolt — the administration was seriously handicapped and the Government Forces were inadequate to deal with the situation; that, if I may say so, seems to me to be a somewhat mild view of the situation in Jaffa. They based their opinion on the evidence given by Mr. Broadhurst, who was second in command of the police in Jaffa, and that of Sgt. Brown who was also stationed in that place. The evidence of those two police officers is very illuminating; it comes to show that in Jaffa from May 1st to October 24th (when the prisoner was shot) eight members of the Police Force had been shot and killed in day-light in public places, and there had been six attempted murders of police-men all within the course of that comparatively short time, while in two months, September and October, and it must be remembered that this offence into which the Assize Court was inquiring took place on October 24th, there had been 24 murders in Jaffa and 31 cases of attempted murder — a record which I think it would be hard to equal in any town which pretends to call itself civilised. In addition, shortly before October 24th, two prisoners had escaped from police custody, one being the accomplice or suspected accomplice of this Haddad, and had not been caught. Both these police officers say that it was not safe for police men to run after an escaping Arab in the Salameh Road, and it would have been dangerous if they would have done so.

Presumably the Appellant together with those who were with him must have known of the state of affairs in Jaffa. They knew that two prisoners had already escaped from police custody — they were in this dangerous neighbourhood, and the course of action, that of firing at the prisoner, which they had to take had to be determined in a second or two, rightly or wrongly. They had no time within

which to think how to decide what their rights or liabilities were, they had, if I may say so, no time such as we sitting in this Court have in deciding the matter, to adjourn if necessary and write reserved judgments. They had to act on the spur of the moment bearing in mind also, as they were undoubtedly entitled to do, that it was not part of their duty to run unnecessary risks to themselves. By the nature of their calling policemen are always liable to some risk, but they had to decide, in this case in a moment of time, what they would do, knowing that they might be called upon later to justify their actions.

Justification as to firing is entirely a question of law to be considered on the circumstances surrounding each case, taking into account inferences to be drawn from facts and the facts proved.

Taking all the circumstances of the case into consideration, bearing in mind the appalling conditions prevailing in Jaffa at this time, bearing in mind the escape already of two prisoners from police custody, we are satisfied that the Appellant Mansell, and in this respect the other Police Constables who were with him are also placed in the same position, was in the circumstances justified in firing low at the man, in view of the likelihood or probability of the prisoner escaping, and that if he had escaped, the possibility of re-arresting him would have been problematical.

We do not want it to be taken that the police are always justified in firing, and we do not want to have anything said in this judgment to be taken as laying that down. In the circumstances of this case we think that they were justified, and that it was the only reasonable means open to them considering all the circumstances to prevent the prisoner's escape. It was unfortunate that the prisoner was killed, but for that the Appellants cannot be blamed.

We have dealt so far solely with the first shots fired. We have left out considering the further shot that Wood is alleged to have fired when the prisoner was lying wounded on the ground.

In these circumstances we allow the appeal of John Mansell and quash the conviction, and order him to be discharged.

With regard to the appeal of Wood we propose to take a little further time to consider our judgment in that case. We are able to do this because the two appeals are separate appeals. What we have stated on the first appeal only applies to Wood in respect of the shot fired by him together with the other men.

We therefore propose to give judgment in the case of Wood on Thursday next at 11 o'clock.

Delivered this 23rd day of January, 1939.

British Puisne Judge.

CRIMINAL APPEAL NO. 1/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J., Greene, J. and Frumkin, J,
In the appeal of:—

William Edward Thomas Wood — Applicant.

v.

The Attorney General — Respondent.

Attempted manslaughter — Conflicting evidence as to what accused was wearing at time of offence — Finding of fact made by Trial Court without giving reasons for it — Question of interference by Court of Appeal with finding of lower Court — Criminal Code Ordinance, Art. 29, 30, 212 — *Rex v. John Reuben Parker,* 6 *C.A.R.* 285.

1. Attempted manslaughter is attempting to cause death by an unlawful act or omission and is a punishable offence.
2. (Per Copland, J.) Where there is a very grave conflict of evidence and Court of Appeal finds that there was misdirection or want of direction in trial Court on a vital matter, it may give Appellant benefit of doubt and quash conviction and sentence.

Goitein for Appellant.
Crown Counsel (*Bell*) for Respondent.

Appeal from judgment of the Court of Criminal Assize sitting at Jerusalem, dated 11.1.1939, whereby the Appellant was convicted of the offence of an attempt to commit manslaughter contrary to Sections 212 and 30 of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment

JUDGMENT.

Copland, J.

In this appeal by William Edward Thomas Wood, the Court has already stated that in its opinion the Appellant together with the other Police Constables who were with him, were justified in the circumstances then present in firing at an escaping prisoner. It is now

necessary to deal with the second incident in which this Appellant is concerned, namely, the conviction for attempted manslaughter by firing on the prisoner who was lying on the ground.

Several minor points taken by Mr. Goitein on his behalf have already been dealt with in Mansell's appeal, but there is one further point which I will dispose of now, and that is the proposition by the defence that there is no such offence known to the law as attempted manslaughter. Manslaughter is defined in the Criminal Code Section 212 as causing death by an unlawful act or omission. Attempted manslaughter is thus attempting to cause death by an unlawful act or omission, and this is obviously an offence. I think that some confusion has arisen owing to the fact that the term "manslaughter" has a different meaning in the Criminal Code of this country from that which it has in English law, since in Palestine the term manslaughter covers forms of killing which in England would rightly be charged and dealt with as murder.

To turn now to the main case. It is to my mind a case of very great difficulty, because there was evidence before the Assize Court, upon which, if property directed, it could act. Wood's guilt depends upon two factors — (1) was a shot fired when the prisoner was lying on the ground and (2) if so — did Wood fire it? As to the first, there was a considerable amount of evidence given by a number of witnesses that the prisoner Mohammad Haddad was fired at when lying wounded. It is true that the manner in which this evidence was obtained — one might almost say canvassed for — detracts somewhat from its value, and it is also true that other evidence given by some of these same witnesses, as to certain facts stated by them which would have proved that the prisoner was deliberately murdered, was rejected by the Court of Trial on the ground that it would be unsafe to draw any inferences therefrom, in view of a conflict in the various tales told, a circumstance which again would throw some suspicion on their veracity in other parts of their evidence. Lieut. Clarke also, a trained observer, states that there were not more than five shots — in a burst of fire — with no pause before the last one. It is also clear that the deceased could not have been hit by such a shot, because there is practically uncontradicted evidence that when the alleged shot was fired, he was lying on his back, and from the medical evidence it is proved that all the shots which hit him were fired from behind him, and it is difficult to belive that if a shot were fired at the man, lying on the ground at a range of one metre that it would have missed him. There was however evidence upon which the Court of Trial even with these considerations in mind could come to the conclusion

that a shot was fired at the deceased when lying wounded on the ground even if it did not hit him, and that finding cannot be interfered with.

As to the second factor, namely, did the Appellant fire the shot, that depends entirely upon whether he was at the time wearing brown overalls or not, and here there is a very grave conflict of evidence. Lieut. Clarke of the 1st Bn. Beds and Herts Regt. who was on the scene within two minutes of the firing, states that Appellant whom he knew previously, was dressed in a grey police shirt and grey flannel trousers. Police Sgt. Brown who was in charge of the "G" Squad., to which the Appellant belonged says that Wood that morning was dressed in a blue shirt and grey flannels. Police Constables Ainsworth, Entwistle and Wilkes, all of whom saw Wood, either immediately before or immediately after the shooting, say the same — that he was wearing grey flannel trousers. No question arises as to the credibility of these witnesses, three of whom were called by the prosecution, and the Court of Trial never mentioned their credibility or the reverse.

On the other hand P. Sgt. Collings stated that Wood das wearing brown overalls, though in cross-examination he qualifies this by adding "to the best of my recollection". Other witnesses say that the driver was wearing overalls or brown overalls. The vital importance of the question of what clothes the Appellant was wearing will be realised when it is remembered that no one witness actually identified Wood personally as the man who shot. They all variously described the person who fired as the "one wearing red clothes, the constable in mechanic's overalls, the man wearing working clothes, or the driver". One prosecution witness said that the "man repairing the machine was the one dressed in brown, not the man who fired". Other witnesses could not describe the dress of the man who fired.

There is no proof, not even suggestion that Wood was over issued with overalls, nor that he had ever worn then on any other occasion — he denies both things.

The Trial Court dealt with this conflict of evidence on the subject of the way in which Wood was dressed in these words:—

> "Before dealing with it there is a point to be considered — this is — how was he (Wood) dressed at material times? As to this there is a conflict; he himself says he was wearing grey flannel trousers; this is supported, inter alia, by Lt. Clarke and Sgt. Brown. On the other hand Sgt. Collings says he was dressed in brown overalls. Sadik says the driver was dressed in "red"; Abu Khadder says — driver... wearing deep brown overalls. Reinhardt — the driver dressed in red-brown over-

all trousers. Upon this we hold that he was not wearing grey flannel trousers, but some kind of overalls."

This part of the judgment is a model of brevity, but hardly, if I may say so with respect of adequacy. As to this conflicting evidence the Court below seems to have thought that it was bound to make a finding one way or the other. It gave no reasons for this finding. It clearly did not base its finding on this point on the demeanour of the witnesses. The proper direction in such a case is not — "which set of witnesses do we believe?" — but — "on this conflicting evidence have we a reasonable doubt as to whether Wood was wearing overalls?". If the Court below had directed itself in this way, and there is not the slightest indication that it did, it is in my view highly probable, that such a direction would have resulted in the acquittal of the Appellant on the ground that it was very doubtful whether Wood was wearing overalls, or, to put it at its lowest, I cannot say that the Court below must inevitably and certainly have come to the same conclusion. In my view, there was a misdirection, or a want of direction, on a vital matter, which may have resulted in a miscarrriage of justice, and I am therefore compelled to come to the conclusion that the trial was unsatisfactory. There is in my opinion a grave doubt in this case at to the accuracy of the judgment, and the Appellant should have the benefit of that doubt.

As to the power of a Court of Criminal Appeal to take such a view, this is clearly laid down in Rex v. John Reuben Parker, 6 C.A.R. 285, where a conviction was quashed where in the opinion of the Court, the jury had not given Defendant the benefit of a grave doubt. In that case, curiously enough, the identification of the Defendant depended upon the fact whether he was at the time of the crime wearing blue overalls.

I would therefore allow this appeal and quash the conviction.

British Puisne Judge.

The result is that the appeal of William Edward Thomas Wood against conviction is dismissed by majority. In the circumstances the sentence is reduced to one of 18 months' imprisonment with special treatment. The period of imprisonment to run from the date of arrest.

Delivered this 26th day of January, 1939.

British Puisne Judge.

JUDGMENT.

Frumkin, J.

In addition to the shots fired at the prisoner as soon as his escape was noticed, a further shot was fired when the prisoner was already lying on the ground wounded. As regards this last shot the finding of the Assize Court is as follows:—

> "...we hold that Wood fired at close range at the man while he was lying on the ground already hit".

and further

> "We cannot be reasonably certain if Wood fired a fatal shot or even hit the deceased, but we are satisfied that to fire at so close a range, at a wounded man lying on the ground, constitutes an attempt to commit manslaughter."

The first ground of appeal on this finding, namely, that the offence of attempted manslaughter is unknown to the law, can be disposed of easily, as by the clear provision of section 29(b) of the Criminal Code Ordinance, attempted manslaughter is a punishable offence.

The objections taken by the defence as regards the merits of the finding were twofold, firstly that Wood did not actually fire the shot, and secondly, that if he did, he did so without any intention of hitting the prisoner.

The first objection must certainly fail. We are faced with a finding of fact supported by direct evidence believed by the Court of Trial, and I can see no reason for interfering with this finding. It is true that some witnesses connected the accused with overalls which he was, accordingly to their testimony, wearing at that time, while there was also conflicting evidence to the effect that he was wearing not overalls but grey flannels.

The Court of Trial need not have accepted either version and could have given the accused the benefit of the doubt, but it was nevertheless entitled, upon weighing the evidence to believe, as it did, the version of one set of witnesses and act upon it. The Court of Appeal cannot go behind such a finding.

As regards the second objection, for a moment it seemed to me that there might be some force in Mr. Goitein's argument. Let me put it this way: intention is clearly an unavoidable element in an attempt to commit any offence; the attempt is really the effort made to carry out the intention — that is why an attempt is considered an offence notwithstanding the failure of the person contemplating it to commit the actual offence contemplated; he is punished for his evil intention so that where there is no such intention there can be no attempt amounting to an offence. In the present case, Mr. Goitein argues,

that there was no such intention and there could be no such intention; Wood is a man trained in the use of fire-arms, presumably also in aiming, he was standing near the prisoner who was lying on the ground, he was shooting at close range, he could not possibly have missed had he intended to hit.

I am afraid I cannot accept this theory in the present case if only for one person, namely, that there is no explanation why this shot was ever fired at all. Wood who went into the witness box denied having fired this shot, but, as I have said, we are bound to hold that he did fire it. For what purposes? Certainly not to prevent escape. It was not fired in the air where one might presume it was fired to keep people away, so that the only possible explanation is that he did intend to hit the prisoner. All sorts of reasons might account for his failure — his hand might have trembled, the wounded man lying on the ground might have moved. The Court of Trial was therefore right in coming to the conclusion that by firing this shot the accused committed the offence of attempted manslaughter and the conviction must stand.

As regards the sentence, it was imposed on the basis of the accused's having firing two shots. In respect of the shot which might have hit the prisoner and might even have caused the fatal wound he was discharged by this Court. The sentence of three years' imprisonment must therefore be reduced. A period of 18 months imprisonment will to my mind be an adequate sentence, the period to run from the date of arrest.

Delivered this 26th day of January, 1939.

Puisne Judge.

JUDGMENT.

Greene, J.

This is an appeal from the judgment of the Court of Criminal Assize dated 11th January, 1939, whereby the Appellant was convicted of an attempt to commit manslaughter and sentenced to imprisonment for three years.

The only grounds of appeal we are concerned with in this appeal are — (1) The offence of attempted manslaughter is one unknown to the law and (2) There was no evidence upon which the Appellant could have been found to have fired a shot while the deceased was on the ground.

The other grounds of appeal have been dealt with in Mansell's appeal decided on Monday the 23rd.

Now as regards (1) the offence for which the Appellant has been convicted of is clearly provided for in Section 212 and 30(1) and 29(b) of the Criminal Code and this ground of appeal fails.

The other ground of appeal — that there was no evidence upon which the Appellant could have been found to have fired a shot while the deceased was on the ground.

Mr. Goitein argues that even if Appellant did fire a shot, which he denies, he did not hit the deceased as deceased was lying on his back when the alleged shot was fired and the medical evidence shows that all the wounds on the deceased were in the back and that the firing of this shot did not constitute the offence with which the Appellant has been convicted of. In my opinion this argument cannot stand. One has to consider what was the intention of the accused when he fired the shot. Did he intend to frighten deceased, or to keep people away or to hit him? The accused denies firing the shot which the Trial Court found as a fact he did fire, and in the absence of any explanation as to the contrary intention the presumption must be that he fired with the intention of hitting, and with regard to intention it is immaterial whether he hit or missed the deceased.

There is conflicting evidence as to how many shots were fired. The accused himself admits to five. A number of witnesses state that after the first firing one of the police went forward and shot at the deceased man again while he was lying on the ground.

The Trial Court believed these witnesses and found as a fact that the policeman who fired at close range at the man while he was lying on the ground already hit, was Wood the Appellant and that in so doing there could be no question of firing to prevent his escape. This is a finding of fact with this finding this Court will not interfere.

The appeal fails and conviction is confirmed

Delivered this 26th day of January, 1939.

British Puisne Judge.

HIGH COURT CASE NO. 2/39.

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

Before:—The Chief Justice (Trusted, C. J.) and Frumkin, J.

In the petition of:—

Milian Daniel — Petitioner.

v.

1. The Chief Execution Officer, Jerusalem
2. Hanns Epstein — Respondents.

Claim and Judgment for amount of German Reichsmarks or equivalent in LP. — Judgment debtor seeking to satisfy judgment by presenting German bank notes to Execution Office — Solomon Enoch Levy v. The Ottoman Bank.

1. Where sum of money in foreign currency or equivalent at certain rate of exchange in Palestinian currency claimed, any objection as to basis of calculation of amount claimed must be made in Court and not in Execution Office.

2. Judgment for payment of a sum of money, even if expressed in terms of a foreign currency, must be satisfied in Palestinian currency.

Edit. Note:—See C.A. 163/32 2 PLR 83 and cases cited therein.

Landau for Petitioner.

Dr. Amdur for Respondent No. 2.

Application for an Order to issue to the first Respondent to show cause why his Order, dated 19.12.38 should not be set aside and execution proceedings in file No. 3822/38, should not be discontinued.

ORDER.

This is a return to a Rule Nisi issued by this Court directing the Chief Execution Officer of Jerusalem to show cause why certain execution proceedings should not be discontinued.

The matter arises from proceedings taken before the Chief Magistrate in respect of rights under a contract made abroad between the parties.

The Plaintiff asked in his claim for "2259 Reichs Marks equivalent to LP 188.250" which was roughly at the rate of 12 Reichs Marks per pound. There is further a reference in the statement of claim to "LP. 40 or the equivalent of 480 RMs" which had been paid

to the Plaintiff. Here again the pound is valued in the neighbourhood of 12 Reichs Marks.

It is quite clear that the Plaintiff (2nd Respondent) based his claim on Reichs Marks, the equivalent value of which in Palestine was about 12 Marks per one pound. It seems to me, that if the Defendant thought that the basis of calculation of the amount claimed was incorrect, that was a matter which he should have sought to have decided by the Chief Magistrate, or which he should have raised in the later stages of the case when it went to successive appeals.

The Chief Magistrate, in making his decree, said:

> "I accordingly give a decree against Defendants jointly and severally for 2055.052 Reichs Marks, or the equivalent value thereof in Palestine pounds at the ordinary rate of exchange at the date of payment."

When he was asked to explain his decree, the Chief Magistrate stated:—

> "The rate of conversion is the ordinary rate accepted by bankers and in the ordinary way of commerce based on the usual Foreign Exchange quotations. Unless there is a considerable fluctuation in the meantime, it may be presumed that the actual rate of exchange will be somewhere in the neighbourhood of 12 Marks to the pound."

Prima facie there is no doubt that if a judgment passes to the Execution Office it must be satisfied in Palestinian currency. It is true that there is a Palestinian authority, i.e., the case of Solomon Enoch Levy v. The Ottoman Bank, reported in Vol. II, Palestine Law Reports, page 83, to the effect that the debt could be discarged in francs or their equivalent in Palestinian currency, but no question seems to have arisen in the execution thereof. The Defendant sought to discharge his liability by representing a bundle of German bank notes to the Execution Office. Even if he was right in his contention that the judgment could be regarded as being in terms of German bank notes (not free Reichs Marks) he should have paid in their equivalent value in Palestinan currency.

As I have said, I think it is clear that the Plaintiff claimed Reichs Marks the equivalent value of which was in the neighbourhood of 12 RMs to the pound, and I think that the judgment was given therefor and should be executed in Palestinian currency on that basis.

The Order is therefore discharged, with costs assessed at an inclusive sum of LP. 5.

Delivered this 30 day of January, 1939.

Chief Justice.

CIVIL APPEAL NO. 243/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—The Senior Puisne Judge (Manning, J.), and Copland, J.
In the appeal of:—

Samuel Wolf Aaaronson — Appellant.

v.

1. The Palestine Import & Export Co. Ltd. in liquidation
2. Mr. Mendel Chaikin in his capacity as liquidator of the said Company
3. Mr. Benjamin Louis Deichovsky
4. Mrs. Hanna Chaikin
5. Mr. Zodek Chaikin
6. Mrs. Bertha Lea Deichovsky
7. Mrs. Bertha Rosenstein
8. Dr. Bernard Homa
9. Mr. Jack Homa — Respondents.

Application for removal of liquidators and appointment of others in their place and for liquidation to be carried out under supervision of Court — Court disregarding allegations that existing liquidators not fit for their office — Court making a supervision order and refusing removal of liquidators — Advocate appointed by Court as additional liquidator some time consulted by one of parties.

1. Fact that advocate appointed by Court as an additional liquidator of company was at some time or another consulted by party seeking removal of liquidators — no ground for Court of Appeal to alter order of Court below by appointing another person in his place.

2. Court ordering that liquidation of company shall be carried out under its supervision but refusing to remove liquidators and appoint others in their place is acting in exercise of its discretion, and Court of Appeal will not interfere if not persuaded that it should do so.

Goitein for Appellants.
Levy for Respondents No. 1-4.
Amdur for Respondents No. 5-9.

Appeal from judgment of District Court, Tel-Aviv, dted 3.11. 1938.

JUDGMENT.

This appeal arises out of an application made by the Appellant to the District Court sitting at Tel-Aviv, in which application he asked that the liquidators of the Palestine Import & Export Co. Ltd., should be removed and that new liquidators should be appointed, and that the liquidation should be carried out under the supervision of the Court. At the close of the proceedings the District Court made an Order that the liquidation should be carried out under the supervision of the Court and that an additional liquidator named Horowitz should be appointed, but it refused to make an Order removing the liquidators.

The Appellant has appealed against this Order and asks this Court to overrule the Order of the District Court refusing to remove the liquidators and to appoint some person other than Horowitz as an additional liquidator. Mr. Goitein, who argued the appeal, took as a first point that in the Court below there had been numerous allegations tending to show that the existing liquidators were not fit to be liquidators of the Company, and his argument was devoted principally to the fact that the Court below when giving judgment did not take into consideration these allegations. He was able to point out a passage in the judgment which ran as follows:—

> "With regard to all the various allegations made during the proceedings by the present Applicant against the liquidator and the advocates, we have not in making our Order been in any way influenced by these allegations and we have not taken them into account."

Both Mr. Levy and Mr. Amdur in resisting the appeal referred us to another passage in the judgment in which the Court said that it had taken into consideration all the evidence which it had heard and all the exhibits. In reply to that Mr. Goitein said that the Court had only said this when deciding that a supervision order should be made but had not considered all the evidence when deciding that the liquidators should not be removed.

Our view with regard to this is that when the Court below referred to the various allegations made by the Appellant it was referring principally to allegations which did not form part of the evidence, and that if such allegations were a matter of evidence it foud that they had not been proved. The litigation in connection with this Company has admittedly risen out of family disputes and we think that the Court below by ordering that the liquidation should be carried out under the supervision of the Court and by appointing an additional liquidator has dealt adequately with the situation and has provided against the occurrence of any irregularities.

With regard to the objection to the appointment of Horowitz as a liquidator, the only objection is that at some time or another he was consulted by the Appellant in his capacity as an advocate, and we do not think that on this ground it is necessary to alter the order of the Court below by appointing any person in his place.

Finally we think that the Court below was acting in the exercise of its discretion when it refused to remove the liquidators and we have not been persuaded that this part of the order should be interfered with. The result will be therefore that the appeal is dismissed and the order of the Court below is affirmed. The Respondents will have the costs of this appeal and we certify a hearing fee of LP. 10 in respect of each advocate.

Delivered this 24th day of January, 1939.

Senior Puisne Judge.

CIVIL APPEAL NO. 2/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—The Senior Puisne Judge (Manning, J.), Greene, J. and Frumkin, J.

In the appeal of:—

Spinney's Ltd. — Appellant.

v.

Ibrahim Rushdi — Respondent.

Leave to appeal to Supreme Court from judgment dismissing appeal from Magistrate's Court — Time for filing appeal after leave to appeal granted — Inapplicability of Rule 321 of Civil Procedure Rules to any decree or judgment governed by Magistrates Courts Jurisdiction Ordinance.

Where leave to appeal under Magistrates Courts Jurisdiction Ordinance granted in presence of applicant or his advocate, period of 10 days for filing appeal runs from date of such grant and no service of any notice necessary.

Papo for Appellant.

Levitzky for Respondent.

Appeal from judgment of District Court, Jaffa, sitting as a Court of Appeal, dated 18.10.1938.

JUDGMENT.

In this appeal several preliminary objections have been taken by Mr. Levitzky on behalf of the Respondent. The first of these objections is that the appeal is out of time. There had been an action before the Magistrate's Court and an appeal from that Court to the District

Court. The Judges of the District Court had disagreed and then made an order that the appeal should stand dismissed.

The appellant applied to the Presiding Judge for leave to appeal and he applied by way of motion and was represented by his advocate when the Presiding Judge granted leave to apeeal. It is laid down in the Magistrates Court Jurisdiction Ordinance in Sub-Section 2 of Section 7 — "that within 10 days from the date upon which notification of leave to appeal is made to the Applicant, the Applicant shall comply with the ordinary provisions of the law relating to appeals as to the payment of fees, furnishing security and otherwise.

Mr. Levitzky's point is that the order granting leave to appeal was dated the 13th of December, 1938, and the appeal was not filed until the 6th of January, 1939 — a period of 24 days — while only 10 days are allowed by the Section of the Magistrates Courts Ordinance to which we have referred.

We are in agreement with Mr. Levitzky's point that when an applicant appears before the Presiding Judge and moves for leave to appeal, and leave to appeal is then and there granted that this is a notification of leave to appeal to the applicant and that no further service of any notice is necessary. It is clear, therefore, that this appeal was not filed within 10 days after notification of leave. The only reply made by Mr. Papo for the Appellant on this point is that he was unaware of the right procedure and that he thought the matter was governed by Rule 321 of the Civil Procedure Rules, 1938. We find it difficult to understand how Mr. Papo fell in this error, as Rule 321 clearly is not applicable to any decree or judgment governed by the Magistrates Courts Jurisdiction Ordinance. We think that the point taken by Mr. Levitzky is a good one and is fatal to the appeal being heard by this Court, and it is unnecessary to say anything with regard to the other preliminary objections raised on behalf of the Respondent.

The appeal will be dismissed with costs, and we certify a fee of LP. 15.— for attendance at the hearing.

Delivered this 6th day of February, 1939.

Senior Puisne Judge.

CIVIL APPEAL NO. 4/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—The Senior Puisne Judge (Manning, J.); Copland, J. and Khayat, J.

In the application of:—

1. Nahum Wilbush
2. Eliyahu Abraham Berligne — Appellants.

v.

Russian Ecclesiastical Mission — Respondents.

Settlement Offficer basing his decision re disputed claim to land on conclusion that prescriptive possession was admitted — Conclusion not warranted by record.

Decision based on unwarranted deduction cannot stand; thus judgment based on conclusion that claim was admitted will be set aside, if nothing on record to justify this conclusion.

Eliash and *Shoham* for Appellants.
Cattan for Respondents.

Appeal from judgment of Land Court, Haifa, sitting as a Court of Appeal, dated 13.12.1938.

JUDGMENT.

This appeal arises out of a disputed claim to land near the Sea of Tiberias. Before the Settlement Officer, the present Respondents succeeded on the ground that they had been in possession of the disputed land without interruption for the period of prescription. In coming to that conclusion, the Settlement Officer based his decision on the fact that the Respondents' possession was acknowledged. If the Settlement Officer meant by this that the Respondents' claim to possession for the period was admitted by the Appellants, then there was nothing on the record to justify this conclusion. The Settlement Officer did not consider it necessary to hear any evidence from the Respondents and it is possible that he may have meant that on the evidence before him he was satisfied as to the Respondents' claim to adverse possession, but he has not said this, and we do not feel justified in assuming that he meant to say it. Based as it is on an unwarranted deduction, his decision cannot stand. There had been an

appeal from the Settlement Officer to the Land Court, but this point was not dealt with in the judgment of the Land Court dismissing the appeal. It may also be remarked that the Kushans produced by the Appellants refer to a certain area of land and to certain boundaries, and therefore we think that the Settlement Officer's finding that the Appellants' title was for buildings only, and not for land, was unjustified.

For the first reason mentioned, namely the incorrect assumption by the Settlement Officer that the Respondents' claim to adverse possession was acknowledged, we think that the case must be sent back. The judgments of the Land Court and of the Settlement Officer will be set aside, and the dispute will be remitted to the Settlement Officer to hear the evidence of the Respondents on the question of their adverse possession of the land. The appeal is allowed, and the costs will abide the event. We certify a fee of LP. 15.— for attendance at the hearing.

Delivered this 7th day of Fefruary, 1939.

Senior Puisne Judge.

PRIVY COUNCIL LEAVE APPL. NO. 16/38.
(Civil Appeal No. 183/38)

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), the Senior Puisne Judge (Manning, J.) and Khayat, J.

In the application of:—

1. Saleem Cotran
2. Dr. Naim Cotran — Applicants.

v.

Iskander Cotran — Respondent.

Claim against several defendants jointly and severally of a sum exceeding LP. 500 — Application for leave to appeal to Privy Council as of right by two defendants who, under the judgment, are to pay a sum less than LP. 500 each.

Where a sum of money is claimed from several defendants jointly and severally and Court finds that they are each liable individually for his share, any such two or more of the defendants as seek to appeal to Privy Council are entitled to leave to appeal as of right, if aggregate sum disputed by them amounts to over LP. 500.

Eliash for Applicants.

Levin for Respondent.

Application for leave to appeal to His Majesty in Council from judgment of the Supreme Court sitting as a Court of Appeal, dated 30.11.1938.*)

ORDER.

This is an application for leave to appeal to the Privy Council as of right under Article 3(a) of the Palestine (Appeal to Privy Council) Order-in-Council, 1924.

In the original action the Plaintiff sued four Defendants claiming a sum of LP.1589.640, jointly and severally, by reason of (inter alia) an alleged breach of trust.

The Court of Appeal by a majority held that the Defendants were each liable individually for his share of the amount claimed, i.e. LP.397. 410 mls.

Two of the Defendants now seek to appeal to His Majesty in Council.

In the circumstances we are of opinion that the applicants are en-

*) C.A. 183/38 5 CtLR 17.

titled to leave as the matter in dispute amounts to over LP. 500, and we are fortified by the decisions of the Canadian and Indian Court cited in the English and Empire Digest, Vol. 17, page 486. Unfortunately we have not the full reports of those cases.

Leave to appeal granted upon condition that Applicants do furnish bank guarantee for LP.300 within six weeks, for due prosecution of the appeal and payment of costs, and that the record be prepared, etc., within three months.

In the event of the judgment being carried into execution, the Plaintiff in the action will, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such order as His Majesty in Council shall think fit to make herein.

Given this 23rd day of January, 1939.

Chief Justice.

HIGH COURT CASE NO. 4/39.

IN THE SUPREME COURT SITTING AS A HIGH COURT

Before:—Copland, J. and Frumkin, J.

In the application of:—

Eisig Gottesmann — Petitioner.

v.

1. Chief Execution Officer, Tel Aviv
2. Eisig Rottenberg
3. David Teitelbaum — Respondents.

Sale of property in satisfaction of mortgage debt — Chief Execution Officer making final order for sale — Application to High Court for stay of execution proceedings.

Petition to stay execution proceedings will not be granted by High Court, if filed after final order for sale was made and if no steps were previously taken by petitioner, either before Chief Execution Officer or in High Court, to protect his interests.

Edit. Note:—See H.C. 68/38 4 CtLR 247 and Edit. Note thereto.

H.C. 32/38 3 CtLR 273 and Edit. Note thereto.

Shershevsky for Petitioner.

For Respondent: Ex parte.

Application for an order to issue to the above Respondents directing them to show cause, if any, why the execution proceedings in Execution File No. 14135/37, Tel-Aviv should not be stayed and the

order for sale made by the first Respondent on 25.1.19 should not be set aside; and for an order of interim stay pending the determination of this petition.

ORDER.

In this case on the petitioner's own admission he knew as early as September, 1938, that his property was being sold in satisfaction of this mortgage debt, liability to pay which is not disputed by him. He took no steps then, either before the Chief Execution Officer or in this Court, to protect his interests, and it was not until after the final order for sale was made that he has come to this Court.

It would be contrary to the established practice of this Court if we were, in these circumstances, to grant the petition, and the application for an order nisi must therefore be refused.

Given this 8th day of February, 1939.

British Puisne Judge.

CRIMINAL APPEAL NO. 3/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Greene ,J. and Frumkin, J.

In the appeal of:—

Mohammad Rasheed Abdullah — Appellant.

v.

The Attorney-General — Respondent.

Conviction and sentence for attempted murder — Appeal to Supreme Court to reduce sentence because parties subsequently reconciled.

Reconciliation of parties to family feud out of which offence of attempted murder arose — not in itself sufficient ground for reduction of sentence imposed by trial Court.

Crown Counsel (*Bell*) for Respondent.

Kamlah and *Ousta* for Appellant.

Appeal from judgment of District Court, Jerusalem, dated 10.1. 1939, whereby the Appellant was convicted of attempted murder contrary to Section 222 of the Criminal Code Ordinance, 1936, and sentenced to five years' imprisonment.

JUDGMENT.

In this appeal the Appellant was convicted of attempted murder and sentenced to five years' imprisonment. The actual conviction is not challenged, but an appeal has been made to this Court to reduce the

sentence because the offence arose out of a family feud, the parties to which have subsequently been reconciled, and it is said that a reduction of sentence will lead to a continuation of peace in this particular part of the country.

We give full weight to these considerations, but we cannot shut our eyes to the facts of the case which show that the offence occured as a result of indiscriminate shooting in this village. In the circumstances we do not consider that the sentence of five years is excessive.

The appeal will be dismissed and the conviction and the sentence will be confirmed.

Delivered this 9th day of February, 1939.

Senior Puisne Judge.

HIGH COURT NO. 7/39.

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

Before:—Copland, J. and Khayat, J.

In the application of:—

Yacoub Yair — Petitioner.

v.

1. Chief Execution Officer, Jerusalem
2. Kedem Bank
3. Mr. Eliashar
4. Bank der Tempelgesellschaft
5. Mr. Steinberg
6. Hathya Bank
7. Banco di Roma
8. Central Bank
9. Metropolin Bank
10. Barclay's Bank.
11. Bank Hashkaot — Respondents.

Chief Execution Officer refusing application by Judgment Debtor for monthly payment of a fixed small amount in each of numerous execution files, etc.

High Court not a Court of Appeal from Chief Execution Officer; it will not interfere with latter's discretion unless he disregarded the law.

Edit. Note:—See H.C. 68/38 4 CtLR 247 and Edit. Note thereto.

Petitioner in person.

Ex parte.

Application for an Order to issue to the first Respondent direct-

ing him to show cause why his order, dated 28.10.38 in the Execution file No. 2517/38, refusing petitioner's application for payment of 150 mils per month in each of the 20 files wherein Petitioner is judgment debtor, should not be set aside and an Order substituted therefor that the Petitioner be allowed to pay 100 mls per month in the said files, that the attachment on Petitioner's domestic chattels be removed, and the attachment order in file No. 1472/36 wherein the Petitioner is judgment-creditor made in favour of the 2nd Respondent, be removed, and the proceeds thereof distributed among other of the Petitioner's creditors.

ORDER.

The application must be refused. The jurisdiction of the High Court is purely discretionary, and we will not interfere with the discretion of the Chief Execution Officer unless the latter has disregarded the law. There is no such allegation here, and the High Court is not a Court of Appeal from the Chief Execution Officer.

The application for an order nisi is therefore refused.

Given this 16th day of February, 1939.

British Puisne Judge.

HIGH COURT NO. 1/39.

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

Before:—The Senior Puisne Judge (Manning, J.) and Frumkin, J.

In the application of:—

Matityahu Grunbaum — Petitioner.

v.

1. The Chief Execution Officer, Haifa
2. Shimon Oppenheimer — Respondents.

Discretionary jurisdiction of High Court — Technical irregularities in execution proceedings causing no prejudice to complaining party.

Jurisdiction of High Court discretionary.

Where High Court of opinion that alleged technical irregularities in certain proceedings have not prejudiced petitioner in any way, it will not grant him remedies, which are only given where necessary in interest of justice.

Edit. Note:—See H.C. 7/39 5 CtLR 84 and Edit. Note thereto.

Yehuda for Petitioner.

Scharf for Respondent No. 2.

Application for an order to issue against the Rirst Respondent to show cause why his order dated 30.11.38, refusing to cancel the proceedings in Execution File No. 4894/36 should not be reversed.

ORDER.

This return to a rule nisi is concerned with what is in effect an application to cancel all the proceedings in connection with sale of a mortgaged property.

The petitioner has alleged certain irregularities in the proceedings. We are of opinion that these alleged technical irregularities have not prejudiced the petitioner in any way. The jurisdiction of this Court is discretionary and the remedies which it can grant are not given unless they are necessary in the interests of justice. This is a case in which it is unnecessary to make any order.

The rule nisi will be therefore discharged. The second respondent will have his costs and we certify a fee of LP. 15.— for attendance at the hearing.

Given this 13th day of February, 1939.

Senior Puisne Judge.

CIVIL APPEAL NO. 236/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Frumkin, J.

In the appeal of:—

Elazar Eliashar — Appellant.

v.

Wardeh Khayat — Respondent.

Contract for sale of half interest not yet ascertained in estate of deceased — Sum fixed as damages in case of breach of contract — Assessment of damages in lieu of liquidated sum held to be a penalty — Supreme Court remitting case Court below to determine question of fact and return file together with findings etc.

1. Contract for sale of interest (or some definite portion of it) in estate of a deceased person — not a gaming or wagering transaction and not illegal.

2. Where provision for payment of a sum certain in case of breach of contract found to be a penalty, damages should be assessed.

3. Assessable damages in case of breach of contract for sale of land — difference, if any, between agreed price and value of the land at date on which transfer should have been effected.

4. Where Courts of first instance propound propositions of law, they should make reference to the authorities upon which they rely.

Edit. Note:—As to 2 see C.A. 135/38 4 CtLR 15 and Edit. Note thereto.

As to 3 see C.A. 217/38 4 CtLR 243 and Edit. Note thereto.

B. Joseph for Appellant.

Levtizky for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 4.10.1938.

JUDGMENT.

By a contract in writing, dated 16.10.33, Mrs. Wardeh Khayat sold to Mr. Eliashar for LP. 100, then paid, half her interest in the estate of Assad Khalil el Khayat, deceased. The contract further provided that she would appoint one, Mr. Mizrahi, her attorney, to transfer the property when it was obtained. It further provided that she was liable for LP. 500 as damages for any breach.

By a judgment Mrs. Khayat's share of the property was ascertained, and on 31st January, 1936, Mr. Eliashar attended at the Land Registry Office, Jerusalem, in order that it might be transferred to him, but Mr. Mizrahi contended that he was unable to effect the transfer owing to some mortgage encumbering the shares.

Mr. Eliashar therefore brought an action in the District Court, Jerusalem, claiming the repayment of the LP. 100, and LP. 500 damages.

On 21st July, 1936, that Court held —

"The Plaintiff's claim must be dismissed. The agreement being void for uncertaintiy."

The Plaintiff appealed, and on 27th May, 1937, this Court held —

"Appeal allowed. — We cannot see any uncertainty in the contract whatsoever. But we remit the case to the District Court for them to state what is the uncertainty which they find, to determine which, if either, of the parties have committed a breach or breaches (if any) and generally to give a judgment on the whole action.

Costs to await retrial."

and the matter went back to the District Court. The facts were simple, and if they could not have been agreed could have been easily ascertained, and one would have thought that the argument could have been completed at one hearing. The matter, however, came before the Court on six occasions and was spread out from 21.10.37 to 21.7.38, when the decision was reserved, and it was not until 4.10.38 that judgment was delivered.

I hope that with the aid of the Civil Procedure Rules, Presidents

of District Courts and Registrars will be able to prevent such prolongation of proceedings.

In its second judgment, after setting out the facts and arguments, the Court held —

> "We are of opinion that the contract is illegal because it relates to the sale of an undefined share which at the time it was not clear whether it was going to be adjudged to her or not."

I do not think there was anything illegal in the contract. The Defendant stated that she had an interest in an estate, half of which she sold. Her interest turned out to be subject to a mortgage — but there was no difficulty in transferring half of it. As the District Court itself points out, she in fact sold it to someone else. I do not think the contract is a gaming or wagering transaction — see Halsbury, 2nd Edition, Volume 15, pp. 468-469, and the cases there cited.

In my judgment there was no reason why the Defendant's agent should not have transferred on 31st January, 1936, or at least have offered to transfer, half that which the Defendant received from the estate, i.e. a mortgaged share, which she in fact transferred to someone else, and the Plaintiff is entitled to succeed.

In the course of argument we asked the advocates before us if they could agree as to the amount of damages, in the event of our being of opinion that damages were payable, but although it appears from the record that attempts to settle have been made they were unable to do so.

We are of opinion that the provision for the payment of LP. 500 was a penalty and that damages should be assessed.

In order that this matter may now be disposed of with the least possible delay, by virtue of Civil Procedure Rule 342, we remit the case to the District Court to determine the question of fact — what was the value on the 31st of January, 1936, of half the Defendant's share in the estate of As'ad bin Khalil el Khayat (deceased), regard being had to the mortgages? Additional evidence should be taken which should be returned to this Court, together with the findings thereon and the reasons therefor. The question of costs will be reserved.

We would point out that where, as in this case, Courts of first instance propound propositions of law, the parties and this Court would be greatly assisted if reference is made to the authorities upon which such Courts rely.

Delivered this 16th day of February, 1939.

Chief Justice.

CIVIL APPEAL NO. 239/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Greene, J. and Khayat, J.

In the appeal of:—

Joseph Sayegh et Freres — Appellants.

v.

D. N. Tadros, Nimmo & Co., — Respondents.

Agreement for the sale and shipment of goods — Deficiency in delivery allegedly by default of vendor — Claim of damages for breach of contract — Finding of fact set aside by Court of Appeal — Interpretation and legal consequences of contract — Finding not supported by evidence.

1. Court of Appeal may reverse finding of fact made by Trial Court if no reasons given for, or no evidence in support of, it.

2. If an party to a contract makes a demand which is entirely unreasonable and which could not have been contemplated by parties when making the agreement, other party not liable in damages in case of non-compliance with demand.

Edit. Note:—As to 1 see: C.A. 135/35 1 CtLR R.17; C.A. 129/35 2 CtLR 14; C.A. 22/37 ibid. 145; C.A. 43/38 3 CtLR 192; Cr.A. 17/38 ibid. 199; Cr.A. 14/38 ibid 246; P.C.A. 38/28 1 PLR 474; C.A. 147/31 1 CoJ 164;

As to 2 see C.A. 30/30 1 CoJ 400.

Eliash for Appellants.

Turtledove for Respondents.

Appeal from judgment of District Court, Jaffa, dated 13.10.1938.

JUDGMENT.

In this case, in pursuance of an agreement in writing, the appellants undertook to sell to the respondents 10.000 cases of oranges. The oranges were to be delivered between the 20th of November, 1936, and the end of January, 1937. The place of delivery was specified to be vessels at Haifa according to the instructions for shipment given from time to time by the respondents. Towards the end of December, 1936, the respondents alleged that there had been an oral understanding that in the event of conditions making shipment at Haifa impracticable, the appellants should make delivery on nominated vessels at Jaffa. This alleged oral understanding was immediately denied by the appellants. The respondents then issued instructions to the appellants to ship 500 cases of oranges on all steamers leaving Haifa

in January for the ports of London or Glasgow. The appellants considered this demand unreasonable but endeavoured to comply with it as far as possible, but the result was that at the end of January there was a deficiency in the delivery of 3,027 cases. The respondents took action in the District Court of Jaffa claiming damages for breach of contract and claiming also a further sum as per Account Sales between the parties. The appellants filed a defence denying that they had broken the contract in any way and alleging that it was the respondents who had broken the contract, and at the same time they counterclaimed for damages. The District Court gave judgment in favour of the respondents. It found that a breach of contract had been committed by the appellants. No reasons were given for this finding nor were the terms of the contract analysed in the judgment in order to show which party had been at fault. The counterclaim of the appellants was dismissed and the Court below held that whatever claim the respondents had in respect of Account Sales should have been made the subject of a separate action. In assessing the damages the Court below allowed not only for the 3,027 cases which had not been delivered by the end of January, but allowed also for 922 cases which had been delivered but which it was alleged were of inferior quality.

The respondents have appealed against this decision and we have no doubt that the conclusion come to by the Court below, was erroneous. The cases of oranges were to be delivered on board vessels at Haifa according to the instructions for shipment given from time to time by the purchasers. Clause 7 of the agreement, which fixes the damages, states that if the vendors fail to ship the full quantity of the fruit as notified on any one steamer as specified by the purchasers, the vendors shall be liable to damages as agreed on. From this we hold that it was the duty of the respondents to instruct the appellants of the name of each ship on which the cases were to be delivered, and that therefore it was the business of the respondents to see that the requisite space on such ship was available for the shipment. We consider that it was an entirely unreasonable demand on the part of the respondents to issue instructions to deliver 500 cases on board every vessel leaving Haifa during January for London or Glasgow. No such demand could have been contemplated by the parties when the agreement was entered into.

We are of opinion that whatever short delivery there was before the end of January was not due to the fault of the appellants and it is obvious that the respondents had no claim whatever to damages for non-delivery as regards the 922 cases already referred to. With regard to these cases there was no evidence before the Court below that

the oranges contained in them were of inferior quality.

We find that there was no breach of contract on the part of the appellants. In the Court below they produced no evidence to show that the action of the respondents had caused them any damage. It is therefore unnecessary to interfere with that part of the judgment of the Court below which dismissed the counterclaim. Our order is that the appeal be allowed with costs here and in the Court below. The judgment of the Court below in favour of the respondents will be set aside and we certify a fee of LP. 15 for attendance at the hearing.

Delivered this 12th day of January, 1939.

Senior Puisne Judge.

CRIMINAL APPEAL NO. 2/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Greene, J. and Frumkin, J.

In the appeal of:—

Paltiel Novik — Appellant.

v.

The Attorney General — Respondent.

Conviction for fraudulent conversion of money entrusted with for certain purposes — Information containing count of stealing of money without alleging fraud — Count containing no precise date of occurrence of offence — Considering evidence in criminal cases — Criminal Code Ordinance, sec. 276(b).

1. If accused convicted after Court found that he fraudulently converted a certain sum of money to his own use, fact that fraud was not expressly mentioned in information in court for stealing money — not a ground for quashing conviction.

2. In cases in which prosecution unable to state precise date of occurrence of offence and no question of limitation arises, it is sufficient if month and year stated.

3. The evidence in criminal cases is to be looked at as a whole; one should not extract isolated passages from record of evidence, especially from cross-examination.

Ben-Yamini and *Dr. Vorchheimer* for Appellant.
Salant for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated 22.12.1938, whereby the Appellant was found guilty of the charge of stealing money entrusted to him for certain purposes, contrary to Section 276(b) of the Criminal Code Ordinance, 1936, and sentenced to a fine of LP. 40, or, in default, three months' imprisonment.

JUDGMENT.

I. In this appeal the Appellant was convicted by the District Court sitting at Tel-Aviv in respect of an offence against Section 276(b) of the Criminal Code Ordinance, and was sentenced to pay a fine of LP. 40, or in default, three months' imprisonment. He has appealed against this conviction, and the first point taken by his advocate, Mr. Ben-Yamini, is that no fraud was alleged in the relevant count of the information.

The cases which Mr. Ben-Yamini cited to support his argument all refer to trials in which appeals succeeded, because the Judge, in charging the jury, had omitted to draw the attention of the jury to the element of fraud necessarily involved in such an offence.

In the present case the District Court have clearly found that the Appellant fraudulently converted a certain sum of money to his own use, and this indicates that the Court directed its attention to the fact that fraud was an ingredient of the offence. Mr. Ben-Yamini objects to the conviction merely on the ground that fraud is not alleged in the information. The count on which the Appellant was convicted was a count for stealing money, and the definition of stealing in the Criminal Code Ordinance imports the element of fraud.

In the description of the offence it might have been more correct if it had been said that the sum of money was fraudulently converted, instead of simply saying that it had been converted, but we do not think that this is a ground for quashing the conviction.

II. The second point taken by Mr. Ben-Yamini is that the count contained no reference to the date of the offence. This is incorrect. The count does contain a reference to the date, as it says that the offence occurred on some day during the month of September, 1937. There must be numerous cases in which the prosecution is unable to state the precise date on which an offence is alleged to have occurred, and in such cases it is sufficient if the date is stated, as it has been

in this information, as long as no question of limitation arises. The cases cited by Mr. Ben Yamini from the English Criminal Appeal Reports deal with cases where persons were charged with a general deficit, and have no application to the point which he has taken.

III. The third point which Mr. Ben-Yamini urges refers to a passage in the cross-examination of the principal witness for the prosecution in which he said: "I do not care what he did or how he did it so long as he produced to me the LP. 90. I did not subsequently instruct him to lodge an action in Court or make an attachment." It is always dangerous to extract isolated passages from the record of the evidence, and especially isolated passages from the cross-examination. The evidence in criminal cases is to be looked at as a whole, and looking on it as a whole it is clear that the Court below were fully justified in coming to the conclusion that the Appellant had been entrusted with the sum of money for certain purposes, and that he had fraudulently converted that money to his own use. This disposes of the grounds urged against the conviction of the Appellant.

The conviction and sentence will be confirmed and the appeal dismissed.

Senior Puisne Judge.

HIGH COURT NO. 6/39.

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

Before:—Copland, J. and Khayat, J.

In the application of:—

Matityahu Greenbaum — Petitioner.

v.

1. Chief Execution Officer, Magistrate's Court, Haifa
2. Moshe Rosenblum, Haifa — Respondents.

Order of imprisonment for a judgment debt — Chief Execution Officer's duty to hear sworn evidence before making an order of imprisonment — Debt (Imprisonment) Ord. sec. 2.

Except in cases provided by law no order of imprisonment for a judgment debt can validly be made without sworn evidence being first heard as to the facts on which the order is sought.

Yahuda for Petitioner.
For Respondents: No appearance.

Application for an Order to issue against First Respondent to show cause why his Order dated 6.2.39 in File No. 436/37 of the Execution Office, Haifa, refusing to annul the Order for imprisonment of the Petitioner, dated 15.12.38 should not be reversed.

ORDER.

The order nisi already granted is made absolute, and the order for imprisonment made by the Chief Execution Officer is cancelled, on the ground that, under Section 2(c) of the Debt (Imprisonment) Ordinance, Chap. 48, before an order for imprisonment can issue for a judgment debt, except in cases falling under Section 2(a) and (b), the Chief Execution Officer must be satisfied by sworn evidence, oral or written, of the facts on which the order is sought. No such evidence was heard in this case, and the order of imprisonment therefore cannot stand.

The petitioner will have the costs of this application to be paid by the second respondent assessed at LP. 10.— to include hearing fee.

Given this 27th day of February, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 1/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), the Senior Puisne Judge (Manning, J.), and Khayat, J.

In the appeal of:—

The Administrators of the late Saul Levy Appellants.

v.

1. Messrs. Russell & Co,
2. Mr. S. Hazan

3. Mr. R. Hazan
4. Mr. S. Nahmias Respondents.

Nomination by parties of experts to audit accounts and settle dispute — Deposit of experts' fees in Court — Increase of an expert's fees in absence of parties after allocation in their presence — Order of Court, after determination of case, as to which party to pay expert's fees.

Where parties agreeing to submit matter to experts were ordered to deposit a fixed amount on account of experts' fees subsequently to be estimated by Court, Court entitled, even after close of case, to assess fees and to decide which party to pay them.

King for Appellants.
Gavison for Respondent No. 1.
Marein for Respondents No. 2-4.

Appeal from judgment of District Court, Jerusalem, dated 6.12. 1938.

JUDGMENT.

In certain proceedings before the District Court, Jerusalem, a so-called judgment was given on 9.7.34, which recited that both parties had agreed to submit the matter to three experts in order to audit the accounts and settle the dispute. Each of them nominated an expert and the election of the third expert was left in the hands of the Court. This Order was presumably made under Rule 5 of the Evidence on Commission Rules, Laws of Palestine, Vol. III, page 2330. Paragraph 4 of this judgment provided:—

> "That the Defendants should deposit LP. 150 with the District Court on account of fees for the three experts, which fees shall be subsequently estimated by the court."

The Court appointed Messrs. Russel & Co. as the third expert.

It appears from the record of the proceedings that on 19.11.36 the Court ordered —

> "Experts go into the books and say if possible whether they would come to a different conclusion after inspecting sale. Costs to be borne by the Plaintiff if no result."

No question now arises in regard to this.

It seems that on the same date the question of the allocation of the deposit on account of fees was discussed by the Court in the presence of the parties. From the record it appears that Mr. Young, on behalf of Russell & Co., asked for LP. 100; Mr. Kisselman asked for

LP. 65; Mr. Cohen LP. 100. The Court reserved its decision, and the next entry in the record shows that on 19.11.35 (clearly a mistake for 36) the Court awarded Mr. Young LP. 65, Mr. Kisselman LP. 50, Mr. Cohen LP. 45. It will be seen that the original sum of LP. 150 which was deposited had been increased by LP. 10. I can find no explanation of this in the English record. From the Arabic record it appears that Mr. Auster, on behalf of the Defendants, had deposited the additional LP. 10.

The next entry in the record, which is dated 18.12.36, is as follows:

> "On further consideration it is decided to allow Russel & Co. an increased fee in view of the fact that his (sic) offices and staff were used for most of the auditing. Fee to be increased from LP. 65 to LP. 120."

Later it appears that Mr. Young complained that his fees had not been paid in full, and on 18.6.37 the Court declared —

> "The Plaintiff to pay the fees due to Russel & Co."

Upon that Order Russell & Co. sought to recover the balance of their fees through the Execution Office, but the High Court (in H.C. No. 38/38)*) decided that the Order of the 18th June, 1937, was null and void, as the parties had not had an opportunity to argue which of them was liable to pay the balance of Russell & Co.'s fees.

The matter went before the District Court again, and on the 6th December, 1938, upon a motion by Russell & Co., the Court decided that the Plaintiff in the action should pay the balance of the fees. Against that Order (which is headed "judgment") the Plaintiff in the action now appeals.

It is unfortunate that the amount of Russell & Co.'s fees should have been increased in the absence of the parties after they had been discussed in the presence of the parties on the basis of the claim first made on behalf of Russell & Co., but in my judgment the Court was entitled to assess the fees and to direct by whom they should be paid, either under the original "judgment", which was in effect an agreement between the parties, or under Rule 5 of the Evidence on Commission Rules, which I think could still be applied by reason of the proviso to Rule 1 of the Civil Procedure Rules, 1938, although now repealed.

Mr. Gavison informed us that he did not wish to take the point that the District Court's Order of the 6th December, 1938, was not appealable without leave, and no leave had been obtained, as Messrs. Russell & Co. were only anxious to have the matter determined. In my

*) Published in this issue, on p. 104.

view that Order was not appealable under the rule 317 of the Civil Procedure Rules without leave.

It may be well to point out that enquiries into accounts can now be ordered under Rules 221 and 222 of the Civil Procedure Rules, and that the cost thereof will be included in the costs of the action.

In the result, in my judgment this appeal should be dismissed. The Respondents will have the costs and we certify a fee of LP. 15 for each advocate for attendance at the hearing.

Delivered this 8th day of February, 1939.

Chief Justice.

P.C.L.A. No. 13/38.
(CIVIL APPEAL NO. 220/38.)

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Copland, J. and Khayat, J.

In the application of:—

1. Jaber Elias Kotia
2. Sami Elias Kotia — Applicants.

v.

Katr Bint Jiryes Nahas — Respondent.

Effect of failure to file counter-affidavit within period granted by Court — Dispute re Certificate of Succession indirectly involving question of value of estate — Inherent power of Court of Appeal to stay execution of a declaratory order — Palestine (Appeal to Privy Council) Order-in-Council, Art. 7.

1. Where Petitioner, complying with order of Court, filed an affidavit, no attention will be paid to Respondent's counter-affidavit, if filed after period granted to him, nor will, in that event, any order be made as to cross-examination of deponent who has sworn to affidavit on behalf of Petitioner.

2. Dispute as to what should be Petitioner's share in deceased's estate indirectly involves question of value of estate and Petitioner entitled as of right to appeal to Privy Council, if amount in dispute exceeds LP. 500.

3. Court of Appeal has an inherent right to preserve the rights of parties intact pending an appeal to Privy Council and can therefore stay execution, even if judgment appealed from does not require appellant to pay money or perform a duty.

4. Court of Appeal may allow registration of property in accordance with decree appealed from against production of a Bank guarantee for due performance of such order as Privy Council may think fit.

Eliash for Applicants.
Goitein for Respondent.

Application for leave to appeal to His Majesty in Council from the judgment of the Supreme Court sitting as a Court of Appeal, dated 31.10.1938.*)

ORDER.

When this petition for leave to appeal to His Majesty in Council came before this Court on the 7th of December last, it was said that certain property was involved, and that this property was valued at over LP. 500. There was no proof before the Court as to the value of the property alleged to be involved, and the Court accordingly ordered the petitioners to file an affidavit as to the description and value of the property within ten days.

That order was complied with and affidavits were filed creating a prima facie presumption that the value of the property alleged to be involved was over LP. 500. The respondent had been granted a period of ten days within which to file a counter-affidavit. No such affidavit was filed within the period and we have decided to pay no attention to the affidavits which were afterwards filed. For the same reason we make no order as to the cross-examination of the deponents who have sworn to the affidavits on behalf of the petitioners.

Mr. Goitein for the respondent has taken the point that no question of value whatever arises in this matter, since the respondent applied to the District Court for a Certificate of Succession. There was no mention of any property and the question is merely one of personal status.

We think that this argument ignores the realities of the case, because it was clear both in the Court below and in the appeal to this Court that the whole reason of the dispute was with respect to property which had been left by the deceased, and how the shares in that property were to be distributed. The District Court had made an order giving a quarter share to the respondent and three eighths to each of the petitioners. That order was varied by this Court and a half share was given to the respondent and a quarter share to each of the petitioners. It is, therefore, obvious that the dispute does indirectly involve a question with regard to the value of the property left by the deceased. The affidavits which have been filed convince us that the amount which will be in dispute in any appeal to His Majesty in Council will be well over LP. 500, and therefore the petitioners are entitled as of right to appeal to His Majesty in Council.

Mr. Eliash for the petitioners has asked for a Stay of Execution.

*) C.A. 220/38 4 CtLR 188.

Mr. Goitein for the respondent has called the Court's attention to Article 7 of the Palestine (Appeal to Privy Council) Order in Council, 1924, in which the question of a stay is said to arise only where the judgment appealed from requires the appellant to pay money or perform a duty. The judgment in this case does not require the appellants to pay money or perform any duty, but we think that this Court must have an inherent power to preserve the rights of parties intact pending an appeal to His Majesty in Council.

We have therefore decided to grant the petitioners leave to appeal on condition —

(a) that within two months they enter into good and sufficient security to the satisfaction of this Court, (the security to take the form of a Bank guarantee) in the sum of LP. 300 for the due prosecution of the appeal and the payment of all such costs, as may become payable to the respondent in the event of the petitioners not obtaining an Order granting them final leave to appeal, or of the appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the petitioners to pay the respondent's costs of the appeal (as the case may be); and

(b) that the petitioners within the said period of two months do take the necessary steps for the purpose of procuring the preparation of the record and the despatch thereof to England.

With regard to what might be called the execution of the decree of the Court, we direct that the respondent is at liberty to register her interest in one quarter share of the property of the deceased and that she may register her interest in another quarter of the property if she enters into a Bank guarantee for the sum of LP. 1000 for the due performance of such order as His Majesty in Council will think fit.

Given this 31st day of January, 1939.

Senior Puisne Judge.

CRIMINAL APPEAL NO. 6/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Greene, J. and Frumkin, J.

In the appeal of:—

Odeh Sirriyeh . . Appellant.

v.

The Attorney General — Respondent.

Charge of stealing and charge of uttering false documents — Necessity of proving actual value of stolen cheque on a charge under sec. 275 of Crim. Code Ord. — Corroborated evidence of an accomplice — Reading as evidence deposition of a witness said to be absent from Palestine — Effect of wrong admission of evidence — Change of constitution of Court without previous notice to advocate — Allegation of inadequacy of Attorney General's instructions regarding charges preferred against Government Official relative to his duties — Preliminary investigation held in two different places — Evidence of a witness not called at preliminary inquiry — Pronouncement of sentence not at time of conviction — Criminal Code Ordinance, sec. 275, 337, 340, 344. *Evidence Ordinance, sec.* 10 — *Trial Upon Information Ordinance, sec.* 74.

1. Conviction under sec. 275 of Criminal Code Ordinance for stealing a cheque cannot stand, if there was no evidence before trial Court that actual value of cheque, regardless of sum written on it, exceeded LP. 50.

2. Evidence of an accomplice that accused had forged another person's name as an endorsement on a bill and had given it to accomplice to dispose of together with evidence of witnesses that endorsement was in accused's handwriting sufficient base for conviction.

3. Wrong reception of evidence does not invalidate conviction sufficiently supported by other evidence.

4. Fact that a differently constituted Court sat to hear case and commenced proceedings de novo, and that owing to not having been previously informed of change to take place advocate was absent from Court when accused was newly charged and when he pleaded and while evidence of a witness was being taken, does not invavlidate conviction, if accused not prejudiced in any way.

5. Requirements of sec. 74 of Trial Upon Information Ord. are satisfied, if instructions given by Attorney General substantially cover matter upon which accused, being a Government Official, is charged in respect of certain acts relative to his function.

6. Preliminary investigation may be held partly in one place and partly in another, if both of them in same District.

7. Where a witness who had not been called at preliminary inquiry was called at trial of Information only in order to strengthen certain evidence given at preliminary inquiry and no new facts thereby introduced on which to charge accused, it cannot be said that Information was not supported by evidence taken at preliminary inquiry.

8. Court of Appeal will not interfere with sentence for

reason only that it was not pronounced at same time as conviction.

Goitein for Appellant.

Salant for Respondent.

Appeal from judgment of District Court ,Jerusalem, dated 13.1. 1939, whereby appellant was found guilty of forgery contrary to Section 344(a), of stealing contrary to Section 275, and of uttering a cheque contrary to Section 340, of the Criminal Code Ordinance, 1936, and sentenced to two years' imprisonment.

JUDGMENT.

The appellant had been charged before the District Court of Jerusalem in an Information containing 10 counts. At the end of the trial the Court acquitted him on 8 of these counts but convicted him on the 5th count on a charge of stealing and on the 7th count on a charge of uttering a false document. In addition the Court convicted the appellant of two offences under Section 344 of the Criminal Code with which he had not been charged. The Court purported to convict him of these charges in lieu of two charges under Section 337 of the Code and one of the grounds of appeal is that it was not open to the Court below to take this action. We are in agreement with this contention. We do not see how the Court could convict the appellant under Section 344 if on the facts before it it acquitted him of the offences charged under Section 337. With regard to the conviction of stealing under Section 275 of the Code it was urged on behalf of the appellant that the property involved must be shown to exceed in value the sum of LP. 50 for a conviction under that section to be valid and that there was no proof before the Court below that the value of the property in question exceeded this sum. The property was a cheque for the payment of LP. 100 and we are of opinion that there was no evidence before the Court below as to the actual value of this cheque apart from the paper on which it was written. For these reasons we think that the conviction under Section 344 and Section 275 cannot be sustained.

The last conviction was one under Section 340 of the Code for uttering a false document and against its validity is was urged that the conviction depended upon the uncorroborated evidence of an accomplice. The evidence of the accomplice went to show that the appellant had forged the name of another person as an endorsement on the cheque and had then given the cheque to the accomplice to dispose of. We are of opinion that this evidence was corroborated by the evidence of

witnesses who testified that the endorsement on the cheque was in the handwriting of the appellant, and we find therefore that the accused was rightly convicted on this charge.

Another objection raised by Mr. Goitein for the appellant to all the convictions was that certain inadmissible evidence had been accepted. This evidence consisted of the deposition made by Jiries Yusef Farah at the preliminary investigation and it was allowed to be read as evidence on the ground that he was absent from Palestine and could not be produced to give evidence. The only evidence before the Court below to prove these facts was that Farah had shown to a certain person a ticket for America. We need hardly say that this piece of evidence does not show that Farah had ever left Palestine or that if he did he was absent from Palestine at the time of the trial. This evidence was therefore clearly inadmissible but having regard to the provisions of Section 10 of the Evidence Ordinance we are of opinion that the wrong reception of the evidence does not invalidate the conviction of the appellant under Section 340 of the Criminal Code as there was other sufficient evidence to support the conviction.

Another ground urged by Mr. Goitein was that on the 13th of December, 1938, without any notice to him, a differently constituted Court sat to hear the case and commenced the proceedings de novo. Mr. Goitein says that he should have been informed of this fact. Owing to not having been informed he was absent from the Court when the accused was newly charged and when he pleaded and while the evidence of a witness was being taken. Mr. Goitein says he would have been present if he had been aware that proceedings were to be commenced de novo. We are of opinion that it would have been fairer had the Court informed Mr. Goitein of the change that was to take place but as the only evidence heard in the absence of Mr. Goitein was the inadmissible evidence to which we have already referred in connection with the deposition of Farah we do not think that the appellant was prejudiced in any way.

Some further minor objections were made by Mr. Goitein. The first of these is concerned with Section 74 of the Trial Upon Information Ordinance which renders instructions from the Attorney General necessary when a charge is preferred against a Government Official in respect of any act relative to his function. The appellant in this case was an employee of the Government and the charges related to certain acts relative to his duties as a clerk in the Department of the Palestine Posts and Telegraps. Mr. Goitein says that the Attorney General's instructions related to one kind of offence and that the appellant was charged with different kinds of offences. We are satis-

fied that the instructions given by the Attorney General substantially covered the matters upon which the appellant was subsequently charged.

Another objection was that the preliminary investigation was held partly in Jerusalem and partly in Bethlehem. Both of these places are in the same district and we see no point whatever in this objection.

Another point taken by Mr. Goitein was that the Information was not supported by the evidence taken at the preliminary inquiry. In support of this he said that a witness who had not been called at the preliminary inquiry gave evidence at the trial of the Information. With regard to this we are of opinion that this witness, who was in fact the accomplice, was only called in order to strengthen certain evidence given at the preliminary inquiry, and that his being called did not mean the introduction of any new facts on which to charge the appellant.

Further, Mr. Goitein said that the Court below committed an error by not sentencing the appellant at the same time as it convicted him. We are of opinion that when the Court below postponed the sentence of the appellant it was acting in a manner more favourable to the appellant than otherwise. It was quite possible that a longer sentence might have been imposed had sentence been pronounced at once.

This exhausts the various points taken by Mr. Goitein on behalf of the appellant, and for the reasons stated in the earlier part of this judgment we uphold the conviction under Section 340 of the Criminal Code and quash the convictions on the other charges of which appellant was found guilty. The Court imposed a sentence of two years imprisonment as a general sentence on all the charges of which it found the appellant guilty. In view of the appellant's position and the seriousness of his offence we do not propose to interfere with this sentence. So far as his appeal against his conviction under Section 340 is concerned, the appeal is dismissed and the conviction and sentence are affirmed. The appellant's appeal is allowed on the other charges to which we have referred.

Delivered this 24th day of February, 1939.

Special treatment allowed. Sentence to date from 9th February, 1939.

Senior Puisne Judge.

HIGH COURT CASE NO. 38/38.

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

Before:—The Acting Chief Justice (Copland, J.) and Frumkin, J.

In the application of:—

The Estate of the late Shaul Levy — Petitioners.

v.

1. Chief Execution Officer, Jerusalem
2. Messrs. Russell & Co., Jerusalem — Respondents.

Advocate's fees and expert's fees — Order for payment of expert's fees made in absence of parties.

1. Unlike an advocate, who cannot sue for his fees because he is a party, an expert in whose favour a proper Order has been made can sue, as by such Order he becomes a quasi-party to the proceedings.

2. Order for payment of expert's fees null and void, if made in absence of parties who were entitled, at least, to argue as to which of them was liable to pay.

Olshan for Petitioners.

E. Gavison for 2nd Respondent.

Application for an order to issue to the first Respondent calling upon him to show cause why he should not be ordered not to interfere with Petitioners' property attached in Execution Office File No. 2913/37 and remove the attachment effected by him on said property in the said file.

ORDER.

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

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

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

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

Given this 5th day of July, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 8/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Senior Puisne Judge (Manning, J.), Copland, J. Khayat, J.

In the case of:—

N. V. Philips Gloeilampenfabrieken — Appellant.

v.

1. Alexander Kremener
2. M. Gafny & Co., M. Gafny and E. Gafny — Respondents.

Clause in contract made in Germany referring all disputes resulting from contract to jurisdiction of Berlin Mitte Court — Disagreement of Judges of District Court as to jurisdiction in view of reference in contract to foreign tribunal — Question of rehearing case by three Judges — Nature of reference in contract to foreign tribunal — Construction of contract — Enforcement of foreign judgment — Civil Procedure Rules, 1938, *Rules* 4, 203 — *Courts Ordinance, sec* 11(3)(*a*) — *Arbitration Ordinance, sec.* 5 — *C.A.* 145/38 4 *CtLR* 61 — *C.A.* 46/38 3 *CtLR* 185.

1. Notwithstanding Rule 203 of Civil Procedure Rules (which lays down that a judgment must either be unanimous or by majority) case tried by District Court composed of two Judges has not, in event of disagreement,, to be reheard by 3 Judges.

2. While in some cases disagreement of District Court composed of 2 Judges will not necessarily entail dismissal of action, it will so in case of disagreement as to whether Plaintiff had a right to sue.

3. Where Defendant raises plea of lack of jurisdiction relying on a certain clause in contract sued on and the two Judges of the Court disagree as to the legal consequences of that clause, it cannot be said that burden of proof was on Defendant and he failed to discharge it.

4. Parties must be bound by their contracts.

Nothingin Rule 4 of Civil Procedure Rules (dealing with place of jurisdiction) can prevent parties making an agreement that all disputes shall be referred to any Court in another country.

Courts of any country have a right to exercise jurisdiction over any person who voluntarily by express clause in contract or in some other way submits to their jurisdiction.

5. Point not raised in Court below and not included in agreed issues cannot be argued on appeal.

6. A reference in a contract made in a foreign country between nationals of that country to a certain tribunal cannot upon one of parties taking up his abode in Palestine be held by Courts of Palestine to be a reference to arbitration under English Law.

7. Whilst many foreign judgments cannot be enforced in Palestine by exequatur, there is nothing to prevent an action being brought here on foreign judgment.

Edit. Note:—As to 1 & 2 see: C.A. 237/37 5 CtLR 49 and Edit. Note thereto.

As to 4 see: C.A. 194/37 3 CtLR 26.

As to 5 see: C.A. 72/38 3 CtLR 229a and Edit. Note thereto; C.A. 187/38 4 CtLR 124.

As to 7 see: C.A. 173/38 4 CtLR 69; C.A. 145/38 ibid. 61 and Edit. Note thereto.

Dr. Smoira for Appellant.
Dr. A. Werner for Respondent No. 1.
For Respondent No. 2: No appearance.

Appeal against Decree of District Court, Tel-Aviv, dated 21.12. 1938.

JUDGMENT.

Copland, J.

This is the considered judgment of the Court.

The facts of the case, so far as they are relevant to this present appeal, are as follows. By a contract dated 10th/20th September, 1933, and executed in Tel-Aviv and Berlin, the firm of G. Kaerger Machinery Factory A.-G. of Berlin or their assignees agreed to consign certain machinery to the firm of M. Gafny & Co. of Tel-Aviv or their assignees. The only clauses of this contract with which we are concerned in this present appeal are Clause 9, whereby Mr. Alexander Kremener of Berlin, the first respondent in this appeal, guaranteed all obligations of the firm of M. Gafny & Co. which might result from this contract, and Clause 10, whereby the parties agreed that all disputes resulting from this contract should be within the exclusive jurisdiction of the Berlin Mitte Court. It is not disputed that at the time of making the conract the first respondent was resident in Berlin but is now living in Palestine. Certain machines were duly consigned to M. Gafny & Co., but disputes arose and the accounts were not paid. Later, on the 20th July, 1937, and the 10th August 1937, G. Kaerger purported to assign their claims against M. Gafny & Co. and the first respondent to the firm of N. V. Philips Gloeilampenfabrieken

of Eindhoven, Holland, the present appellants and the plaintiffs in the District Court. The validity of this assignment was contested in the proceedings in the District Court, but that Court made no finding thereon, and we therefore say nothing about it, but for the purposes only of this present appeal, we assume that it was valid. In the meantime M. Gafny & Co. have been declared bankrupt, a part of the claim against them has been paid out of the proceeds of the bankkruptcy, leaving the amount of RM. 5386.62 still unpaid, and the appellants sued for this amount in the District Court sitting at Tel-Aviv against M. Gafny & Co. and the first respondent. Gafny & Co. entered an appearance but did not defend at the trial.

A number of points were raised on the pleadings and five agreed issues were drawn up for determination, the first of them being — had the Court jurisdiction to entertain the case. On this issue the learned Judges of the District Court found themselves unable to agree, the Relieving President, Judge Curry, holding that in view of Clause 10 of the contract the parties had agreed to the exclusive jurisdiction of a German tribunal, and Judge Korngrun being of opinion that Rule 4 of the Civil Procedure Rules, 1938, allowed the action to be properly brought in Palestine, and that any judgment of a German Court was valueless as it could not be executed in Palestine. The District Court thereupon dismissed the action. Hence this appeal.

The appellant has urged before us that Rule 203 of the Civil Procedure Rules, 1938, lays down that a judgment must either be unanimous or by majority, and that, when a Court is composed of two Judges and they disagree, there is no majority and therefore no proper judgment, and that a third Judge should have been called in and the case reargued. Alternatively he has urged that since the first respondent raised the plea of lack of jurisdiction, the burden was on him to prove it, and since he failed to satisfy the Court, the plea should have been over-ruled. Here however there is no question as to the burden of proof — there was no dispute as to the facts — the only argument was, as the first respondent rightly says, as to the proper interpretation and the legal consequence of Clause 10 of the contract; in other words whether, under Clause 10, the appellant had the right to bring an action in Palestine. An almost exactly similar question arose in this Court in Shlomo Fried v. Aaron Zelig Volansky, C.A. 46/38,*) where also the two Judges in the lower Court had disagreed on the point whether there was a right to sue and this Court held that in such a case, the action was properly dismissed. And in the

*) 3 CtLR 185.

present case following this previous decision, we equally think that, in view of the nature of the disagreement, the Court below had to dismiss the action. And with regard to the first argument, that the case should have been reheard by three Judges, the Courts Ordinance, Cap. 28. S. 11(3)(a) as amended, states that a civil action in which the claim does not exceed five hundred pounds "shall be tried" by two Judges. No provision is made in the event of the two Judges disagreeing, and we think that, the old Ordinance of March 1920 having been specifically repealed by the Trial Upon Information Ordinance 1924, all amendments to it must also be taken to have been repealed by the same Ordinance, since the amendments without the original Ordinance are largely meaningless. It may well be that in some cases it would not necessarily follow that an action should be dismissed because the two Judges disagreed, but that it not the case here, where the disagreement was on a point of law, which this Court can itself decide.

The next argument by the appellants is that Rule 4 of the Civil Procedure Rules allows this action to be brought in the Courts of this country, and that Clause 10 of the contract cannot take away this right.

The first respondent replies that Rule 4 merely lays down which Court in Palestine shall have jurisdiction, if any Court here has, that the Rule is not exhaustive and that nothing in it can prevent the parties making an agreement that all disputes shall be referred to any competent Court in another country. With this argument of the first Respondent we are in agreement. In Dicey's Conflict of Laws 5th Ed. p. 32, the principle is laid down that the Court of any country have a right to exercise jurisdiction over any person who voluntarily submits to their jurisdiction, with certain exceptions, such as divorce, and it is pointed out that submission may take place in various ways, and one of these ways is where a party has made it a part of an express contract that he will, if certain questions arise, allow them to be referred for decision to the Courts of a given country. The reason for this is that parties must be held to be bound by their contracts.

The appellants further argue that since by English Law a reference to a foreign tribunal is deemed to be a reference to arbitration, then under S. 5 of the Arbitration Ordinance, Cap. 6, the first respondent should have applied to the District Court to stay proceedings, or have entered an appearance under protest, and that since he did neither of these things, but entered an unconditional appearance and also applied for further time to deliver his defence, he must be deemed to have submitted to the jurisdiction of the District Court and could

not therefore raise a plea of lack of jurisdiction. The first respondent's answer to this is that this point was never raised in the Court below and was not included in the agreed issues, and neither was it raised in the grounds of appeal, since the laconic statement in para. 7 of the appeal, that "even if English Law were applicable, respondent No. 1 could not succeed in his plea of lack of jurisdiction", does not evenl faintly suggest this point. We think that this contention of the first respondent is right but, even if it were not so, we still think that the appellants' arguments would fail for these reasons. In construing this contract we must do so by reference to the time and place and circumstances in which it was made. When this contract was entered into, the assignors of the appellants and the 1st respondent were both Germans and resident in Germany, the contract would fall to be governed by German Law, and the reference to the Berlin Mitte Court was not a reference to a foreign tribunal, but to the parties' national tribunal, and therefore the Courts of Palestine cannot hold that English Law applies and that the reference is one to arbitration. The legal character of a contract cannot be changed because one of the parties thereto changes his residence and takes up his abode in another country. Holding this view, as we do, the appellants' next point, that a clause to agree to submit disputes to arbitration cannot under English Law be assigned, does not arise. In any case this point again was not raised in the Court below nor in the grounds of appeal.

We now come to the appellants' last arguments in support of the appeal, namely that the plea of lack of jurisdiction is not made in good faith, because the first respondent has no property in Germany, and is only endeavouring to evade liability, that the first respondent being a Jew cannot appear in a German Court to defend, and that a German judgment, even if obtained, cannot be executed in this country, owing to there being no reciprocity between the two countries in respect of execution of judgments.

The allegation of bad faith is strongly denied by the first respondent who says that one of his reasons for preferring the German forum is that he can take advantage there of the German Law as to limitation of actions, and that under the German Civil Code this action would be barred. One cannot say that there is necessarily bad faith here, unless to defend an action is ipso facto an act of bad faith.

As to the point that the first respondent could not defend the action in a German Court, that is one which might be raised by him, but hardly by the appellants. And finally, whilst the appellants could not apply in the Courts of this country to enforce a German judgment by exequatur, there is nothing to prevent them bringing an action on

a judgment here. Many foreign judgments cannot be enforced in Palestine by exequatur, since this procedure is only available where there is a treaty or convention between two countries for the reciprocal enforcement of judgments, or where such judgments are made enforceable in Palestine by Ordinance. See Calamari v. Abdallah C.A. 145/38 (Ct.L.R. IV p. 61). But there is nothing to prevent in such circumstances an action being brought here on the judgment of a German Court.

There may be circumstances where the Courts of Palestine would assume jurisdiction, but those circumstances do not arise in this case. There is nothing to prevent the appellants instituting proceedings in Germany, as provided for in the contract, and to adopt the words of the learned Relieving President, we do not consider that a plea of greater convenience is sufficient to entitle the Court to ignore the agreement of the parties.

For all these reasons we think that this appeal fails and must be dismissed with costs to include LP. 15.— fees for attending the hearing to the first respondent.

Delivered this 23rd day of February, 1939.

British Puisne Judge.

I concur

Senior Puisne Judge.

I also concur

Puisne Judge.

CRIMINAL APPEAL NO. 8/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Frumkin, J.

In the appeal of:—

George Ibrahim Elias — Appellant.

v.

The Attorney-General — Respondent.

Appeal against sentence by accused who pleaded guilty — Sentence deferred in trial Court until after disposal of cases against other persons engaged in same transactions — Absence of advocate owing to shortness of notice — Record containing no note that provisions of sec. 47 of Trial Upon Information Ord. were complied with.

1. Before passing sentence Court must comply with provisions of sec. 47 of Trial Upon Information Ordinance and make note of such compliance.

2. If prisoner has an advocate, latter should be given opportunity of being heard before sentence passed, so that he may point out all matters which may influence Court before imposing penalty.

George Elia for Appellant.
Salant for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 16.2.39, whereby the Appellant was convicted of the charge of Uttering a false document contrary to Section 340 of the Criminal Code Ordinance, 1936, and of the charge of Receiving stolen property contrary to Section 309 of that Ordinance, and sentenced to three years' imprisonment.

JUDGMENT.

The Appellant pleaded guilty before the District Court to uttering a forged document and receiving stolen property. He now appeals against his sentence.

Several other persons were engaged in the same transcations, and sentence was deferred until after the disposal of the other cases.

After the other cases were heard the Appellant was, without proper notice, brought before the Court for sentence, and owing to this shortness of notice his advocate was absent.

It is not disputed that the other cases were tried by a Court constituted differently to that which tried the Appellant, and that an individual described as the principal offender was sentenced to two years' imprisonment.

When the Appellant was brought before the Court for sentence the provisions of Section 47 of the Criminal Procedue (Trial Upon Information) Ordinance applied. There is no note on the record

that they were complied with. This Court has in other cases drawn attention of Courts of trial to the desirability of such a record.

Sub-clause 2 provides that the Court shall, before passing sentence, hear the prisoner or his advocate on his behalf. It is true that these are stated in the alternative, but it is obvious that if a prisoner has an advocate he should be given the opportunity of being heard.

In the present case the Court had no knowledge as to the fact beyond what appeared from the information. It is true that some members of the Court had tried the other offenders, but that is clearly insufficient.

The prosecution stated that they did not press the case and pointed out that the prisoner had helped the prosecuion. Had the prisoner's advocate been present, he would no doubt have pointed out in detail the assistance which the prisoner had given — which he indicated to us — and would have drawn the attention of the Court to certain relevant dicta in English cases which he cited to us. There are matters which clearly might have influenced the Court had they been before it.

In the result the Appellant was sentenced to three years imprisonment, that is, one year more than the so-called principal offender. The Attorney-General's representative associates himself with Mr. Elia's plea for a reduced sentence.

Having regard to the irregularities at the trial, and taking into account the age of the Appellant, who is stated to be only 20, and the assistance which he rendered to the police and the prosecution, we set aside the sentence of three years' imprisonment and direct that he be bound over with one surety for LP. 100 to be of good behaviour for one year.

Delivered this 28th day of February, 1939.

Chief Justice.

CIVIL APPEAL NO. 16/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J., Greene, J. and Khayat, J.
In the application of:—
The Syndic in Bankruptcy of the Fiirm
"S. N. Khoury" of Haifa — Applicant.
v.
Wolf Slavouski — Respondent.

Order of Land Court to pay into Court purchase price within fixed period before action of specific performance would be heard — Refusal of Land Court to grant leave to appeal from its order — Application to Court of Appeal for leave on ground that in motion giving rise to procedings grounds were not specifically stated — Purchaser declining to comply with order of paying in on ground that land not yet in his possession — Civil Procedure Rules, Rules 307, 317.

1. If party applying for leave to appeal was in no way prejudiced and procedure seems to have been corect, Court of Appeal will not grant leave on ground that in the motion which was the foundation of present proceedings before it applicant did not state specifically grounds of motion and Court below heard arguments on other grounds.

2. Where purchaser claims specific performance of agreement to transfer land and vendor ready and willing to transfer subject to deposit by purchaser of price (or such amount as undisputed), purchaser cannot successfully oppose order of payment into Court, as he is in no way prejudiced by it.

Edit. Note:—See C.A. 132/38 4 CtLR 25.

Sanders and *Atalla* for Applicant.
Y. S. Shapiro for Respondent.

Application for leave to apppeal under Rule 317 of the Civil Procedure Rules, 1938, against the interlocutory order of District Court, Haifa, dated 18.1.1939 (Motion 11/38).

ORDER.

This is an application for leave to appeal from an Order of the Haifa Land Court given on the 18th of January, 1939, whereby the applicants, who were plaintiffs in the Court below, were ordered to pay into ourt the sum of LP. 5,750 within one month before their

action of specific performance would be proceeded with. The Land Court refused leave to appeal from this Order and the applicants have now come to this Court.

Two points have been raised in support of the application, the first one being that in the motion of the 1st of December, 1938, which was the foundation of the present proceedings now in this Court, the respondent did not state specifically the grounds on which this motion was based and the Land Court heard arguments on other grounds, whereas they should not have done so under Rule 307 of the Civil Procedure Rules. We do not think that there is anything in this point. We cannot say that the present applicants were in any way prejudiced and the procedure seems to have been correct.

A second point is that no Order for payment into Court of the value of the property concerned can be made unless the person who is ordered to pay in is in possession of the whole property. But it must be remembered that in this case the action was brought by the purchaser claiming specific performance. It is said by the applicant that the respondent has made no offer to transfer the property to him, whereas in paragraph 10 of the respondent's motion of the 1st of December, 1938, he does make an offer to transfer subject to the deposit of the purchase price mentioned in the option, or, if the amount of the purchase price cannot be agreed upon, then the undisputed amount should be paid in, and if such a course be adopted he offers at the same time to withdraw all defences other than that relating to the amount of the purchase price. The applicant assures us that he is only too willing to purchase this property if he can get a transfer.

It seems to us in these circumstances a little difficult to realise why he is showing such an extreme dislike to pay the money into Court, in a case such as this where, if the money is paid into Court, the only point in dispute would be the amount of the purchase price. It seems to us that the applicant will in no way be prejudiced but in fact the purchase on which he has apparently set his heart will be considerably expedited.

In these circumstances we do not think leave should be given and the application is therefore refused. The respondent will have the costs to include LP. 15.— fees for attendance at the hearing.

Given this 6th day of March, 1939.

British Puisne Judge.

HIGH COURT NO. 8/39.

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

Before:—Copland, J. and Khayat, J.
In the application of:—

1. Subhi Khoursheed
2. Ishak Khoursheed — Petitioners.

v.

1. The Chief Execution Officer, Tel-Aviv
2. Moshe Smilansky — Respondents.

Contesting liability to pay mortgage debt — Allegation by mortgagor that mortgage only a security for fulfilment of agreement between parties — Judgment as to nature of mortgage — Injunction restraining mortgagee from enforcing security — Hassan and another v. Chief Execution Officer and others, H.C. 35/38 Ct.L.R. Vol. III p. 225.

Mortgagor alleging that mortgage was only a security for fulfilment of terms of an agreement between parties must obtain judgment to that effect from a competent Court and then entitled to an injunction restraining mortgagee from enforcing security until liability established.

Edit. Note:—See H.C. 35/38 3 CtLR 225 and Edit. Note thereto.

Germanus for Petitioners.
Respondent No. 1 — Not present — served.
Scharf (by delegation) for Respondent No. 2.

Application for an Order to issue directing the Firist Respondent to show cause why he should not refrain from executiing his order dated 11.1.39 in the Execution File of Tel-Aviv No. 9768/38, and why it should not be set aside, and alternatively, why Petitioners should not be granted an extension of one year for the payment of the sum included in the mortgage deed.

ORDER.

This is a return to an order nisi granted by this Court calling upon the Respondent to show cause why an order of the Chief Execution Officer, Tel-Aviv, granting a petition for sale of certain mortgaged property, should not be set aside.

The case is a very simple one and it is in our opinion governed by the principles laid down by this Court in Hassan and another v. Chief Execution Officer, Tel-Aviv and others — H.C. No. 35/38, Ct.L.R. Vol. III, p. 225. In that case, as here, the petitioners alleged that the mortgage was a security for the fulfilment of the terms of an agreement between the parties. In the above quoted case we said that the Petitioners' proper remedy was to go to a competent Court and obtain a judgment that this mortgage in respect of which an order for sale has been made was a security, and that if that could be established to the satisfaction of that Court, then the Petitioners would be entitled to an injunction restraining the Respondent from enforcing the security until the liability was established.

These words apply with equal force to the case now before us, and we do not think that we can usefully add anything to what we then said. We grant a temporary stay of ten days from to-day to enable Petitioners to take this course, if they so wish. Subject to that, the rule is discharged with costs to include LP. 10.— for attending the hearing.

Given this 13th day of March, 1939.

British Puisne Judge.

HIGH COURT NO. 12/39.

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

Before:—Copland, J. and Khayat, J.

In the application of:—

1. Eliahu Berman
2. Baruch Berman
3. Todros Berman
4. Arie Berman
5. Moshe Berman — Petitioners.

v.

1. The Chief Execution Officer, Jerusalem
2. Henryk Huppert — Respondents.

Final sale notice to mortgagor — Grant by Chief Execution Officer of 2 months' time for payment — Chief Execution Officer's discretion.

1. Chief Execution Officer has, even after final sale notice

has been given, a discretion to extend time for payment of mortgage debt.

2. Where mortgagor resident abroad, Chief Execution Officer cannot be said to have exercised discretion improperly or unreasonably, if he granted 2 months' time for payment.

Edit. Note:—Compare H.C. 4/39 5 CtLR 82 and cases cited in the Edit. Note thereto.

Marein for Petitioners.

Ex parte.

Application for an order to issue directing the First Respondent to show cause why his Order in Execution File of Jerusalem No. 4152/37 dated 3.3.39 should not be set aside and why he should not direct the Land Registrar of Jerusalem, to register the sale of the mortgaged property in the name of the highest bidder in accordance with his previous Order dated 1.2.39.

ORDER.

In this case an application is made to this Court to set aside an order of the Chief Execution Officer, Jerusalem, granting two months' time for payment by mortgagor as from the 13th February, 1939, after final sale notice has been given.

We think that the Chief Execution Officer has a discretion to extend times for payment, and we cannot say that that discretion has been improperly exercised in this case, since the mortgagor is resident abroad and two months' time seems to us to be a reasonable period in the circumstances. For these reasons the application for an order nisi is refused.

Given this 13th day of March, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 249/39

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.) Greene, J. and Frumkin, J.

In the case of:—

The Attorney General on behalf of the Government of Palestine — Appellant.

v.

Ezra Zakai — Respondent.

Payment of customs duty on basis of purchase price — Re-assessment on basis of amount actually received by vendor in foreign country — Interpretation of sec. 131 *of Customs Ordinance — Customs Ordinance, sec.* 131, 132, 153, 154.

In an action for recovery of customs duty ad valorem paid under protest Court has to decide c.i.f. price which importer would give at place of importation, not price which he actually gives or which vendor receives.

Bell (*Crown Counsel*) for Appellant.

Dr. Werner for Respondent.

Appeal from Decree of District Court, Haifa, in Civil Case No. 47/38, dated 29.11.1938.

JUDGMENT.

I am of opinion that this appeal should be dismissed.

In October, 1937, the Respondent imported certain cotton goods from Germany, and import duty thereon, amounting to LP. 73. 602 mils, was assessed and paid. This was on the basis of the purchase price being Reichs Marks 3629.72.

It seems that by reason of certain financial arrangements made by what is known as Haavarah, the vendor in Germany received an amount in excess of that sum, and the Customs Authorities claimed that the duty had been under-assessed, and re-assessed it on the basis of the amount actually received by the German vendor. The Respondent paid under protest, and brought an action in the District Court to recover the additional amount so paid. The District Court decided in his favour and the Attorney-General appeals to this Court.

The matter turns upon the interpretation of the Customs Ordinance. The goods in question were liable to assessment for duty upon an ad valorem basis, and section 131 provides:—

"The value of any article for the purpose of assessment of ad valorem duties shall be taken to be the price which an im-

porter would give for the article if the article were delivered, freight and insurance paid, in bond at the port or place of importation and, subject to the provisions of section 153, duty shall be paid on that value as fixed by the Director."

It should be observed that this section refers to the price which an importer would give, not which he actually gives. It does not refer to the amount which the vendor receives if this should be some other amount.

Where there is an open market and an honest invoice, no doubt the invoice price gives a fair criterion upon which to base the price for the purposes of the section, and Section 132 contemplates that the Director may have regard to an invoice, but I do not think that either he or the importer is necessarily bound thereby.

Section 154 makes it clear that the value fixed by the Director is not conclusive, and where duty has been "paid under protest" an action may be brought against Government in respect thereof. When such action is brought the Court has to decide the c.i.f. price which the importer would give at the place of importation.

In this case the Court decided that the criminal assessment was right, there was evidence as to the value of the goods upon which it could so decide, and the appeal will be dismissed with costs. Costs to include LP. 15 for attendance at the hearing.

Delivered this 14th day of February, 1939.

Chief Justice.

CIVIL APPEAL NO. 12/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chie Justice (Trusted, C. J.), Greene, J. and Frumkin, J.

In the application of:—

1. Joseph Ziman
2. Eliahu Lager
3. Joseph Zimberknopf — Applicants.

v.

Moshe Shwarz — Respondent.

District Court remitting case to arbitrators to make a fresh award — Application for leave to appeal from judgment of District Court remitting case to arbitrators.

Court of Appeal will refuse application for leave to appeal from District Court remitting case to arbitrators (to make a fresh award), if fresh award has been given in meantime.

Kolodny for Applicants.
Hatchwell for Respondent.

Application under Section 15(3) of the Arbitration Ordinance for leave to appeal against the judgment of District Court, Tel-Aviv, dated 21.12.38.

JUDGMENT.

This is an application for leave to appeal from the judgment of the District Court in an unfortunate arbitration case which has been dragging on for some time. The Applicants applied for the award to be set aside, alleging misconduct on technical grounds, and they admit that their application to set aside the award was not filed until eight months after its publication.

The District Court remitted the case to the arbitrators to make a fresh award, and we understand that a fresh award has been given in the meantime. We therefore see no useful purpose in granting leave to appeal. The applicants may now, if they so desire, take the appropriate action against the second award.

Leave to appeal will therefore be refused and the application dismissed. The Respondent will have his costs assessed at LP. 6, which sum shall include the fee for attendance at the hearing.

Deliveered this 27th day of February, 1939.

Chief Justice.

CIVIL APPEAL NO. 234/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Frumkin, J.

In the appeal of:—

1. Yousef Khalil Najjar

CORRIGENDUM.

CtLR Vol. V No. 10, p. 104, line 9 top read: *he is not a party*

for *he is a party*..

of succession by subsequent consent of heirs who were not parties to proceedings before that Court.

2. Where Certificate of Succession was issued by a Religious Court to an heir without other heirs having been parties to application, that heir not estopped from subsequently applying to District Court for an order declaring succession in respect of same estate.

Goitein for Appellants.

Koussa for Respondent.

Appeal from Order of District Court, Haifa, dated 20.7.1938.

JUDGMENT.

It seems that some time ago Wardeh Khalil Najjar obtained from the Court of the Catholic Melkite Community a certificate of Succession in respect of the estate of her deceased father, who was said to

District Court remitting case to arbitrators to make a fresh award — Application for leave to appeal from judgment of District Court remitting case to arbitrators.

Court of Appeal will refuse application for leave to appeal from District Court remitting case to arbitrators (to make a fresh award), if fresh award has been given in meantime.

Kolodny for Applicants.

[redacted]

propriate action against the second award.

Leave to appeal will therefore be refused and the application dismissed. The Respondent will have his costs assessed at LP. 6, which sum shall include the fee for attendance at the hearing.

Deliveered this 27th day of February, 1939.

Chief Justice.

CIVIL APPEAL NO. 234/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Frumkin, J.

In the appeal of:—

1. Yousef Khalil Najjar
2. Mikhail Khalil Najjar
3. Yacoub Khalil Najjar
4. Naim Tewfiq Najjar
5. Elias Tewfiq Najjar — Appellants.

v.

Wardeh Khalil Najjar — Respondent.

Certificate of succession issued by Religious Court upon application of one out of several heirs — Application to District Court for a certificate of succession by same heir who previously obtained such certificate from Religious Court — Subsequent consent of other heirs who were not parties to proceedings in Religious Court to jurisdiction of that Court — Contention that certificate of succession of Religious Court raises an estoppel to subsequent application to District Court in same matter — Civil Procedure Rules, Rule 341 *— Succession Rules, Rule* 26 *as amended.*

1. Religious Court does not acquire jurisdiction in a matter of succession by subsequent consent of heirs who were not parties to proceedings before that Court.

2. Where Certificate of Succession was issued by a Religious Court to an heir without other heirs having been parties to application, that heir not estopped from subsequently applying to District Court for an order declaring succession in respect of same estate.

Goitein for Appellants.
Koussa for Respondent.
Appeal from Order of District Court, Haifa, dated 20.7.1938.

JUDGMENT.

It seems that some time ago Wardeh Khalil Najjar obtained from the Court of the Catholic Melkite Community a certificate of Succession in respect of the estate of her deceased father, who was said to

have died in 1917. The other heirs were not parties to this application.

In an action brought in the Land Court, Haifa, in 1934, Wardeh, as Plaintiff, claimed a share of certain land from the other heirs. She then pleaded that the testator died in 1917. The other heirs set up a deed against her and she failed in her action. She appealed to this Court, but failed on technical grounds.

In November, 1937, she applied to the District Court, Haifa, under the Succession Ordinance, for an Order of Succession in respect of her father's estate.

At the first hearing on 4.2.38, the President formulated the issues as follows:—

> "First issue — Is Petitioner estopped from applying to this Court for the order prayed, since she has obtained an order of succession of Ecclesiastical Court already and has acted upon it, e.g. in Land Court case No. 111/34?
>
> Second issue — Is the Order of Ecclesiastical Court dated 6.10. 1933 valid in the circumstances stated by the parties?
>
> Third issue — If this Court has jurisdiction, what then was the date of the death of the Testator concerned?"

and on the 26th of February, 1938, ruled —

> "*Ruling.* I think on the facts admitted and statements of the parties, the Petitioner is not estopped from applying to this Court in the circumstances here, unless there was positive consent either direct or implied by all the heirs to the jurisdiction of the Ecclesiastical Court — then the latter was not properly seized with the matter.
>
> Again, since there is no suggestion or allegation that Petitioner has acted with fraud or intent to deceive, I think I am entitled to assume that she has acted bona fide in coming to this Court. As to whether there may be any estoppel against her in regard to the evidence which she may wish to adduce as regards the date of the Testator's death — I will not express any opinion at this stage.
>
> In the circumstances I rule in favour of Petitioner on the first two issues."

It would seem that there remained to determine the simple question of fact — when did the testator die? subject to possible argument as to estoppel.

The matter came before the President on several occasions and evidence was taken and argument was heard. However, attention seems eventually to have been drawn to Rule 26 of the Succession Rules, and

on 17.5.38 the President gave the following ruling:—

> "In the circumstances, therefore, I direct the trial before the competent Court of the issue. — "Did Khalil Ibrahim El Najjar, the alleged father of Wardeh Khalil Najjar die on or about the 27th day of November, 1916, and if not when did he die?
>
> I direct further that the Petitioner here shall be Plaintiff, and the Respondent here shall be the Defendant in such trial subject to the rights or powers of the competent Court upon proper application made to it to make any further order as regards the parties and procedure as it may deem just and necessary in accordance with the rules of procedure applicable to the proceedings in such trial."

On the 20th of July, 1938, the Court, consisting of the President and His Honour Judge Shems, sat to try this issue of fact, but instead of deciding it they accepted further argument and ruled as follows:—

> "*Ruling.* These proceedings having been filed after the Civil Procedure Rules, 1938, came into force, we hold that the said Rules must be followed. We consider, however, having regard to the proceedings already pending before the same parties, out of which this action has arisen, and to the framing of the issues already made by the Court in P.R. No. 62/37, given on 17th of May, 1938, (of which copy filed in these proceedings), we see no sufficient reason why this action would not proceed in its present form. (cf. Rule 123).
>
> As regards the question of the suggested issue of estoppel — this question, apart from what we have said before, was dealt with expressly by the other Court in its ruling of 26/2/38 — and finally by the Court in its issue referred in its order of 17.5.38 — which must be taken to have confirmed the order of 26.2.38 and overruled impliedly also any question of estoppel. This Court Order is final (of 17.5.38) now as it was never appealed. We rule therefore as above, and that the issue now framed already and the course is to proceed from such stage in accordance with Civil Procedure Rules."

I am glad to think, that the question whether the Civil Procedure Rules apply to such a reference is for the future of academic interest only, as Rule 26 has been amended to simplify the procedure. In my opinion, the present case should have raised no difficulty. Pleadings are obviously unnecessary, as there is only one issue which has already been formulated. The parties should summon their witnesses, the Plaintiff would begin, the evidence would be given and recorded in the ordinary way, and the Court would give the answer to the question.

As to the second part of the ruling, it is clear that on the 26th of February the Court expressly did not decide if there was any estoppel with regard to the date of the testator's death, and the ruling of the 7th of May gave no express decision on the point.

It is argued that if the President had been of opinion that there was an estoppel he would not have given the ruling of the 17th of May. On the other hand it is said, the President merely referred to the appropriate tribunal the question of fact for determination, and that that tribunal should determine that question in accordance with the ordinary laws of evidence, and that an estoppel — estoppel being a law of evidence — should be regarded by that tribunal, just as for example, rules as to hearsay evidence would be regarded.

The Court does not appear to have decided the question whether there was an estoppel but to have taken the view that it was not open to it. As to this I think our powers under Civil Procedure Rule 341 are sufficient to enable us on the admitted facts to decide the question.

It is admitted by the Appellants here that when the Religious Court gave the Certificate of Succession they had not consented to these proceedings and were not parties thereto. They now state that subsequently they were willing to consent to that jurisdiction and accept the certificate. I do not think that they can give a Religious Court jurisdiction by so doing, and in consequence the order of that Court cannot raise an estoppel.

It is not suggested that the Appellants here have in any way acted upon the Respondent's representation, so that it would be inequitable that she should be allowed to seek to alter what she said.

I am of opinion, therefore, that there is no estoppel as to the date of the testator's death.

The case will be remitted to the District Court to decide the question — when did the testator die? The representations which were made by Wardeh in the Land Court are matters which no doubt the Court will consider when she furnishes her explanation as to why she now alleges that the death took place on a date other than that which she first alleged.

When the Court has decided this issue of fact the matter will go back to the learned President, and I trust that he will then be able to dispose of it without further delay.

This being a succession matter, and having regard to all the circumstances, we make no order as to costs.

Delivered this 23rd day of February, 1939.

Chief Justice.

I concur

British Puisne Judge.

I concur

Puisne Judge.

CRIMINAL APPEAL NO. 85/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Frumkin, J.

In the appeal of:—

The Attorney-General — Appellant.

v.

Ya'acov Ben Yehiel Melnik (Kimhi) — Respondent.

Second marriage by an Ashkenazi Jew during subsistence of first one — Charge of bigamy — Bigamous marriage prohibited under Jewish law yet not void — Criminal Code Ordinance, sec. 181 — *Palestine Order-in-Council, Art.* 47, 51, 53.

While in accordance with ban imposed by Rabbi Gershon nearly thousand years ago a married Jew, whose marriage was not dissolved by divorce or otherwise, is prohibited from marrying another woman, such second marriage not void under Jewish law, and, as it does not fit definition of bigamy in Criminal Code Ordinance, does not constitute a criminal offence.

Salant, J.G.A. for Appellant.

For Respondent: No appearance — served.

Appeal from judgment of District Court, sitting at Tel-Aviv, dated 6th October, 1938, whereby the Respondent was acquitted from a charge of bigamy contrary to Section 181 of the Crimnial Code Ordinance, 1936.

JUDGMENT.

This is an appeal by the Attorney-General from a decision of the District Court, Tel-Aviv, whereby the Respondent was acquitted of a charge of bigamy contrary to section 181 of the Criminal Code Ordinance, which provides —

"Any person who, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, is guilty of a felony and is liable to imprisonment for five years. Such felony is termed bigamy;

Provided that it is a good defence to a charge brought under this action to prove:—

(a) that the former marriage has been declared void by

a court of competent jurisdiction or by a competent ecclesiastical authority; or

(b) the continuous absence of the former husband or wife, as the case may be, at the time of the subsequent marriage, for the space of seven years then last past without knowledge or information that such former husband or wife was alive within that period; or

(c) that the law governing the personal status of the husband both at the date of the first and at the date of the subsequent marriage allowed him to have more than one wife."

The accused had previously been discharged by the Magistrate, and he was committed by the Attorney-General by virtue of his powers under section 28(5)(a) of the Criminal Procedure (Trial Upon Information) Ordinance.

Article 51 of the Order-in-Council gives an exclusive jurisdiction in matters of personal status — which include marriage and divorce — in certain circumstances to Religious Courts, and Article 53 amplifies this and gives to the Rabbinical Courts of the Jewish Community an exclusive jurisdiction in marriage and divorce to members of their community other than foreigners.

The Respondent is an Ashkenazi Jew and is not a foreigner.

Article 47 of the Order-in-Council provides:—

"Where in any civil or criminal cause brought before the Civil Court a question of personal status incidentally arises, the determination of which is necessary for the purposes of the cause, the Civil Court may determine the question, and may to that end take the opinion, by such means as may seem most convenient, of a competent jurist having knowledge of the personal law applicable."

Although evidence as to the law applicable was taken before the District Court we thought fit to take the opinion of Chief Rabbi Herzog in this matter. While strongly deprecating the result, he expressed the view that according to the law applicable the alleged bigamous marriage was not void by reason of its having taken place during the life of another wife.

Before the District Court the Chief Rabbi of Tel-Aviv and Jaffa expressed the opinion —

"In accordance with the excommunication of Rabbi Gershon it is prohibited for a married Jewish man, whose marriage was not dissolved by divorce or otherwise, to marry another woman."

but he explained this and stated later —

> "In this case I would hesitate to allow the woman to remarry without a divorce".

We have had a long and interesting argument from Mr. Salant as to the precise effect of Jewish law, so far, however, as this Court is concerned, there is obviously a doubt in the matter, and this being a criminal prosecution the Respondent is entitled to the benefit of that doubt, and the appeal is dismissed.

Delivered this 19th day of January, 1939.

Chief Justice.

JUDGMENT.

Frumkin, J.

The accused is a Palestinian Jew. His case is governed by Jewish Law. The position under Jewish Law is clearly stated in the comprehensive decision of the learned Investigating Magistrate. The crucial point is whether or not the marriage in respect of which the accused was brought to trial is void for the reason of its taking place during the life of his previous undivorced wives. There was evidence before the District Court that the marriage was not so void. This evidence is borne out by the opinion of the learned Chief Rabbi Herzog. It is clear, therefore, that there can be no conviction under Section 181 of the Criminal Code Ordinance and the appeal must fail.

It is much to be regretted to my mind that the accused should, because of a virtual technicality, escape the hands of the law, for his deplorable act, which involves the welfare of several women, and is looked upon with great abhorrence by the entire community, including that of which he happens to be a member.

It is true that polygamy was recognised by Biblical Law, but for nearly a thousand years the vast majority of Jews namely the Ashkenazim who comprise over 90% of the entire Jewish people all over the globe, adopted the monogamous system. Among that portion of Jewry originating from Spain and Portugal, generally known as Sephardim, who have not submitted to the ban imposed by Rabbenu Gershon, styled the Lumiere of the Diaspora (a.d. 960-1040), it is only some culturally very backward communities, in Asia und Africa, like

those of Kurdistan and Yemen, who still adhere to polygamy. But even members of those communities, when they come to Palestine and assimilate in the Renaissance of the Jewish people, gradually give up the practice of polygamy, although it is not prohibited to them. Again, Sephardic Jews in European countries and America long ago adopted monogamy because bigamy is considered an offence by the law of their respective countries.

I think, therefore, I am justified in stating that bigamy is considered a sin and looked upon unfavourably by most of the Jews, and it will certainly meet the demands of the Jewish Community in this country if it is treated as an offence also as regards Jews, by making it punishable not only when the marriage is void by reason of its taking place during the lifetime of a wife, but also when, as in the present case, the marriage although not void, is prohibited by the national law of the community of which the party is a member.

The remedy for this lies with the legislature.

Delivered this 19th day of January, 1939.

Puisne Judge.

CIVIL APPEAL NO. 241/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Frumkin, J.

In the appeal of:—

David Yochels — Appellant.

v.

The Attorney-General — Respondent.

Civil Court of Appeal differing from a finding of fact made by trial Court — Claim for refund of deposit of money with Immigration Authorities — Denial of signature on document produced during cross-examination — Court disbelieving Plaintiff's story.

1. Great weight due to decision of a Judge of first instance whenever, in a conflict of testimony, demeanour and manner of witnesses seen and heard by him are material elements in the consideration of their credibility, but parties entitled (in civil actions) as well on questions of fact as on questions of law to demand decision of appellate Court, who, while making due allowance to fact that it has neither seen nor heard the witnesses, should weigh conflicting evidence and draw its own conclusions.

2. Where Defendant never pleaded contract in writing, though he produced document when cross-examining Plaintiff, and latter denied his signature and produced evidence including that of a handwriting expert to substantiate his contention, and no rebutting evidence adduced by Defendant, finding of trial Court disbelieving Plaintiff may be reversed by Civil Court of Appeal, there being no sufficient reason for such disbelief.

Edit. Note:—See C.A. 239/38 5 CtLR 89 and Edit. Note thereto.

Eizenberg and *Levy* for Appellant.
Salant for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 28.10.1938.

JUDGMENT.

This case involves the question as to how far a Civil Court of Appeal (criminal appeals are regulated by Ordinance), is justified in differing from a finding of fact made by a Court of First Instance. I think that the principles that should guide us are well stated in the Yearly Practice of the Supreme Court (England) for 1939, at page 1244, as follows:—

> "Great weight is due to the decision of a Judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled as well on questions of fact as on questions of law to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect."

Bearing in mind these principles I think we are entitled to differ from the Court of Trial and allow this appeal. The facts of the case

are simple, and with one important exception, are not in dispute.

On 1st May, 1935, the Plaintiff in the action, who is the present Appellant, deposited LP. 120 with the Immigration Authorities in respect of the entry into this Territory of a Mr. and Mrs. Yochels as travellers . Permission to remain longer was not granted to these persons during the first three months of their stay here, but they were subsequently given two extensions, and eventually they left.

On 16.1.38 the Appellant applied for the return of the LP.120 on the ground that Mr. and Mrs. Yochels had left the country, and was given permission by the High Court to sue Government therefor.

In a Statement of Defence filed before the commencement of the Civil Procedure Rules the Government denied liability on the ground that Yochels should have left before the 16th September, 1935, which, admittedly, they had not done.

The matter came before the District Court on 15.7.38. The Plaintiff produced the receipt for the LP. 120 and stated that it was stipulated, presumably on the payment of the deposit, that if Benzion and his wife left the country the sum would be refunded.

Counsel for the Government admitted the receipt of the LP. 120 and denied the Plaintiff's claim, and put him to proof thereof. The Court ordered as follows:—

> "Whereas both parties agree that the sum was paid in as a deposit, it is for the Plaintiff to prove the condition for the refund of the sum claimed by him, that is to say, to prove that he is entitled to get back the sum at any time the guaranteed persons, Mr. and Mrs. Yochels, leave Palestine."

Apparently, on 8th June, 1938, the parties agreed as follows:—

> "The parties have agreed upon the following issue of fact to be tried:—
>
> Was the plaintiff entitled to a refund of the deposit if Mr. and Mrs. Yochels left Palestine more than 3 months from the date of their entry?"

It will be seen that neither in the pleadings, nor before the Court when the issue was framed, nor in the agreed issue did the Government suggest that the contract had been reduced into writing.

At the hearing on 15.7.38 the Plaintiff gave evidence and stated —

> "I asked the official as to when I can take back the money. He answered me that as soon as the guaranteed persons leave the country I shall get it back. He did not fix for me a specific time for that."

He was then shown a document, Exhibit J., which he denied having signed.

The Plaintiff's wife said:—

> "When the sum was paid I did not see my husband signing any paper or undertaking. My husband asked as to when he can receive back the sum and he received a reply that he will get it back after the guaranteed persons leave the country."

A witness called by the Plaintiff, Mayer Pardo, substantiated the story.

Exhibit J. was a bond in common form alleged to be signed by the Plaintiff, whereby it was stipulated that if the Yochels did not leave within three months of their entry the deposit of LP. 120 would be forfeited.

The case was adjourned, and at a subsequent hearing the Plaintiff called an expert to say that the writing on the bond was not the Plaintiff's.

The Government called no witness who saw the Plaintiff sign the bond, or who contradicted his story as to what took place when the deposit was made — nor was any other handwriting expert called to prove that the writing on the bond was the Plaintiff's.

The onus was clearly on the Plaintiff to prove his case, which, if he was believed, he did. The Government never put forward any substantive defence. As I have pointed out it never pleaded the contract in writing, which was never proved except in so far as it was produced by an official of the Immigration Department, and in these circumstances the Government could rely upon the document only for purposese of cross-examination to show that the Plaintiff should not be believed.

The Court of Trial in the course of a careful judgment held —

> "Both parties adduced their evidence on this point in dispute, and the Government produced also an undertaking dated 1.5.35 on which is signed the name of the Plaintiff in proof of the stipulation for the refund of the amount of the security. According to this understanding, the Government is entitled to confiscate the amount of the deposit if Benzion and his wife Jana do not leave the country within the three months from the date of their entry to Palestine. But the Plaintiff has denied the signature appended on this undertaking to be his, and he brought an expert to prove his denial. However, the Court is satisfied from the material evidence before it, including the fact that the signatures agree with one another, that the undertaking is signed by him. Even regardless of this undertaking, the Court is convinced by all the evidence before it that the return of the deposit is dependent on the condition that the said two persons shall leave the country within three months; this is evident from the visa which was granted to both of them on

their passport for a period of three months only, and Regulation 2 of the Migration Regulations, supplemented to the Schedule of the Migration Ordinance (Laws of Palestine, Chapter 67) supports it."

In effect this was a finding that the Court did not believe the Plaintiff, firstly, because it was of opinion that the signature on the bond was his signature, and secondly because the visa given to the travellers was for three months, and the Regulations provide for admission for three months in the first instance.

As to the signature, I do not think there was sufficient evidence to justify this view. As to the other matter, it is quite clear that the period of three months may be exended, and it does not therefore necessarily follow that the deposit must have been made on the basis of these travellers leaving within three months.

I am of opinion therefore that there was no sufficient reason to disbelieve the Plaintiff, and that he was entitled to succeed, and that this appeal should be allowed. The judgment will be set aside and judgment entered for the Plaintiff for LP. 120, with costs here and below, and we certify a fee of LP. 15 for attendance at the hearing.

I express no view as to the position which would have been created if the Government had pleaded and proved that the Plaintiff had signed the bond.

Delivered this 16th day of February, 1939.

Chief Justice.

JUDGMENT.

Frumkin, J.

In concurring I wish to state a further reason why to my mind, the District Court erred in not accepting the Plaintiff's plea that he did not sign the bond. Apart from his own evidence, there was the evidence of an expert in handwriting to the effect that the signature on the bond was not that of the Plaintiff. It is not necessary in this case to go into the question whether the Court can, without the aid of expert evidence, compare handwriting itself and come to its own conclusions. Here we are concerned not with the case in which no party has tendered expert evidence, but where one party produced such evidence and the other party chose to tender no evidence of any kind in rebuttal. In such a case, and in the absence of evidence to the contrary, the Court was not justified in disbelieving the evidence tendered.

Puisne Judge.

CIVIL APPEAL NO. 6/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Nahiba bint Michael El-Bahu, widow of Bandali Adas on behalf of her husband's estate — Appellant.

v.

Elias El-Bahu — Respondent.

Plea of Res judicata — Interpretation by Court of Appeal of its previoius judgment.

Where Court of Appeal is of opinion that words in its previous judgment "and the judgment of the Land Court set aside" mean dismissal of original claim brought in Land Court, action cannot be re-entered in latter Court for rehearing, its subject matter being res judicata.

Salah (*by delegation*) for Appellant.

Weinshall for Respondent.

Appeal from judgment of Land Court, Haifa (22/37), dated 21.12.1938.

JUDGMENT.

In this appeal from the judgment of the Land Court, Haifa, the only point for determination is whether the subject matter of the claim before the Land Court is or is not res judicata, bearing in mind the judgment of this Court in Civil Appeal No. 51/32 — Naim El-Bahu and another v. Nahiba bint Mikhail El-Bahu, widow of Bandali Adas, on behalf of her husband's estate.

The Land Court held that the cause of the action, the subject matter of the claim, and the parties were the same in the action before them as they were in a previous action, which culminated in Civil Appeal 51/32. The solution to this question depends entirely upon the interpretation of the previous judgment given by this Court. In that judgment, this Court held that the witnesses who were heard by the Land Court, other than the Plaintiff and Defendant, did not give any evidence against the Appellant Elias, who is the Respondent in this rpesent appeal. This Court went on to say that, Naim's half share, being undisputed, the appeal must be allowed and the judgment of the Land Court*) set aside with costs. Do these words mean

*) Edit. Note: This judgment was in favour of the present Appellant.

that the claim entered in the Land Court was dismissed or not? We think on this wording that this Court dismissed the original claim brought in the Land Court and that the matter was not left suspended, as one may say, in mid-air, calling for the action to be re-entered in the Land Court for rehearing. Is is of course usual and, if I may say to with respect, the better practice, in dealing with an appeal, after allowing it, to dismiss the original action or otherwise as the case may be.

On the wording in this case we are satisfied that the present Appellant's claim against the Respondent is res judicata, by reason of estoppel on the record, and that the Land Court therefore was right in refusing to entertain it. The appeal must be dismissed with costs to include LP. 15.— for attending the hearing.

Delivered this 13th day of March, 1939.

British Puisne Judge.

LAND CASE NO. 22/37.

IN THE LAND COURT OF HAIFA.

Before: — The President (Sherwell, J.) and Shems, J.

In the case of:—

Nahiba, daughter of Mikhail el Bahou
widow of Bandali Adas — Plaintiff.

v.

Elias el Bahou — Defendant.

JUDGMENT.

We think the objection by the Defendant here is well founded on the facts and in law and we hold that this action cannot be maintained since the parties are the same and the cause of action and subject matter of the claim here are identical with those raised in the original action which formed the subject of the Supreme Court's judgment in Land Appeal No. 51/32 and therefore having regard to Art. 1837 of the Mejelle we hold the claim is res judicata and cannot now be entertained by this Court. The action is therefore dismissed with costs and LP. 5. advocate's fees.

Given in presence of advocates Mr. Yahya and Dr. Weinshall appearing for the parties respectively and delivered this 21st day of December, 1938.

President.

CRIMINAL APPEAL NO. 88/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Frumkin, J.

In the appeal of:—

The Municipality of Nablus — Appellant.

v.

Rashad Anis el-Maslamini — Respondent.

Sale of commodities in shop instead of in special market contrary to Municipal By-Law — Ambiguous finding of fact — Interpretation of Municipal By-Law — Effect of Trades and Industries Ordinance upon Municipal By-Law — Municipal Corporations Ord. 1934 — *Traeds and Industries Ord.*

Court of Appeal will uphold judgment of trial Court discharging person tried for an offence against Municipal By-Law prohibitinig sale of fruit etc. other than in municipal fruit etc. market, if accused was holder of a licence under Trade and Industries Ordinance and finding of fact made by trial Court ambiguous.

Crown Counsel (*Bell*) for Appellant.

Respondent in person.

Appeal from judgment of District Court, Nablus (Appellate Capacity) whereby the Respondent was acquitted of the charge of selling fruit within he Municipal Area, other than in the Municipal Fruit Market, contrary to No. 3 By-Law of the Nablus Municipal By-Laws, 1935.

JUDGMENT.

This is an appeal by the Attorney-General. The Respondent was charged before the Magistrate, Nablus, with an offence against By-Law 3 of the Nablus Municipal By-Laws, 1935, wchich provides —

> "No person shall sell any fruits, fresh cheese or vegetables within the municipal area except in the municipal fruit, fresh cheese and vegetable market."

in that he was alleged to have sold oranges in his shop which was in the Municipal Area but not in the market.

He was discharged o the grounds —

> (a) "Section 3 of the By-laws does not apply to the case against the accused, because, to my mind, it applies to large quantities of vegetables which are brought from outside the municipal area by sellers for the purpose of selling the same, to dealers in vegetables, in the municipal market place".

and (b) on the ambiguous finding that the accused did not sell his commodities within the Municipal Area, but he purchased them from outside the Municipal Area and brought them into his shop and sold them in retail.

The prosecution appealed to the District Court which held —

> "In our opinion the aforesaid by-law merely prohibits persons who are not the possessors of shops from hawking their vegetables about the streets and enacts that they sell them in the Municipal market."

and dismissed the appeal.

When the case first came before this Court it was alleged that the Respondent had a licence issued under the Trades and Industries Ordinance, and we adjourned the case in order to verify this. It is now clear that he has been granted a licence under that Ordinance as a vegetable salesman.

Several points of importance are raised in this appeal, particularly, is the By-law ultra vires the powers conferred on the Corporation by the Municipal Corporations Ordinance, 1934? And assuming that it is not, as to which we express no opinion, how far are the provisions of the By-law modified by the Trades and Industries Ordinance? By-laws made by Municipal Corporations under the Ordinance are not uniform, and as a matter of interest it may be observed that the Beit Jala By-laws expressly refer to the Trades and Industries Ordinance.

The Respondent, who appears in person, is unable to assist us with arguments on these points, and having regard to the ambiguous finding of fact we do not feel that we could convict him whatever the law may be. We therefore dismiss the appeal and award the Respondent LP. 2 his costs.

No doubt the legal advisers to the Municipal Corporations, possibly with the assistance of the Attorney-General, will wish to consider these points now that they have been raised.

Delivered this 9th day of March, 1939.

Chief Justice.

CIVIL APPEAL NO. 22/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

The Attorney-General on behalf of the Government of Palestine — Appellant.

v.

Mrs. Rebecca Notrica Bouenos — Appellant.

Deposit by foreigner on being granted a traveller's visa for Palestine — Traveller acquiring Palestinian citizenship by marriage within authorized period of stay — Construction of receipt given to payer of deposit — Question or forfeiture of deposit.

1. Question whether a deposit returnable or not depends on terms of contract between parties in connection with which the deposit was made.

2. A deposit with Government of Palestine is not necessarily forfeited if holder of traveller's or tourist visa does not leave within period stipulated in visa.

Such deposit must be returned, if condition was that tourist shall leave Palestine within period authorised by Palestine authorities and he subsequently obtains Palestinian Passport entitling him to remain permanently in country.

3. If A paid B a certain sum as a deposit, without signing a bond in B's favour, he cannot successfully claim that B must return deposit on ground that he (B) did not send him a notarial notice.

Edit. Note:—See C.A. 36/37 1CtLR Rep. 53; C.A. 241/38 5 CtLR 128.

Hogan (*Crown Counsel*) for Appellant.

Margolith for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 7.2.39.

JUDGMENT.

This is an appeal by the Attorney-General from a judgment of Judge Shaw sitting in Jerusalem, in which he ordered the Palestine Government to return to the Respondent the sum of LP. 60. the amount deposited by her on her being granted a traveller's visa to enter Palestine for three months.

The facts are as follows. The Respondent, who was then unmarried, and residing in Rhodes, applied to the British Consul there for a traveller's visa to enter Palestine for three months. On the 30th July, 1935, she deposited with the British Consul the sum of Italian lire 3637.80, being the then equivalent of £ 60 sterling. Apparently the British Consulate at Rhodes is not allowed to retain money or issue visas, and the deposit was forwarded to the British Consul in Venice, who thereupon granted the visa and at the same time issued a receipt, Ex. L. B. 6, on the 2nd September, 1935, in these terms:—

PALESTINE DEPOSIT.

Italian Passport No. 38954
Endorsement No.
Visa No. 2710 of Sept. 2nd, 1935 } issued on July 30th, 1935, at Rhodes.
to Rebecca Notrica

I acknowledge the receipt of (a) Lire 3,637.80 deposited with me as the Agent acting for and on behalf of the Government of the Mandate Territory of Palestine by Miss Rebecca Notrica subject to the condition that, if she fail to satisfy me either by personal call or other evidence before (b) December 2nd, 1936, that she has finally departed from Palestine within the period authorised by the Palestine authorities, the said sum shall be forfeited to the Government of Palestine, but upon condition also that, if and when the said Miss Rebecca Notrica shall satisfy me, not later than (b) December 2nd, 1936, that she has complied with the above condition, the said sum shall be repaid her upon her request.

British Consulate Venice
Sept. 2, 1935. Sgd. *Acting British Consul.*

(a) £ 60 sterling, or, where local regulation preclude this, the equivalent in local currency of £ 60.
(b) a date 15 months after the date of this receipt."

The Respondent arrived in Palestine in November, 1935. Before the expiration of the time mentioned in the visa, in February, 1936, she applied for and obtained an extension of three months, which would expire in May, 1936. Having meanwhile become engaged to be married she was granted on that ground a further extension, which expired on the 10th July, 1936. She was duly married on the 28th June, 1936, and on the 3rd July, 1936, her husband forwarded to the Immigration Office in Tel-Aviv his own passport, his wife's Italian passport, the marriage certificate, and an application for the issue to his wife of a Palestine passport, which latter was granted, and the new passport was received back on the 14th July, 1936. It is to be noted that the new passport of the Respondent bore the dated of the 10th July, 1936, the date on which the second extension to her tourist visa expired.

Application was then made for the return of the deposit of LP. 60, which was refused by the Department of Immigration, and correspondence on the subject continued until the end of November, 1936, with no result. The Respondent did not leave Palestine either by the 10th July, 1936, or by the 2nd December, 1936, or at all. No bond was signed by the Respondent, agreeing to forfeit the deposit of £ 60 sterling, if she should remain for longer than the period mentioned in her visa.

The Respondent then sued the Appellant for the return of the deposit in the District Court and obtained judgment. The Court found that she was fully aware of the contents of Ex. L. B. 6, and that the fact that the Appellant did not answer the further letters of the Respondent did not estop the former from alleging that the terms of that exhibit had to be strictly complied with by the Respondent. With those findings we agree. The learned Judge then went on to ask the question, were the words "within the period authorised by the Palestine authorities", occurring in Ex. L.B. 6, good notice to the Respondent that her deposit would be forfeited even if she were authorised by the Palestine authorities to remain permanently as an immigrant? He came to the conclusion that the Respondent could not have read such a meaning into that document, and that since she had been authorised by the Palestine Government to remain permanently in Palestine she was entitled to recover her deposit, and gave judgment accordingly.

The statement of appeal filed by the Appellant submits first, that the Court below wrongly construed the terms of the contract beyond the clear and unambiguous terms thereof, and secondly, that having found that the Respondent knew the contents of the contract, Ex. L.B. 6, and in view of the admission that she had not left Palestine, she must be deemed to have failed to comply with the terms and conditions of the contract, and that therefore judgment should have been given against her.

Before discussing the arguments which have been adressed to us, it may be convenient at this point, to refer to two cases which have been cited in the course of the hearing. The first is Battat v. the Attorney-General, C.A. 36/37.*) In that case the appellant had paid a deposit to the Government of LP. 100 as a guarantee that a woman traveller would leave Palestine within the one month allowed to her on a tourist visa, and he had signed a bond also to the same effect. Within the one month the woman married a Palestinian, and had

*) CtLR Vol. 1, Rep. 53.

her name entered on her husband's passport, and did not leave the country. The appellant brought an action claiming the return of his deposit on the ground that the woman, being then of Palestinian nationality, was entitled to remain in Palestine, but this Court dismissed his appeal, holding that on the terms of the bond executed by him the money was forfeited, since the bond clearly stated that the woman must leave within the one month, and that the bond did not state, as it might well have done, that the deposit should be forfeited if she remained illegally in Palestine for longer than one month.

The second case is Yochels v. The Attorney-General, C.A. 241/38.*) There the appellant had deposited LP. 120 with the Government as a guarantee that two travellers, man and wife, would leave the country within three months. Two extensions of residence were granted, but it was not until after the last extension had expired that the travellers finally left Palestine. The Government refused to refund on the ground that the travellers had left the country after the permitted period of residence. The District Court endorsed that view, but on appeal this Court reversed the decision and gave judgment for the return of the deposit on the ground that there was insufficient evidence that the bond had been signed by the Appellant, that it was never pleaded that there was a contract in writing, and that since it was clear that the period of three months could be extended it did not necessarily follow that the deposit must have been made on the basis of the travellers leaving within the three months.

The principle which can be deduced from these two cases seems to be this — that the question of whether a deposit is returnable or not depends on the terms of the contract between the parties in connection with which the deposit was made, but that since the period of permitted residence may be extended, a deposit is not necessarily forfeited if the holder of a traveller's or tourist visa does not leave within the period stipulated in the visa.

In this present appeal, Mr. Hogan, for the Appellant, bases his main argument on the simple and attractive proposition, that all that the Appellant promised to do was to return the money, if the Respondent satisfied their agent that she had finally departed from Palestine by the 2nd December, 1936, and that since she has never left the country, the Government are under no legal obligation to return the deposit. The Respondent's advocate contends that there was no contract, since the Respondent never signed the receipts Ex. L.B. 6, and that she did not know the contents of this document since she did not know English. Secondly, he argues that if there were a contract,

*) 5 CtLR 129.

then there was no breach on her part, since all the time she has been in Palestine lawfully, and that the intention of both parties underlying the contract was that the Respondent should not remain in Palestine unlawfully, which she did not do. Alternatively he pleads that the Appellant is estopped from relying on the breach, if any, since they issued a passport to the Respondent, and that by their own conduct they made it impossible for the Respondent to leave Palestine within the stipulated time. And finally he says that the Appellant should have sent a notarial notice to the Respondent to leave Palestine, and that since they did not do so, they cannot retain the deposit, since this deposit is in the nature of damages.

To take the last point first, it is quite clear that in this case no notarial notice is necessary. In the first place the Appellant is not suing the Respondent for the amount, but the Respondent is suing the Appellant, and in the second place, no bond has been executed by the Respondent in favour of the Appellant. And we equally reject the Respondent's contention that the conduct of the Government made it impossible for her to leave Palestine before the 2nd December, 1936. The Government never asked her to forward her Italian passport — they put no hindrances in the way of her leaving, and whilst it might have been more courteous and businesslike to have replied to her letters, lack of courtesy, reprehensible though it may be, cannot create an estoppel.

We think that the receipt of the 2nd September, 1935, Ex. L.B. 6, constitutes a contract between the two parties, and as we have already intimated, we agree with the learned Judge when he found that the Respondent had knowledge of the contents of that document. By the terms of that contract, the Respondent was entitled to the return of her deposit if she satisfied the Appellant's agent at Venice, before the 2nd December, 1936, that she had finally departed from Palestine within the period authorised by the Palestine Authorities. The deposit, therefore, was made on the basis that she should leave this country within the period authorised by the authorties, not necessarily by any date fixed at the time of making the contract. Supposing, for the moment, that the Respondent had not married, but had obtained an extension or series of extensions of residence, authorising her to remain in Palestine beyond the 2nd December, 1936. In view of the decision in Yochels v. The Attorney-General (supra) we do not think that it could have been argued with any success, that she would not have been entitled to the return of her deposit, if she had finally departed within the authorised period, even if the departure were after the 2nd Decmber, 1936. Here, the Government, by issuing to the

Respondent a Palestine passport, in full knowledge of all the facts, have authorised her to remain in Palestine permanently. The authorised period has therefore been indefinitely extended, and the Government have themselves varied the terms of the contract, making the conditions therein contained with regard to the return of the deposit inoperative, since the Respondent need never leave Palestine. The case of Battat v. The Attorney-General (supra) is distinguishable from the present case because there was a condition in the bond that the traveller should leave within one month, not, as here, within the period authorised by the authorities, and also because in the present case there is no bond.

There is one further point raised by the Appellant, and that is that the Government, if liable to repay the deposit to the Respondent, are only under an obligation to return the amount of the deposit in Italian lire, and not in any case the sum of LP. 60. This point, though mentioned in the defence filed by the Appellant in the District Court, was not raised in Court at the trial, so far as can be discovered from the record, and unfortunately it was not raised in the grounds of appeal, and therefore we are unable to deal with it at this stage. We say "unfortunately" because it semms to us, without expressing any definite opinion on the matter, that it might have met with a certain amount of success, though not perhaps to the full extent hoped for. We only mention it now because we do not want this present case to be taken as an authority for the proposition that, where a deposit is made in a foreign currency in a foreign country, the sum returnable in Palestine is the nominal value in Palestine currency of the amount of foreign currency at the rate of exchange at the time of deposit. That point must remain open.

In the result we think that the learned Judge was right in giving judgment for the Respondent, and this appeal must be dismissed with costs to include LP. 15 fee for attending the hearing.

Delivered this 30th day of March, 1939.

British Puisne Judge.

HIGH COURT NO. 20/39.

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

Before:—Copland, J. and Greene, J.
In the application of:—
Rabbi Aaron Teitelbaum — Petitioner.
v.
1. The Chief Execution Officer, Tel-Aviv
2. Haim Nathanel — Respondents.

Petition to High Court to set aside final sale order on ground of mis-description of property to be sold — Claim that Chief Execution Officer should have granted further extensions before making final order of sale — Interference of High Court with orders of Chief Execution Officer.

1. After final order of sale — too late to complain before High Court of mis-description of property advertised for public auction.

High Court will not, except on very strong reasons, grant an order nisi on such grounds.

2. Unless Chief Execution Officer misdirected himself in law or failed to direct his mind to question of discretion, High Court will not interfere with his orders.

Edit. Note:—See H.C. 1/39 5 CtLR 85 and Edit. Note thereto.

E. S. Fellman for Petitioner.
Ex parte.

Application for an order to issue to the First Respondent directing him to show cause why his final order of sale in Tel-Aviv Execution File No. 15716 should not be set aside and why a new seizure and/or valuation and/or enlargement of time of sale and/or further advertisements in the said Execution File should not be made.

ORDER.

This is an application for an order nisi to issue to the Chief Execution Officer, Tel-Aviv, to show cause why his final order for sale in these sale proccedings should not be set aside.

Mr. Fellman for the petitioner advanced two grounds, first, that there were mis-descriptions in the particulars of the property to be sold, in its locality and in the state of the property, but the applicant mainly rests his claim on the second ground, that the Chief Execution Officer wrongly exercised his discretion in not advertising the extension of the auction for a longer period than he did.

As regards the first points regarding mis-description, these are old points that should have been taken at once when the description of the property was published. It is too late, as so many people do, to come to this Court after a final order for sale has been made, and to complain that a description of the property to be sold, issued several months before, was wrong. This practice if allowed, would inflict a great hardship on judgment creditors or on mortgagors. It we countenance these applications by granting orders of stay on these grounds, the whole of the time and money spent by the judgment creditors or by the mortgagees before final order for sale has been granted would be thrown away and would have to be re-incurred. There must be, therefore, very strong reasons before we would grant an order nisi on such grounds and those reasons do not appear in the present case.

To take the question of the discretion being wrongly exercised, again this Court is reluctant to interfere with the exercise of discretion by the Chief Execution Officer,who must of necessity have had all the facts before him and who must know the conditions in his District much better than we in this Court can possibly know them, and unless he has misdirected himself in law, or unless he has failed to direct his mind to the question of discretion we are never inclined to interfere.

Here the auction proceedings, and it is not alleged to the contrary, have been carried out exactly as the law lays down. A complaint has however been made, that further extensions of the auction should have been granted. This is a diffcult question, but I do not think we can say that the Chief Execution Officer has wrongly exercised his discretion in not granting a further extension, and we do not think that we should grant the order asked for.

Therefore the application must be refused.

Given this 31st day of March, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 15/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Khayat, J.

In the appeal of:—

Avraham Kalazan — Appellant.

v.

Stawri Slihit — Respondent.

Sale of land not in accordance with Land Transfer Ordinance — Receipt for first payment o/a of purchase price of land contemplating the making of a contract by purchaser — Construction of document as agreement to sell land — Land Transfer Ordinance, sec. 11.

A document regarding sale of land lacking provisions for registration in accordance with Land Transfer Ordinance and not containing essential terms but contemplating further conditions to be inserted in a contract to be drawn up — not an agreement to sell, and money mentioned in the document as paid on account of purchase price may be recovered.

Edit. Note:—See C.A. 31/38 3 CtLR 166.

M. Levanon for Appellant.

D. B. Mizrahi for Respondent.

Appeal from judgment of District Court, Jerusalem (appellate capacity) dated 10.1.1939.

JUDGMENT.

Section 11 of the Land Transfer Ordinance makes clear that a disposition of land to be binding must comply with certain formalities, and that money paid under a disposition which is null and void may be recovered. The Courts, however, recognized agreements to sell, but these must contain the essential terms, and generally, inter alia, contain provisions for the carrying out of the necessary formalities.

In this case there were negotiations between the parties for the sale of two shops, but it is quite clear there was no sale in accordance with the requirements of the Ordinance. The only document in the case is headed "Receipt", and states —

"It is a fact that I, the undersigned, Mr. STAWRI SLIHIT, hereby confirm that I have sold to Mr. ABRAHAM KALAZAN two shops Nos. 73, 74, situate at Beth Israel beside

the Hungarian houses, as per the general plan approved by the Municipal Corporation of Jerusalem, for the sum of LP. 440.-- the said two shops numbered as above, and have received from Mr. Abraham Kalazan — as start payment the sum of LP.20.— in cash. The remainder of the payment will be paid in accordance with the conditions and the contract which Mr. Abraham Kalazan will arrange.

"In witness whereof I have hereunto set my hand this 7th December, 1937, Jerusalem."

(Here follows a sentence in Arabic which reads —
Received LP. 20.— by me as per this receipt).

(Sgd.) *Stawri Slihit*

8.12.1937. (Across stamp for 7 mils).

The District Court took the view that this was an agreement to sell and therefore not void. With all resepect to the District Court, I cannot agree with this view, as the document clearly contemplates that further conditions are to be inserted in a contract which is to be drawn up, and I can hardly think that it was the intention of Mr. Slihit to accept payment upon any conditions which the purchaser might see fit to embody in the contract.

The judgment of the District Court is set aside and in the result that of the Magistrate restored, with costs assessed at an inclusive sum of LP. 15. I must not be taken as agreeing with all the reasoning of the learned Magistrate.

Delivered this 21st day of March, 1939.

Chief Justice.

CRIMINAL APPEAL NO. 9/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Frumkin, J.

In the appeal of:—

Muhammad Sayed Yusef — Appellant.

v.

The Attorney-General — Respondent.

Elements of offence of receiving stolen property — Onus of proof — Absence of finding that the goods found had been stolen — Insufficient evidence as to identity of goods produced by police and those found in accused's possession — Criminal Code Ordinance, sec. 309 — Criminal Procedure (Trial Upon Information) Ord. sec. 51.

Conviction of receiving stolen goods cannot stand if no finding made by Court that the goods had been stolen or when they were stolen and no evidence to show that the goods produced by police were those found in accused's possession.

Appellant in person.
Bell (*Crown Counsel*) for Respondent.

Appeal from judgment of District Court, Haifa, dated 15.2.39, whereby the Appellant was convicted and sentenced to two years' imrisonment for wilfully receiving property, knowing the same to have been stolen, contrary to Section 309 of the Criminal Code Ordinance, 1936.

JUDGMENT.

This case has caused us great difficulty. The Appellant was convicted of receiving stolen goods, knowing the same to have been stolen contrary to Section 309 of the Criminal Code Ordinance.

It is necessary for the prosecution to support such a charge to establish —

(*a*) that the good were stolen;
(*b*) that the accused person received them;
(*c*) that he knew they were stolen.

In such a case it is frequently difficult to prove the knowledge of an accused person, but when the goods have been recently stolen, he may in some circumstances be convicted. The principle is stated by Reading L.C.J. in Issac Schama v. Jacob Abramovitch, Vol. XI. Criminal Appeal Reports, at page 49, as follows:—

> "Where the prisoner is charged with receiving recently stolen property, when the prosecution has proved the possession by the prisoner, and that the goods had been recently stolen, the jury should be told that they may, not that they must, in the absence of any resonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal, because the Crown has not discharged the onus of proof imposed upon it of satisfying the jury beyond reasonable doubt of the prisoner's guilt. That onus never changes, it always rests on the prosecution. That is the law; the Court is not pronouncing new law, but is merely restating it, and it is hoped that this re-statement may be of assistance to those who preside at the trial of such cases."

The length of time between the theft and the finding of the goods and the nature of the property stolen, and whether or not it is likely

to pass readily from hand to hand, are matters to be taken into account

In this case the District Court found —

> "The evidence against the accused is that a large quantity of cloth goods were found in a private house in his sole occupation at the time of their discovery. There is evidence that the house had been in his possession for some days before. The policeman who found the goods says that accused admitted him to the premises, and we believe him in this too, in spite of accused's story that he only returned to the premises after Friday. From the large quantity and the character of the goods, we have no doubt that accused, when he received them into his premises and possession, must have known that they were stolen goods. We therefore find him guilty of the offence charged."

It will be observed that there is no finding that the goods found had been stolen, or of the date when they were stolen.

Section 51 of the Criminal Procedure (Trial Upon Information) Ordinance provides —

> "Upon the conviction of any person for any offence the presiding judge shall, upon his notes of the proceedings, record the findings of fact on which the conviction is based
>
> Provided that no conviction shall be invalid for failure to include in such record a finding of a fact if such fact shall appear to be sufficiently established by the evidence given in the case."

We have to look, therefore, to see if the necessary facts are sufficiently established from the evidence.

Police Constable Hollander stated —

> "I remember 27.12.38. On patrol in Kingsway. Watchman came and gave information. I went to Jaffa Street, saw 1st Accused standing by a house — Rosenfeld beside him. I went into house on someone's suggestion — sack was beside house. Halfway upstairs was closed door. I knocked, 2nd Accused (Appellant) opened. I then went up to top of stairs. Saw 3 sacks and blanket on threshold of door. 2nd Accused only person in the house — searched all. The place is a known brothel and 2nd Accused lives there. Sacks contained cloth produced."

Assuming this to mean that both the sacks and their contents were produced to the Court, there is no record that the cloth was an exhibit in the case.

The first witness, Quannu, said —

> "My shop was burnt — in part Insurance Co. received keys. I received information and went to police station. At station I saw goods there — varied colour".

he then enumerates the goods and goes on —

> "All are my goods, most have my stock label attached still.

> Saw goods and knew these. Value before fire LP. 150, now LP. 20—30. I have not been paid insurance. The goods were left to Insurance Co. when I gave over keys. There was theft before the fire — I handed over the keys shop — then a fire and a subsequent theft. These goods were in shop when I handed over to Insurance Co."

The second witness said —

> "Agent Yorksire Insurance Co. Haifa. I know last witness — his shop insured with us, general policy. We had claim for theft and later for fire. We took charge of shop after fire. We received keys. I got information of police — went and found Yale padlocks broken — 2 locks — 2? doors. I took inventory after fire. I saw goods produced in shop. I was called to station and saw all these goods there. I checked goods in shop and I know them — they smell of smoke too. Goods are property of Insurance Co."

We cannot be certain that the goods found in the sacks were the goods to which Hollander referred. There is no evidence to show that the goods at the police station were the goods found in the Appellant's possession.

Another man was charged with the Accused with having stolen Quannu's goods on the 26th December, i.e. the day before the sacks were found — and he pleaded guilty — but he was not called as a witness, and this alone is not evidence against the Appellant. So far as the Appellant is concerned, therefore, there is no evidence as to when the goods were stolen.

In these circumstances we feel that the conviction cannot stand. It is therefore quashed, and the Appellant discharged.

Delivered this 9th day of March, 1939.

Chief Justice.

CRIMINAL APPEAL NO. 11/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Frumkin, J.

In the appeal of:—

The Attorney-General — Appellant.

v.

Theodore Saliba Sa'ad — Respondent.

Uttering forged bank notes — Argument that offence not common in Palestine — Inadequate sentence — Criminal Code Ordinance, sec. 349(1).

In serious offences like those whose maximum penalty imprisonment for life, question whether offence is or is not common in Palestine not of importance as regards sentence.

Hogan (*Crown Counsel*) for Appellant.
Atallah for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 14.2.39, whereby the Respondent was sentenced to two years' imprisonment on the charge of uttering notes purporting to be bank notes, knowing them to be forged, contrary to Section 349(1) of the Criminal Code Ordinance, 1936.

JUDGMENT.

This is an appeal by the Attorney-General. The Respondent was convicted by the District Court of uttering forged bank notes under Section 349(1) of the Criminal Code Ordinance and sentenced to two years' imprisonment.

The view which the Legislature took of this offence is clear from the maximum penalty, which is imprisonment for life.

Having regard to the seriousness of this offence we consider that the sentence of two years was inadequate, and we increase it to one of three years' imprisonment.

We are told that this has not been a common offence in this Territory, but we should like to make clear that persons who commit this offence may well find themselves condemned to long terms of imprisonment.

Delivered this 23rd day of March, 1939.

Chief Justice.

CIVIL APPEAL NO. 20/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J., Khayat, J. and Abdul Hadi, J.
In the appeal of:—

Government of Palestine — Appellant.

v.

Greek Catholic Church of Haifa — Appellant.

Meaning of "any Judge" in Rule 197 *of Civil Procedure Rules — Interpretation of Rule* 197 *— Rehearing by newly constituted Court of evidence heard by Court before coming into force of Civil Procedure Rules — Automatic adjournment of case — Civil Pro-*

cedure Rules, Rules 1, 197 — *Interpretation Ordinance, sec.* 3 — *Ottoman Civil Procedure Code — Order* 36, *Rule* 17 *of the Rules of the Supreme Court in England.*

1. "Any Judge" in Rule 197 of Civil Procedure Rules also means "any Judges".

2. Words "may deal with any evidence" etc in Rule 197 only cover evidence taken after but not evidence taken before coming into force of Civil Procedure Rules; such evidence must be reheard by newly constituted Court.

3. Some note should be made on record of a case where a Judge is prevented by any cause from concluding the trial of an action begun before him.

Hogan (*Crown Counsel*) for Appellant.
Cattan (*by delegation*) for Respondent.

An appeal from Order of Land Court, Haifa, dated 15.2.1939.

JUDGMENT.

This appeal from an interlocutory order of the Land Court, Haifa, raises a simple but interesting point under Rule 197 of the Civil Procedure Rules 1938. The main argument in the Court below was centered on whether the word "Judge" in Rule 197 could be held to include Judges. Mr. Hogan for the appellant does not now dispute that it does, and we are in agreement with that view. It is quite clear to us that the words "any Judge" in Rule 197 mean also "any Judges", both from the wording of the Rule and from the Interpretation Ordinance, Cap. 69, Section 3.

The point taken on this appeal is that Rule 197 cannot be applied in this case, because much of the evidence already heard by the Land Court was so heard before the coming into force of the Civil Procedure Rules in May, 1938. The Rule reads as follows:—

> "197. Where any judge is prevented by any cause from concluding the trial of an action, another Judge may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down or heard by him, and may proceed with the action from the stage at which his predecessor left it."

Mr. Hogan argues that the evidence, if it can be taken into consideration by the Judge, must have been taken down under the Civil Procedure Rules.

Mr. Cattan, for the respondent, argues that by Rule 1 the new rules are entirely retroactive and that any evidence previously heard may be taken as evidence heard by the new Court. He further goes on to argue that in any case the rules, under which the previous evidence

was heard, did not differ in any material respect from the new rules under the Civil Procedure Rules 1938.

We are of opinion that the words "may deal with any evidence taken down under the foregoing rules" mean strictly what they say, that is, that evidence taken after the coming into force of the Civil Procedure Rules of 1938 is covered by Rule 197 but evidence taken before the coming into force is not so covered, and therefore before a Court can take such previous evidence into consideration it must be reheard by the newly constituted Court. The new Rules contain certain important provisions which did not appear in the Ottoman Civil Procedure Code, which was in force when the original evidence was taken.

Two further small points have been taken by the appellant with which we think we may as well deal in order to regularise procedure, though they do not affect the result of this appeal. There is, in this country, no rule providing for the automatic adjournment of a case set down for a particular day to the succeeding day, if time should not permit of it being taken on the first day. There is no counterpart in the Rules of Procedure in this country of Order 36 Rule 17 of the Rules of the Supreme Court in England.

The next point is a very small one, that there should be some note made on the record of a case where a judge is prevented by any cause from concluding the trial of an action begun before him. We agree that it is desirable that a note in such terms should be made on the record in order to complete the record.

It is of course unfortunate that this long delayed case is going to be still further delayed but we have no option. We must allow the appeal and set aside the order of the Land Court and send the case back to the Land Court to be dealt with in accordance with the Rules and with our foregoing observations on those Rules.

After hearing counsel for the appellant and for the respondent, the Court makes no order as to costs.

Delivered this 20th day of March, 1939

British Puisne Judge.

HIGH COURT NO. 16/39.

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

Before:—Copland, J. and Greene, J.
In the application of:—

1. Joseph Tischler
2. Hanna Tischler — Petitioners.

v.

1. Chief Execution Officer, Tel-Aviv
2. Samuel Simelson
3. "Aetan" Co. Ltd. — Respondents.

Sale proceedings of mortgaged property interrupted by negotiations for settlement — Allegation of misdescription of property advertised for public auction — Delay in applying to proper authority.

After final order for sale has been made by Chief Ececution Officer — too late to apply to High Court alleging misdescription of property or other irregularities which petitioner knew long ago.
Edit. Note:— See H. C. 12/39 5 Ct.L.R. 116 and Edit. Note thereto.

B. Joseph for Petitioners.
Ex parte.

Application for an order to be issued to the First Respondent to show cause why his order dated 3.2.39 and 21.3.39 in Execution File Tel-Aviv No. 1424/37 should not be set aside.

ORDER.

This is again an application for an order nsi to issue to the Chief Execution Officer, Tel-Aviv, to show cause why a final order of sale made by him with regard to a sale of mortgaged property should not be set aside.

In this case sale proceedings started in October, 1937. It is said that after this date there were certain delays by consent, money paid on account, and that sale proceedings were not pressed, and that it was not until December, 1938, when I suppose it was seen that negot-

iations for settlement would not be successful, that the sale proceedings started in real earnest.

It is not quite correct to say that no steps were taken between October, 1937, and December, 1938, because, and I am taking all these dates from the petitioner's own statement to us as we have no other data to go on with, in April 1938 a description of the property to be sold was published. It was not until the 2nd December, 1938, that is to say some eight months later, that the petitioners applied to the Chief Execution Officer to set aside proceedings up to date, on the ground that the property was misdescribed. That petition, it is said, was never dealt with, except indirectly, when on the 3rd February, 1939, the Chief Execution Officer ordered final sale, thereby showing that the petition of the 7th December, 1938, was not granted. I should mention also, as alleged in the petition, that on the 2nd of May, 1938, petitioners called the attention of the Chief Execution Officer to some of the irregularities of the proceedings, and the Chief Execution Officer granted a period of two months' delay, and on the 29th September, 1938 ordered the continuation of the said proceedings.

Now much of what we have said in High Court Application No. 20/39,*) which came before us this morning, applies to this case: it is not right to come to this Court alleging misdescription of the property after final order of sale was given. Whether or not there were negotiations for settlement it is quite clear that these negotiations for settlement ended in September, 1938, and it was therefore at that date, at the very latest if not sooner, that this question of description should been tackled, and if the Chief Execution Officer had not given a favourable answer, it was the duty of the petitioner to put the question at once before this Court. It is too late, after a final order for sale has been made, to come to this Court alleging irregularities which the petitioner knew of ten months ago. That I think covers the arguments tendered in this case.

It has been alleged that this petitioner has found a purchaser, and signed a contract for the sale of this property at a considerable higher price than has been realised in the exeution proceedings. If this be so, then we can see no objection to his putting the matter afresh before the Chief Execution Officer who may see his way to vary his order in the light of those circumstances. We express no opinion as to what the Chief Execution Officer should do. We as a High Court cannot interfere, and the application for an order nisi must be refused.

Given this 31st day of March, 1939.

British Puisne Judge.

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*) 5 CtLR p. 143.

HIGH COURT NO. 15/39.

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

Before:—Copland, J. and Greene, J.
In the application of:—
Jacob Nissim Mizrahi — Petitioner.
v.
1. The Chief Execution Officer, Tel-Aviv
2. Sassoon Ezra Sassoon
3. Menashe Yehezkiel Aslan
4. David Beracha
5. Hayim Beracha — Respondents.

High Court cancelling appointment by Chief Execution Officer of receiver in execution proceedings — Challenging procedure followed for some years.

1. Procedure practiced for some years may be discontinued if, when challenged, found to be wrongly exercised.
2. No power for Chief Execution Officer to appoint a receiver in execution proceedings; High Court will cancel appointment if alrady made.

Goitein for Petitioner.
Respondents Nos. 1-3 — served.
Eisenberg for Respondents Nos. 4-5.

Application for an order to issue to the First Respondent directing him to show cause why his order dated 10.3.1939 in Execution File No. 14210/38 of Tel-Aviv should not be withdrawn and the appointment of Mr. Nazim Menashe Aslan as Receiver of the said property be cancelled.

ORDER.

This is a return to the Order Nisi which we think must be made absolute.

It appears at this late period, that there is no power for the Chief

Officer to appoint a receiver in execution proceedings. Although it has been the practice in the past years to adopt such a procedure, it is only in these proceedings that this procedure has been challenged and alleged to be wrongly exercised.

Therefore the order nisi must be made absolute. Petitioner to get his costs and LP. 10 fees for attending the hearing from Respondents Nos. 2 and 3. We also award the 4th and 5th Respondents their costs and LP. 10 fees for attending the hearing from Respondents Nos. 2 and 3.

Given this 31st day of March, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 3/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Abd Mustafa Khalaf, on behalf of himself and on behalf of the Estate of Musallam Khalaf

Appellant.

v.

1. Said Muhammad Said El-Ja'ouni
2. Majida Fauzi Ali El-Ja'ouni
3. Wijdan Fauzi Ali El-Ja'ouni

Respondents.

Discretion of Land Court to hear appeals from Land Settlement Officer in open Court or in Chambers — Discretion given to Court not to be exercised by President alone — Invalidity of judgment given in Chambers without decision of Court as to application made for hearing in open Court — Rule 334 of Civil Procedure Rules conflicting with sec. 63(3) of Land (Settlement of Title) Ordinance — Desirability of normally granting application for hearing of appeal from Land Settlement in open Court.

1. Unless specific power to that effect given, a rule cannot amend an ordinance.

Land (Settlement of title) Ordinance not affected by rule 334 of Civil Procedure Rules (giving a party right to have appeal heard in open Court).

2. In appeals from Land Settlement Officers Land Court has entire discretion to hear appeal in Chambers or in open Court.

3. Application to Land Court by one of parties to hear appeal from Land Settlement Officer in open Court must be considered and dealt with by Court as a Court and not only by President; judgment given by Land Court in Chambers contrary to this rule cannot stand.

4. Usually desirable that application to hear appeal from Land Settlement Officer should be granted unless there is a particular reason to the contrary, or appeal on face of it a frivolous one or it is clear that no apparent purpose would be served by hearing it in open Court rather than in Chambers.

Cattan for Appellant.
Kamal for 1-2. Respondents.

Appeal from judgment of Land Court Jerusalem (LA. 199/38), dated 10.12.1938.

JUDGMENT.

In this appeal a short point has been raised by the Appellant with which it is advisable to deal first.

By section 63, sub-section 3 of the Land (Settlement of Title) Ordinance Cap. 80 —

> "An appeal shall be decided in chambers unless the court, of its own motion or on the application of any party, shall otherwise direct: at any such appeal in chambers no party shall be heard."

Now it has been argued by Mr. Cattan for the Appellant that this clause is obligatory on the Court, that is to say, when an application to hear an appeal in open Court is made by one of the parties, then that application must be granted. We do not agree. We think that on the wording it is quite clear that the Court has an entire discretion

as to whether it shall hear an appeal in Chambers or in open Court, but when an application to hear an appeal in open Court is made by one of the parties, it is essential that the Court should direct its attention to considering his application, that is to say, that before it can exrcise its discretion, the Court as a Court must consider and deal with this application.

Now in this present case there is nothing to show that the Court as a Court did consider the application. The application was considered and refused by the President, but there is nothing to show that it was considered by any other judge, and for the purpose of the trial of this particular appeal the President and one judge constituted the Court. If at the beginning of their judgment they had said — "We refuse to hear this appeal in open Court" — everything would have been well, but so far as we can discover on the record, there is no decision of that Court on this point. For that reason, therefore, this judgment appealed from cannot stand.

Rule 334 of the Civil Procedure Rules, which purports to give the right to a party to have an appeal heard in an open Court, insofar as it conflicts with the clear provisions of the Land (Settlement of Title) Ordinance must be held to be inoperative, for it is a recognised canon of law that unless specific power to that effect be given, a rule cannot amend an ordinance. The appeal must therefore be allowed, the judgment of the Land Court set aside and the case remitted to be dealt with as suggested in this judgment. Costs to await the result of the retrial.

We would express the opinion that when an application to hear an appeal in open Court is made it is usually desirable that that application should normally be granted, unless there should be any particular reason to the contrary, or unless the appeal is on its face a frivolous one, or unless it is clear that no apparent purpose would be served by hearing it in open Court rather than in Chambers.

We wish to make it clear that this judgment refers only to appeals form Land Settlement Officers, under the Land (Settlement of Title) Ordinance, and not to other appeals to the District or Land Courts to which other and possibly different considerations might apply.

Delivered this 5th day of April, 1939.

British Puisne Judge.

HIGH COURT NO. 9/39.

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

Before:—Copland, J. and Khayat, J.

In the application of:—

"Yakhin" Agricultural, Contracting, Cooperative Association Ltd. Petitioners.

v.

1. The Chief Execution Officer, Haifa
2. Halvaah Vehisahon, Hedera, Cooperative Society Ltd.
3. Mr. Abraham Raplanski
4. Mrs. Feiga Raplanski
5. Mr. Zwi Butkovski Respondents.

Priority between judgment creditors — Chief Execution Officer's powers and duties — Right of preference claimed on basis of registered charge.

In determining question of priority between judgment creditors Chief Execution Officer must consider the operative parts of the judgments and what the judgments are hased on.

Edit. Note :— See art. 123, Law of Execution.

Goldman for Petitioner.

Agranat for Respondent No. 2.

Respondents No. 2—4: served — no appearance.

Application for an Order to issue to the First Respondent to show cause why his order dated 17.1.39, Haifa Execution File No. 294/38 should not be set aside and why a fresh order should not be given that the petitioner enjoys a right of priority before the debt of the second Respondent and that the money should be paid to the Petitioner.

ORDER.

The question to be decided on this return to an order nisi granted by this Court is whether the order of the Chief Execution Officer of Haifa, dated the 7th of January, 1939, deciding that neither of two judgments has priority over the other, was correct or not.

The petitioner obtained judgment in the Magistrate's Court against the 3rd and 4th respondents for a certain sum of money. That judgment was dated the 10tht March, 1938, and was amended in certain respects by the District Court, on appeal, on the 14th of April, 1938. The amendment by the District Court was to the effect that the Magistrate had no power to decide questions of priority on attachments, and that part of his judgment was therefore set aside and a provisional

attachment originally granted by the Magistrate and discharged by him was restored.

The 2nd respondent obtained judgment against the same defendants in the Magistrate's Court on the 27th of January, 1938. That judgment gave the 2nd respondent preference on the ground that they had filed a registered charge and it confirmed the original attachment on the same property as was comprised in the judgment obtained by the petitioner.

The petitioner contends that on his registered charge he is entitled to priority over the other creditor, the 2nd respondent, on the ground that the latter's charge was never properly registered in time.

Now the Chief Execution Officer's duty is to execute judgments and it is therefore important to see what exactly these various judgments said and what they were based on. Both the judgment of the petitioner and the judgment of the 2nd respondent are stated to be based, in the first case, on promissory notes and the admission of the defendants, and in the second case, on a promissory note. That is all that the Chief Execution Officer can regard when asked to decide this question of priority between the parties. This is clear from Article 130 of the Execution Law which says:—

> "In order to establish a right of preference the character of the debt must be clearly set forth in the decree. Claims which contradict the contents of the decree or which are made only at the Execution Office will not be heard."

As the advocate for the 2nd respondent has said, everything depends on the operative parts of the judgments, and on these operative parts it is to our minds quite clear that no preference can arise in relation to the judgment of petitioner, and we think, therefore, that the Chief Execution Officer was right in his order. Holding this view the further question as to the refund of moneys already paid does not arise.

I have refrained from mentioning or making any remarks on the point that the judgment of the 2nd respondent purports to give him a right of preference based on his registered charge. That judgment I may say was never appealed and has become final. In these present proceedings, however, the 2nd respondent cannot claim that he is entitled to preference over the petitioner and, since possibly other proceedings may arise, we make no finding and make no comments upon that point.

The order nisi must be discharged with costs to include LP. 15.— for attendance at the hearing.

Given this 23rd day of March, 1939.

British Puisne Judge.

HIGH COURT NO. 69/38.

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

Before:—The Chief Justice (Trusted ,C. J.) and Frumkin, J.
In the application of:—

The Dental Manufacturing Company, Ltd. Petitioners.

v.

1. The Registrar of Trade Marks
2. Vita Zahnfabrik, H. Rauter O.H.G. Respondents.

Opposition to registration of word "Lumin' as trade mark in respect of artificial teeth — Analysis of provisions of sec. 8(f) of Trade Marks Ordinance, 1938, regarding capability or otherwise of figures, letters or words to be registered as trade marks — Trade Marks Ordinance, 1938, sec. 8(f) 14(1) — Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs and Trade Marks,, 1938.

Word not bearing direct reference, though perhaps near the line, to character or quality of goods in respect of which it is sought to be registered as a trade mark can be so registered.

Dr. Wittkowsky for Petitioners.
Dr. Smoira for Respondents.

Opposition to the registration of the word "Lumin" as a trade mark in class 11 in respect of artificial teeth in the name of the Second Respondents in pursuance of their application which was advertised under No. 4868 in Supplement No. 3 to the Palestine Gazette No. 790 of the 16th June, 1938, page 64.

JUDGMENT.

This is an application under the Trade Marks Ordinance for an order that the Second Respondents shall not be permitted to register a certain trade mark which, from a notice, No. 4868 in supplement No. 3 of the Gazette 790 of 16th June, 1938, it appears they desire so to do, which in my judgment should be dismissed. The mark in question is the word "Lumin", and the Second Respondents seek to register it in respect of artificial teeth.

On the 21st November, 1938, an Ordinance entitled the Trade Marks Ordinance, 1938, was promulgated, which repealed the Trade Marks Ordinance, Chapter 144, and made some changes in the law.

In particular the procedure in opposition to registration is altered, but it is submitted by the Petitioners that by reason of the proviso to Section 14(1) the procedure under the old Ordinance applies to this opposition, and the Second Respondents do not dispute this.

The Petitioners contend that the word "Lumin" cannot be registered by reason of the provisions of Section 8(f) of the Ordinance, which provide that the following, inter alia, are not capable of registration:—

> "(f) marks consisting of figures, letters or words which are in common use in trade to distinguish or describe goods or classes of goods or which bear direct reference to their character or quality; words whose ordinary signification is geographical or a surname, unless represented in a special or particular manner; provided that nothing herein contained shall be deemed to prohibit the registration of marks of the nature described in this paragraph which have a distinctive character within the meaning of subsections (2) and (3) of section 7."

It may be noted that this wording differs slightly from that of the old Ordinance which reads:—

> "(e) marks consisting of figures, letters or words which are in common use in trade to distinguish or describe goods or classes of goods or which are directly descriptive of their character and quality; and words whose ordinary signification geographical."

It is obvious that manufacturers of artificial teeth should seek to obtain what may be described as a bright and lively appearance of the teeth rather than a dull, artificial or dead appearance.

In an affidavit filed by the Petitioners a patent agent says —

> "That the aforesaid invention claims to solve the problem, which has hitherto existed, of manufacturing artificial teeth which have the luminous appearance of natural teeth even in artificial light and that luminosity is one of the coveted qualities of artificial teeth."

It will be seen that he uses the word "luminosity" (according to the Oxford Dictionary "the quality or condition of being light") to describe a quality of artificial teeth.

The word "lumin" is said to be not an invented word but merely a misspelling of the word "lumine", which, according to the Oxford Dicitionary, is now rare or obsolete, but was in use as a transitive verb having the meaning "to light up, to illumine".

It is argued before us that in dental circles which must be assumed

to have acquaintance with the Latin tongue, lumin imports the idea of light and hence has reference to the character or quality of luminosity.

The Respondents reply by referring to their patent specification, and their patent agent in his affidavit says —

> "That as regards the optical appearance of artificial teeth the said Vita Zahnfabrik H. Rauter O.H.G. are the registered proprietors of i.a. Palestinian Patent No. 932, wherein it is described and claimed that artificial teeth are made of a block of non-shrinking porcelain material upon which transparent ceramic material is fired, which is coloured to correspond with the natural teeth."

This hardly deals with the allegation that luminosity is a quality of artificial teeth.

The principles underlying this kind of legislation were discussed by the House of Lords in The Eastman Photographic Materials Company v. The Comptroller-General of Patents, Designs, and Trade-Marks, 1898, Appeal Cases, page 571, the material words of the English Act being "has reference to the character or quality of the goods". Lord Hershall, at page 580, says —

> "The vocabulary of the English language is common property: it belongs alike to all; and no one ought to be permitted to prevent the other members of the community from using for purposes of description a word which has reference to the character or quality of goods."
>
> "If then, the use of every word in the language was to be permitted as a trade-mark, it was surely essential to prevent its use as a trade-mark where such use would deprive the rest of the community of the right which they possessed to employ that word for the purpose of describing the character or quality of goods.".

and Lord Macnaghten, at page 583, says —

> "The object of putting a restriction on words capable of being registered as trade-marks was of course to prevent persons appropriating to themselves that which ought to be open to all. There is a "perpetual struggle" going on, as Fry L. J. has observed, "to enclose and appropriate as private property certain little strips of the great open common of the English language." "That", he added, "is a kind of trespass against which I think the Courts ought to set their faces."

Assuming that luminosity is a quality of artificial teeth it is clear that words such as "luminous" or "luminent" might offend against the section, but does the rare word "lumin", with or without an "e", do so? It may perhaps be near the line, but I do not think it

can be said to bear direct reference to the character or quality of artificial teeth. I certainly do not think that its registration would deprive the rest of the community of the use of a word that they would be likely to employ for the purpose of describing the character of artificial teeth.

The petitioners will pay the second Respondents their costs assessed at a sum of LP. 15 inclusive.

Delivered this 23rd day of March, 1939.

Chief Justice.

CIVIL APPEAL NO. 17/39.
CIVIL APPEAL NO. 19/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J., Greene, J. and Khayat, J.
In the appeals of:—

The Gan Shlomo Company Ltd. — Appellant.
v.
Abraham Meir Weisbord — Respondent.
and of:—
Abraham Meir Weisbord — Appellant.
v.
The Gan Shlomo Campany Ltd. — Respondent.

Agreement to plant, cultivate and manage an orange grove — Provision for liquidated damages — Failure of one party to do whole work as contracted and of other to pay last instalments — Interest on arrears.

1. No question of assessing damages where claim not in nature of damages but for return of money paid in respect of services not rendered and work not done as contracted for.
2. Party found to be in default in not carrying out all terms of agreement cannot succeed in claim for damages from other party who failed to fulfil his undertakings.
3. Party entitled to payment of money also entitled to interest thereon.

P. Goldberg for the Gan Shlomo Co. Ltd.
S. Gratch for Abraham Meir Weisbord.

Appeal from decree of District Court, Jaffa, sitting at Tel-Aviv, dated 27.1.1939.

JUDGMENT.

We have already intimated that in our opinion both appeals fail, except in regard to one matter, and our reasons for so holding are the following.

These appeals are in effect an appeal and a cross appeal from a judgment of the District Court at Tel-Aviv dismissing the appellant's claim for damages and the greater part of the respondent's counterclaim against the appellant in the same action.

By an agreement between the parties dated the 5th February, 1933, subsequently extended by a further agreement dated 22nd February, 1934, the Plaintiff Company undertook to plant, cultivate and manage for the respondent an orange grove of approximately 110 dunums in area upon certain terms contained in the agreement. The work to be done by the Company was set out in the schedule to the agreement of 5th February, 1933 and also in what is called a technical specification. The agreement was for a period of four years, and the respondent undertook to pay the Company at the rate of LP. 64.— per dunum, payment being spread over the four years. It was agreed that any party in default should pay to the other liquidated damages assessed at LP. 15.— per dunum, and the necessity for a notarial notice was waived. By clause 5 if the respondent's expert objected to the manner in which the Company were carrying out their work, he had to notify the Company to this effect by registered letter.

The respondent failed to pay the amounts due in the fourth year, amounting to LP. 1435, and the Company thereupon entered an action in the District Court claiming, this sum and also LP. 1655.775 mils as liquidated damages for breach of contract. The respondent filed a counterclaim against the Company for LP. 5870.— being the amount paid by him to the Company under the agreement. The District Court gave judgment for the Company for LP. 1435.— dismissing the further claim for liquidated damages, and on the counterclaim gave judgment for the respondent for LP. 1,257.760 mils and disallowed the remainder. As a result, the Company obtained judgment for LP. 177.240 mils, no costs being given to either side. It is from this judgment that the present appeal and cross-appeal have been brought.

The case was tenaciously fought at great length in the District

Court, some ten days being occupied in the hearing, and a large amount of evidence was heard. The District Court, in a detailed and well reasoned judgment, went carefully into the dispute, and made certain findings of fact on the evidence heard by them, and we agree with those findings and the conclusions which the Court drew from them. There is no doubt that the respondent was in default in not paying the balance due under the agreement, since by clause 7 of the agreement he was under the obligation, if the Company failed to fulfil its undertakings, of settling all accounts for work already done by the Company, and since no action as to the deficient work was taken by him until after the expiration of the four years' term, he is liable for the amount claimed. It is equally clear that the Company was in default in not carrying out all the terms of the agreement, and their claim for liquidated damages must consequently fail.

This disposes of the appeal on the Company's claim in the District Court except in regard to one item which we will deal with later, and we now come to the counterclaim. The first argument of the Company is that all the counterclaim should have been dismissed, since the respondent did not sent them a registered letter as provided for in clause 17 of the agreement. But the amounts awarded on the counterclaim were not in the nature of damages, but were for the return of money paid by the respondent to the Company in respect of services not rendered and of work not done by them, as contracted for by them, and a registered letter was therefore unneccessary.

To take the individual items, first the well. The Company was under an obligation to give the respondent a title to the well — this they have not done — and it is no excuse to say that they need not to so because the respondent did not pay the last instalments. The District Court have assessed the value of the right to the well at LP. 500, and we see no reason to differ from that. As to the item for the missing trees on 1½ dunums, there was sufficient evidence to support the finding of the lower Court, and the same applies to the other items in the judgment on the counterclaim — they are supported by the evidence. It has been urged that the damages were not properly assessed by the District Court. The answer to that is, first, that the amounts awarded are not damages, and secondly, that the District Court based its figures on the evidence before it as to the value of the various items, and was entitled to accept that evidence if it so saw fit.

Finally, we hold that, on the action of the parties, and on the terms of the contract between them, there is no estoppel on the counterclaim, and that neither by conduct nor by negligence, nor in any other way

did the respondent waive his rights. Both parties were in default, and we think that the District Court came to a correct conclusion, and an eminently fair and equitable one, as to their respective rights and liabilities, and nothing in the arguments of either party leads us to think that they were wrong in their appreciation.

There is however one point with which the District Court did not deal, and which they appear to have overlooked, doubtless owing to the complicated and voluminous nature of the respective claims, and that is the question of interest on the sum of LP 1435 awarded to the Appellant Company. The respondent admits that the Company is entitled to interest on the balance due to them. We think that they are clearly entitled to interest on the sum of LP. 1435.— at the rate of nine per centum per annum from the date when the action was filed in the District Court, and we give judgment accordingly for that amount.

In the result, subject to the above variation, we think that both appeal and cross appeal should be dismissed. Each side must pay their own costs.

Delivered this 30th day of March, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 5/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

1. Muhammad Saleh Asha
2. Fatmah Asha
3. Saleh Ben Yusef Saleh Asha
4. Said Ben Yusef Saleh Asha
6. Jamileh Bint Yusef Asha
7. Nimeh Bint Yusef Asha
8. Azizeh Bint Yusef Asha
9. Rakieh Bint Yusef Asha

Appellants.

v.

1. Moshe N. Dahan
2. Moshe Nahman
3. Ephraim Barukh
4. Emmanuel Barukh

Respondents.

Case rested principally on question of possession of land in dispute — Court refusing inspection of land already inspected and identified in a previous action — Request alleged to have been made in trial court not on record.

1. Where land in question had been inspected in a previous action and its identity established, Land Court may refuse new inspection, which no reason to suppose would lead to any different result.

2. Court of Appeal will not consider complaint that appellant was not allowed to call rebutting evidence, if nothing on record to show that such a request was ever made below, and Court of Appeal cannot infer that a request was so made.

Elia for Appellants.
S. Mizrahi for Respondents.

Appeal from judgment of Land Court, Jerusalem, dated 20.12. 1938.

JUDGMENT.

This Appeal from a judgment of the Land Court of Jerusalem fails. Practically the only points raised are questions of fact, and the Court below heard evidence, and believed one set of witnesses rather than the other set.

The Appellants rest their case principally on the question of possession. The Land Court asked the Respondents, who were the Plaintiffs before them, to prove their possession, and the Respondents duly proved, to the satisfaction of the court, that their predecessors in title were in possession of this land. Naphtali Baruch, who was a co-owner of the Respondent's predecessors in title, in another action, was equally proved to have been in possession of a one-sixth share in this same land.

We do not think that the Land Court erred in refusing an inspection. This same land had been inspected in the course of the proceedings in the above mentioned previous action, and its identity had been established. We have no reason to suppose that a second inspection would have led to any different result.

Finally, complaint has been made by the Appellants that they were not allowed to call rebutting evidence. There is nothing on the record to show that such a request was ever made to the Land Court, and we cannot infer that a request was so made.

For these reasons the appeal must be dismissed with costs, and LP. 15 for attending the hearing.

Delivered this 3rd day of April, 1939.

British Puisne Judge.

HIGH COURT NO. 17/39.

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

Before:—Copland, J. and Frumkin, J.
In the application of:—
1. Hafzibah Bukai
2. Joseph Douer

v.

1. The Chief Execution Officer, Tel-Aviv
2. David Rosenberg Respondents.

Sale of land through Execution Office — Claim of possessory right to a hut situated on land to be sold — Final order of sale — Application to stay proceedings of eviction — Undue delay in applying to High Court.

Person considering his interest affected by Chief Execution Officer's order and intending to test the order must act diligently; if by not doing so he leads 3rd party, who buys that interest, to think that claim had been abandoned, his subsequent application to High Court, being too late, will fail.

Edit. Note:—See H.C. 16/39 5 CtLR 153.

Machlis for Petitioner.
Respondent No. 1: Not present; served.
B. Cohen for Respondent No. 2.

Application for an order to issue to the First Respondent directing him to show cause why his order dated 19.3.39 in Execution File No. 1433/35 Tel-Aviv should not be set aside, and why the 2nd Respondent should not apply to a competent Court to prove his title.

ORDER.

This is a return to an order nisi calling upon the Chief Execution Officer, Tel-Aviv, to show cause why his order of the 19th March, 1939, should not be set aside and why the second respondent should not be ordered to apply to a competent Court to prove his title to certain property in dispute.

Proceedings in the sale of the property have given rise to this pre-

sent petition. The dispute began several years ago, and last year the property was put up for sale and eventually was purchased by the second respondent. In the Notice of Sale it was stated quite clearly in the Schedule that the property was sold free of all incumbrances and claims.

In the petition to this Court the petitioners say that they knew that the property they now claim was being included in the sale proceedings, and they knew that at the end of July, 1938, and it is in fact evidenced in the return of the Chief Execution Officer in his inspection report of the property on the 6th of May, 1938, that one of the petitioners was present, and it is therefore clear that from that date she knew that the property was to be sold. It was not until the 19th of August, 1938, that is to say, some three months and a half after that one of the petitioners knew of the sale proceedings, that their first application was made to the Chief Execution Officer claiming possession of a hut situated on the land to be sold. The Chief Execution Officer after hearing the parties made an order on the 24th of October, 1938, that the proceedings should continue so long as the applicants, that is the present petitioners, did not bring an order from a competent Court. Subsequently to this, final order for sale was made, and the second respondent obtained registration of the property on the 26th January, 1939. Later still on the 22nd February, 1939, the petitioners again applied to the Chief Execution Officer to stay eviction proceedings which had been commenced against them by the second respondent, and on the 19th of March, 1939, the Chief Execution Officer decided to continue the proceedings of eviction, giving the petitioners fifteen days to apply to a competent Court. It is from this last order that the present application is made.

To our minds the critical date in this case is the 24th of October, 1938, when petitioners' application to the Chief Execution Officer alleging that they were entitled by possession to this hut was rejected by him. There was nothing to prevent petitioners coming straight away to this Court to test that order of the Chief Execution Officer, and, by not doing so then, their behaviour led the second respondent to think that their claim which they had made to possession, and which claim had been rejected by the Chief Execution Officer, would no longer be pursued.

The second respondent, in the circumstances, when he paid for this property and obtained registration of it in his name, was entitled to assume that there were in fact no claims to the property, as had been stated in the notices of sale. If we were to grant the present petition, it would cause damage to the second respondent for which he would

be in no way responsible. This present application is, as is the case with so many applications to this Court, made too late, and for that reason, following our invariable rule, we cannot grant it. The rule nisi must, therefore, be discharged with costs to the second respondent of LP. 10.— to be paid by the petitioners.

Given this 18th day of April, 1939.

British Puisne Judge.

HIGH COURT NO. 14/39.

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

Before:—Copland, J. and Frumkin, J.

In the application of:—

Ruth Chudakov — Peitioner.

v.

1. The Chief Execution Officer, Tel-Aviv
2. David Cohen — Respondents.

Summons served upon wife of deceased mortgagor — Final order of sale of mortgaged property on usual terms — Reopening of sale proceedings upon mortgagor's heir petitioning Chief Execution Officer and explaining to him circumstances of case — Fresh order of final sale — High Court upsetting final order of sale in view of initial fault in citation of parties and exceptional circumstances calling for relaxation of strict rule.

Where in sale proceedings of mortgaged property there was initial fault in citation of parties, High Court may in exceptional circumstances, unknown to Chief Execution Officer at earlier stage of proceedings, declare in interest of justice final sale to be void ab initio.

Edit. Note:—See H.C. 16/39 5 CtLR 153.

Dickstein for Petitioner.

Respondent No. 1: Not present — served.

Ruda for Respondent No. 2.

Application for an order to issue to the First Respondent directing him to show cause why all the proceedings in Tel-Aviv Execution File No. 9056/38 should not be cancelled.

ORDER.

This is a curious and exceptional case. One Abraham Chudakov now deceased, and his wife Haya Chudakov, jointly entered into two mortgages with the 2nd Respondent in this case, both of which mortgages have now fallen due. Abraham Chudakov died on the 19th October, 1937.

On the 9th of June 1938, the 2nd Respondent applied to the President District Court sitting at Tel-Aviv, for an Order of Sale of these properties. Summonses were issued and the summons addressed to the late Abraham Chudakov was returned by the process server endorsed with a remark that it had been served upon his wife at his place of residence. No question arises as to the service on the wife.

The application for sale duly came on before the President District Court, and on the 14th of June 1938, an Order for Sale on the usual terms was made, the mortgagors not appearing. The execution proceedings were carried out and on the 15th of November, 1938, final order of sale of the properties were given for the sum of LP. 630.

On the 23rd December, 1938, the present petitioner, who is the daughter of the late Abraham Chudakov and Haya Chudakov applied to the Chief Execution Officer explaining the circumstances of the case, and asking for cancellation of the prooceedings. The Chief Execution Officer refused to cancel the proccedings but ordered that the properties should again be put up to auction and as a result a higher bid of LP. 950 was obtained. The matter again came before the Chief Execution Officer on the 9th of March, 1939, when he again refused to cancel the proceedings but gave ten days delay for an application to the High Court.

Now the only point with which we propose to deal in this present application is this question of the alleged service of the notice to the deceased Abraham Chudakov on his widow. It is not disputed that it was not until the 23rd December, 1938, that the Chief Execution Officer became aware of the death of Abraham Chudakov. There is no evidence that the President of the District Court ever knew of his death.

It is admitted that the petitioner knew of the Order for Sale on or about the time it was made, but it is urged on her behalf that being only just 18 years of age, that her mother was mentally unsound, even if not certified as such by the competent authority, that her father was dead, that she had the responsibility of the care of young minor children with nobody to advise her, that in these circumstances she could not be expected to take steps to test the legality of the order

of sale at an earlier stage. The 2nd Respondent has referred us to Article 115 of the Execution Law which says that any application disputing the possession of immovable property must be made to the Execution Office before final order for sale is given.

On many occasions this Court has held that when facts are known to a petitioner which would upset execution proceedings they must be brought to the knowledge of the Chief Execution Officer at the earliest possible moment, and that if the Chief Execution Officer refuses to comply with the application, then the matter should be tested in this Court without delay.

As I said at the commencement of this judgment this is a curious and exceptional case. The only person who could test these proceedings was the present petitioner, a young girl without any advice, and, therefore, we think that this is one of those exceptional cases when it would not be fair and equitable to apply in all strictness the rule laid down by this Court which I have just quoted. And there is this further reason, that there is no doubt that these sale proccedings were wrong ab initio. It was known to the mortgagee that one of the mortgagors was dead and he never communicated that intelligence to the President District Court, when asking the latter to order sale proceedings. If there had not been that initial fault then I think it unlikely that we should have been prepared to consider the present petition, but seeing that there was initial fault in citation of the parties by the 2nd Respondent and that by that initial fault the President District Court was unable to direct his mind to this important question, that there were minor children interested in the proceedings of the sale and therefore the President was unable to consider the exercise of his discretion in their favour by granting a postponement of the sale whether on terms or not, bearing in mind, as I have said, this initial fault, we think that it would be in the interests of justice that this rule nisi should be made absolute and that the sale proceedings taken by the 2nd Respondent should be declared to be void ab initio.

In view of the fact that there was delay, though to a certain extent excusable on the part of the petitioner, but that delay has led the 2nd Respondent into costs which have been thrown away, we think that we should make no order as to costs on this petition.

Given this 17th day of April, 1939.

British Puisne Judge.

I fully agree.

Puisne Judge.

CRIMINAL APPEAL NO. 16/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Thie Chief Justice (Trusted, C. J.), Copland, J. and Frumkin, J.

In the appeal of:—

Benjamin Nahum Mizrahi — Appellant.

v.

The AttorneyGeneral — Respondent.

Charge of premeditated murder during a quarrel — Counsel applying for adjournment to call medical evidence as to sanity of accused — Counsel retiring from defence upon refusal of his application — Application without indicating nature of evidence.

1. Where there is a quarrel, and at some stage one of parties runs away, and other subsequently follows him and kills him, it may be that requirements of sec. 216 of Criminal Code Ordinance (premeditation) are complied with.

2. Counsel bound to defend accused even if application made by him be refused or submission not accepted.

3. Insanity of accused — a plea to be distincty made and proved by defence.

4. Court of Appeal may refuse application of accused's counsel to hear further medical evidence, if no indication given by affidavit or otherwise as to nature of this evidence.

Hoter-Ishay and *N. Ben-Haviv* for Appellant.
Hogan (*Crown Counsel*) for Respondent.

Appeal from judgment of Court of Criminal Assize sitting at Tiberias, whereby the Appellant was convicted of murder contrary to Section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death.

JUDGMENT.

The appellant appeals against his conviction by the Court of Criminal Assize for murder.

The powers of this Court are statutory and are set out in Section 65 of the Criminal Procedure (Trial Upon Information) Ordinance. In the first place we have to consider, was there evidence on which the Court could lawfully find the facts which it found. The material facts of the case are set out on page 7 of the judgment as follows:—

> "Accused and deceased quarrelled outside the office and cursed one another, but no one seems to have heard the actual words used. Two shots were then fired by the accused from a shot gun at deceased, and one at least of these shots hit deceased in the chest. Witness Zeltz ran out on hearing the shots and saw accused reloading his gun. This witness made an effort to take the gun from accused but failed to do so, and accused fired at this witness and wounded him in the leg. Accused then fired a second shot at witness Zeltz. He then re-reloaded his gun for the second time and proceeded to the office where deceased had escaped to. Accused then fired at deceased from very close range hitting him in neck and head, causing immediate death."

I am satisfied that there was evidence upon which the Court could so find.

We have next to consider, do these facts constitute the offence on which the Appellant was chagred. Where there is a quarrel, and at some stage one of the parties runs away, and the other subsequently folows him and kills him, it may be that the requirements of Section 216 of the Criminal Code Ordinance are complied with. It is a question of degree, and each case must be taken on its merits. I am satisfied that in this case the Court was justified in its finding that the appellant killed the deceased with premeditation.

It is said that there has been some irregularity of procedure in connection with the trial, and this brings me to a somewhat difficult question. Mr. Ishay, who appears for the Appellant, was appointed by the Court to defend him. He was appointed seven days before the trial. When the case was called on, Mr. Ishay asked for an adjournment to enable him to call medical evidence as to the sanity of the accused, before the accused was asked to plead. The Court heard the Medical Officer, Haifa, and upon his evidence it decided that the Appellant was fit to plead. Mr. Ishay then said that he was unable to defend the accused, as he had no time to examine the records, or get experts to examine the accused. In my opinion he had ample time for both these purposes. I would point out that where counsel for an accused person makes an application, which is refused, or a submission, which is not accepted, it is his duty to continue to defend his client.

As has been said in the course of this appeal, persons are assumed to be sane until they are shown to be insane, and insanity is a plea which should be put forward by the defence. In this case the witnesses for the prosecution were not cross-examined, and no plea of insanity was put forward. But, no doubt owing to the question being raised as to the capacity of the Appellant to plead, the Court, exercising the power given to it by Section 41 of the Criminal Procedure (Trial Upon Information) Ordinance, called the doctor of the colony, who was in Court, who said that he had known the accused for the past few years, that he had attended him on many occasions for ailments, that he was a normal labourer, and that he had seen no sign of mental derangment. Upon that evidence the Court — although, as I have said, the issue of insanity was never strictly raised by the defence, — said that it was satisfied that the accused was sane at the time he committed the offence.

In the course of the hearing an application was made to us to hear further medical evidence, but as no indication was given to us by affidavit or otherwise, as to the nature of this evidence, the application was refused.

The Appellant has not satisfied me that any of the grounds of Section 65 apply, and in my judgment the appeal should therefore be dismissed.

Delicered this 20th day of April, 1939.

Chief Justice.

CRIMINAL APPEAL NO. 10/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Frumkin, J.

In the appeal of:—

The Attorney-General — Appellant.

v.

1. Abraham Azari
2. Haim Libovsky — Respondents.

Charge under Town Planning Ordinance sufficiently clear—Submitting written arguments to Court — Town planning scheme not published in Palestine Gazette — What prosecution must show in order to obtain a conviction under Town Planning Ordinance — Town Planning Ord. 1936-8 sec. 11,35, 41 — *Town Planning Ord.* (*Cap.* 142) — *Interpretation Ord. sec.* 3, 7.

1. Charge must be stated with sufficient clarity to enable accused to know what he has to meet, yet a charge may stand which only states section of law without indicating subsection.

2. Practice of allowing parties to submit arguments in writing, instead of in open Court, should be discouraged.

3. To obtain a conviction under Town Planning Ordinance prosecution to show inter alia that property in question — within town planning area, and that there was a town planning scheme lawfully made, contents of which must be proved.

Crown Counsel (*Hogan*) for Appellant.
Salomon for Respondents.

Appeal from judgment of District Court, Haifa (in its appellate capacity) dated 25th January, 1939, whereby Respondents were acquitted on a charge of contravening Section 35 of the Town Planning Ordinance of 1936—38.

JUDGMENT.

This is an appeal by the Attorney-General. The Respondents were charged before the Magistrate, Haifa, with an offence against the Town Planning Ordinance but were discharged. The Attorney-General appealed to the District Court, which upheld the decision of the Magistrate, but for different reasons.

The charge sheet set out that the offence took place in Hashomer Street in July, 1938, and stated the offence as follows:—

> "Contravening Art. 35 of the Town Planning Ordinance, 1936—38, in that:—
>
> They have opened the plinth, thus rendering the height of building four storeys, contrary to the approved plan and restriction of the Outline Scheme for the Zone in which the building of the above accused is located."

The evidence for the prosecution was scanty. Two witnesses only were called, Mr. Kalphon, who said —

> "At the end of July, 1938, I visited the Hashomer Street and found that in the building of the accused the foundation was being opened. It is a house of three storeys erected on a high foundation. The house was built according to a permit. The accused have opened the walls around the foundation, i.e. they demolished them and lowered the ground in the foundation in a way that a hollow place was formed beneath the three storeys so that the house became composed of 4 storeys. According to the Town Planning Ordinance it fixes the height of the storeys in this zone at three storeys."

and Mr. Joseph Cohen who said —

> "I have visited the building of the accused, I visited it even yesterday. I know the building before they opened the foundation. Before its opening it was Sokol's building facing the street beneath the ground floor, approximately 3½ metres high. Outside there was a wall. There were three storeys in the building. After they have opened I inspected it. There is an open Sokol supported by columns and this gives 4 storeys. In that zone only three storeys are permissible."

The Magistrate's record concludes with a note —

> "It is decided to inspect the place and give the attorney for accused the opportunity of submitting oral pleadings. Case adjourned to 28.11.38."

The Magistrate, in his judgment, first criticizes the citation of the Ordinance, in that it did not particularise the sub-section or paragraph, and states — "This, in itself, is a sufficient ground for dismissing the present action."

There are no rules regulating the form of charges but it is obvious that they must be stated with sufficient clarity to enable an accused person to know what charge he has to meet. Section 35 of the Town Planning Ordinance, 1936, as enacted in Section 11 of the Town Planning (Amedment) Ordinance, 1938, — which may conveniently be so cited — is a penalty section. There is no reference in the charge sheet to a permit, or to By-laws or Rules, but only to the outline scheme for the zone. I think it is clear, therefore, that the charge must have been under sub-section (1)(b) which provides —

> "(b) carries out any such work or non-conforming use" (i.e. by para. (a) work for which a permit is required) "otherwise than in accordance with any by-laws, rules or town planning schemes made under the provisions of this Ordinance, or any Ordinance repealed by this Ordinance."

I do not think the charge was in consequence bad, but it would have been better had it been clearer.

The Magistrate then dealt with the facts, and said —

> "Generally the two persons may not be convicted of a criminal charge on the evidence of the 2 witnesses."

I take this to mean that the evidence was insufficient

We are told that written arguments were submitted to the Magistrate's Court. I would say that the practice, if it exists, of allowing parties to submit arguments in writing, instead of in open Court, is to be discouraged.

The District Court dismissed the appeal on the ground that the outline town planning scheme had not been published in the Gazette and that it came within the purview of Section 7 of the Interpretation Ordinance.

Under any system of town planning the liberty of the individual must to some extent be sacrificed for the benefit of the public, and however much one may sympathise with the objects of town planning on the grounds of health and amenity, Courts must be careful to see that the safeguards which the legislature has imposed are observed.

The basic law of town planning in this Territory is now to be found in the Town Planning Ordinance, 1936, as amended. Section 41 of that Ordinance preserves schemes lawfully in force at its commencement, and the provisions of that Ordinance apply thereto, as if such schemes had been put into force under it. By-laws, rules and orders are also saved until revoked.

In the present case we are concerned with a scheme which came into force before 1936. We have to ascertain, therefore, if it was lawfully in force under the then law — i.e. the 1921 Ordinance, as amended — for which it is now convenient to refer to Drayton, Vol. II, page 1437. A town planning area was declared for Haifa, the limits of which were set out in the Gazette in 1921, and re-defined by an order in the Gazette of 1st August, 1931.

Where any question arises before a Court it is clearly necessary formally to prove that property concerned is within the area. In the present case it is recorded that the Magistrate intended to inspect the property — but it is not clear if he did so. No doubt, in some circumstances, a Court could satisfy itself by inspection that the property was within the area.

The law orignially provided for one scheme, which was first published as a draft. In 1929 the law was amended (see Section 11—13 in Drayton) to provide for an outline scheme " in respect of all lands within the town planning area, with the general object of securing proper conditions of health, sanitation and communication, and amenity and convenience in connection with the laying out and use of the land," and for a detailed scheme with reference to any land within the area. The detail scheme had to be within the general compass of the outline scheme, but, as its name implied, it dealt with matters not included in the outline scheme.

An outline town planning scheme is said to have been brought into force in Haifa, and it is that scheme with which we are concerned. As I have said, the District Court took the view that it was invalid because it had not been published in the Gazette , and relied on Section 7 of the Interpretation Ordinance, the material paragraph of which is (d), as follows:

> "(d) all regulations and orders, save where otherwise provided, shall be published in the Gazette, and shall have the force of law upon such publication thereof or from the date named therein."

Admittedly the scheme was not so published.

Two questions arise, therefore: (a) is it a regulation or order; (b)are there other provisions applicable to it. "Regulations" is defined only as including rules and by-laws; "Orders" is not defined.

No doubt some of the provisions of the scheme are in the broad meaning of the word regulations, and I doubt if the obligation to publish in the Gazette what are in effect regulations can be avoided by calling them by another name.

The particular law applicable to schemes is set out in Section 21 of the Ordinance in Drayton, sub-section (3) provides —

> "The scheme shall come into force fifteen days after the publication of such notice in the Gazette unless some other date be fixed in the order of approval."

A notice was published in the Gazette of 15.2.34, bringing the scheme into force fifteen days after the publication of the notice.

Some difficulty may arise from the section referring to the scheme, whereas the law as amended by the 1929 Ordinance contemplated two schemes. The explanation is that the publication section was not amended in 1929. In my view this is an example of the application of the rule in Section 3 of the Interpreation Ordinance, that words in the singular include the plural.

With all respects to the District Court, which expressed some doubt as to its own conclusion, I am of opinion that the express provision

of the Town Planning Ordinance applied, and that the outline scheme was lawfully in force.

The scheme not having been published in the Gazette, it would be necessary to satisfy the Court as to its contents. It would also be necessary to show that the provision relied upon was intra vires the section of the law under which it was made.

The scheme was not proved before the Magistrate, but as some argument was addressed to us upon it, it may be convenient to consider it.

The provisions of the 1929 Ordinance, appearing in Drayton as Section 11(2)(e), are as follows:

> "(e) the imposition of conditions and restrictions in regard to the open space to be maintained about buildings and the particular height and character of buildings to be allowed in specified areas."

The scheme provides that the height of buildings to be erected or altered shall be in accordance with Zoning Table II (Density), i.e. it shall not exceed for residential districts a stated number of storeys. It is argued that this is inconsistant with the definition of "height" in the scheme, but in my opinion the express provision should prevail, and I am of opinion that it is intra vires the Ordinance.

Comprehensive provisions as to permits are now contained in the 1936 Ordinance.

In order to obtain a conviction it was necessary for the prosecution to show

(a) that the property in question was within the town planning area; and
(b) that there was a town planning scheme lawfully made, the contents of which would have to be proved; and
(c) that the provision of the scheme upon which reliance was placed if challenged, was intra vires the Ordinance; and
(d) that work had been done for which a permit was required, and that such work had been done otherwise than in accordance with the material provision of the scheme.

It is clear from the evidence that the prosecution did not comply with these requirements. The appeal therefore will be dismissed.

The Respondents will have their costs assessed at an inclusive sum LP. of 5.

Delivered this 6th day of April, 1939.

Chief Justice.

CIVIL APPEAL NO. 35/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.) and Khayat, J.

In the appeal of:—

"Aviron" Palestine Aviation Co. Ltd. — Appellants.

v.

F. Hauptmann — Respondent.

Application for injunction restraining party to a contract of service from working for any other firm — Refusal of application for injunction on ground that damages sufficient remedy for breach —Grant of interlocutory injunction a matter of discretion.

Grant of application for interlocutory injunction—discretionary, and Court of Appeal will not interfere, if not satisfied that trial Court failed to exercise its discretion properly.

Smoira for Appellants.

Seligman for Respondent.

Appeal from Order of District Court, Jaffa, sitting at Tel-Aviv, dated 29th March, 1939.

JUDGMENT.

This is an appeal from the Order of the District Court, Tel-Aviv, refusing an application for an interlocutory injunction. As it may be that the parties will proceed further with the action, I express no views as to its merits.

In their statement of claim the Plaintiffs pleaded a contract, and prayed for an injunction to restrain the Defendant from working for any other concern. On the 27th of March, the Plaintiff's advocate applied to the Court for an interlocutory injunction on the ground that the matter was very urgent and that irreparable and serious harm would be caused to the Plaintiff if that application was not granted. The matter came before the District Court, when Mr. Bar-Shira stated that it was not a question that the Defendant was joining a rival company, but that the Plaintiffs objected to the treatment and breach of the agreement, and stated that the Plaintiffs were held up for eight weeks, with overhead expenses still going on. Upon that the Court held that damages could be a sufficient remedy for the breach, and refused the interlocutory injunction.

This was described as an order, not as a judgment.

The Plaintiffs desired to appeal to this Court and applied for leave so to do. The District Court appears to have been in some doubt

as to whether they had given a final order, and so granted leave to appeal. We are satisfied that they did not give a final judgment, but dealt only with the interlocutory application.

It is clear that the grant of an interlocutory injunction is discretionary, and the Appellant has not satisfied us that the Court failed to exercise its discretion properly. The appeal, therefore, will be dismissed.

It seems that an application was made to this Court for an interlocutory injunction pending the hearing before us, but that this was refused, and the question of costs reserved.

The Respondent will have the costs of this appeal and the application to this Court for interlocutory injunction, which together we fix at a sum of LP. 10.

Delivered this 17th day of April, 1939.

Chief Justice.

HIGH COURT NO. 24/39.

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

Before :— The Chief Justice (Trusted, C. J.) and Green, J.

In the application of :—

The Attorney-General. Petitioner.

v.

The Palestine Building Syndicate Ltd. Respondent.

Application for change of venue in a Civil action — Agreement of parties to change of venue.

Where both parties agree to change of venue of trial of civil case from Court of the district to one of another district, High Court may order accordingly.

Hogan (*Crown Counsel*) for Petitioner.

Krongold for Respondent.

Application for change of venue of Civil Case No. 22/39 pending in the Jerusalem District Court to the District Court of Tel-Aviv.

ORDER.

Both parties agreeing to the change of venue of the trial of Civil case No. 22 of 1939, from the District Court of Jerusalem to the District Court of Jaffa sitting at Tel-Aviv, the Court orders accordingly.

Given this 4th of May, 1939.

Chief Justice.

CRIMINAL APPEAL NO. 19/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— The Chief Justice (Trusted, C.J.), Greene J. and Khayat J.

In the appeal of :

1. Abdulla El Hussein El-As'ad
2. Suleiman El-Hussein El Mohammad — Appellants.

v.

The Attorney General — Respondent.

Sentence of young offender for attempted murder to a certain period in Reformatory — Proper wording of sentence of juvenile offender — Juvenile Offenders Ordinance, 1937, *sec.* 14.

A juvenile offender not to be sentenced under sec. 14 of Juvenile Offenders Ordinance, 1937 to a number of years in Reformatory but to be detained for that period in such place and upon such conditions as High Commissioner may direct.

George Salah (*By delegation*) for Appellants.
Hogan (*Crown Counsel*) for Respondent.

Appeal from the judgment of the District Court of Haifa dated 5.4.39 whereby the appellants were convicted of attempt to murder contrary to Section 222(a) of the Criminal Code Ordinance, 1936 and the first appellant was sentenced to four years imprisonment and the second appellant to three years in the Reformatory.

JUDGMENT.

We are satisfied that there was evidence in the Court below to warrant the findings of fact.

As to the wording of the second appellant's sentence, it should be made in conformity with the law as laid down in Section 14 of the Juvenile Offenders Ordinance, No. 2 of 1937, which provides that after sentence is passed the young offender shall be detained in such a place and on such conditions as the High Commissioner may direct, and whilst so detained shall be deemed to be in legal custody.

The appeal is dismissed and the judgment of the Court below is confirmed, the sentence upon the second appellant being varied accordingly, i.e. detention for three years in such place and upon such conditions as the High Commissioner shall direct.

Delivered this 27th day of April, 1939.

Chief Justice.

HIGH COURT NO. 19/39.

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

Before :— The Chief Justice (Trusted, C.J.) and Copland, J.

In the Application of :

Bank Nurok-Idelsack Ltd. Petitioner.

v.

1. The Chief Execution Officer, Tel-Aviv.
2. The Equity and Law Life Assurance Society.
3. Mr. Shlomo Wollstein. Respondents.

Joint application by mortgagee and mortgagor for appointment of receiver of mortgaged property — Assignee of rent of mortgaged property opposing application for appointment of receiver — Capacity of President District Court when ordering sale of immovable property in satisfaction of debt — Inapplicability of Civil Procedure Rules to proceedings before Chief Execution Officer — Inapplicability Of art. 51 of Execution Law to immovable property — Practice and convenience without statutory authority — Ott. Execution Law, Art. 51, 94 — Land Transfer Ordinance, sec. 14 — H.C. 4/38 — H.C. 15/39.

1. President District Court when ordering sale of immovable property in satisfaction of debt acts as Chief Execution Officer.
2. Civil Procedure Rules, 1938, do not apply to proceedings before Chief Execution Officer.
3. Neither under sec. 14 of Land Transfer Ordinance nor under art. 51 of Execution Law has a Chief Execution Officer power to appoint a receiver of immovable property; such power can only be exercised by a Court or Judge.
4. Practice and convenience cannot take the place of statutory authority.

Ben Yamini for Petitioner.

Seligman for Respondents No. 2—3.

Application for an Order to issue to the First Respondent directing him to show cause why his order dated 17.3.39 in Execution File No. 2891/39, Tel-Aviv should not be set aside.

ORDER

This is the considered opinion of the Court.

In this case the second respondents are the mortgagees and the third respondent is the mortgagor of certain property. The mortgagor being in default in repayment of the loan secured by the mortgage, the second respondents applied to the President District Court, Tel-

Aviv, for an order of sale, and the second and third respondents jointly applied for the appointment of a receiver to manage the mortgaged property.

The petitioners, who claim to be the assignees of the rents of the mortgaged property for two years by virtue of an agreement dated the 16th March, 1938, made between them and the third respondent, whilst not objecting to the order of sale, opposed the application for the appointment of a receiver. The Chief Execution Officer, after hearing all parties, came to the conclusion that he had the power to appoint a receiver and proceeded to do so. The petitioners have now come to this Court asking for an order to set aside that order of the Chief Execution Officer.

The respondents' first objection in this Court to the petition is that the matter was dealt with by the learned Judge as President, District Court, and not as Chief Execution Officer, and that therefore this Court has no jurisdiction to hear the petition. The answer to that is that the learned Judge ruled that he would hear the application in is capacity as Chief Execution Officer and also that he had no power to hear it as a Judge unless and until an action was commenced in the District Court. In that we think that he was right. In any event, he heard the application in his capacity of Chief Execution Officer and the only question which we have to decide is whether it is within the powers of a Chief Execution Officer to appoint a receiver of mortgaged property when an order for sale in respect of that property has been made. Furthermore there is a long series of decisions of this Court, culminating in Amne Mohamed Abu Leila vs. Chief Execution Officer and another — H.C. 4/38 *, in which it has been held that a President District Court, when making an order under Section 14 of the Land Transfer Ordinance, Cap. 81, is acting in his capacity of Chief Execution Officer, and we cannot see that the Land Transfer (Amendment) Ordinance, 1938, has in any way altered the basis of those decisions. This ruling is settled law, and has been such for many years, and it is useless now to endeavour to contest it.

To come now to the main question. The Chief Execution Officer held, in our opinion correctly, that the Civil Procedure Rules, 1938, do not apply to proceedings before the Chief Execution Officer and that any appointment of a receiver must be made, if at all, under the Ottoman Law of Execution. He came to the conclusion that Art. 51 of that Law, which makes provision for the appointment of a guardian to safeguard movable property that has been attached, could be applied,

* 3 CtLR. 71.

by analogy, to immovable property. The respondents support that view, and further argue that it has been the established practice for receivers to be appointed by Chief Execution Officers, and that the property must be protected, and that no one's rights are prejudiced. In addition they say that the petitioner have no standing in the matter, since both mortgagor and mortgagees agree to the order, and that they have no rights, and therefore cannot be parties. But the petitioners have put forward a claim basing themselves on their agreement with the mortgagor, and that claim cannot be adjudicated upon by a Chief Execution Officer — it can only be dealt with by a Court. Prima facie, they have an interest in the mortgaged property and the determination of that interest cannot be defeated merely because the mortgagor and mortgagees agree to the order.

The petitioners in reply submit that under Section 14, as amended, of the Land Transfer Ordinance all that a President, District Court, acting as Chief Execution Officer can do is to order the sale of mortgaged property, or if certain conditions are fulfilled to postpone sale, and that the section gives him no power to appoint a receiver. Further they say that the appointing of a receiver is a judicial act, and a Chief Execution Officer is not a judicial officer, which is true — also that Art. 51 of the Execution Law gives him no powers with regard to immovable property and cannot be applied by analogy, and finally, that even if there were a practice as alleged, which they deny, that practice cannot override the Law.

There is, of course, Art. 94 of the Execution Law, to which no reference has been made in the course of the arguments before us. This Article is in these terms :—

> "The judgment debtor may be left in possession of the immovable property pending the result of the action. Provided that if he damage the attached property, or cause any diminution in its value or refuse to allow intending bidders to inspect, the President may order his ejectment."

It may posibly be, though on this we express no opinion, that in certain circumstances this Article might be held to give power to appoint someone to manage or preserve mortgaged property ordered to be sold. But there is no question of the application of this Article to the present case, since it is not suggested that the mortgagor has been guilty of any of the acts or omissions set out in the proviso to the said Article, nor is it suggested that the alleged agreement with the petitioners was executed after default had been made on the mortgage with the second respondents, which might be held, though

again we do not decide this point, to constitute an act of damage or diminution to the attached property, and in any case the Chief Execution Officer based his decision not on Art. 94 but on Art. 51. As we have said, we must not be taken to express any opinion as to how far, if at all, Art. 94 could ever be used to appoint a receiver, and that question may well wait to be decided until the necessity for so doing should arise.

Taking into consideration the facts of this case and the arguments adressed to us, we agree with petitioners' contention and we are of opinion that neither under Section 14 of the Land Transfer Ordinance nor under Art. 51 of the Law of Execution is there any power given to a Chief Execution Officer to appoint a receiver of immovable property. And we do not think that such a power can be implied by analogy with the powers possessed by a Chief Execution Officer in respect of movable property — the two things are quite different, and it would have been easy to say so in Art. 51, if it had been intended that the same power should apply in cases both of movable and of immovable property. The appointing of a receiver is a judicial act, and as such can only be exercised by a Court or Judge, unless specific authority is given by Statute to the contrary, which is not the case here, and practice and convenience cannot take the place of statutory authority.

It seems perhaps curious that this question of appointment of receivers has only recently been raised in the Courts, but it is a fact that only one previous decision on the point has been found, and that was a case decided only this month, Jacob Nissim Misrahi vs. Chief Execution Officer, Tel-Aviv and others — H.C. 15/39 *. In that case it was held that a Chief Execution Officer had no power to appoint a receiver, but unfortunately that case was not contested by the respondents cited in it, and therefore, as an authority, it is not of great value, and we have approached the consideration of this present case, entirely untrammelled by the fact that there was such a decision, preferring to regard the question as not covered by authority.

In conclusion, whilst we find it difficult to appreciate why the petitioners think that they will be prejudiced by the appointment of a receiver, unless they regard the appointment as an attempt by the mortgagor and mortgagees to prevent them exercising their alleged rights under the agreement of the 16th March, 1938, we think that

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* 5 CtLR. 155.

the rule must be made absolute and that the order of the Chief Execution Officer, Tel-Aviv, dated the 17th March, 1939, appointing a receiver, should be set aside. The petitioners will have the costs of the petition assessed at LP. 10.— to include fees for attending the hearing, to be paid by the 2nd and 3rd respondents jointly and severally.

Delivered this 28th day of April, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 42/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

American Engineering Supply Co., Yitzhaq Shertok. Applicant

v.

Heiman Zabludovsky Respondent.

Proceedings taken out from Magistrate's Court and referred to arbitration — Submission referring to arbitration claim and counterclaim exceeding in total LP. 250 — Jurisdiction of District and Magistrate's Court in matters under Arbitr. Ord. — Agreement to extend time of arbitration made within time and signed later — Interlocutory decisions by two of arbitrators having power to give judgment by majority.

1. Where submission to arbitration refers to claim and counterclaims amounting together to more than LP. 250, proper Court to deal with matters under Arbitration Ordinance — District Court, not Magistrate's Court. (*)

2. Extension of time of arbitration, agreed to by arbitrators orally within time, though signed later, — good and valid.

3. Where two of arbitrators have power to give judgment by majority, they also can validly give interlocutory decisions (including extension of time).

Levanon for Applicant.

Naaman for Respondent.

(*) Ed. Note. *Sed quaere,* if submission to arbitration came after both claim and counterclaim were filed in Magistrate's Court.

Application for leave to appeal from the judgment of the District Court of Tel Aviv, dated 2.3.39.

JUDGMENT.

We are of opinion that this application for leave to appeal must be refused.

The first point raised by the applicant is that it was not within the jurisdiction of the Court below to entertain an application for the enlargement of the time within which to make an award, and that the case should have been tried by the Magistrate's Court. It was stated that the case originated from proceedings taken before the Magistrate, but the submission to arbitration refers to a claim and counterclaims which amount together to L.P. 600. No. counterclaim was filed by the applicant in the Magistrate's Court at the time, and therefore it is clear that the amount involved in the arbitration proceedings was one falling within the jurisdiction of the district Court. This point will therefore fail.

The second point raised is that the arbitrators had no power to extend the time. That point also fails. The last date for the extension of the time by the arbitrators was 31st December, 1937. On that date the arbitrators agreed orally to an extension for a further three months, and two of them signed it on the very same day, while the third arbitrator added his signature later. In our opinion it is sufficient if the agreement to extend be made within time, and that decision is signed later. But further, in any case two of the arbitrators had power to give judgment by majority, and it is childish to suggest that if a majority can give a valid judgment, they cannot also validly give an interlocutory decision.

The third point is that there was no evidence before the Court below to support the finding that a good part of the delay was caused by negotiations between the parties for an amicable settlement. From the extracts of the record read to us, it is clear that there was evidence to that effect. If so, the Court rightly used its discretion under Section 10 of the Arbitration Ordinance.

For the above reasons the application fails and leave to appeal is refused with costs to include LP. 10.— fees for attendance at the hearing.

Delivered this 2nd day of May, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 31/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— The Chief Justice (Trusted, C.J.), Greene J. and Frumkin, J.

In the appeal of :

The waqf Department of Jaffa — Appellant.

v.

The Attorney General — Respondent.

Land registered as State Domain claimed as Wakf — Municipal Corporation converting land in dispute into a road — Land Court striking case out "as property no longer exists" — Proper procedure where land passed from Defendant to someone else.

Where land claimed in Land Court taken by Municipal Corporation in order to be used for public purposes, Plaintiff to join Corporation as Defendant and Court to adjudicate upon Plaintiff's rights.

Haikal (Ma'amour Awkaf) of Jaffa for Appellant.
Omar Eff. Wa'ari for Respondent.

Appeal from the judgment of the Land Court of Jaffa, dated 1st March, 1939.

JUDGMENT.

This is an unfortunate case which has been pending for a long time. The parties directly concerned are the Ma'mour Awkaf of Jaffa and the Government of Palestine, the Municipal Corporation of Jaffa is indirectly interested. It seems a pity that they could not come to some agreement rather than indulge in prolonged litigation.

It appears that certain property in Jaffa is registered as State Domain in the name of Government in the Land Registry. We have a certified copy of the entry but it does not give us much assistance except that, prima facie, the property which is claimed is registered as State Domain.

The Ma'mour Awkaf apparently claims, by virtue of a written wakfieh going back to the Turkish time, that the property is wakf.

The action was commenced in Jaffa in 1929, but for some reason

or other the hearing was delayed, and meanwhile the actual property itself is said to have been taken by the Municipal Corporation of Jaffa, in order to be used for public purposes as a road, so that when the matter came before the Land Court in March of this year the Court held —

> "It seems to us that the correct action to bring is one claiming compensation against the Municipality, as this Court cannot issue a judgment in respect of property which no longer exists. In our opinion, therefore, the present action is misconceived and cannot be heard. We therefore strike it out."

It is clear that in the physical sense the property must still exist, but it may be that the Court had in mind that they could not issue a judgment in respect of land vested in someone else presumably by operation of law. It has not been explained to us precisely what the Municipal Corporation has done, or whether any and what steps were taken before the land was converted into a road.

If the Plaintiff (Appellant) in this case can establish his claim to the property prima facie he may be entitled to compensation from somebody — either Government or the Municipal Corporation. As to that we express no view ; it depends on whether or not he can establish his claim to the property in dispute.

It seems to us that the most satisfactory way of dealing with this matter is to send back this case to the Land Court of Jaffa, for the Plaintiff to join the Municipal Corporation of Jaffa as a Defendant, and for the Court then to adjudicate upon the Plaintiff's rights, and as Government and the Municipal Corporation are concerned, if the Court decides as to the disputed rights to the land, we feel that there should be no difficulty as to the compensation to which he is entitled, if any.

The Judgment of the Land Court is set aside, and the case remitted accordingly. The costs of this appeal will be costs in the cause.

Delivered this 26th day of April, 1939.

Chief Justice.

CIVIL APPEAL NO. 23/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

1. Joseph Weinberg
2. Perl Brakha Elke Weinberg — Appellants.

v.

1. The Palestine Jewish Colonization Association
2. The Village Settlement Committee of Kfar Saba — Respondents.

Claim before Settlement Officer of undisputed possession for over 10 years — Querying finding made by Settlement Officer that there was no evidence to prove prescription — Allegation of corroborative evidence — Ground not raised in notice of appeal — Citation as 3rd party equivalent to entry of claim for purposes of calculating prescription — Acts of possession — Calculation of prescription in proceedings after Land Law (Amendment) Ordinance came into force.

1. No grounds to be advanced in Court which have not been set out in notice of appeal, without an application being made under Rule 316 of Civil Procedure Rules.

2. Question whether there was evidence justify finding of fact made by trial Court — a question of law not of fact.

3. In cases of prescription the dates must be determined with certainty.

4. In absence of any specific date of commencement of possession Settlement Officer (and Land Court) entitled, if not compelled, to take date most favourable to party against whom claim of possession is made.

5. Fencing — an act of possession, so also ploughing, even without further act of planting.

6. A party is claimant in an ordinary action from date of filing the action, not from date of his first appearance in Court.

7. Citation of a person by Settlement Officer as third party equivalent to entry of claim in an ordinary civil action.

8. Claim of prescriptive possession falls under law applicable at time when this right comes into being, i. e. when period of prescription completed according to law then in force.

In proceedings commenced after enactment of Land Law (Amendment) Ordinance, i. e. after 23rd August, 1933, period of prescription must be calculated in (Gregorian) calendar years.

Edit. Note: As to 1 see: C.A. 232/38 5 CtLR 14; C.A 18/38 4 CtLR 124
As to 2 see: C.A 241/38 5 CtLR 128 and Edit. Note thereto.
As to 4 see: Mejelle art. 11.
As to 5 see: C.A. 187/37 2 CtLR 126.
As to 8 see: C.A. 184/37 2 CtLR 219; C.A. 204/37; ibid. 153.

Scharf for Appellants.
Minkovitch for Respondent No. 1.
Respondent No. 2: Absent — served.

Appeal from Judgment of Land Court, Tel-Aviv, dated 13.2.39.

JUDGMENT.

This is an appeal from a Judgment of the Land Court sitting at Tel-Aviv, dismissing an appeal from the Ramle settlement Officer.

The appellants, who were defendants in the settlement proceedings, were originally the owners of four rural plots and four building sites in Kfar Saba. One of the rural plots together with its building site was subsequently sold by them to one Orloff, and, at settlement, though the appellants claimed all four plots, the sale to Orloff was confirmed, both the Settlement Officer and the learned President of the Land Court, to whom application for leave to appeal was made, stating that the claim of the appellants to Orloff's plot was a false one.

It appears, as found by the Settlement Officer, that one building site was appurtenant to every rural plot, but that the building sites were selected by purchasers at a later date on the principle of "first come, first served." It would seem, therefore, that, being entitled to three rural plots only the appellans could only claim three building sites. In the present case, however, they filed a claim to four building sites, namely parcels 12/8, 12/9 (which is a double site) and 12/10. Parcels 12/8 and 12/9 are already registered in their names, and the present dispute centres round parcel 12/10. The Settlement Officer has found as a fact that parcels 12/8 and 12/9 give the approximate area of building sites to which the appellants were entitled on the strength of their ownership of three rural plots, holding that the area of 5 dunums assigned to a building site was only approximate, since roads had to be deducted from it, and any small shortage in area was thereby explained.

The appellants' claim was that the parcel in dispute was registered in their names in the unofficial Land Books of the Colony, and that they had been in undisputed possession of it since 1922. The claim of ownership is palpably false, since they are entiteld to three

building sites only, and those three sites they already have, and nothing more therefore need be said about that part of the claim. The only point for determination by this Court is whether the appellants are entitled to be registered as owners of parcel 12/10 by prescription. They alleged that they took possession of the parcel in 1922 and erected a fence round parcels 8, 9 and 10 in that year. The Settlement Officer found that there was no evidence to support this allegation except that of the male appellant, whom he did not believe, and that no acts of possession in any of parcels 8, 9 or 10 were taken untill some time in May 1928, and that therefore prescription would not commence to run until this latter date. On the appeal, the Land Court confirmed this view, and I will deal with this part of the appeal first.

In this Court, the advocate for the appellants has argued, first, that the corroborative evidence as to possession by the appellants since 1922 has been wrongly disregarded, and he has put forward as corroboration certain remarks endorsed by the Asst. Settlement Officer on the particulars of claim, and the evidence of a Mr. Hamburger, who was heard as a witness. Of course, there is not a scintilla of corroboration — the remarks of the Asst. Settlement Officer are not evidence and Mr. Hamburger could give no dates whatever as to the alleged acts of possession by the appellants — he could not say, to quote his own words, "whether it was 7, 8, 9 or 12 years" before, and further on being shown the plan, he could not say whether the appellant had fenced parcel No. 10, the one now in dispute.

It is then argued that the Settlement Officer wrongly relied on proceedings in another case, to which the male appellant had been a party, in disbelieving the male appellant in this case. The Settlement Officer said in his judgment that the proceedings in this other case, which concerned the plot sold by the appellants to Orloff, to which I have already referred, "did not inspire one with confidence in the male defendent, and I unhesitatingly reject his unsupported evidence that he erected a fence round the parcel in dispute in 1922." Apart from the fact that this ground of appeal was never raised in the appeal to the Land Court, nor in the grounds of appeal filed in this Court, and therefore it cannot now be considered, it must be remembered that the attention of the male appellant was called at the trial to the proceedings in the Orloff case, and he was cross-examined on them, and his answers were most unsatisfactory, as in fact was much of his evidence, and if it were necessary I should be prepared to hold that there were ample grounds, apart from the one given by him, to justify the Settlement Officer in disbelieving the evidence of the male appellant where unsupported.

Here, perhaps, I might call attention to a practice, which is creeping in, and should be discouraged, and that is, the advancing of grounds on the hearing of an appeal which have not been set out in the grounds of appeal filed in Court, without any application being made to submit further grounds under Rule 316. It should be unnecessary to point out that the whole reason for filing the grounds of appeal is that the respondent may have notice of the points on which he may have to reply, and that this object is entirely defeated if additional grounds are advanced without leave of the Court. I trust that this practice will cease.

I come now to what is the main ground of appeal, namely that the appellants have acquired a prescriptive title, having been in undisputed possession of the parcel in dispute at any rate since some date in 1928, either in April or May of that year.

In support of this proposition, it is submitted on behalf of the appellants that on the 8th Nissan 5688, which corresponds to the 29th March, 1928, they entered into a contract with a Mr. Druyan to plough and plant an area of 14 dunums, subsequently extended to 16 dunums, that this contract covered parcels 8 and 9 and also a part of parcel 10, and that possesion must be deemed to commence when this contract was entered into. They say that the Settlement Officer was wrong in holding that prescription began to run from the 29th May, 1928, since even if the part of parcel 10 was the last piece to be ploughed, the ploughing in that part must have commenced some time before this latter date, and that ploughing is a sufficient act of possession in itself without planting, the Settlement Officer having fixed the 29th May, 1928, as the date when planting was completed, and consequently the date from which the period of prescription would fall to be calculated.

Now Mr. Druyan stated definitely that he planted 14 dunums, that the planting was not completed until about two months after signing the contract, and that it was afterwards that he erected a fence round parcels 8, 9 and 10. He said that he believed that the 14 dunums entered into parcel 10 a little on the northern part, but that he knew that the appellants were not the owners of parcel 10. His evidence is somewhat vague, and in cases of prescription it is necessary that the dates must be determined with certainty.

The respondents, in reply to the appellants' arguments, say, first, that there is no evidence that there was any ploughing in parcel 10, and that they do not admit any encroachment in that parcel, until the end of the two months' period of the ploughing and planting under the contract, and secondly, that it is not for them to say how much was

ploughed or what particular area was encroached upon. They also say that the date of the first act of possession is a question of fact, that the Settlement Officer having found as a fact that it was the 29th May 1928, that finding cannot be queried in this Court, where appeals are limited to questions of Law. This last proposition, however, is subject to this consideration, that it is a question of law whether there was evidence to justify the finding of fact.

It may be as well at this point to dispose of one further question which was raised in the grounds of appeal to this Court, but has not been further pursued here, and that is the date when the respondents should be deemed to have entered as claimants in this case. The Settlement Officer decided that the date was the 19th January 1938, when he cited them as a third party. The appellants submitted that the correct date was the 31st January 1938, when the respondents made their first appearance before the Settlement Officer. I think that the Settlement Officer was right, because the citation of the respondents by the Settlement Officer is equivalent to the entry of a claim in an ordinary civil action and a party is a claimant in an ordinary action from the date of filing the action, not from the date of his first appearance in Court.

Now it is an axiom that a party alleging a fact must prove it. In this case the appellants alleged that they entered into possession of parcel 10, and it is for them to prove that fact, and also the date on which they entered into possession, and by proof, I mean definite proof, not mere supposition or guess work. I am of opinion that ploughing would be an act of possession, of at any rate the actual part ploughed, and that the further act of planting is not an essential part of possession in such a case. Fencing would also be an act of possession. The question of fencing in this case can be disposed of at once, becaue there is no evidence that the fencing was set up until some time after the expiration of two months after the 29th March, 1928, and there is absolutely no evidence as to how long after. This question of the date of ploughing in parcel 10 depends entirely on the evidence of Mr. Druyan, and that evidence amounts to this, that he *believes* that he went a little into parcel 10, he does not state it definitely as a fact that he did, that he did not conmmence ploughing parcels 8 and 9, and possibly a little in parcel 10, until after the date of the contract, 29th March 1938, and that he completed the ploughing and the planting about two months later. "About two months later" is extremely vague — it may mean a little more or a little less, it is impossible to say. This was all the evidence before the Settlement Officer on which he could rely. The Settlement Officer has

apparently found, or, perhaps it is more correct to say, assumed for the purpose of his judgment, though he does not perhaps say so directly, that there was some encroachment in parcel 10. He might equally well on this evidence have found that there was none. Be that as it may, I cannot see that on this evidence, vague and indeterminate at it was, that he was under any obligation to take the date most favourable to the appellants, who were making the claim to a prescriptive title, and whose duty it was to prove, if possible, the exact date. It was not for the Settlement Officer to guess when ploughing began, if it did begin, in parcel 10. In the absence of any specific date he was entitled, if not compelled, to take a date the most favourable to the respondents, which date is in fact the only one which can be said to be reasonably definite and which does not involve speculation, and I am not prepared, on cosideration of the evidence before him, to say that he was wrong in finding the date to be the 29th May, 1928. I agree with the learned Judges in the Land Court that there was evidence before him on which he could reasonably arrive at such conclusion.

I have dealt with this question of dates at some considerable length, because, whilst on one view of this case, as will be seen presently, it is not material, yet on another view, the exact date is of vital importance, a few days one way or the other giving possibly different results.

This brings us to the question whether the calculation of the time of prescription was accurate. The Settlement Officer found that the first act of possession was at or about the end of May 1928, that the respondents became claimants on the 19th January, 1938, and taking the Moslem Calendar as the basis, and seeing that it was well known that the Moslem year was some 11 days less than the Gregorian year, it was clear that in 10 years the difference would be about 110 days. Since between even the 31st January 1938 and the end of May 1928, the difference is some 120 days, ten years even on this calculation had not expired and so the plea of prescription failed. If the 19th January 1938, which I think is the correct date, should be taken, then the difference would be some 130 days .

The Land Court, on appeal, went into this question in somewhat greater detail. It found and that finding has not been challenged, that the 29th May, 1928, corresponds to 10th Zil Hija 1346 and the 19th January, 1938, to 17th Zil Kahdi 1356, making it clear therefore beyond any doubt that ten lunar years had not expired and therefore the period of prescription had not elapsed. I agree both with the Settlement Officer and with the Land Court that the plea of prescription fails.

The respondents at the end of their reply raised the point which they had also taken in the Land Court, but which that Court did not deal with as it was unnecessary to do so in the view it took of the case, that the period of prescription should be calculated not in lunar years, but in years according to the Gregorian Calendar, on the ground that since their claim was deemed to be lodged in 1938, the provisions of section 7 of the Land Law (Amendment) Ordinance, Cap. 78, applied. This Ordinance came into force on the 23rd August, 1933, and section 7 is as follows —

> "In every provision of the Ottoman Land Code and any other Ottoman Law concerning immovable property in Palestine fixing the period within which any action may be heard or any right may be exercised, the terms "month" and "year" shall be deemed to refer to a calendar month or year respectively according to the Gregorian calendar."

The effect of this clause therefore is to make the period of prescription ten calendar years for miri land, since the „ten years" referred to in Art. 20 of the Land Law must now read "ten calendar years".

In Fahima Khanum v. Shekh Assa'ad Shukeiri, C.A. 184/37 *), Manning J. held that this section was not retrospective in its action, that it "must be regarded as an amendment of the law applicable in 1933, and as such cannot affect any proceedings pending at that date." he further says "that the law in force when the action was commenced is the law applicable." So far as the present respondents are concerned, these proceedings were not commnced until 1938, when the Settlement Officer cited them as claimants. Following the above authority is seems to me that in these present proceedings, which were commenced after the land Law (Amendment) Ordinance came into force, the period of prescription must be calculated in calendar years, and on this basis the ten year period again has not been completed. Prescription is a right given to a person, who has for ten years been in undisputed possession of land, to retain possession as against the registered owner in an action for recovery by the latter. The right does not come into being until the ten years have been completed; during the ten years, no right is in existence, there is only the possibility of a right arising in the future. Disregarding the claim of ownership, the appellants' case was divided into two parts, first, that they had been in possession for ten years since 1922, and secondly, that at any rate they had been in possession for ten years since 1928. This second part of the claim could not have been made before 1938 at the earliest, and therefore must fall to be determined under the law applicable in 1938.

*) 2 CtLR 219.

For all these reasons I think that this appeal fails and should be dismissed. I would only add, that, even if I had been of the contrary opinion, I should have held that the case would have had to go back to the Settlement Officer to determine the exact amount of encroachment, if any, in the parcel in dispute, and further, if there were any such encroachment, to determine whether the ploughing or planting of trees in a part only of the parcel could be deemed to be possession of the whole parcel.

British Puisne Judge.

I concur

Puisne Judge.

The appeal will, therefore, be dismissed with costs to include LP.15 fees for attending the hearing to the first respondent.

Delivered this 27th day of April, 1939.

British Puisne Judge.

JUDGMENT.

Frumkin, J.

I am in agreement that the Appellants failed to make out a case based on sufficient evidence that they were in possession prior to 1928. The evidence of one of the Appellants the Court below did not believe, at least not without some corroborative evidence, and there was no such corroboration.

As regards possession since 1928, I propose to deal first with the point taken last by the Respondents, namely, that the period of prescription should be calculated on the basis of calendar years, because if that is the case it will not be necessary to enlarge on minute calculations as to days.

Now the period of prescription is ten years. They were lunar years up to the 23rd of August, 1933, when the Land Law (Amendment) Ordinance was passed, and became calendar Gregorian years since that date. In Fahim Khanum v. Sheikh Assad Shukeiri, Civil Appeal 148/37, Manning J. held that in an action brought prior to the said amending Ordinance, the period is to be calculated by lunar years. This is obvious. If when an action is brought the defendant has a legal right to bar the action of his opponent by proving that he was in possession for a certain period, if subsequently to lodging the action the period is enlarged by legislation, such enlargement could not be retrospective in so far as it affects the right of a party to rely on a shorter period.

In the present case the action of the Respondent was not entered until some time in 1938, long after the amending Ordinance, enlarging

the period of prescription by the difference between lunar and solar years. The Appellants could therefore only succeed in defeating the action of the Respondents by lapse of time if they could prove their possession for a period as provided by the law in force in 1938, namely ten calendar years, and not ten lunar years.

It has been suggested that in determining the question whether the period of prescription should be calculated under the old or new law, attention should be paid not so much to the law in force at the commencement of the action, but to the law in force at the time when the step was taken giving rise to prescription. In other words, the period should be fixed in accordance with lunar years, because that was the law in force in 1928, when the Appellants encroached upon the property in dispute.

The answer to that contention is this. Taking possession does not in itself confer any right; it is the completion of a period prescribed by law confers on the possessor the privilege of retaining possession, not so much because he has acquired a right, but because his opponent is considered to have forfeited his right. So that in 1928 the Appellants had no right whatsoever, nor had they any right in 1933, at the time of the promulgation of the amending Ordinance, at which time the Appellants could rely on no period of possession exceeding ten years.

From the date of the promulgation of the amending Ordinance they came under the new law, and in order to succeed they had to satisfy the Courts below that when the action was brought they were already in possession for a period exceeding ten calendar years.

This they failed to prove, even taking all the dates in their favour, namely, that the period of prescription began on the 29th of March, 1928, when they entered into the contract, and not on the 29th of May, 1928, when the period of the contract was deemed to have been concluded, and expired on the 31st of January, 1938, when the present Respondent first appeared before the Land Settlement Officer, and not on the 19th of January, when the Settlement Officer decided to cite the Respondent as claimant in the action. Ten calendar years have not been completed, and Respondent's action was therefore not barred by lapse of time.

Having arrived at that conclusion it is not necessary for me to deal with the other factors which would be of relevance only if lunar years were applicable, and I express no opinion as to that. The appeal should therefore be dismissed with costs.

Delivered this 27th day of April, 1939.

Puisne Judge.

HIGH COURT NO. 26/39.

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

Before :— Copland J. and Greene J.
In the application of:—
Jiryes Turjman — Petitioner.

v.

1. The Execution Officer, Jerusalem.
2. Fadwa Turjman, in her personal capacity and as guardian over her minor children Michail and Juliette as heirs of the late Elias Turjman. Respondents.

House held in co-ownership not admitting of actual partition — Sale of house through Execution Office on order of Court — Seizure of proceeds of co-owner's share in dwelling house in favour of his judgment creditor — Incompetence of Chief Execution Officer to stay sale of property carried on in compliance with a judgment in a partition action — Scope of protection given by art. 90 of Execution Law — Ottoman Execution Law, Art. 90, 122.

1. Where sale of land carried on in pursuance of a judgment in a partition action, Chief Execution Officer has no power to stop sale.

2. Judgment debtor whose share was sold on an order of Court in a partition action — not too late when applying immediately after sale completed for proceeds of his share to be exempted from seizure.

3. Proceeds of sale of judgment debtor's share in a house sold through Execution Office — protected in same way as partitioned share would be under art. 90 of Execution Law (excluding dwelling house from restraint) and, if already paid over to judgment creditor, must be refunded to him to be reinvested in purchase of a suitable dwelling house.

Edit Note : As to 3. see H.C. 24/31 2 C of J 695; L.A. Najid v. Kafo ibid 690; H.C. 74/27 1 PLR 199.

Bruchstein for Petitioner.
Ex-parte.

Application for an order to issue directed to the First Respondent to

show cause why his order dated 24.4.39 in Execution File No. 1735/34 should not be set aside, and why he should not order the eviction of the 2nd Respondent from Petitioner's house.

ORDER.

The second Respondent in this case is the judgment debtor of the petitioner and the main point in this application is whether the purchase price of a share in a house which has been found to be the necessary dwelling house of the second Respondent is protected by Art. 90 of the Execution Law in the same way as the house itself would be. It is not necessary to set out the facts which have been given very fully by the Chief Execution Officer in his order, and as to which no dispute arises.

Art. 90 is as follows :—

> "The dwelling house of the judgment debtor, if suitable to his position, and if not mortgaged or sold with a condition of right to re-purchase, is left for the judgment-debtor".

In the first place it must be remembered that the sale of the house was effected on an order of the Court in a partition action, and the Chief Execution Officer therefore had no power to stop the sale of the second Respondent's share — he had to carry out the order of the Court. If the property could have been partitioned then there is no doubt that the partitioned share of the judgment debtor could not have been sold, and we cannot see why she should be in a worse position because the property could not be partitioned. We agree with the learned President that the money derived from the sale of the judgment debtor's share is protected in exactly the same way as a partitioned share would have been — and that it should be re-invested in the purchase of a suitable dwelling house. It has the same characteristics as where a large house is sold, and part of the proceeds re-invested in the purchase of a smaller house suitable to the judgment debtor's position, which is also frequently done under Art. 90.

We do not think that there has been any undue delay by the judgment debtor in the action taken by her to protect her interests and those of the minors of whom she is the guardian. She could not have stopped the sale of the property, which, as we have pointed out, was in compliance with a judgment of the Court, and it was not until the sale was completed in December, 1938, that she could apply for the proceeds of her share to be exempted from seizure, which she immediately did. And finally the set off made by the Execution Officer was wrong, and resulted

in money belonging to the judgment debtor being wrongly paid over to the judgment creditor, which exactly fits the wording of Art. 122 of the Execution Law. The learned President was therefore right in ordering the refund to the estate.

The application for an order nisi must be refused.

Delivered this 12th day of May, 1939.

HIGH COURT NO. 11/39.

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

Before :— The Chief Justice (Trusted, C. J.) and Frumkin, J.

In the Application of : —

Ya'cob Hazan — Petitioner.

v.

1. The Chief Execution Officer, Tel-Aviv.
2. Mrs. Margalith Hazan. — Respondents.

Judgment of Rabbinical Court of 1st instance given by Chief Rabbi sitting alone — High Court's power to go into matters of competency of Religious Courts — Number of Rabbis or Judges required to constitute a Rabbinical Court — Effect of parties consenting to single Rabbi — Appeal to Rabinical Court failing on a technical ground — Incapability of judgment of Religious Court not properly constituted of being executed — Palestine Order-in-Council — Religious Communities (Organisation) Ordinance — H.C. 27/36 — Jewish Civil Law.

1. High Court has power to go into matter of competency of Religious Courts.

2. Rabbinical Court not properly constituted if not composed of at least 3 Rabbis or Judges.

3. Judgment of Rabbinical Court composed of one Rabbi or Judge sitting alone is, if party objects, not capable of execution unless proved that parties consented to single Rabbi.

4. Where appeal from judgment of Religious Court which was not competent to deal with the matter failed on a technical ground appellant may oppose judgment on ground of incompetency of Court, when judgment put into execution.

Kaufman for Petitioner.
Shereshevsky for Respondents.

Application for an order to issue to the First Respondent directing him to show cause why his order for the attachment and sale of the rights and interests of the petitioner's immovable property situated at 9, Hatham Sofer Str., Tel-Aviv, Block 55, Parcel 22 (Tel-Aviv Execution File No. 11544/37) should not be set aside, and to refrain from any further proceedings on the strength of the judgment of the Chief Rabbinate, Jaffa Tel-Aviv District dated Menahem-Av 6th, 5697 (14. 7.37) case No. 540/5697. Alternatively, for an order to issue to the First Respondent to reduce the amount due for execution to LP. 22.

ORDER.

Frumkin, J.

The Respondent in this case put into execution what purports to be a judgment of the Rabbinical Court of Tel-Aviv, signed and delivered by Chief Rabbi Uziel sitting alone. It is one of the grounds taken by Petitioner, in opposing the execution of the said judgment, that a Rabbinical Court in order to be properly constituted, must be composed of not less than three judges.

It is clear that this Court has power to go into matters of competency of Religious Courts. If a Religious Court is not competent to deal with a certain matter, any decision given by it is not capable of execution. The constitution of a Court is a matter of competency and we are called upon to decide whether or not a Rabbinical Court composed of one Rabbi or Judge sitting alone is properly constituted.

Neither in the Palestine Order in Council nor in the Religious Communities (Organisation) Ordinance or Regulations made thereunder nor indeed in any other Palestinian Legislation is there any provision as regards the number of Judges required to constitute a Jewish Rabbinical Court.

In Hary v. Hary — H.C. 27/36 *), this Court acting upon an opinion given by the Chief Rabbi of Palestine, Rabbi Jacob Meir, decided that a Rabbinical Court, sitting as a Court of Appeal, must be composed of at least three Judges and ordered the non-execution of a judgment delivered by two Rabbis only. In the same case this Court expressed the view that "it is a well known rule in Jewish Law, that any Rabbinical Court, even sitting in first instance, must always be composed of three Judges."

The authority in Jewish Law as regards the number of Judges is to be found in "Hoshen Hamishpat", a compilation of Jewish Civil Law, where it is laid down in 3(1) that no Court can be composed of less

*) 9 C of J 745.

than three Judges. So far as I know there are no special rules as regards the composition of Courts of Appeal, and if Chief Rabbi Meir in Hary v. Hary referred to Courts of Appeal only, it was due to the fact that the question involved was the composition of a Court of Appeal. So that in my view this Court was justified in its dictum that even a Court of first instance is to be composed of no less than three Judges.

It is true that there are certain exceptions to the rule. In 3(2) ibid it is provided that a judgment issued by less than three Judges is not valid even if they have not erred, unless the Judge has been accepted by the parties or he is "recognised by the public as an experienced Judge", (Mumhe Lerabim). The first exception does not arise because there is nothing to show consent on the part of the petitioner to accept the Judge sitting alone.

As regards the second exception, I am not competent to say what exactly are the requirements of the term "Mumhe Lerabim". If I were to act on my own judgment I would not hesitate in stating that Rabbi Uziel with his wide learning and experience has all claims to be "recognised by the public as an experienced Judge." But in the same sub-section quoted above we find the observation that in present times it is not customary even for Rabbis of that category to sit alone against the will of any person. In my view consent, especially in the case of a defendant, is not a matter to be presumed but proved. As said before, there was no evidence of consent.

Again we find in sub-section 3 of the said section that although it is allowed for a Rabbi recognised by the public as an experienced Judge to sit alone, it is commended by the Wise to join others to sit with him.

It is unfortunate that this Court should have to deal with the niceties of Jewish Law relating to the composition of a Rabbinical Court of First Instance, a matter which in the ordinary course of events should have been brought before the Rabbinical Court of Appeal for determination. We understand however that an appeal lodged by the Petitioner failed on a technical ground. So that his only opportunity to oppose the judgment was when it was put into execution.

On the authorities cited above, I feel justified in holding that if a party to a judgment issued by a Rabbi sitting alone, takes objection to its execution, the Execution Officer must refrain from executing it.

This being the case it is not necessary to deal with the other objections raised by the Petitioner, and the order will be made absolute with costs, fixed at an inclusive sum of LP. 5.

Delivered this 8th day of May, 1939.

Puisne Judge.

CIVIL APPEAL NO. 87/39

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the Appeal of :

Benzion Bravermann — Appellant.

v.

1. Shemuel Rozov
2. Zeev Ben Arieh. — Respondents.

The Palestine Electric Corporation Ltd. — Third Party.

Judgment for Plaintiff with costs, without mention of sum and interest thereon — Application for correction of judgment by inserting sum and interest — Doubtfukness as to whether interest omited in judgment accidentally or purposely — Applicability of Civil Procedure Rules 1938 — *Civil Procedure Rules,* 1938 *Rules* 1, 358.

1. Judgment cannot be corrected on application under Civil Procedure Rule 358 to insert interest, if no indication whatsoever as to whether Court intended to order payment of interest or not.

2. Applications made after coming into force of Civil Procedure Rules, 1938, even if concerning matters prior to that date, are governed by these Rules.

Hofmann for Appellant.

Levin for Respondent No. 1.

Application for the correction of judgment.

JUDGMENT.

This is an application under Rule 358 of the Civil Procedure Rules 1938, to correct a judgment given by this Court on the 24th July, 1933. In the District Court, from which the case emanated, the action had been dismissed, the plaintiff appealed and this Court reversed the District Court, and to adopt the actual words of the judgment on appeal "the appellant is therefore entitled to succeed on both points and the judgment of the District Court must be set aside. As against the first respondent, judgment will be entered for the appellants with costs here and below." The action in the District Court was on a promissory note for the sum of LP. 300, together with interest, and the appellant now asks

us to correct this judgment, by inserting the words "for LP. 300.— and interest as from March 20th, 1931." Rule 358 allows correction of judgments where there has been a clerical mistake, which does not arise here, or where there is an error arising from any accidental slip or omission. I do not think we can say that this is a case of an accidental slip, what we have to consider is whether it is a case of accidental omission. There is no dispute that the capital sum involved was LP. 300.— and we think that, as to the judgment of this Court, one may say that judgment was intended to be entered for the appellant for LP. 300.— with costs, and the sume of LP. 300.— was accidentally omitted, because, without that sum being mentioned, the judgment would be largely meaningless.

Regarding the question of interest, however, the matter rests on a rather different footing. The question of interest was never argued in the Court below nor in the Court of Appeal, no finding was made on the point in the Court below, and neither was the point taken in the grounds of appeal in this Court. The payment of interest, it is needless to remark, does not necessarily follow in every case, and it is quite impossible for us to say whether this Court intended to give a judgment for interest or not. Balancing the probabilities, if one may indulge in a little speculation, it may quite possibly be that they did not intend to include interest. That being so we think that the judgment of this Court should be amended by the insertion, after the words "judgment will be entered for the appellant" in the penultimate paragraph thereof, of the words "for LP. 300.—". The remaining part of the application will be refused. In the circumstances we think there should be no costs to either side.

I would only mention one further point which I should have mentioned at the begining of this judgment, and that is Mr. Levin's argument that the rules are not retroactive. Rule 1 states that the rules shall come into force in all future proccedings and in every pending proccceding at the stage at which the proceedings had arrived at the time the rules became law. This present application before us was made after the coming into force of the Civil procedure Rules, 1938, and we think that the Rules therefore, including Rule 358, clearly apply to it.

Delivered this 15th day of May, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 39/39

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

1. Theodore Iskander Knesevich
2. Henry Iskander Knesevich
3. Nimar Abu Khadra in his capacity as an heir of and on behalf of the estate of Hassan Hassan. Appellants.

v.

1. His Excellency the High Commissioner of Palestine.
2. Al Khoury Nimatallah El Maurani. Respondents.

Failure of payment of fees on appeal from Settlement Officer to Land — Fees payable on appeal from Settlement Officer where land in dispute not valued — Period within which to pay fees on appeal from Settlement Officer — Effect of non-payment of fees —Court fees Rules, 1935 — *Land (Settlement of Title) Rules* 1928, *Rule* 20.

1. Fees are payable on appeals from Settlement Officers to Land Courts; payment at latest before appeal heard.

2. Where proper fees not paid case cannot be heard.

3. It would be inequitable to penalise a party acting upon order of President of Court in good faith, when in fact President was wrong in application of law.

4. Principle adopted in long series of decisions of Supreme Court over a period of many years outhweighs recent decisions of this Court which, while distinguishable, appear as a deviation from that principle.

Edit. Note : As to 2 see :C. A. 36/38 3 CtLR 177; C.A. 20/38 ibid. 289; C.A. 15/30 1 PLR; C.A. 155/38 4 CtLR 107.

Issa Akel for Respondent No. 1.

Hanna Atallah for Appellants.

Appeal from judgment of Land Court, Jaffa (in its appellate capacity) dated 18.3.39.

JUDGMENT.

This is an appeal from a judgment of the Land Court, Jaffa, dated 18th March 1939, dismissing an appeal from the Land Settlement Officer on the ground that no fees had been paid on the appeal to that Court and therefore there was no valid appeal before it.

Leave to appeal was granted by the Settlement Officer and LP.

1.— was paid by the Appellants on lodging the application for leave. No further fees have been paid since.

Several interesting points arise in this case, and I will deal with them in turn. First of all Mr. Atallah for the Appellants has argued that under the rules in force when the appeal in the Land Court was heard, there was no period fixed within which the appeal should be made, and therefore, there was no period within which fees, if payable at all, should be paid. He says that the Civil procedure Rules of 1938 were not applicable, and in that we agree, and that there is nothing in the Civil procedure Rules of 1936 nor in the Land Settlement Ordinance which prescribes any period within which an appeal should be made.

His next point is that no fees are prescribed at all for appeals from Land Settlement Officers to the Land Court, and no scale of fees is laid down for appeals under the Land Settlement Ordinance, and that under the Court Fees Rules of 1935 the only item which could be applied is Item 37, and he says that that item is not in fact applicable.

Now Mr. Akel for the Attorney General has called our attention to Rule 20 of the Land (Settlement of Title) procedure Rules of 1928 which are to be found in volume 3 Drayton, p. 1803.

Rule 20 states —

> "Where leave to appeal is granted and no valuation of the land claimed has been made under section 69(2) of the Land (Settlement of Title) Ordinance the Commissioner of Lands shall, upon the application of the appellant, estimate the value of the land : fees of appeal shall be paid upon the value as estimated."

It seems to us beyond doubt that fees on appeals from Land Settlement Officers are in fact payable, and that such fees should be assessed under Item 37 of the Schedule to the Court Fees Rules of 1935, since no valuation has been made.

This item reades —

> "On lodging notice of appeal (or cross appeal) where the value of the subject matter of the judgment appealed from is not expressed in money".

and the fees laid down in the Schedule for appeales to District and Land Courts is LP. 2.—.

It is clear to us, therefore, that a fee of LP. 2.— was payable in respect of the appeal to the Land Court. As for the period within which the fees should be paid we agree that there was no period set out within which the fees should be paid. They must though, at the latest, be paid before the appeal is heard, at any rate before the appeal

should be heard, and possibly at the time the appeal itself is lodged. It is immaterial in this case to decide which of these two theories is the correct one, since the correct fee has in any case not been paid up till now.

We now come to the point that the prescribed fee not having been paid in time, was the Land Court correct, therefore, in dismissing the appeal? There are a large number of cases on this point and until recently it was always decided that if the proper fees had not been paid the case could not be heard. The first reported case is Sheikh Abdel Qader el-Muzaffar v. Abdel Hamid Dirhalli — Civil Appeal 15/30 P.L.R. 1, p. 625. This was a case in which the last day for entering the appeal and paying the fees was a Friday. In Jaffa on Fridays the offices and the Cash Registres of the District Court were closed. A clerk who was not authorised to receive money took the money for the fees and paid them over to the Chief Clerk or Cashier on a subsequent date. It was held that the fees had not been paid in time, and therefore the appeal was not made within time. That case refers to another appeal which it adopts, namely, Ibrahim Hakki El-Taji v. Ali El Nakib — Civil Appeal 254/23. The next case is Elazar Kantarowitz and others v. Shalom Yohanan Mizrahi — Civil Appeal No. 141/35. Following Muzaffar v. Dirhalli this Court held that the correct fees not having been paid within the prescribed time the appeal must be dismissed. Again in Fatmeh Bint Ahmad Mustafa el Hilou and others v. Jacob Haski — Civil Appeal 113/38 — this Court following Civil Appeal No. 141/35 again held that where the correct fees have not been paid within the prescribed period the appeal must be dismissed.

We now come to Akel v. Abu Alayan — Civil Appeal 20/38 *) where the learned Chief Juctice in a minority Judgment said that he did not think that because fees had not been collected the Court had no jurisdiction. The other learned judges composing the Court did not deal with the point. In that case however the original action had been struck out and the learned President in ordering it to be re-instated ordered that it should be restored without payment of fees. This he had no power to do since only a Court can give this order. We think this case is distinguishable therefore from the other cases to which we have referred in this judgment on the ground that it would be inequitable to penelise a party who had acted upon the order of a President in good faith, when in fact the President was wrong in his application of the law.

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*) 3 CtLR 289.

Finally we come to Abdul Rahman Ramadan and another v. Jabbour Hanna el Katteh and Bros. — Civil Appeal 155/38 *). In that case this Court, which incidentally included my brother Abdul Hadi and myself, followed the judgment of the Cheief Justice in Civil Appeal 20/38 —Zahra Yehia Akel v. Khlil Ibrahim Abu Alayan and held that non payment of fees did not deprive the Court of its jurisdiction. This case however resembles Civil Appeal 20/38 inasmuch as the case had originally been struck out and fees were not paid when the action was renewed, and the same consideration should apply, and the point also was not necessary for the decision of the appeal which was dismissed on other grounds.

We think therefore that, following this long series of decisions dating back to the year 1923, under the law applicable when this appeal was before the Land Court of Jaffa, that the Land Court was correct in dismissing the appeal for the grounds given by it, namely that proper fees had not been paid.

For these reasons we think that this appeal must be dismissed with costs to the first Respondent, to include LP. 15.— fees for attending the hearing.

Delivered this 16th day of May, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 37/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the Appeal of :

1. The partnership of Mahmoud and Darwish el Daoudi.
2. Darwish el Daoudi.
3. The beirs of Sheikh Mahmoud el Daoudi ; his widow Hikmat daughter of Haj Abdul Muhsin el Daoudi and his children Abdin, Hussein, Ali Suleiman,

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*) 4 CtLR 107.

Fatmeh and Adeeleh represented by their guardian the said Darwish el Daoudi. Appellants.

v.

Messrs. E. R. and F. Turner Limited. Respondent.

Appeal from interlocutory order of District Court — Refusal of application for issue of a commission to take evidence of a very material witness living outside Palestine — Application for a commission to issue made not within reasonable time.

1. In considering whether examination of a witness be taken by commission regard to be had to possibility of his not being a credible witness, when extremely important that Court should see and hear him and other party given fullest opportunity of cross-examining him.

2. If trial Court from evidence already heard finds in interests of justice that examination and cross-examination of witness outside Palestine should take place before it, Court of Appeal will, as a rule, not interfere.

3. If application to hear a witness outside Palestine by commission not made within reasonable time after settling of issues, Court right in refusing it.

Cattan for Appellants.
Levin for Respondent.

Appeal from interlocutory order of District Court, Jerusalem dated 31.3.39.

JUDGMENT.

This is an interlocutory appeal from an interlocutory order of the District Court of Jerusalem, dated the 31st March, 1939, by which the District court refused the application by the present appellants, who were defendants before that Court, for the issue of a commission to take the evidence of one Leon Israel in Egypt. It is not disputed, in fact it is admitted by both parties and found by the District Court, that this person is a very material witness. He was at one time the representative of the respondent firm in Egypt, and acted on their behalf in Palestine; at any rate, the present action in the District Court arises partly out of his activities in Palestine. His evidence is sought by the present appellants, and both sides say that they would prefer that his evidence should be given before the Court in this country, but the appellant say that if they cannot get him here they would like his evidence taken on commission in Egypt, whereas the respondents insist that his evidence, if it is to be heard at all, should be heard

in Court here. The District Court made this finding and I read first part of its judgment :—

> "Taking into consideration the part that Leon Israel has played in this case as revealed by the evidence already heard before us, we are satisfied that it is in the interest of justice that he should be given an opportunity of cross-examining this witness in Court. We do not consider therefore that permission should be granted for hearing the evidence of Leon Israel on Commission."

The District Court than goes on to quote authority, and says further that it is not satisfied that this witness is unable to come to this country in view of the fact that he was willing earlier in the proceedings to come, and has disclosed no valid reason why he cannot do so now. Every case of this nature, in the words of Cotton L.J. in Lawson v. Vacuum Brake Co. (1884), 27 Chancery Division, on page 143, depends on the circumstances of each individual case. There is a great difference between a plaintiff and a mere witness to be examined abroad, but it is admitted that this witness's evidence is very material, and we think that the words again of Cotton L. J. in Berdan v. Greenwood, reported in the footnote in re Boyse (1881-2), 20 Chancery Division, on page 766, are material and should guide us in deciding this case. Cotton L. J. Said :—

> "I am very unwilling to express any opinion upon the question which has been so much argued, the credibility of General Berdan, but, in considering whether the examination of a witness should be taken by commission, we must have regard, at any rate, to the possibility of his not being a credible witness. If the witness is a credible witness it is hardly material whether he gives his evidence viva voce in Court or before a commission, or by affidavit, or in any other form. But we must assume the possibility of his not being a credible witness, and then it becomes of the most extreme importance that the jury, or the Court which has to decide the question, should have the opportunity of seeing the demeanour of the witness, and observing the way in which the various questions which are put to him in cross-examination are answered."

The District Court have held that, in view of the evidence already heard in the case as to the part played by this witness, it was in the interests of justice that the examining of this witness and cross examination should take place before the Court. Though we are of course in a position to take a different view, yet we should be reluctant to do so in view of the finding made by the District Court. After all it is the District Court which has to try this case, it is the District Court which has to value the evidence given before it, and taking into consideration that it is not merely what the defendents' case requires

but what justice to the plaintiff as well as the defendants requires, it seems to us that it is eminently important that the demeanour of the witness should be seen and his precise answers to the questions put to him should be heard by the Court which has to decide the case, and that the respondents in this appeal should have the fullest opportunity of cross-examining him, they being really only able to do this effectually, when the witness is in Court.

Further we are not satisfied that the appellants have shown that this witness cannot be reasonably expected to come here. From the letters read to us, he was apparently quite willing to come here in December 1938, and his reasons given for not coming now are not convincing.

For these reasons we think that the District Court was right in refusing the application for the commission to issue. Further points have been taken that the application for the issue of the commission was made too late and not within a reasonable time. The issues were settled in June, 1938, the application for a commission to issue was not actually made in terms until February, 1939. There had been a certain amount of discussion that the evidence of this witness was essential but there is nothing in the record which shows that an application was made for a commission to issue until, as I have said, in February 1939.

On this ground also we think that the District Court was right in refusing the application to issue the commission. The appeal must therefore be dismissed and the respondents will have the costs of the appeal, to include hearing fees, fixed at a total sum of L.P. 15.—

We note that in the last paragraph of its judgment, the District Court as an indulgence granted the present appellants an adjourment of about three weeks in order to secure the attendance of this witness. We have no doubt that the District Court will equally be prepared to fix this case on a date which will give the appellants the oppotunity of making a further attempt to secure the attendance of this witness in Jerusalem, and we suggest that perhaps three weeks' notice should be given, as was previously done.

Delivered this 15th day of May, 1939.

British Puisne Judge.

CRIMINAL APPEAL NO. 15/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— The Chief Justice (Trusted, C. J.), Copland, J. and Frumkin, J.

In the Appeal of :

Attorney General. — Appelant.

v.

1. Nicolai K. Ivanoff.
2. Michael Elagin. — Respondents.

Breaking and entering a shop — Conditional discharge upon entering a bond to be of good behaviour — Appeal by Attorney General against lenient sentence.

Court of Appeal, while finding that accused was treated leniently by trial Court, may on other hand hold that no good reason given why sentence should be increased.

Hogan (*Crown—Counsel*) for Appellant.
Respondent 1 in person.

Appeal from the judgment of the District Court, Jerusalem, dated 16.3.39, whereby Respondents were convicted of breaking and entering a shop contrary to Sec. 297 of the Criminal Code Ordinance, 1936 and were discharged conditionally upon entering into a bond in LP. 15 to be of good behaviour for two years.

JUDGMENT.

From the circumstances of this case it may appear that this accused was treated leniently by the Court below. On the other hand there is no good reason given why the sentence should be increased. The accused may be fortunate in receiving a light sentence, but it does not follow that if other persons are convicted of this crime they will not receive a heavior sentence.

The appeal as far as the present accused is concerned is dismissed.

Delivered this 20th day of April, 1939.

British Puisne Judge.

HIGH COURT NO. 13/39

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

Before :— Copland, J. and Khayat, J.
In the Application of : —
1. Sami Bey Kabany.
2. Fauzy Bey Kabbany.
3. Khairy bey Kabbany.
4. Shafik Bey Kabbany.
5. Suleiman Bey Kabbany
6. Khairiyan Abdul Ghani Kabbany — Petitioners.

v.

1. The Chief Execution officer, Jaffa.
2. Nasri Eff. Nasser.
3. Fatmeh El Kabbany. — Respondents.

Sale by Execution Office of judgment debtor's share in land — Claim of ownership by third person by reason of adverse possession of the land — Delay of third person living outside Palestine but having a representative here in applying to Land or High Court — Possession by co-heirs or co-owners — Who to go to Court — Land Law (Amendment) Ordinance, 1939, *sec.* 2(1).

1. If person alleging that his interests are affected by an order of sale of Chief Execution Officer is negligent in exercising his rights, his application for stay of sale will be refused.

2. Absence from Palestine — not sufficient explanation for great delay in application for cancellation of attachment of land, if authorised representative was in Palestine and present at proceedings of taking possession by Execution Officer.

3. Occupation of land by co-heir or co-owner raises presumption that he holds the land on behalf or as agent of other co-heir or co-owner.

4. B having both registered title and (constructive) possession cannot be compelled to bring an action for ownership against A whose claim based only on alleged adverse possession. Chief Execution Officer right in ordering A to go to Court to prove his claim.

Cattan for Petitioners.
Goitein for Respondent 2.

Application for order to be issued to the First Respondent directing him to show cause why the sale proceedings in Jaffa Execution File No. 6776/36 should not be stayed and the attachment in respect of the said land be released.

ORDER.

This case at first sight seems to be a complicated one, but when once the essential facts are seen in their true perspective, then it becomes quite simple.

The shares in certain lands in Wadi Kabbani belonging to the 3rd respondent were put up for sale in satisfaction of a judgment debt due to the 2nd respondent. The petitioners are opposing the sale alleging that they are the owners of the land by reason of adverse possession as against the 3rd respondent for a period exceeding the period of prescription.

The Chief Execution Officer after hearing arguments, on the 25th October, 1938, held that there was a dispute as to ownership, and gave the petitioners a delay of fifteen days, subsequently extended, in order to obtain an order from the Court for suspension of the sale proceedings. The present petition to this Court was filed on the 16th March, 1939.

The first ground advanced here by the second respondent is that there has been undue delay on the part of the petitioners in exercising their alleged rights. Judgment was given on the 26th March, 1936, and on the 4th April, 1936, attachment of the shares of the third respondent was applied for. On 19th June, the Execution Officer took possession of the property, the first petitioner, who holds a power of attorney from the other petitioners, being present. On the 2nd November, 1937, the Registrar ordered sale of the property and it was not until the 28th September, 1938, that the petitioners applied to the Chief Execution Officer to cancel that order. It is clear from these dates that there has been great delay on the part of the petitioners. They knew, since their representative was present, on the 19th June, 1937, that the shares of the debtor in this land were attached by the Execution Officer. They never then made any attempt to have that attachment cancelled. Their explanation is that they were living in Syria, and that communications with Palestine were difficult, but their authorised representative was in Palestine in June, 1937, and it would have been possibly and easy then to have applied for cancellation of the attachment. And even in October, 1938 when their belated application was heard, they would seem to have been extraordinary negligent

in complying with the conditions laid down in the order. The advocate, who appeared for them then, should have been properly instructed, and it is difficult to see any reasonable grounds for the delay in complying with the order, especially after the extension of six weeks which was subsequently granted.

But, on the other hand, the judgment creditor, the second respondent, has also been guilty of delay in following up the execution, particularly after the provisional order for sale was given.

On balance there can, we think, be no doubt that the petitioners were considerably the more negligent, and since that negligence has prejudiced the second respondent, we should on this ground alone be justified in refusing the application.

But we do not decide the case on this ground alone.

The second respondent bases his further arguments on Section 2(1) of the Land Law (Amendment), Ordinance 1933, Cap. 78. The effect of this sub-section is that occupation of land by co-heirs to the exclusion of other co-heirs raises a presumption to the effect that the occupant holds the Land on behalf or as agent of the other co-heir or co-heirs not in occupation, but that such presumption may be rebutted.

The land in this case is Masha'a and certain shares are registered in the names of the petitioners and of the 3rd respondent, by inheritance from a common ancestor. The parties were therefore both co-heirs and co-owners.

The effect of Section 2(1) of the Land Law (Amendment) Ordinance is that any possession by the petitioners raises the presumption of constructive possession by the third respondent. The third respondent therefore had not only the registered title, but was also presumed to be in possession, and it seems to us that it would be contrary to all reason and principle to compel a person who had both the registered title and possession to bring an action for ownership against a person whose claim is based only on alleged adverse possession. In such circumstances we do not think that the principles laid down in Taha Salem Othman v. Chief Execution Officer and others — H.C. 91/36, can apply, since both parties are in possession and not merely one of them — the basis of that decision, and of the earlier ones of the same nature, is that the person not in possession is the one to bring the action, and is therefore clearly not applicable here.

In addition, there have been produced to us certified copies of leases in which one or other of the petitioners are stated to be lessees and the lessor was the third respondent. There is also a copy of a judgment of a Magistrate's Court, confirming the validity of one of the leases.

The only point for us to determine is whether the learned Chief Execution Officer was right in directing the petitioners to go to Court to prove their claim. We are satisfied that he was right and the rule nisi must therefore be discharged. The petitioners will pay the costs of the second respondent to include LP. 10.— for attending the hearing.

Delivered this 28th day of April 1939.

British Puisne Judge.

HIGH COURT NO. 27/39.
28/39.

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

Before:—Copland, J. and Greene, J.

In the applications of:—

1. E. Karwassarsky, as Curator of the estate of Musafa Sakijha, interdicted person — Petitioner.

v.

David Moyal — Respondent.

2. E. Karwassarsky as Curator of the estate of Sheikh Tewfik Dajani, interdicted person — Petitioner.

v.

David Moyal — Respondent.

Application for change of place of trial on account of danger in original place — Conditions not justifying change of venue.

High Court will only grant change of place of trial, if satisfied that there would be real danger for petitioner to appear in original place.

Edit. Note:—See H.C. 48/38 4 CtLR 55.

Linderman for Petitioner.

Ex parte.

Application for an order nisi to issue to Respondent to show cause why the Petitioner's application for a change of venue should not be granted for the trial in Tel-Aviv instead of Jaffa of two Civil Cases (CCDC Ja 110/37 and 59/35).

JUDGMENT.

In these two cases application has been made for an order nisi to issue to the Respondent to show cause why Petitioner's application for a change of venue should not be granted for the trial of two civil cases in Tel-Aviv instead of in Jaffa.

The Petitioners and the Respondents are the same in both applications and in each case the application is made on grounds of security, that is, that it is not safe for Jewish advocates to appear in the District Court sitting at Jaffa. In both these civil cases there seems to have been a certain amount of uncertainty as to the place of trial in as much as the cases were first listed for trial in Jaffa, were then transferred to be tried in Tel-Aviv, and later again at the instance of the Respondent were re-transferred back for trial to Jaffa. It would be as well if orders for transfer, when given, should in normal circumstances be adhered to, as it is rather confusing when cases are first transferred to another place for trial and then transferred back again to the original place. This shows a certain amount of indecision which is to be regretted.

To take these present applications, the petitioner has strongly urged the conditions in Jaffa are such that it is not safe for him to appear, and to appear personally he must, and that he would not feel at ease in what he describes as a hostile atmosphere, though he modified his statement by saying that it does not refer to the Court but to the surroundings.

In the Marine Trust Ltd. v. Cohen and others H.C. 48/38 *) which came before this Court in July last year, we granted a similar application on the ground that in July last year conditions in Jaffa were very bad indeed, and the case involved the attendance of not only Jewish parties, but a considerable number of Jewish witnesses. Each case of course of this nature must be decided on its own merits. At the present moment it is a matter of common knowledge that conditions in Jaffa are vastly improved compared with what they were a year ago. Further the Court house in which the District Cout sits has been transferred from what was doubtless a dangerous neighbourhood to a new position in King George Avenue within fifty metres of Police Headquarters, and the Court house itself is under military guard both day and night.

Cases in which we would grant a change of a place of trial should not be encouraged and we would only grant it provided we are satisfied that there would be real danger in asking the petitioner to appear

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*) 4 CtLR 55.

in the original place. We are not satisfied that there would be that danger here now. The President of the District Court, Judge Cressall, gave as his reasons for refusing to transfer cases back again for trial to Ted-Aviv, that Judge Edwards would be going away on leave shortly, and whilst he appreciated the Petitioner's reluctance to come to Jaffa yet he could always apply for Police escort if he considered it unsafe to come without one. We are sure that if conditions of security should detoriate, which we do not anticipate, the President will deal sympathetically with any other application which may be made to him.

In the present case, as I have said, we do not think it is a proper case in which to grant the applications and they must both be refused.

The petitioner will at any rate be fortified by the knowledge that in encountering the dangers and perils which he anticipates that he will meet, these dangers and perils will be shared in the same degree by his friend Mr. David Moyal. That will, I am sure, prove to be a great consolation to him.

Delivered this 16th day of May, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 26/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—Copland, J., Khayat, J. and Abdul Hadi, J.
In the appeal of:—

Levi Ben Yoav Gul Babayoff — Appellant.

v.

Oholiav Gul Shauloff — Respondent.

Document of sale of immovable property executed in 1907 — Point taken by Court in its judgment of its own motion — Recital of fact in a document in favour of person executing it.

1. Where point which was not among settled issues and never raised by any party was taken by Court of its own motion

in its judgment, Court of Appeal will not interfere if it does not think that any injustice has been done to appellant by this.

2. Mention of a certain fact in a document in favour of party who executed it cannot prove such fact, even if document produced in evidence by opponent.

Levitzky and *Levanon* for Appellant.
Geichman for Respondent.

Appeal from judgment of Land Court, Jerusalem, dated 10.2. 1939.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Jerusalem in which they ordered the registration, in favour of the Appellant, of a share of the property in dispute, such share to be calculated according to a certificate of succession of the Appellant's father, and rejected his claim to the remaining part of the land.

The property was bought many years ago by the father of the Appellant. Since the latter was not a Turkish subject he could not get registration of this property in his own name, and he therefore caused it to be registered in the name of the Respondent's father, in order to avoid this difficulty.

In the year 1907 the father of the Respondent executed the document, which has been referred to in these proceedings as Exhibit P. 2, by which he purported to transfer the property to the present Appellant. As Mr. Levitzky, for the Appellant, remarks, it is a very detailed document. It purports to be a document of sale of the property, in return for the sum of 320 French napoleons, and, at the time the document was executed, the present Appellant made a declaration in which he says that the father of the Respondent bought the property for his, the Appellant's father, and taking the wording of this document which has been put in by the Appellant, the property is said to have been bought for the Appellant's father, and that with the consent or permission of the Appellant's father they gave a deed before the Rabbinical Court. He also goes on to say —

> "and whenever I shall desire to separate from my father and brothers, this deed of Beth-Din mentioned above, shall be null and void, and it shall be deemed as before when I had no such deed."

There were somewhat lengthy proceedings in the Land Court and certain issues were framed, but, needless to say, the real point of dis-

pute was not amongst those issues, and it was not until the termination of the proceedings that this was realised.

The one and only point in this case is this — on these documents did Exhibit P. 2 operate as a transfer of the whole interest in this property to the Appellant or not? Mr. Levitzky, for the Appellant, has argued as the first ground of appeal, that it was wrong for the Land Court to have taken the point, of its own motion, that the consent of the Appellant's father was necessary in order to validate the transfer. We do not think, however, that any injustice has been done by this, and as I have said, it is the one and only point in this case, the answer to which is decisive in the case.

The second point is, that there was sufficient evidence as to the consent to the transfer by the Appellant's father. That consent is said to be shown by Exhibit L.B. 1, by the evidence of the original plaintiff and defendant in the Land Court, and by the fact that the other heirs of the Appellant's father are not claiming the property. Now neither Exhibit P. 2, nor Exhibit L.B. 1, have been signed by the Appellant's father. Exhibit L.B. 1, on which reliance is placed, is executed by the plaintiff himself, and cannot in our opinion prove the consent of his father. In addition, the document itself nullifies the idea of the sale which is said to have been effected by Exhibit P. 2, because of the final words, in which it says that if the Appellant should leave his father and brothers the sale would be null and void, showing quite clearly that the sale, purported to be effected by Exhibit P. 2, was a fictitious one. The fact that the other heirs are not claiming the property in these present proceedings proves nothing. They may well have thought they would leave it to the present Appellant to prove it or not on their behalf, and that it was not for them to waste their own money in the matter.

The evidence of the Appellant carries the case no further, and there is evidence that, during the ten or twelve years until his death, the Plaintiff's father remained in occupation of the premises now in dispute; and there is again Exhibit L.B. II(a), a letter written some twenty-seven years after Evhibit L.B. 1, in which the present Appellant refers to the property as the property of his father.

For all these reasons we think the judgment of the Land Court is a correct one, and the appeal fails, and must be dismissed with costs to include LP. 15, fee for attending the hearing.

Delivered this 26th day of April, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 21/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— The Chief Justice (Trusted, C. J.) and Frumkin, J.
In the Appeal of :

1. Isgouhi Aghadjanian
2. Cirpouhi Aghadjanian
3. Haroutune Aghadjanian — Appellants.

v.

1. May Annie Paul Merguerian
2. Miss May Pauline Merguerian — Respondents.

Opposition to application for an order declaring succession — Foreign birth certificates — Evidence of witness called by Court — Statment of deceased person in a question of pedigree — Application to take evidence of witness on commission — Court's discretion to adjourn case — Succession Ordinance — Succession Rules, Rule 23 *— Civil Procedure Rules, Rule* 183.

1. Withdrawal of opposition or rejection by Court of objector's allegations does not relieve petitioner in a succession matter from obligation to prove his case.

2. Judgment cannot be entered in favour of opposer to a petition for an order declaring succession, if he has never properly constituted himself petitioner.

3. Foreign registers of births and marriages or certified extracts from them — receivable in evidence, if they have been kept under sanction of public authority, and are recognised by the tribunals of the country as authentic records.

4. To raise presumption that child is lawful issue of marriage between A and B until contrary proved, first necessary to show that B is the mother of the child.

5. A birth certificate even if properly proved cannot be sufficient prima facie evidence that child is child of wife, if it does not give latter's name.

6. Declarations of deceased relatives as to pedigree — admisible in evidence if made ante litem motam (befor disputes as regards the property had arisen).

7. Court dispensing with mazbata of mukhtar as required by Rule 23(1) of Succession Rules should make a record of it.

8. Where Court of Appeal, while finding that trial Court was justified in dismissing opposition to petition for order declaring succession, remits case for further consideration or for hearing

further evidence which petitioner may call, opposer may continue his opposition if he wishes. —

9. Court has discretion to adjourn case in order that further evidence may be obtained, but in considering such application Court entitled to take into consideration the time when it is made.

10. Court may agree or refuse to hear evidence on commission according to whether application made with due diligence or under delay.

11. Court may call a witness, if it finds that interests of justice are thereby served, but if witness's answers to questions of Court are adverse to either party, Court should allow that party to cross-examine the witness upon his answers, not a general fishing cross-examination.

12. Where witness having an official capacity was called by Court and gave evidence in a matter connected with his office, such part of his evidence as refers to facts which came to his knowledge outside that capacity — inadmissible, if objected to by either party.

Shershewsky and Amdur for Appellants.
Gavison for Respondents.

Appeal from the judgment of the District Court, Jerusalem, dated 7th February, 1939.

JUDGMENT.

This is an appeal from an order from the District Court made under the Succession Ordinance whereby succession was granted to Mrs. Annie Paul Merguerian, as the Widow, and Miss May Pauline Merguerian, as the daughter, of Lazarus Paul Merguerian, deceased.

The petition stated that the deceased died on 8th August, 1938, that he left him surviving his widow and daughter, and that he was a Palestinian and a member of the Armenian Community.

This was supported by the affidavit by the dauther, which also set out that the deceased was intestate, and by affidavit of Mr. Horowitz, who said that he had known the deceased personally and professionally for fifteen years, and that he understood that he had a wife and one child, the daughter — May Pauline, and that he believed the deceased to have died intestate.

The matter came before the Court, and objection was raised by other members of the family on the ground that Annie Paul is not the widow of the deceased, and that May Pauline is not the daughter of the deceased and Annie Paul, this latter allegation being based on the opinion of certain members of the family, and the fact that the

parties had been married for twenty-five years before the date when the child is alleged to have been born, and that at that time Annie Paul was forty-three years old. The issue was complicated by the daughter having been in India, in which country the deceased had employment.

The objection to the widow's application was withdrawn, and as to the objection to the daughter's claim the Court held —

> "that there is no evidence to support the opposition put forward by the opposers which is based merely upon most unfounded and unpleasant insinuations which do not even spare the reputation of their near relative and are brought in the hope of disinheriting, to their own advantage, the widow and daughter of the late Lazarus Paul Merguerian."

Rule 23 of the Succession Rules provides as follows :—

> "(1) The petitioner shall be required to prove the facts stated in the petition, or such other facts as the court shall direct, by the evidence upon oath of the petitioner and witnesses cognizant of the facts and by a mazbata of the mukhtar of the place in which the deceased had his last usual residence in Palestine, but the court may, by its order, dispense with the evidence of the petitioner and the production of the mazbata from the mukhtar."
>
> "(2) If the court be not satisfied as to the truth of any fact or facts required to be proved, the proceedings may be adjourned until sufficient proof be given."

There is clearly a primary obligation upon a petitioner to prove his case, and the fact that an opposition is made and subsequently withdrawn, or that the Court does not accept the substantive allegations of an objector, does not relieve him of that obligation.

The notice of appeal concludes with the following prayer :

> "It is humbly prayed that this appeal be allowed, the judgment appealed from be set aside, the petition of second Respondent be dismissed, and judgment be entered in favour of the Appellants."

There is no appeal against the orded in favour of the widow, and we are not therefore concerned with it, and it is clear that judgment cannot be entered in the Appellants' favour, as they have never properly constituted themselves petitioners.

We have to consider, therefore, if the daughter, May Pauline, was entitled to succeed.

The case turns upon the application of a number of points of evidence and, subject to the qualification to which I will later refer, English principles must be applied.

She herself gave evidence stating that she was the daughter of the deceased, and she produced a birth certificate obtained in India, and another birth certificate from the Armenian Patriarchate, and a marriage certificate of Lazarus Paul and may Annie Paul.

Generally speaking certificates of this kind, made by public officers, are prima facie evidence of the facts which they record, on the ground that, where the law has entrusted a person to act for a specific purpose, it will trust him to act under his authority, and the extent of the extension of that principle to foreign records is set out by Lord Selborne in Lyel and Kennedy, 14 Appeal Cases, at pages 448-9, as follows :

> "Foreign registers of baptism and marriages, or certified extracts from them, are receivable in evidence in the Courts of this country, as to those matters which are properly and regularly recorded in them, when it sufficiently appears (in the words of Mr. Habback's learned work on Evidence) that they 'have ben kept under the sanction of public authority, and are recognised by the tribunals of the country' (i. e. of the country where they are kept) 'as authentic records'."

In England there are statutory provisions regulating the production of Indian records (see Westmacott v. Westmacott, 1899 P., p. 183), but no authority has been cited for the proposition that they extend to this Territory.

There is no evidence that the Indian marriage certificate or the Indian birth certificate produced comply with the requirements which I have stated.

In the course of the hearing the District Court held —

> "There is a marriage certificate which is not disputed and further the parties were living together at the time, and the presumption therefore is that the child referred to in the Indian Birth Certificate produced is the lawful child of the said marriage until the contrary is proved."

To raise this presumption it is necesary to show that the child is the child of the wife, and even if a birth certificate properly proved is sufficient prima facie evidence of that fact, it could only be so if it gave the mother's name, and the Indian certificate produced does not do so.

The certificate given by the Patriarchate stated that —

> "Miss May Pauline Lazarus Paul Merguerian, daughter of Lazarus Paul Merguerian and of his lawful wife, May Anna Mergurian, was born in Bangalore (India) on 14th July, 1909."

Mr. Garabed Nurian, an official of the Patriarchate, stated that this was given on the strength of a document supplied by Lazarus Paul, dated January 13, 1910, signed by an Armenian priest in India, as follows :—

> "Bombay, January 13th, 1910.
>
> To Mrs. May annie Lazarus Paul Merguerian was born a daughter in Bengalore, India, on the 14th of July, 1909, who was baptised in Bombay by me. Father Thateos Alexandrian, in the Church of St. Peter, on the 13th of January, 1910, and was named MAY PAULINE.
>
> I have written this according to the sacred law of Baptism."

It will be observed that this does not contain the father's name. I do not think that the certificate given by the Patriarchate carries the matter any furher.

The Appellants objected to the calling of Mr. Nurian, and I will deal with that objection later.

The petitioner also called Mr. Horowitz, who said that the deceased often spoke of her (the Petitioner) as his daughter, and that he approved of a draft deed in which she was described as the daughter of the settlors (i. e. Lazarus Paul Merguerian and his wife May Annie Paul Merguerian) but the deed was never produced. Mr. Nurian also said that the deceased habitually referred to the Petitioner as his daughter.

This evidence was presumably tendered under the rule that where a question of pedigree is in issue a statement of a deceased relative is admissible in evidence.

It is clear that declarations by deceased persons as to pedigree may be exceptions to the hearsay rule. The law is to be found in a series of old cases.

It is referred to by Mansfield, C. J., in the famous Berkeley Peerage case, and in the note on the learned Chief Justice's Judgment in Thayer on Evidence, an American text book, at page 374, it is stated —

> "Compare Lord Chancellor Erskine's statement in Vowles v. Young, 13 Ves. 140, 147 (1806): "The Law resorts to hearsay of relations upon the principle of interest in the person, from whom the descent is to be made out..." Also Lord Chancellor Eldon's statement in Whitelocke v. Baker, id. 511, 514 (1870) : "It was not the opinion of Lord Mansfield, or of any Judge, that tradition, generally, is evidence even of pedigree : the tradition, must be from persons, having such a connection with the party, to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken. The whole goes upon that: declarations in the family, descriptions in Wills, descriptions upon monuments, descriptions in Bibles, and Registry Books, all are admitted upon the principle that they are the natural effusions of a party, who must know the truth ; and who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth."

Channell, B., delivering judgment in Plant v. Taylor, in the Court of Exchequer, 5 L. T. R. (1861) 318 at 320, said —

> "The Defendant was called as a witness to prove declarations by his father with respect to his first marriage. Before a declaration can be admitted in evidence the relationship of the declarant de jure by blood or marriage must be established by some proof independent of the declaration itself. See the cases

> cited in Taylor on Evidence, vol. 1, p. 526, note 4. Slight evidence, no doubt, would be sufficient; there was no proof of any relationship de jure between the declarant and the defendant. The proof was the contrary. Perhaps the learned judge was right in rejecting the evidence, on the ground that any declaration made by Thomas Taylor, the father, on the subject, although not made post litem motam, or after disputes as regards the property had arisen, would be a declaration by a person whose mind could not be free from bias."

In Dyke v. Williams, 6 L. T. R. (1862) 726, the question was considered in a bastardy issue, and the head note to that case reads —

> "In such a case evidence of declarations made by a deceased person, other than the deceased in the cause, is inadmissible, unless the relationship is proved aliunde; but evidence of declarations made by the deceased in the cause is admissible."

In Rex v. St. Marylebon (Inhabitants) (1863) 27 J. S. 423, it was held that a statement by a father that he had never married affected the position of his daughter, on the ground, that it was a case of pedigree about the father's family, and the father was a member of his own family.

The principle is referred to in Crispin v. Dogliony, 8 L. T. R. (1863), 91, and was considered at length by Sir Wilde in Smith v. Tebbitt, 1 L. R. P. and D. (1867), 354 (also reported with a slight variation in 15 L. T. R. 594). The question involved was the relationship between the Defendant and a deceased lady to whom the Defendant claimed to be a lawful sister. The deceased lady had executed a deed and had therein described the Defendant as "her sister". The learned judge stated —

> "Now, one of the rules of evidence that govern courts of law — and it is very familiar as a rule of evidence in pedigree cases — is, that the statement of a deceased relative of the family is evidence of pedigree. That rule is subject to some conditions. The first condition is, that the statement must have been made ante litem motam. Another condition is, that the person making the statement must be a person who is dead; but a prior, condition to both of these is, that it should be proved, and by some source of evidence independent of the statement itself, that the person making the statement was related to the family about which she spoke. It seems to me that all these conditions are satisfied in the statement made by Mrs. Thwaytes in that deed; for, to begin with the first, of course she must have been a member of her own family. She is the person to whom relationship is to be proved and every person must be a member of their own family, and therefore there was no objection to be made on that head. It was made ante litem motam. There is no question, thirdly, but that she is dead, and therefore it is the statement of a deceased person. It seems to me, therefore,

> that there is in that deed a piece of evidence which is perfectly legitimate for the proving of the defendant to be the sister of the deceased person. And I may go further at once, and say, that it is not only legitimate evidence for the purpose, but that it entirely satisfies me of the fact.
>
> "But then it is suggested, she may have been the illegitimate sister, and that the sister says nothing in the deed about legitimacy. That is quite true; but I think that is a fault or vice in the statement, which would probably apply to almost all the statements that have been admitted at all times under this head of evidence, because when people speak of a man or woman as their brother or sister, son or daughter, unless they say something to the contrary, I think the meaning is the legitimate son or daughter, brother or sister, and therefore I think that objection fails."

The principle was again referred to in Hitchins v. Eardley, 25 L. T. R. (1871) 163, and Rex v. Perton, 53 L. T. R. (1886) 707, but I have been unable to find any more modern authority.

The result of these authorities seems to me to be that a declaration made ante litem motam by a deceased father may be used as evidence that the individual referred to is his lawful daughter. The weight of the evidence is for the Court to determine.

Dealing with Mr. Horowitz's evidence the Court said "disregarding... and the evidence of Mr. Horowitz with the settlement produced by him." I agree that evidence could not be given as to the contents of the deed, but it is not clear if the Court considered his evidence as referring to a declaration by the deceased in the light of the authorities I have cited. In this connection Mrs. Nazouhi Merguerian, a witness for the opposers who gave evidence on commission, stated — "Lazarus Paul said this is our daughter", and the Court, in dealing with the evidence, expressed no view as to this.

There is a further matter in connection with the Petitioner's case to which I should refer. The witness, Anna Merguerian, called by the opposers, said —

> "I went with my uncle L. Paul. We went straight to India. I did only stay there a few months, 3 or 4. I returned to my old mother. I remained away 4 to 5 months. I know that L. Paul and Mrs. had a child, a girl, she is alive, Pauline, born in India Bangalore in the hospital. I was at the time in India, but I did not go to the hospital. I returned 1st from India."

This, if believed, seems to me to help the Petitioner's case, but the Petitioner herself, in cross-examination, said —

> "I know Anna Merguerian, she lives with me. She has lived in India. I came to Palestine when a year old, I believe. I have not been back to India. I came with my mother and father then.

> Anna was in Palestine. She had not been living with L. Paul in India before my birth. She came to Palestine over a year before I was born, I believe."

and in re-examination she said —

> "Anna left Bengalore about a year before I was born."

She clearly could not know this of her own knowledge, and one would have expected her to say so.

The District Court, in its jugment, referred to Anna's evidence, but expressed no view about it. In the circumstances I do not feel that I can weigh its worth.

I would point out that there is no record that the court formally dispensed with the production of a mazbata of the mukhtar as required by the rule.

For these reasons I cannot be satisfied as to the grounds on which the Court found in favour of the daughter's claim, and I think the case should go back to the District Court to enable it to consider the evidence further in the light of this judgment. I think that having regard to Rule 23(2) of the Succession Rules, she should be allowed to call further evidence if she wishes to do so.

As to the Appellant's opposition, as the case stands at present no medical evidence was tendered, the evidence which was given was in some instances conflicting, and some of the statements recorded were not evidence in that they did not comply with the requirements of declarations as to pedigree to which I have referred. In my judgment the District Court was justified in dismissing it, but if the case is further considered the opposers may continue their opposition if they wish.

Two matters were argued before us to which I should refer. In the course of the opposers' case it seems that an application was made by them to have the widow's evidence taken on commission, and that this was refused, and that this refusal is now a ground of appeal.

A court of trial has a discretion to adjourn a case in order that further evidence may be obtained (see Civil procedure Rule 183) but in considering such an application it is entitled to take into consideration the time when it is made, cf. Stewart v. Gladstone, 7 Ch. D., 394.

In the present case, having regard to the Succession Rules, the opposers may have been justified in anticipating that the widow would give evidence, but on the first occasion on which the matter was before the Court, i. e. 25.11.38, they could have enquired. The application to take the widow's evidence was not made until two months later. I do not think therefore that we should interfere with the exercise of the Court's discretion.

Objection was taken by the opposers to the evidence of Mr. Nurian

on the ground that he was called by the Court, and reliance is placed upon the case of Enoch and Zaretzky, Bock & Co., 1910, 1 K.B.D., 327. Strictly speaking that case is only an authority respecting the conduct of arbitrators, but the learned Lords Justices discuss the intriguing question as to how far a judge, in the interests of justice may call a witness. Whatever the common Law of England may be, it is clear that it can be applied here, subject to such qualifications as local circumstances render necessary. In my opinion, there may be occasions when a Government official or a public officer can usefully give evidence as to a fact, the knowledge of which has come to him in his official capacity — the circumstances in which the certificate was given by the patriarchate in this case seem to me an excellent example — and he may well, having regard to local circumstances, be anxious not to appear to associate himself with either party to the dispute by giving evidence for him. In such a case I think the ends of justice are served by the judge calling him with the corollary, which I would express in the words of the Master of the Rolls, in Coulson v. Disborough, (1894), 2 Q.B.D., 318, that "if what the witness has said in answer to the questions put to him by the judge is adverse to either of the parties, the judge would no doubt allow, and he ought to allow, that party's counsel to cross-examine the witness upon his answers. A general fishing cross-examination ought not to be permitted."

In the present case Mr. Shereshewsky, on behalf of the opposers, was permitted to cross-examine Mr. Nurian, and I am of opinion that that witness's evidence as to the birth certificate was admissible. I do not think that the latter part of his evidence, when he speaks of the relationship of the deceased and his daughter, which came to his knowledge outside his official capacity, should have been accepted if objection was taken to it by the oppossers, but there is no record of any such specific objection.

In the result the Order declaring succession in favour of May Pauline Merguerian will be set aside, and the case remitted to the District Court. The Appellant having succeded in part and failed in part, no order will be made as to costs.

Delivered this 8th day of May, 1939.

Chief Justice.

I concur : *Puisne Judge (Frumkin J.)*

CIVIL APPEAL NO. 33/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J. and Khayat, J.

In the appeal of:—

Wakfs Commission — Appellant.

v.

Rushdi Bey El Imam El Husseini — Respondent.

Contract of service empowering employee to engage other persons—Employer considering contract still in force after death of employee as regards persons engaged by latter — Implied powers of Wakf Commission established under Defence (Moslem Awkaf) Regulations, 1937, to sue and to be sued — Admission in evidence of unstamped copy of document identified by a competent witness as copy of the original.

1. Wide powers of controlling and managing funds include by implication power to sue, this being a necessary accompaniment of power to require payments of debts.

2. If a corporate body has power to sue there is also power to sue them.

3. Copy of document, though not stamped and not the original, may be regarded as sufficient proof if identified by (competent) witness as copy of the original document.

4. Where correspondence between parties shows clearly that party considered contract between him and other party still in force and governing relations between them, — not necessary to go into question whether or when contract was cancelled.

Cattan for Appellant.

Hassan Boudeiri for Respondent.

Appeal from judgment of the District Court, Jerusalem, dated 8.3.1939.

JUDGMENT.

The circumstances out of which this appeal arises are the following. By a contract dated 13th August, 1922, between Kamal Eddin Bey, a Turkish Architect, and the Supreme Moslem Council, the former was appointed as professional adviser to the Council to supervise the reparations of the Sakhra and El Akssa Mosque in the Harem es Sheriff, Jerusalem. By the terms of this contract, Kamal Eddin Bey was under the obligation to design the restorations, prepare the necessary maps and carry out the work accordingly. He was also given power to engage and employ other architects and expert workmen, who whould work under his supervision. His salary was fixed at an annual sum of LE. 2000, and it was further stipulated in the contract, that if any

obstacle should prevent the completion of the restoration works for any reason, the Council would pay the salaries to Kamal Eddin Bey and to the other members of the Professional Board for two months. The Council also guaranteed payment of salaries to those members of the Professional Board who should be engaged by Kamal Eddin Bey and it is admitted that they did pay the salaries themselves.

The present respondent, Rushdi Bey el Imam el Husseini, was one of the members of the Professional Board engaged by Kamal Eddin Bey, and in fact this name appears in the schedule to the above mentioned contract of the 13th August, 1922, and his salary is shown at a sum of LE. 840 per annum and LE. 70 per month. The respondent entered on his duties on the 1st October, 1922, and worked for several years as a member of the Professional Board. Some time in 1925, the Supreme Moslem Council being apparently apprehensive as to the length of time which the repairs were taking and also as to the expense involved, sumoned Kamal Eddin Bey for an interview. What took place at that interview is not quite clear, but Kamal Eddin Bey shortly afterwards retired from his post as Chief Architect together with two other members of the Professional Board, and the respondent and one Nihad Bey continued the work of the Professional Board. Kamal Eddin Bey died in 1925. In 1927 the repairs having not yet been completed, a letter was sent by the Supreme Moslem Council to the Architect in charge of the repairs of the Harem es Sheriff, that is, to the present respondent Rushdi Bey, signed by the President of the Supreme Moslem Council, and dated the 30th of January, 1927, (Exhibit A), in which they called attention to the fact that it had been promised that the repairs of the El Akssa Mosque would be completed in that month and that, since they had not been completed, the Council asked that repairs should be completed before the forthcoming Ramadan. Again on the 25th of April, 1928, another letter was sent by the President of the Council (Exhibit B), in which the attention of the respondent was called to the fact that his last and final promise was to complete repairs in the El Akssa Mosque in April, and that promise had not been kept. The Council therefore requested the completion of the repairs by all means on the first day of El Adha feast and intimated that they would in no circumstances agree to any expenses on the present repairs after that feast. Then on the 25th September, 1928, there comes a very important letter (Exhibit SH. 3) signed by Jamal Husseini, for the president of the Council, and addressed to the Professional Board in which it is stated as follows:—

> "The repairs of the first part of the scheme for repairing Harem esh Sharif, having been completed, the Council has decided to ter-

> minate the services of your Professional Board including all its employees, as from the first of October, 1928, thanking you for your professional services rendered with both care and diligence until the conclusion of the first part of this important scheme."

It will be noted that twice in this letter it is stated that the *first part* of the scheme of repairs had been completed, And there is another letter dated the 17th April, 1929, ,Exhibit R.I.), which is in the form of a certificate signed by Haj Amin el Husseini, President of the Supreme Moslem Council, in which it is stated that the respondent was appointed an architect for the repairs of the Mosque of Omar on the 1st October, 1922, and that he remained in his work until the 25th September, 1928, "as the first part of the scheme of repairs had been completed and the work stopped." It is also stated that his last monthly salary was LP. 70. It should again be noted that it is the first part of the scheme of repairs which is stated to have been completed.

Matters than remained in abeyance until the 11th January, 1931, when the respondent wrote to the Supreme Moslem Council making a claim for two months' salary as compensation for the cessation of the repairs, and a further claim to his salary for six months for the period of leave to which he claimed that he was entitled, with which latter claim we are not in this present case concerned. A reply was sent on the 10th May, 1931, (Exhibit P.M. 2) signed by Saad Eddin el Khatib, the secretary, for the President of the Council, in which the following passages occur. After stating that the Council has studied the letter and the contract and the correspondence on the subject, the letter goes ons to say :

> "The clause set out in the contract, on which you rely in your claim to the salary of two months in the event of an obstacle occurring to prevent the continuance of the repairs, provides that the term is dependent upon the commencement of the scheme for the repairs, the subject matters of the contract, and the continuance of the work — in that in the event of an impediment arising and leading to the discontinuance of the work before the repairs are completed the stipulation accrues due.

Now, if we refer to the decision of the Council, dated the 18th of September 1928 (No. 1016), which was communicated to the Technical Commission in a letter dated the 10th Rabi' El Thani (25th September 1928, No. 1086), we shall find, expressly stated therein, that the repairs had been completed, and not stopped, and that having thus been completed the function of the Technical Commission had ended. This is corroborated by the letter sent to the said Commission dated the 6th El Thil Qi'deh, 347 25th April, 1928, No. 5158), the text of which reads as follows :—

> "you promised to complete the repairs at El Aqsa in April, and now April has also expired and the repairs have not been completed. The Council therefore requires that these repairs be completed and inaugurated on the first day of the feast of El Adha. The Council would like to assure you that it would not agree to any further expenses connected with the present repairs to the Aqsa after the feast, and considers this letter as final in the matter."
>
> The Council then celebrated the occasion of the completion of the repairs, and the celebration was attended by the neighbouring Moslem Countries."

At the end of the letter the Council regretted that it could not agree to his claim.

The respondent thereupon entered, in 1932, an action against the Supreme Moslem Council, in the District Court, claiming a sum of LP. 140, being the two months salaray stipulated for in the contract. The case dragged on for some considerable time, and as a matter of fact came before this Court in Civil Appeal 172/33, but finally on the 8th March, 1939, the District Court gave judgment in favour of the Respondent. From that judgment the present appeal has been taken.

A large number of points have been taken by Mr. Cattan for the Appellants, who are the Wakf Commission, the first one being that the Wakf Commission is not a proper party in this case. The Wakf Commission was established by an order dated the 18th October, 1937, by of the Defence (Moslem Awkaf) Regulations, 1937, issued on the 16th October, 1937, under the Palestine (Defence) Order-in-Council of that year. Clause 5 of these Regulations states, inter alia, that the Commission "shall have all or any of the powers vested in the Supreme Moslem Sharia Council and the General Wakf Committee by the Supreme Moslem Sharia Council Regulations dated the 20th December, 1921, and the Supreme Moslem Sharia Council Ordinance, 1926," for "the purpose of controlling and managing" the Moslem Awkaf Funds, cash, securities and deposits. The Commission has the power, (a) to require all persons indebted to the Awkaf to pay the amount of such debt and, (b) to issue receipts or discharges in respect of sums receivable or payable by the Awkaf. It has been argued by Mr. Cattan that these Regulations did not give any power to the Wakf Commission to sue or to be sued and in the course of his argument he has cited to us the terms of the Orthodox Partriarchate Commission Ordinance of 1928. We do not think that such a comparison is of very much value because the two matters dealt with are entirely separate and have no connection with one another, and the powers of the Wakf Commission must be determined by what is contained in the Regu-

lations appointing them, and not by what is contained in another Ordinance appointing another Commission, and not in the Defence Regulations. We think that the wide terms of the Defence (Moslem Awkaf) Regulations, vesting in the Commission all powers appertaining to the Supreme Moslem Council and the General Awkaf Committee, for controlling an managing the Moslem Awkaf funds, must include by necessary implication the power to sue, as this is a necessary accompaniment of the power given to them to require payments of debts due to them, and if they have the power to sue we can see no good reason why there should not also be the power to sue them. We think, therefore, that the cation has been properly brought against the Wakf Commission as the successors to the Supreme Moslem Council and the General Wakf Committee in respect of the subject matter of this action.

Further points taken by Mr. Cattan are that the copy of the contract produced in Court was not stamped and was not the original and was not properly proved. These objections fail because Abdullah Eff. Mukless — Mudir el Awkaf el Aam, Jerusalem, who gave evidence in the District Court, identified the copy produced to him as a copy of the contract concluded between Kamal Eddin Bey and the Supreme Moslem Council, for the restoration of buildings in the Harem es Sheriff.

The next points taken by the appellants are that respondent was not a proper party inasmuch as he had no power to sue because he was not a proper party to the contract entered into between Kamal Eddin Bey and the Supreme Moslem Council, since it is a well recognised and universal rule of law, that only parties to a contract can sue on it — further, that the contract was cancelled by Kamal Eddin Bey in 1925 and again, that, in any case, the contract was cancelled by the death of Kamal Eddin Bey in this latter year. We will deal with all these points together, because on the facts of this case we think that all depends upon what contract, if any, the respondent was serving under after 1925. From the correspondence which has been produced, signed on behalf of the Supreme Moslem Council, it is quite clear that the latter considered that the contract of the 13th August 1922, between Kamal Eddin Bey and the Council, was still in force up to Ocotober, 1928, insofar as the respondent was concerned, and governed the conditions of employment of the respondent until that date. This is abundantly clear, not only from Exhibit P.M. 2, in which the Council admit that the claim is based on this contract and in which they did not repudiate the contract nor did they state that it is no longer in existence but merely held that, as the works had been completed, and

not stopped, the condition for two months' salary did not apply, but it is also evident from Exhibit SH. 3, and Exhibit RI. Exhibit SH. 3 in particular states that the Council decided to terminate the services of the Professional Board as from the 1st October, 1928, showing beyond all doubt that the contract of employment was considered by them to continue until that date, and if the contract is considered to be in force until then, all its terms must equally be considered to be in force including the term that the members of the Professional Board were entitled to two months' salary as compensation in case the work was stopped before completion. It is not necessary, therefore, for us to consider whether the contract of the 13th August 1922, was entered into by Kamal Eddin Bey on behalf of himself and of the other members of the Professional Board engaged by him, nor whether the contract was cancelled by Kamal Eddin Bey in 1925, or was cancelled by his death later in that year, because it is clear from the correspondence that in any case, as we have said, the remaining members of the Professional Board after 1925, including the respondent, continued to work on the same terms as are contained in the contract of the 13th August, 1922, with the approval of the Supreme Moslem Council.

The only remaining point is the argument of the appellants that the work had been completed by the 1st October, 1928, and therefore two months' salary in addition was not payable. Whether the work was completed or not is entirely a question of fact. On the correspondence produced there was material on which the District Court could find that the work was not completed on that date, and we see no reason to interfere with that finding, with which we are in agreement.

For all these reasons, we think that the District Court came to the correct conclusion both on fact and in law and the appeal therefore fails, and must be dismissed. The respondent will have the costs of this appeal assessed at LP. 15 to include fees for attending the hearing.

Delivered this 11th day of May, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 27/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Frumkin, J.

In the case of: —

Ihud Regev Aguda Cooperativith Lehovala — Appellant.

v.

Eliahu Hihinashivli — Respondent.

Non-appearance of Appellant on appeal from Magistrate's Court listed for hearing in open Court — Dismissal of appeal without hearing it — Ex-parte application to Chief Registrar for fixing deposit in lieu of bond.

1. If Respondent appears and appellant does not, Court has no power to dismiss appeal without hearing it but must either hear or adjourn it.

2. Application to Chief Registrar to fix amount to be paid into Court in lieu of bond need not be made by motion.

Edit. Note :— As to 2 see CA 155/38 4 CtLR 107, CA 199/38 ibid. 185.

Polonski for Appellant.

M. Goldberg for Respondent.

Appeal from judgment of District Court, Tel-Aviv (C.A. 314/38 dated 23.2.1939).

JUDGMENT.

This is an appeal by leave from a decision of the District Court of Tel-Aviv, dismissing an appeal from a decision of a Migistrate's Court. It appears that the appeal had been listed for hearing in open Court and that Respondent appeared, but the appellant's advocate did not appear as he was engaged elsewhere.

Under Civil Procedure Rule 337 (c) two coursses were open to the Court, i.e. to hear the appeal or to adjourn it. The Court, however, dismissed the appeal without hearing it; this it had no power to do.

I would like to take this opportunity to observe that if an advocate does not appear on an appeal, it is a matter for the Court's discretion, having regard to the circumstances, if an adjournment should be granted.

An important point of practice has been raised by the Respondent before us. It appears that an application was made to the Chief Registrar, under Civil Procedure Rule 327, to fix the amount to be paid into Court, and the Registrar acted under that rule. It is argued that as that rule speaks of the notice of appeal being accompanied by an application, Rule 305 applies, and that the Appellant should have proceeded by motion. That rule clearly only applies, when there is no express provision, and I think Rule 327 clearly contemplates an application in writing. No hardship to a respondent can arise from this interpretation, as he can, if he so desires, move the Court under Rule 329.

This point therefore fails, and the appeal will be allowed, and the judgment of the District Court set aside. The costs of this appeal will be costs in the cause.

Delivered this 10th day of May, 1939.

Chief Justice.

CIVIL APPEAL NO. 18/39

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— The Chief Justice (Trusted, C. J.), Green, J. and Frumkin, J.

In the appeal of :

The Attorney General — Appellant.

v.

Moses Blam — Respondent.

Claim for damages against Railway Administration arising out of a collision between a motor vehicle carrying passengers and the train — Wrong citation of defendant — Statutory limitation of action not pleaded by defendant — Failure to erect gates etc. on railway crossings — Damages for causing bodily harm — Scope of applicability of Moslem Law in Civil Courts of Palestine.

1. Statutory limitations are weapons of defence which defendant may use if he wishes — they do not automatically extinguish the cause of action.

2. A lacuna or ambiguity in any branch of law of Palestine can be made good by resort to English Common Law, subject to the proviso to art. 46 of Palestine Order in Council.

3. Failure on part of Railway Authorities to erect gates or barriers on railway level crossings gives no cause of action under Palestine Law.

No damages can under Mejelle (Ottoman Civil Code) be awarded for causing bodily damage.

4. (Per Frumkin, J.).

5. No provision in Palestine Law conferring actual right for an award of Dyet ("Blood money"), as there is no substantive law applicable in Civil Courts in this respect.

6. Only such parts of Moslem Law are applicable in Palestine as have been embodied in Civil Legislation by Imperial Irade (Decree), or otherwise.

Salant for Appellant.

Spindel for Respondent.

Appeal from the decree of the District Court of Tel-Aviv, dated 29th January, 1939.

JUDGMENT.

This is an appeal from a judgment of the District Court, Tel-Aviv, in an action brought by the Respondent as Plaintiff against the Railways Administration.

The Plaintiff's claim arose out of a collision between a motor vehicle, in which he was a passenger, and a train, at the level crossing on the main Jerusalem-Jaffa road, east of Lydda. In his petition to the High Commissioner, which took the place of a statement of claim, he stated —

> "The place where the car crossed was open, there was no signal that the train was about to pass, and no signals were given by the train when it came near to the car.
> "Hence it is clear that the blame for the collision rests on the Railways, and the Plaintiff will adduce further evidence to prove that the damage caused to him was solely the guilt of the Railways."

This is prima facie a plea of negligence, the particulars being that no warning was given that the train was about to pass.

The Defendant denied the negligence, and pleaded contributory negligence.

The Plaintiff adduced evidence that the train did not whistle, and that there were no gates at the crossing. The latter fact is common knowledge to users of the road. The defendant's witnesses stated that the train whistled.

The District Court made no finding as to the whistling, presumably not being satisfied by the Plaintiff's evidence as to this, but decided the case on the fact that there were no gates, stating —

> "We are satisfied that the accident was mainly due to the fact that the Railways Administration failed to provide the level crossing with a gate or a bridge. This constitutes a negligence on the part of the Railways Administration. It is true that the said level crossing is an open terrain, but that does not constitute a sufficient protection in a highway like the Jerusalem-Jaffa highway, with its very heavy traffic, specially at night and in winter time."

Although not pleaded, the Defendant submitted at the hearing —

> "(a) Under Crown Actions Ordinance such a claim cannot be made against Government (Section 3).
> (b) The Plaintiff must sue the train driver, under the local law, i.e., the Mejelleh.
> (c) Under the Mejelleh there is room for an action on damage of property and not bodily damage. (C.A. 88/930)."

Submission (a) is based on the form of the action which was Moshe Blam v. The Attorney General. Section 12 of the Government Rail-

ways Ordinance, 1936, (reproducing with some modification section 42 of the Railways Ordinance, Cap. 125) is as follows:—

> "12.(1) All actions which, if a railway were the property of a company registered in Palestine, might be brought by or against such company, may be brought by or against the administration:
>
> Provided that before any action against the administration is prosecuted the written consent of the High Commissioner authorising the claimant to bring the action shall have been obtained in the manner prescribed by the Crown Actions Ordinance, 1926.
>
> (2) In any action by or against the administration, the General Manager shall be the nominal plaintiff or defendant, as the case may be.
>
> (3) Any petition, statement of claim, notice or other document required or authorised to be served on the administration may be served by leaving the same or sending it by registered post addressed to the General Manager at the principal office of the administration.
>
> (4) No action shall be brought against the administration unless the same be commenced within six months after the cause of the action arose.
>
> (5) Subject to the provisions of this section, the Crown Actions Ordinance, 1926, shall apply to any action brought by or against the administration."

It is clear that the action should have been brought under the Railways Ordinance, and in answer to the Defendant's submission, the Court decided — "to continue the case in its present form and allow the necessary amendment in the correct form". This was presumably done under Civil Procedure Rule 67(2) — it would have been better if the citation of the action had been changed.

In this connection it is well that I should refer to the judgment of this Court in Meshek Gesher v. The General Manager of the Palestine Railways, Civil Appeal 200/38,*) P.L.R., Vol. 5, p. 510, to which I was a party. In that judgment it is stated —

> "the Plaintiff was given leave by the High Commissioner to sue under the provisions of the Crown Actions Ordinance. It should be noted that his claim was not, and could not have been based on negligence."

It now appears that the action was brought under Section 42 of the Railways Ordinance, Cap. 125, in the manner prescribed by the Crown Actions Ordinance. There was nothing in that Ordinance to prevent an action based on negligence being brought if such action could have been brought against a company, but it is quite clear that that action

*) CtLR IV p. 201.

was not framed in negligence, and it is also clear from the judgment of this Court that there was no finding of negligence by the District Court.

While dealing with the requirements of the law in this kind of action, I may point out that sub-section (4) imposes a limitation similar to that imposed by the Public Authorities Protection Act in England. In this case the accident occured on 6.12.36. The petition to the High Commissioner was undated, but the original appears to have been received in the District Court, Tel-Aviv, for submission to the High Commissioner, on 20.6.37, that is, some two weeks after the expiration of the period of six months. It is clear from the judgment of Cozens-Hardy, M.R., in Gregory v. Torquay Corporation, 1912, 1. K.B., 442, that the provision of section 12(4) is a statutory limitation. Such limitations are weapons of defence which a defendant may use if he wishes — they do not extinguish the cause of action — see authorities cited in Halsbury, 2nd Ed., Vol. XX, p. 777. In this case the Defendant has not employed the weapon.

It may be useful to observe that in England such a defence has to be pleaded. At the time when this action was commenced the Civil Procedure Rules were not in force, but we now have Rule 113, the marginal note to which is misleading.

Submissions (b) and (c) raise once again the problem presented by Article 46 of the Order-in-Council. In Akel v. Alayyan,*) P.L.R. Vol. 5, p. 319, I considered the authorities and expressed the view that they laid down the proposition that a lacuna or ambiguity in any branch of the law of this Territory can be made good by resort to English Common Law, subject to the proviso to the article. The other judges in that case, and another division of this Court in Civil Appeal 191/37,**) seem to me to have extended that proposition, and while I have followed the decisions of this Court as to liquidated damages and penalty — as I am bound to do — I still adhere to the view which I expressed.

The law of this Territory was discussed at length in the Municipality of Haifa v. Khoury, P.L.R., Vol. 1, p. 724. It seems to some extent been amplified by Section 43 of the Criminal Code Ordinance, and although that Ordinance repealed the Ottoman Penal Code, dyet has since its promulgation been awarded — see Application for provisional attachment, Cr Ap. 20/37, Nechama Zwanger and another v. Reuben Scheinzwit.

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*) C.A. 20/38 CtLR III p. 289.

**) CtLR II p. 169.

In the Haifa case this Court held —

> "The District Court found as a fact that the Municipality dug the trench and that Dr. Khoury fell into it. They also found that there was a liability upon the Municipality to make arrangements to protect from any danger, which they did not do.
>
> "There was evidence before the District Court upon which they could lawfully find the facts they did, and Appellants' appeal against these findings must fail."

and this Court was presumably satisfied that there was a liability on the Municipality.

In the result I take the District Court to have held the present case does not fall within the authority of the Municipality of Haifa v. Khoury, and I agree that the failure to erect gates gives no cause of action to the Plaintiff under Palestinian law. Is there any lacuna which should be filled by reference to English Common Law? It may be that there is, but it does not seem to me necessary to consider the question now, as I know of no principle of the English Common Law whereby the Respondent could recover by reason of the absence of gates, the obligation to fence railways and to erect gates in England being statutory.

In my judgment the appeal should be allowed, and the judgment of the District Court set aside.

Delivered this 10th day of May, 1939.

Chief Justice.

JUDGMENT.

Frumkin, J.

The plaintiff in this case sued for damages caused to his person at a collision between a car in which he was travelling and a train run under the control of the General Manager of Railways. He suceeded in the Court below, and the Attorney General, on behalf of the Railways Administration, appealed.

The Junior Government Advocate, instead of facing the Plaintiff's claim on its merits put up a number of technical objections mainly to the effect that English law does not apply and that Plaintiff has no remedy under the law of Palestine.

The first argument on this line is that under the Mejelle no damages can be awarded for damages caused to the person. This is so. As more fully set out in my judgment in Haifa Municipality v. Khoury, (C.A. 88/30, P.L.R., Vol. I, p. 728), the Mejelle does not deal with damages of that nature. But this argument goes against the Appellant. If the Mejelle does not apply to the case and if there is

no other Palestine law on the subject, that is just a good reason for introducing English law.

I fail to appreciate the further argument that under the Mejelle it is the driver of the train who is liable and not the General Manager of Railways. Whatever principles there are contained in the Mejelle relating to vicarious liability, it could affect liability to damages to property but not to damages to the person not dealt with at all in the Mejelle.

The Junior Government Advocate then submitted that if the Respondent has no remedy under the Mejelle he could sue for Dyet, another reason why to his mind English Law should not be resorted to. The reply to this argument is twofold.

Firstly there are at present only two references to Dyet, as distinct from compensation in lieu of Dyet, in the law in force in Palestine, neither of them conferring the actual right for an award of Dyet.

The first reference is to be found in Section 6(1) of the Civil and Religious Courts (Jurisdiction) Ordinance which confers upon Civil Courts jurisdiction in certain cases of applications for Dyet. But that is all what this sub-section does: conferring jurisdiction. In order to enable the Civil Court to exercise its jurisdiction, a party claiming Dyet will have to rely on substantive law conferring upon him a right to be awarded Dyet. Such rights as existed in the Ottoman Penal Code has been extinguished with the repeal of the Code.

The second reference to Dyet is to be found in the Criminal Code Ordinance, 1936, where it is said in Section 43(c): "Nothing in this section shall affect rights to Dyet", again, a right to Dyet has to be established by some substantive law applicable in the Civil Courts of this country conferring such rights. As more fully set out in Haifa Municipality v. Khoury and Palestine Mercantile Bank Ltd. v. Fryman and others*) (C.A. 140/37 P.L.R., 5, p. 165) Moslem law as such is not a part of the legal system of Palestine and only such parts of it became applicable as have been embodied in the Civil Legislation by special Imperial Irade or otherwise.

The second answer to the argument as regards Dyet is that even under Moslem law the question of Dyet does not arise at all in this case. Dyet in Moslem law is a sort of indemnity awarded to the heirs of a deceased person against the person who caused his death. In its broader sense this term would include also "Irsh" meaning indemnity awarded for the loss of a member. But the indemnity sued for by the Respondent is not for the loss of a member of his body, but for

*) CtLR III p. 104.

damages for temporary inability to work of a general character.

It follows therefore that neither the Mejelle nor any other law contemplated in the first part of Section 46 of the Palestine Order-in-Council does extend or apply to the present case. There is nothing which calls for the application of the qualifying proviso of the said Section, and this case may therefore be decided in conformity with the common law and doctrines of equity in force in England.

But in order to succeed under Common Law the Respondent must prove negligence on the part of the Railways. This he failed to do. The only negligence on which the Judgment of the Court below is based is failure on the part of the Railway Authorities to erect gates. In England this is a statutory duty. There is no similar statutory obligation in Palestine. On the contrary in so far as the Palestine Legislature deals with the duty to take care in avoiding a collision between trains and cars such duty is rightly or wrongly imposed upon drivers of cars and not upon the Railway Administration. Rule 18(2) of the Road Transport Rules (Cap. 128) provides that —

> "The driver of a motor vehicle shall, before passing over any railway level crossing not protected by a gate or barrier, cause such motor vehicle to stop.

True the Respondent was not himself driving the car, but this fact does not shift the duty on the Railway Authorities

The Appeal must therefore be allowed and the Judgment of the District Court set aside.

Delivered this 10th day of May, 1939.

Puisne Judge.

CIVIL APPEAL NO. 36/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Khayat, J.

In the application of:—

1. Anna Agop Brounsouzian
2. Leventine Shukri Brounsouzian
3. Miriam Manouk Brounsuzian
4. Osqui, daughter of Agop Mouradian and Khatoum Brounsouzian — Applicants.

v.

Adele Apkarian — Respondent.

Application for alteration of succession order — Successful heirs relying on judgment of foreign Court showing the heirs of the deceased — Rule 25(1) of Succession Rules.

Foreign judgment showing the heirs of deceased not necessarily conclusive, so as to estop any person not included in that judgment from claiming share of inheritance in the estate.

Olshan for Applicants.
Germanus (by delegation) and *Sassoun* for Respondent.

Application for leave to appeal from the interlocutory Order of District Court, Jaffa, dated 6.4.1939.

ORDER.

After prolonged litigation an Order, declaring succession, was made in what is known as the Murad case.

An application has now been made under Rule 25(1) of the Succession Rules for an alteration of that order, and a ruling has been given by the President of the District Court, Jaffa, against which the present Applicants, who were the successful parties in the original proceedings, now seek leave to appeal.

The question turns upon the effect of a judgment given by Turkish Courts, which is referred to as the Marash judgment, and the learned President held:—

> "After full consideration, therefore, I have come to the conclusion that although the Marash judgment may be used by the successful heirs as evidence of a fact relevant to the issue now before me, namely who are the true heirs entitled to the Palestine Estate, it cannot be treated as a conclusive judgment estopping the Petitioners from proceeding with their claim.
>
> "I hold, therefore, that this Court is empowered to enquire into the petition on its merits, and I accordingly call upon the petitioners to prove their claim."

It appears to us that the Marash judgment is not necessarily conclusive, and without expressing any opinion as to the effect of that judgment upon the present proceedings, we refuse the application for leave to appeal.

The application is dismissed with costs, which we fix at an inclusive sum of LP. 5.

Delivered this 18th day of April, 1939.

Chief Justice

CRIMINAL APPEAL NO. 17/39.

IN THE SUPRFME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (C. J.), Greene, J. and Khayat, .I.
In the appeal of:—

The Attorney General — Appellan.

v.

Eliahu Haim Spitzer — Respondent.

Charge of being in possession of a wireless set without a licence — Licence stated by accused to contain wtong date of expiration — Defence of honest and reasonable mistake — Court of Appeal giving Respondent benefit of doubt as to what grounds formed basis of his discharge by trial Court — District Courts (Summary Trials) Rules 1938, *Rule* 27 — *Criminal Code Ordinance, sec.* 12 — *Wireless Telegraphy Ordinance — Phillips v. Evans* (1896) 1. *Q. B.*, 305.

1. Where a licence clearly states date of its expiration and accused relies on sec. 12 of Criminal Code Ordinance, Court will require strong evidence to satisfy it that he was under an honest and reasonable mistake as to when his licence expired.

2. Claim, although possibly well founded, to exemption from duty in respect of a licence or to a longer period than that for which prior licence had been granted — no defence to a charge of not having taken a licence.

Hogan (*Crown Counsel*) for Appellant..
Respondent: Not present — served.

JUDGMENT.

This is an appeal from a decision of the District Court, Haifa, exercising a summary jurisdiction, dismissing a charge against the Respondent of being in possession of a wireless set wthout a licence.

The case appears to have been inadequately put before the Court of trial.

A post office official stated that the Respondent had a licence which expired on 31.10.38, and that on 9.12.38 he visited the Respondent's home and found a set there.

The Respondent gave evidence and said that a statement which he had made to the police was correct.

The effect of that statement was that for some years prior to 1937

he lived at Kfar Gideon where he had a licenced set. That in October, 1937, he moved to Haifa, that he did not bring his set with him but sold it and notified the Post Office. That in April, 1938, he bought a new set and applied for a licence, and that he obtained a licence, No. 41373, which he thought was for one year. He went on to say that at the time of making the statement he understood that the official made a mistake and wrote that it was valid only until 31.10.38, and that in the result he thought he had a licence until April, 1939. He said that he did not remember if he received a warning..

These matters were not put to the Post official who was not cross-examined.

Upon this the Court found —

> "In the case the defence has always been that the Post Office made a mistake in the date inserted in the original licence of April, 1938. The Post Office seems to have taken up the attitude that there could be no mistake, and under threat of prosecution accused seems to have taken out a second licence. The defence is now repeated that he had a justifiable claim to a licence running to April, 1939. The Post Office have not taken the trouble to produce the former licence which, if in the ordinary form, would acknowledge the receipt of 500 mls, the fee for a whole year. The case is dismissed and accused is discharged."

These findings of fact are not clear and would hardly seem to comply with the District Courts (Summary Trials) Rules, 1938, Rules 27, but the effect of them would seem to be that the Respondent was without a licence at the material time but that as there was a mistake by the Post Office the Respondent was not guilty of the charge.

The licence No. 41373, which has found its way back to the Post Office has been produced to us. It is in the prescribed form (see Annual Volume, 1936, III, p. 1015). It is dated 28th April, 1938, is stated to expire on 31.10.38, and acknowledges the payment of the fee of 500 mils.

The explanation given to us by the Crown Counsel is that when a licence has expired and a new licence is given, or the licence is renewed to the same licensee, the new licence is given for a year from the expiration of the old licence, and that that was what was done in this case. This clearly involves issues of fact in this particular case, which the Court below did not expressly determine.

If the Court believed the Respondent's statement when he said —

> "In April, 1938, I bought a new radio set from my friend Shelomo Bettre of Affule, and on 28.4.38 I obtained a licence, No. 41373, and thought that the licence was for one year."

It is possible that it acquitted him under Section 12 of the Criminal

Code Ordinance. I would observe that this is a section which must be applied with care, having regard to the facts established in the particular case, and prima facie a Court would require strong evidence to satisfy it that an individual was under an honest and reasonable mistake as to the date of expiration of a licence, when that date is clearly stated in a prominent place on the document itself.

If, however, the Court took the view that the Respondent had failed to obtain a licence, or renew his licence, not because he was under an honest and reasonable mistake as to the date when his prior licence expired, but because, although he knew his prior licence had expired, he thought he had a justifiable claim to a licence for a longer period than that for which the prior licence had been granted to him, I do not think that there is any defence.

A somewhat similar point arose in Phillips v. Evans, (1896) 1. Q.B., 305, where it was held that a claim to exemption from duty in resepct of a dog licence, although possibly well founded, was no excuse for not taking a licence.

Having regard to the facts and the form of the judgment there may be an element of doubt as to the grounds on which the proceedings were dismissed by the District Court, and I think the Respondent should have the benefit of that doubt.

We have had a long discussion about the grant of licences under the Wireless Telegraphy Ordinance and the rules made thereunder, which I hope may result in some of the provisions being made clearer.

The appeal is dismissed accordingly.

Delivered this 17th day of May, 1939.

Chief Justice.

CIVIL APPEAL NO. 40/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—Copland, J. and Khayat, J.

In the Appeal of:—

The Syndic in Bankruptcy of the Firm S. N. Khoury — Appellant.

v.

Woolf Slavousky — Respondent.

Dissmissal of action for specific performance on non-compliance with previous order to pay money into Court — Meaning of readiness and willingness to pay price of land claimed.

When a person claiming a certain piece of land states he is ready and willing to pay the price, he must be so at time of

making the claim, not on some future date; Court not bound to grant long period for making payment.

Edit. Note: —See C.A. 16/39 5 CtLR 113; C.A. 132/38 4 CtLR 25.

Sanders for Appellant.
Shapiro for Respondent.

Appeal from judgment of Land Court, Haifa, dated 21.3.1939.

JUDGMENT.

We need not trouble you, Mr. Shapiro.

This is an appeal from a judgment of the Land Court of Haifa dismissing an action brought by the present appellant, on the ground that, by non-compliance with a previous order of the Land Court to pay into the Court the sum of LP. 5,750 in an action for specific performance, the appellant was not ready and willing to perform the contract and therefore the action failed. This case came before us on two previous occasions. On the second occasion the present appellant applied for leave to appeal against the order of the Land Court ordering him to pay this sum of money into Court before proceeding with his action. This Court after a full argument refused leave to Appeal. The case then went back to the Land Court which gave judgment, as I have previously stated, dismissing the appellant's claim.

Three points have been raised in this present appeal. The firist one is that the Land Court was not entitled to make the order to pay the money into Court, but that point has already been decided in the Syndic in Bankruptcy of the Firm S. N. Khoury v. Woolf Slavousky, Civil Appeal 16/39, between the same two parties in which this Court confirmed the order of the Land Court.

The second ground of appeal is that the appellant is ready and willing to pay the money, not however at the time ordered by the Land Court, but at his own convenience, if I may say so, if and when transfer should be effected. This of course is not the readiness and willingness which the law requires. When a person states that he is ready and willing to pay money when claiming a certain piece of land, he must be ready and willing at the time that he makes the claim, not on some future date, one month, six months, one year hence. That point falis.

The third and last ground of appeal is that the order of the Land Court giving the appellant one month in which the appellant should pay the sum into Court, was too short, in view of the present conditions in Palestine. This ground I am afraid has no more substance

in it than the other two grounds. It introduces again the question of readiness and willingness to pay. If people are claiming certain land they should be prepared to pay the price at the time they make that claim. One month was, one might say, an ex gratia extension of the time, and we cannot, under any circumstances, say that the period was too short. The Land Court might well have made an order to pay between 5 days or 7 days, and that might have been equally right. The result therefore is that the appeal must be dismissed and the appellant must pay the costs of the appeal to the respondent to include a fee of LP. 15.— for attending the hearing.

Finally we would express the hope that this long drawn out bankruptcy should be brought to an early determination, so that some sum will be available to be distributed among the numerous creditors.

Delivered this 13th day of June, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 46/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of:—

Y. Trachtengut — Appellant.

v.

Palestine Copper Industry "Nechushtan" Ltd. — Respondent.

Leave to appeal from appellate judgment of District Court — Presiding judge granting leave to appeal without stating points of law — Procedure upheld by Court of Appeal for a long period of years.

1. Judges of lower Courts must follow law as it has been laid down by Court of Appeal for a long period of years.

2. Presiding judge must satisfy himself that there is a point of law involved in order to enable him to grant leave, and when granting leave he must state point or points of law on which he does so.

3. Where no point of law shown by presiding Judge on which he grants leave to appeal — no appeal proper before Court of Appeal.

Edit. Note:—As to 1 see. C.A. 126/38 4 CtLR 34 and Edit. Note thereto.

As to 2 and 3 see: C.A. 191/38 4 CtLR 185 and Edit. Note thereto.

Ph. Joseph for Appellant.

Bar Shira for Respondent.

Appeal from judgment of District Court, Tel-Aviv, (CADC 304/38) dated 20.2.1939.

JUDGMENT.

In this appeal, which is stated to be by leave from the District Court, from an appellate judgment of the District Court on a judgment from the Magistrate's Court of Tel Aviv, a preliminary point has been taken by the Respondent that there is no appeal proper before this Court, and the presiding Judge of the District Court has not stated the point or points of law on which he granted leave to appeal.

This point has come before us on several occasions lately, and in Rubin v. Kaufman, Civil Appeal 191/38*), reported in the Law Reports of Palestine, Vol. 5, p. 506, we stated, as we then thought quite clearly, what the law required, but apparently we failed to impress upon some presiding judges with sufficient clarity what was meant.

Section 6 of the Magistrates' Courts Jurisdiction Ordinance 1935, is in these terms :—

> "The decision of the District or Land Court in any appeal from a Magistrate's Court shall be final, but the presiding judge of the court may, if he considers it proper so to do, grant leave to appeal to the Supreme Court on a point of law."

Now in Rubin v. Kaufman (supra) we said that it was clear that following a long line of previous decisions the presiding Judge must state the point or points of law on which he grants leave to appeal. That opinion has been the consistent opinion of this Court from the date of the promulgation of the first Magistrates' Court Jurisdiction Ordinance in the year 1924 and so far as I am aware there is only one case in which that dictum has been queried, that was the case of Blumenfeld v. Imperial Chemical Industries, Civil Appeal 87/37**), In Rubin v. Kaufman (supra) we dealt with that case and distinguished it, and we do not think we can usefully add anything further to what we have said there. So long as the law remains as it is, however inconvenient or objectionable a presiding Judge may find it so to do, he must state the point or points of law on which he grants leave, and it is irrelevant to say that there is no power in existence to compel him to state a case. He must follow the law as it has been laid down by this Court for a period exceeding 10 years.

In the case before us the presiding Judge has written a long judgment giving reasons why he should not state a case, and the result

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*) 4 CtLR 185.

**) 2 CtLR 19.

of that judgment, as we read it, is this, that he is not satisfied that there is any point of law put forward to him by the applicant as a ground on which he should grant leave, but that in order not to embarrass the applicant and not to embarrass the Supreme Court in dealing with the appeal, he granted leave.

We do not think that this is sufficient. The presiding Judge must satisfy himself that there is a point of law involved in order to enable him to grant leave, and if he is not so satisfied and in effect states so, he cannot grant leave. Following once more these previous decisions of this Court, we trust that this judgment, at any rate, may make it quite clear now what the law requires. As no point of law has been shown by the presiding Judge on which leave to appeal should be granted, we agree with the contention of the Respondent that there is no appeal proper before this Court.

In the result the application must be dismissed with costs to include LP.15 fees for attending the hearing.

Delivered this 1st day of June, 1939.

British Puisne Judge.

HIGH COURT NO. 32/39.

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

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

In the application of:—

Fahimeh Fakhri Bey — Petitioner.

v.

1. The President District Court Haifa acting as Chief Execution Officer
2. Guiseppe Singaglia
3. Guillermo Feldman — Respondents.

Sale of mortgaged property through Execution Office — Application for further extension of time — Non-interference of High Court where matter pending before Land Court.

1. Where land is being sold through Execution Office and judgment debtor applies to Land Court in connection therewith, only Land Court may order postponement of sale.

2. High Court does not assume jurisdiction when another Court has jurisdiction.

3. If postponement of sale of land through Execution Office granted, matter revives, at expiration of period granted, at same stage at which it left off previous to postponement.

4. If final order of sale had been given and only thing required was order of registration of property, Chief Execution Of-

ficer not legally bound to issue any further notice whatsoever.

Edit. Note:—As to 2 see: H.C. 99/35 2 PLR 413; H.C. 27/38 3 CtLR 221; H.C. 18/38 ibid. 179;

Moghannam and *Elia* for Petitioner.

Ex parte.

Application for an Order to issue directed to the First Respondent calling upon him to show cause why his order dated the 10th of June, 1939 should not be set aside, and why the Petitioner should not be given a period of three months in order to enable her to conclude certain negotiations being made in Syria for receiving a loan for the purpose of discharging the mortgage debt.

ORDER.

We both unanimously agree that no further extension can be given by this Court.

The petitioner had six months granted to her in November last for the purpose of deciding the validity of the assignment of the mortgage in the Land Court. So far as we know, though Mr. Moghanam has told us that she has made an application, no effective steps seem to have been taken in the Land Court. If she has in fact made an application to the Land Court, then it is the Land Court which has the power to order a postponement of the sale and it is the rule in this Court not to assume jurisdiction when another Court has jurisdiction.

With regard to the points raised that the procedure of the Execution Office is irregular, we find that they fail. In November last, when this case came before us, the final order for sale had been given and the only thing requird was the order of registration of the property. This Court postponed the sale for six months from November, that means, that at the expiration of six months the matter revives at the same stage a which it left off six months previously. There was therefore no reason, no legal liability on the Chief Execution Officer to issue any further notice whatsoever.

So far as this present application to us is concerned, there is nothing to show that the Chief Execution Officer has wrongly directed himself in law and we do not think that further stay beyond the six months, which the petitioner has already had, can possibly be granted, in the absence of any application to the Land Court. The petition must therefore be dismissed.

Given this 19th day of June, 1939.

British Puisne Judge.

Current Law Reports

Editor: M. LEVANON, Advocate, Jaffa Road, Jerusalem

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OF JUDGMENTS PUBLISHED IN THE
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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
CXO, Chief Execution Officer
DC, District Court
Dfdt, Defendant
Eccles, Ecclesiastical
HC, High Court
Jdgt, Judgment
Jurisd, Jurisdiction
LC, Land Court
L Reg, Land Registry, — Registrar
LSO, Land Settlement Officer
Mag, Magistrate
MC, Magistrate's Court
OCCP, Ottoman Civil Procedure Code
O. in C., Order-in-Council
Ord, Ordinance
P/A, Power of Attorney
Pal, Palestine
PC, Privy Council
PDC, President District Court
Pltf, Plaintiff
P/n, Promissory Note
Proc, Procedure
Rspdt, Respondent
SC, Supreme Court
XO, Execution Office, — Officer

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